

# A training course on land, property and housing rights in the Muslim world



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# 1. About the course

## Why this training course?

Over 20 percent of the world's population is influenced to varying degrees by Islamic principles, which intersect customary, informal and statutory land laws. Despite their relevance, global land reviews and interventions rarely consider the application of Islamic land principles. This ignores the complex and distinctive forms of land tenure particular to Muslim societies derived from Islamic principles that co-exist alongside more easily recognizable patterns. This training course addresses this knowledge gap and seeks to build capacity in the field as a vehicle for enhanced rights, empowerment and sustainability. Instead of avoiding ground realities or dismissing Islamic law from the outside as a static, even inscrutable, historical narrative of little contemporary utility, this training course constructively engages with Islamic perspectives and their relationship to universal development goals.

## What is this training course about?

The training course engages with the positive implications of Islamic dimensions of land for programmes broadly relating to land administration, land registration, urban planning and environmental sustainability. In particular, it focuses on opportunities for developing innovative and authentic tools in a range of specific areas and disciplines including Islamic family law, women's rights, inheritance systems, the *waqf* or Islamic endowment, human rights and development and Islamic credit/microfinance. The eight modules recognise the diversity across Muslim countries in land and property rights and the distinctive weave of Islamic, customary, secular and cultural practices in different countries and regions. Given the broad range of land issues in Muslim countries, the short course centres on selected topics as detailed below.

## The course in the context of the Global Land Tool Network (GLTN)

Global Land Tool Network (GLTN), serviced by UN-HABITAT, is a multi-sector and multi-stakeholder partnership. One of the cross-cutting themes of GLTN is on Islamic dimensions of land and how these relate to (i) land use planning, (ii) land rights, records and registration, (iii) land management, administration and information, (iv) land law and enforcement and (v) land value capture.

The GLTN work on Islamic land issues aims to identify best practices on land and housing in the Muslim world and translate them into actionable tools which are innovative, pro-poor, scalable, gender-responsive and affordable (see [www.gltm.net](http://www.gltm.net)).

GLTN has developed this training course in response to increasing demand for greater knowledge exchange and capacity building in the field of land, property and housing rights in the Muslim world. In particular, the course aims to systematically address documentation, dissemination and application of Islamic land law.

The Training Package arises from GLTN's work which began in 2004 with the commissioning of research which led to Sait & Lim's *Land Law and Islam: Property and Human Rights in the Muslim World* (London: Zed Press/UN-HABITAT, 2006), the Cairo Initiative 2005, the East London Guiding Principles 2007, through to a 2009 peer review workshop on this package in Nairobi. The experiences of GLTN partners, feed back received from participants at various meetings, facilitators and resource persons have enriched the content and design of this training package.

### By the end of the course participants should be:

- familiar with the Islamic legal framework, concepts and principles surrounding land.
- aware of the diversity within Muslim societies, and the inter-relationship between Islam, customary, statutory and other norms.
- able to critically assess the potential for Islamic land tools to support land rights initiatives in Muslim societies.
- able to respond to the socio-political contexts in which Islamic arguments take place.
- capable of reflecting upon specific case studies and their own experiences on Islamic land issues.
- able to identify how Islamic land tools can gender and age inclusive and enhance the land, housing and property rights of Muslim women and men.

poor, inclusive, innovative and authentic land tools. Finally, the Islamic principles are egalitarian and enhance security of tenure for all sections including minorities; in particular Islamic principles support women's rights which should be encouraged.

## How will this course be run?

This is not a faith-based learning course but one that pragmatically appreciates a system that influences the lives of over 1.2 billion people. GLTN seeks to identify and develop Islamic land tools as a supplementary strategy aimed at securing universal rights which is compatible with its other programme activities. Equally, secular human rights and religion need not be presented as mutually exclusive choices for people of faith. Religious practice can provide a foundation for human rights activism and seeking strategies for more equitable application of formal legal principles. Thus, the course is to be delivered through an open-ended, non-ideological and constructive exploration of the potential benefits of Islamic systems where they exist.

## What to expect from this course?

This training course uses the GLTN vision, core values, priorities and approach to land issues as a foundation. The course is intended to meet the needs of participants working on land issues or those with an interest in the Islamic framework on land and property rights who seek a detailed knowledge and understanding of that framework.

## What are the key drivers behind the course content?

There are four main methodological approaches adopted in designing the course. The first is that Islamic principles must be understood in the context of its own rules, determined through Islamic scholarship from within. Second, the substance of and manner in which Islamic principles are understood and applied vary across communities and countries, and their relationship (arising out of socio-historical influences) with customary, statutory and modern laws must be recognized. Third, Islamic principles exhibit a strong rights-based approach, which has to be appreciated in the documentation and further development of pro-

## Target groups for this course

This course is designed as an introductory training module, which would enable participants to equip themselves with foundation principles, further disseminate the knowledge or train others. The end-users of the course are intended to be policy makers or an audience at a beginners or undergraduate level, without any pre-requisite knowledge of Islamic land law but those with basic experience on land issues in the Muslim world. While the course is foundational, it is possible to adapt the course content for advanced learners through more rigorous reading and case studies, and prior exchange and dissemination of reports and materials from participants which exemplify their work or contexts. In selecting participants, ensuring geographical and gender distribution, a range of expertise and experience as well as diversity of ethnic and religious backgrounds would augment the mutual learning experience.

## Structure of the course

The course is divided into 8 modules to be delivered over a three-day period. However, the course can be longer (5 to 7 days) to allow for more in-depth presentations and discussions. Alternatively, individual modules can be used as stand-alone training sessions, for example for a specific course on waqf, or on gender in the context of Islamic land law. However, where only one individual module is covered, it is suggested that the materials for modules 1 and 2 are also provided to the participants, to ensure that they receive relevant background material on the Islamic land framework and GLTN's focus on Islamic land tools.

Each module consists of:

1. An overview of the module topic
2. A list of readings materials
3. Learning outcomes
4. Suggested group work

5. Background Q & A
6. A PowerPoint presentation that can be modified and used by the facilitator.
7. Further readings, which are accessible, written in straightforward language, and explain essential terms, concepts, principles and ideas and together provide a balanced perspective upon the Islamic framework in the context of universal development goals. The collection draws upon a range of writers from different parts of the Muslim world. Most extracts also include illustrative case studies which can be used for further discussion and reflection as part of the training process.

There is an annex to the overall training package, that includes a glossary of Arabic and Islamic terms, a short Muslim history timeline, and selected verses of the *Qur'an* and *Hadith*. These can be drawn on in the facilitation of any of the eight modules, as appropriate.

## Overview of course modules

Module	Themes	Synopsis
1	Relevance of Islamic land tools	This module considers the relevance of Islamic approaches and practices in the developing integrated pro-poor and innovative land and property strategies in the Muslim world.
2	Islamic law, land and methodologies	This module introduces the basic features, sources, as well as the general substantive and methodological principles, in relation to Islamic land law.
3	Islamic human rights and land	This module compares the Islamic and universal human rights principles in relation to land rights as tools for promoting security of tenure.
4	Islamic land tenures and reform	This module identifies the distinctive land tenures in the Muslim world, which assists in appropriate interventions and evaluation of reform strategies.
5	Inheritance laws and systems	This module considers the sources, status and significance of Islamic inheritance principles in order to consider their impact on equitable property rights.
6	Property rights of Muslim women	This module outlines the gendered property flow chart under Islamic principles and practice that could provide greater realisation of Muslim women's property rights.
7	Waqf (Endowment) and Islamic philanthropy	This module aims to identify the problems and potential of pious endowments and their resurgence as a tool for innovative land rights.
8	Islamic microfinance	This module outlines the basic Islamic finance principles relevant to microfinance as well various products and their potential in pro-poor financing.

## 2. Notes for facilitators

### How to use the package

This Facilitator's Guide contains suggestions relating to the effective delivery of the training course. The training package has been designed for use by both facilitators and participants. Facilitators will use the package to prepare and conduct the workshop. Participants will use it as a reference tool both during and after a course. The package is a generic model which can be adapted to different geographical, thematic and stakeholder contexts. It can also be used for developing specific training on selected topics.

### Title of the training package

The training package refers to the 'Muslim world' rather than Islamic, for several reasons. The first is to emphasise application in Muslim communities, rather than on theoretical Islamic law itself. Second, as is apparent, Islam is only one of the factors in Muslim communities and thus 'Muslim' is broader in scope. The reference to Muslim also puts at ease those who are not religious. Third, it is easier to organize training on Muslims rather than Islam, because there could be scepticism from hosts as well as other constituencies given the political and religious sensitivities (though these are addressed in the package).

Two other elements in the title may be striking. The flagging of Islamic land rights/law may reflect the specialisations of the original authors, but the choices have endured because the themes appear to be broad enough. Islamic law is much wider and more relevant to Muslims than what is understood to be law generally. The emphasis is on land, but property and housing rights are not far behind. This must be kept in mind as participants may wish to focus more on an integrated approach or specific aspects of land rights. The package is general in scope, capable of adaptation to specific stakeholders or themes.

### Learning objectives

The learning objectives are set out on page 3. The facilitators may want to consider if these are too broad or appropriate to the time and level of the training process. The learning objectives are intended to strengthen the capacity of participating individuals and their organisations in their engagement with Muslim societies on land issues, towards initiatives such as training, awareness campaigns, and advocacy. Thus, it also addresses other objectives such as skills development, preparation for advocacy and lobbying roles. Participants will not only share and learn about Islamic and other factors in Muslim land contexts but should also be able to think through and apply these ideas.

### About the training package

This training package is self-contained, and contains all the basic materials needed to carry out a training workshop or a TOT workshop. It includes this Facilitator's Guide, eight course Modules, plus the Annexes (Islamic glossary, history timeline and *Qur'an* and *Hadith* verses). It is important for the facilitator to familiarize themselves with all the materials because Islamic debates (as discussed below) can be rather contentious and it is important to have basic reference points. The key source for the package is Sait S and Lim H (2006) *Land Law and Islam: Property and Human Rights in the Muslim World* (London: Zed Press/UN-HABITAT). Wherever possible the facilitator/resource persons should also bring other relevant material in.



Cairo, Egypt © Carlos Morales

## Nature and philosophy of the course

Systematically engaging with Islamic approaches will challenge a majority of participants. It is likely that participants have mixed ideas on vital questions. What is (the core of) Islam? What is its role in the modern world? How does it impact on land, property and housing rights? The facilitator should expect a diverse group with some participants holding more extreme views— some would want much more Islamic inputs, others may want less of them. At the outset, the facilitator should emphasise that the goal is not to challenge or change participants' religious or political assumptions or principles, but to encourage them to pragmatically consider the Islamic and other implications for land rights. In any discussion, the facilitator should guide the discussion rather than advocate any one position.

## Who can be a facilitator?

There are generally two key subject competencies required to deliver this course – land rights and Islamic studies, in addition to a training background. These could be found in one person, or more typically in a team of facilitators (perhaps two) who complement each other's expertise. The level of expertise is to be commensurate with the level of the trainees, the depth of learning and extent of the debate anticipated. Language skills in Arabic are not required, but familiarity with commonly used Arabic terms is essential. Where the training is adapted to local settings, it will be preferable to have someone who is familiar with local issues, at least as part of the team. In general, the trainee could be from any part of the world.

It is not necessary that the facilitator be a Muslim as this is not a faith course, however he/she must be well versed on the subjects and be credible. If a team teaches the course, it is best comprised of both Muslims and non-Muslims, men and women, for perceived balance. It will also help reflection on the nature of the course. The non-Muslim facilitator would need to be sensitive to handling sacred material such as the *Qur'an* and *Hadith*. It does not matter whether the facilitator is male or female, as far as the individual is able to negotiate the cultural and gender dynamics. The facilitator is not expected to have all the answers – that is not possible in this wide field - but must be someone who can effectively deliver the course, and refer matters beyond their knowledge either to the group, or to course consultants/organizers.

There may be different delivery roles in the training programme – organizers, facilitators and additional resource persons. It is vital to clarify the roles, and ensure harmony. The number of facilitators would depend on the size of the workshop group. Advance briefing sessions with facilitators (and resource persons) are strongly recommended to ensure maximum benefit from their participation, and their inputs.

## Planning the course

Training needs and situations vary, therefore planning should anticipate and take into account the variables. Among the factors that will determine the level, length and approach of the workshop are the experience of the facilitators, the knowledge and skill level of participants, and the training context. Whether it is multi-stakeholder, a more homogenous group, or a training of facilitators will determine the shape and agenda of the training. Attention needs to be given to selecting an appropriate venue for the workshop, for example prayer facilities, dietary needs and cultural/religious sensitivities.

## Pre-training assignment

The pre-training assignment (PTA) is a vital tool in a participatory learning process. Here the organizers contact participants prior to the workshop with specific queries or tasks (often to be used at the workshop). Therefore, the PTA template or format for the Islamic training is an important part of the workshop planning. The PTA encourages the participants to prepare for the

training as well as think of their own roles and inputs as well as material they can bring to the workshop. The completed PTAs must be received well in advance of the training, so they can be analysed and feed into the training programme. Ideally, the whole training package should be sent to participants in advance so that they can start to familiarize themselves with the content, as well as be encouraged to bring their own case studies and examples to the course.

## Selecting participants

Generally, a minimum of 12 and a maximum of 30 participants are recommended. Participants selected should have some knowledge and experience – and interest - in land issues in the Muslim world. The overall composition of participants (gender, regional and faith) is best balanced with a mix of backgrounds and expertise.

## How to schedule the course

The planning process will determine the optimum duration of the training programme. A typical day begins at 9:00 a.m. and ends between 5:30 and 6:00 p.m. The schedule must make allowance for culture-specific needs such as prayers. The schedule must consider the number of activities (presentations/ group work/ discussions and plenary feedback) and allocate adequate time. Every day best begins with recaps (30 minutes) and ends with a debriefing (15 minutes). Make sure to provide adequate time for morning and afternoon breaks (20 to 30 min. each) and lunch (about 1 hr).

The opening session should ideally provide an overview of the context and general objectives of the course. It is an opportunity for the hosts/organisers to discuss expectations and process, and go through the schedule. Allow sufficient time during the session for participants to introduce themselves, their backgrounds and expertise, the institution they represent as well as their expectations from the workshop. An expertise matrix exercise is a good way for participants to share their areas of expertise, and possible inputs. A sample of this is also attached at the end of the Guide.

Each module has been planned to take approximately 90 minutes, with a normal course day consisting of 3 or 4 sections. It is suggested that working sessions *not* continue for more than 90 minutes without a break, to avoid exhausting participants, particularly given the complexity or intensity of the topics.

## How can the modules be facilitated?

The facilitator/s must be familiar with adult learning techniques. In view of the sensitivity of the topics, they will need to be experienced in facilitating different opinions and backgrounds.

It is up to the facilitator/s to determine how they want to plan the module within the time provided in a particular course schedule. Each module may open, for example, with a few provoking questions, or a short ice-breaker, to engage the participants. This can be followed by a short presentation by the facilitator drawing on the PowerPoint slideshows available in the training package.

Following the presentation, there are group discussions/exercises available based on a case study with four suggested questions which arise out of the case study, but which also relate to the whole module. The objective of the group work is to enable participants to translate theoretical principles from presentations/readings into practical context. The facilitator may also opt to include a role-play.

Participants will be encouraged to bring their own country contexts into the discussions and reflect upon them. The course programme also includes an action planning session to encourage individual/national follow-up (see sample form at the end of the Guide).

## Structuring the training programme

The modules can be used as a set, or be divided into shorter courses. They are written in such a way that they are more or less independent, but the themes are inter-related and overlapping (e.g. inheritance and women, law and human rights, *waqf* and finance) and reference is sometimes made in the text to contents of other modules.

The facilitator must decide, after assessing training needs, which sessions are best suited to the participants. For example, participants may already be familiar with some themes, in which case less time need to be spent on these. Be careful to ensure that the expertise of one or more in the group does not disadvantage others who expect those areas to be covered.

## Delivery of presentations

Inputs, such as the PowerPoint presentations, from facilitators should be kept short, keeping in mind that there is a large amount of material to be covered, that this is at introductory level and that some points are contentious. Always allow for questions and general plenary discussion, with the timing and manner of interventions explained at the beginning. The emphasis is not on Islamic or land theories but on practical application and the development of strategies for action.

There are topic outlines at the beginning of the Q & A section of each module, and these are reflected in the PowerPoint presentations. These can be adapted to the facilitator's style and to the course participants. The presentations are intended to stimulate participant's to think about their own experience and to offer opinions for discussion. The facilitator should share the PowerPoint presentations with the participants beforehand where possible. In delivering the package, the facilitator must keep the emphasis on empowerment, rights and inclusiveness, particularly on gender, age and diversity. How explicitly these objectives can be addressed would depend on the context.

The PowerPoint presentations are not intended to 'feed' the participants with pre-fabricated information but to foster dialogue and encourage them to present their own knowledge and experience. Thus, each module begins with identifying the objectives and asking participants to briefly mention their experiences and preliminary impressions on the topic.

## Facilitating group work

The country study group work exercises are diverse geographically, thematically, in the kind of material they use and in the gender focus. Each exercise has a case study of a few paragraphs followed by 4 or 5 questions. The information is sufficient for the exercise though participants will be bringing in their experiences. In most of the exercises, there is no one 'right' answer, but a range of possibilities with different merits.

Exercises are best done in small groups, the size depending on the number of course participants and the number of groups. The smaller the size of the group, the more likely it is to involve participants and generate a wider level of discussion. Often, groups need more time for discussions than allocated, so it is important to monitor their progress and give them notice that their time is up. Yet, after discussion sessions, each group should be given the opportunity to make a short report, which would feed into the plenary. A summary of these presentations and the discussions should be recorded and then copied down (e.g. by the supporting resource person), as a record of all the proceedings.

## Dealing with debate

While encouraging constructive debate on relevant issues, the facilitator must be able to draw a line where a very strong disagreement about fundamental values arises. The facilitator should flag this and praise it, noting that debate is welcome but not all debates can be resolved in the course. Most importantly, the facilitator should ensure that every participant (within reason) is able to make their point and that everyone's views are treated with respect. This is particularly true for minority opinions at the workshop, which the facilitator must allow space for.

This training in Islamic issues is different from some other training in that there is a fixed minimum of information (a percentage of the course) that needs to be used, and is not negotiable. Participants are required to look at Islamic principles as they would view any other system, with their faith not being relevant. Therefore, the facilitator could distinguish the personal, political and professional levels of reactions to the training. Personal is not encouraged (except as part of the inputs), while the political context is relevant but often beyond the scope of this training and the content is aimed at the professional level for practical action.

## How to engage with some typical scenarios during the course

A training on Islamic land issues is likely to generate different kinds of scenarios, some of which the facilitator can anticipate and deal with. A few common ones are presented below.

### Is this training authentic, does it have an agenda?

A Muslim participant challenges the facilitators on the authenticity of the package or the credibility of the hosts to undertake this sensitive course. It may take the form of a particular point or discussion of a specific issue where the participant is an expert and proposes a different line of reasoning from the package. The intervention may be defensive (projected as defending the authenticity of Islam) or aggressive in challenging the role of outsiders to project Islam. For example, this could be on interpretation of a verse from the *Qur'an* or a narrative from the *Hadith* relating to property rights. It could involve linguistic (Arabic) or broader jurisprudential discussions. Such an outburst may come unexpectedly in the middle of substantive discussion on some much more technical issue. There may be an irritation that something important has been left out – for example children.

It is often difficult to gauge whether the participant is showing off his/her knowledge and asking for attention, or is genuinely concerned because the philosophy of the course does not match his/her outlook. The facilitator should let the intervention take place and allow others to respond. However, this should be at the end of the facilitator's presentation or during the group work where it does not change the flow of the module too much. The first point to make is to acknowledge that the participant may be an expert on the particular aspect or approach and welcome the intervention, and that it could be feedback for the designers of the package. However, the package is a product of long consultations and endorsements from Al Azhar, experts at the Arab League meeting, stakeholder discussions and a peer review workshop.

The facilitator could also consider whether this is a direct issue relating to the workshop that needs to be addressed immediately, or a broader matter to be taken up outside the course. If it involves a challenge to the course agenda, the response should be on the transparency of the process – including the multiple stakeholders involved, and that the course is diverse

and does not go into detail on all aspects. If the query is about the sources – such as reference to the *Qur'an* and *Hadith* – the facilitator can invite a written feedback with suggestion of amendment. Where the facilitator is confident that the intervention will not derail the process, he/she can turn to the other participants and ask if they would like to briefly respond. Their responses can be listed to be taken up at an appropriate stage.

### Is gender equality desirable?

Two participants get into a confrontation over the issue of gender equality. One female participant argues that most Muslim societies are patriarchal and use religion selectively. The male respondent asserts that Islam stands for a high status for women, and should not be corrupted by Western views. The debate could turn out to be discussion on the concept of human rights, empowerment, roles within family or of religion and politics. It is obvious that these are deeply held convictions based on dogmatic or practical positions. Both participants are willing to rely on their expertise/experience and also promoting their opinions among other participants, risking to chart a different direction for the course. In an alternate possible scenario, there is only one vocal participant, which creates ripples at the course and fuels debate.

These kinds of interventions can be used to further the discussion provided that it does not hijack the course. Therefore the facilitator must remain neutral, acknowledge the debate as one that exists in real life and focus rather on establishing the time and debate parameters for discussion. S/he may also bring in the other participants to diffuse the conflict. Ultimately, the facilitator's role is to help define/frame the debate in a constructive way. Be flexible if the programme allows for it – gender will be a recurring theme. It may be appropriate to mention that the case studies (e.g. the *Moudawana* decrees in Morocco) will focus on this question and may be the specific context to address the debate.

The facilitator can ask the contributor to summarise his/her position, provide concrete examples or clarify a statement. If there is an emotional outburst, address the underlying tension by clarifying the position, and avoiding personal accusations. Always be aware that the discussion must be moderated, and stopped where it appears to be acrimonious or too long. The likely outcome will not conclusively support one position or the other but indicate how there is need to work towards 'convergence', without discrediting either view.

## Is this training futile?

A participant, a self-identified secularist – questions how the training could be useful. He points out that, in his country, Islam is not relevant in official policy or debate, and there are many problematic aspects of engaging with Islamic dogma. Further, he finds that the theoretical discussions are too broad and not of any practical or professional utility. In his view, using Islamic arguments not only complicates the picture but also empowers the conservative forces. Other participants may challenge this. In an alternative scenario, a Muslim decries the workshop saying that Islam is central to the life experience of Muslims but this course does not do enough to recognise authentic positions and seems to blur the picture by favouring the ‘Western approach’ which is unrealistic and counter-productive.

Though both positions appear to undermine the rationale and substance of the course, they are both justified in their own outlooks. The course package is global and multi-dimensional in scope making it necessary to adapt it to particular needs and country/thematic contexts. It is also equally true that Islamic dimensions are often invisible and appear difficult to sort out. On the other hand, it is also evident that sections of the Muslim community take Islamic approaches that are puritanical and without reference to ‘external’ standards. The facilitator must acknowledge the two approaches by pointing to the pluralism and diversity in the Muslim world, asserting that the course is merely a framework to discuss multiple scenarios, and the appropriateness of an Islamic analysis would vary from context to context.

The facilitator could turn to other participants to use this window to debate the political ‘risks’ of addressing Islamic dimensions of land, property and housing rights. At the same time, be firm in establishing the common neutral line of the course – the Islamic dimension must be studied simply because it is there (whether or not easily documented). The discussion could turn into the role of faith, custom and modernisation, which are all relevant considerations, particularly in group work. This line of discussion can also be usefully harnessed in two other ways. First, to bring forth case studies where Islamic studies have or have not worked. Particularly, this would reflect on the role of Islamic inputs into various professional disciplines of law. It will highlight ‘visible’ and ‘invisible’ Islam. Second, it would demonstrate the need for negotiation and reconciliation among the believers, agnostics and secularists on strengthening land, housing and property rights.



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## Evaluation and follow up

Feedback from participants on content and process is vital for improving the course content. Evaluation could be held at the end of each day, and at the end of the workshop. Forms for both appear at the end of this Guide. The design of this evaluation (at least the final evaluation form) should be part of the planning process. The forms should be filled in anonymously. For the daily evaluations, a short summary of the feedback can be provided by the organizers at the start of the next day. If this is done, it is important to ensure that the organizers and facilitators also consider changing some aspects of the course depending on participants’ feedback and what is possible to change. If the course includes an action planning session, it is important that the organizers explain how they intend to follow up on the actions proposed.

## ANNEX 1. Expertise matrix

### Sample professional focus/expertise matrix

This matrix can be used as an ice-breaker when introducing participants to each other. The exercise usually takes 30-40 minutes, depending on the number of participants.

1. The facilitator will need a whiteboard or large sheets of paper, as well as markers, to prepare the matrix.
2. In addition, each participant is handed a few post-it notes.
3. The categories in the matrix should be agreed jointly with participants, but a template can already be prepared beforehand by the facilitator to get the process started.
4. Each participant is then asked to take a few moments to reflect where they best fit in, in terms of their experience.
5. Participants are then invited to come up to the whiteboard or sheets, introduce themselves in a couple of sentences, and place the post-it note where it belongs in the matrix.
6. There may be participants who feel they do not fit into any category (or have a resistance to being “boxed in” or stereotypes into one category). In this case, the facilitator can welcome them to put their sticker anywhere on the board with any description they like of themselves.
7. The organizers may wish to place the completed matrix on one of the walls in the training room, so that it can be referred to, if needed, during the course. It can also be typed up and included together with a set of bios of the course participants in the final course report.

	Law and human rights	Land professionals/ planning	Gender	Finance	Waqf	Other
Academia						
NGO						
Research						
Private sector						
Intergovernmental organizations (incl. UN)						
Government						
Other?						

## ANNEX 2. Daily evaluation form

### LOGO(s) of training organizers/sponsors

#### EVALUATION QUESTIONNAIRE

< Official title of the training program >

Date, location (city and country)

1. What did you like most about today?
2. What did you like least about today?
3. What are your recommendations for tomorrow?

## ANNEX 3. Final evaluation form

### LOGO(s) of training organizers/sponsors

#### EVALUATION QUESTIONNAIRE

< Official title of the training program >

Date, location (city and country)

1= strongly disagree; 2= disagree; 3= agree somewhat; 4= agree; 5= strongly agree

#### A. Objectives and training scheduling

**LOW      1      2      3      4      5      HIGH**

1. Clearly understood the training objectives.

**1      2      3      4      5**

2. The stated training objectives were fully met.

**1      2      3      4      5**

3. The scheduling, timing and length of the training was suitable to my needs.

**1      2      3      4      5**

#### B. Programme design and training materials

1. The training was designed to allow me to learn from and share with participants effectively in order to produce effective results.

**1      2      3      4      5**

2. I found the training consistently stimulating, of interest and relevant to me.

**1      2      3      4      5**

3. The training programme was designed in a sensible manner.

**1      2      3      4      5**

4. The training materials and handouts were informative and useful.

**1      2      3      4      5**

5. The balance between presentations and practical sessions was about right.

**1      2      3      4      5**

### C. Course delivery

1. Presentations made by participants stimulated my thinking and the discussions deepened my knowledge.

1      2      3      4      5

2. The training has contributed to a better understanding of Land, property and housing rights in the Muslim world.

1      2      3      4      5

3. The geographic, gender and organizational mix of participants was about right.

1      2      3      4      5

### D. Facilitation

1. I was able to see clear links between various components of the program.

1      2      3      4      5

2. I had adequate opportunities to express my views in small group work.

1      2      3      4      5

3. I had adequate opportunities to express my views in plenary discussion.

1      2      3      4      5

4. The atmosphere promoted openness and sharing amongst all participants.

1      2      3      4      5

### E. Logistics and administration

1. The invitation letter and the accompanying information leaflet were sufficient to allow me to prepare for and participate in the course.

1      2      3      4      5

2. The conference rooms and facilities were favorable to learning.

1      2      3      4      5

3. The hotel and the local transport arrangements were satisfactory.

1      2      3      4      5

4. The organizers were supportive and sensitive to my needs.

1      2      3      4      5

### F. Perceived impact:

1. The knowledge and ideas gained through this training are appropriate and adequate to engage in land, property and housing rights in the Muslim world.

1      2      3      4      5

### ANNEX 3. Final evaluation form

2. Overall, I am very satisfied with this training.

1 2 3 4 5

3. When I return to my organization, I will inform my colleagues and other stakeholders about the training.

1 2 3 4 5

#### I found the following course topics very useful

1. Relevance of Islamic land tools.

1 2 3 4 5

2. Islamic law, land and methodologies.

1 2 3 4 5

3. Islamic human rights and land.

1 2 3 4 5

4. Islamic land tenures and reform.

1 2 3 4 5

5. Inheritance laws and systems.

1 2 3 4 5

6. Property rights of Muslim women.

1 2 3 4 5

7. *Waqf* (Endowment) and Islamic philanthropy.

1 2 3 4 5

8. Islamic microfinance.

1 2 3 4 5

#### I would have liked to have more... (Select several options if appropriate)

Plenary discussions

Lectures / Presentations

Group Work

Social Events

Free Time

Other (please specify below):

.....  
.....  
.....  
.....

I would have liked to have less... (Select several options if appropriate)

Plenary discussions

Lectures / Presentations

Group Work

Social Events

Free Time

Other (please specify below):

.....

.....

.....

.....

.....

Which messages and/or methods you learned during the course did you find most interesting?

.....

.....

.....

.....

.....

How do you intend to apply what you have learned during the course?

.....

.....

.....

.....

.....

Which follow-up activities would you like to see?

.....

.....

.....

.....

.....

Other Comments and Suggestions:

.....

.....

.....

.....

.....

.....

Thank you for your inputs!  
Your feedback will help us improve the organization of similar events in the future.

## ANNEX 4. Action planning

**Session:** Action planning (likely to be held at the end of the course, just before the final evaluation)

**Activity:** Individual and group work on action planning

**Duration:** Variable, depending on the number of groups

### Session objective

1. The objectives of this session are to allow each participant:
2. To reflect on what has been learnt in the preceding days of the course;
3. To think about what future steps he/she will do / to act on this new knowledge when returning to his/her work place;
4. To provide a space for interaction with peers for possible collaborator in national organization level follow-up. The latter works if and when more than one person attends the training

### Session plan

Time	Session activity
10-20 minutes	<b>Guidance on action planning:</b> Short introduction to Action Planning (why it is considered important) and to the session
60 minutes	<b>Individual action planning:</b> This sub-session will consist of individual reading of materials that have been handed out during the preceding days of the course and consideration of how the participant, in his/her individual capacity, will be able to use the new knowledge and skills gained from the course when returning to his/her position back home. A handout will be provided for completion to each participant, to help trigger thoughts on this.
60 or 90 minutes	<b>Group action planning:</b> This sub-session will consist of two parts. <ul style="list-style-type: none"> <li>• The first 30 minutes will be spent in <i>group work by thematic profession</i> (such as academic, government, NGO), or any other applicable breakdown. These groups will have a mix of participants from different professions/disciplines. The intention is for the thematic group work to trigger ideas within each professional group as to what their role can be back home or in their work place.</li> <li>• (<i>Only applicable in case of a regional training programme</i>) The next 30 minutes will be spent in <i>group work by country</i>. Participants will have an opportunity to report back on ideas they have gained from the first group exercise, to help in brainstorming on what can take place as a national follow-up to the regional training course. A suggested template will be provided to each group for reporting back in the plenary session.</li> <li>• The last 30 minutes will be provided for the thematic (or country) groups to complete the presentation.</li> </ul>
10 minutes per group + 10 minutes plenary	Action planning presentations by thematic or country groups. Each group will have 10 minutes to present, followed by 10 minutes open plenary discussion

## Model for Personal/Country Action Plan

Your name, organization and country	
Idea to implement	
Internal context: problems/obstacles and strengths/opportunities	
External context: opportunities and threats	
Who must be involved?	
What resources are needed?	
How will you introduce this idea?	
When will you initiate it?	



# MODULE 1

Islamic land framework

# MODULE 1:

## Islamic land framework

### Overview

This module covers key concepts and doctrine in Islam relevant to land, housing and property issues. It considers the balance in Islamic property rights in between private property rights and responsibilities owing to the assumed ownership of land by God. It reflects on the potential of using the dimensions of equity, justice and accountability to enhance land, property and housing rights in Muslim contexts. The module explores the development of a variety of innovative, authentic land rights tools. While the module identifies positive aspects, it also recognises the gaps between principles and practice that need to be addressed.

The module considers the impact of holistic, moral and ethical aspects of religious faith (*imaan*) which are part of Muslim consciousness on property rights. Muslims generally do not view land merely as an asset or investment, but part of a range of social transactions and meanings. Land and property fall within the area of social relations, which under Islamic law are called *mu'amalat*, as distinct from matters relating to worship (*ibadat*). Social transactions are more open to a greater degree of interpretation than religious matters, and therefore more easily adaptable to contemporary challenges. Land access is also facilitated through the emphasis on solidarity, and philanthropy through mechanisms such as *zakāt* (charity obligation) and *sadaqah* (voluntary charitable giving).

Private land ownership and enjoyment must be just and responsible. As land rights are largely linked to land use, they must not be exercised wastefully or exploitatively. This approach supports sustainable resources use with equitable rights, and promotes models which are environmentally responsible. It also promotes land access and re-distribution for marginalized groups.

### Reading materials

Behdad S (1992) 'Property Rights and Islamic Economic Approaches' in K. S. Jomo, *Islamic Economic Alternatives* (London: Macmillan) pp. 77-103

Owen R (2000) 'Introduction' in R. Owen (ed) *New Perspectives on Property and Land in the Middle East* (Cambridge, Mass: Harvard University Press).

Rosen L (2000) *The Justice of Islam* (Oxford: Oxford University Press).

Sait S and Lim H (2006) Chapter 1- Land Law and Islam: Property and Human Rights in the Muslim World (London: Zed Press/UN-HABITAT).

### Learning outcomes

At the end of this module, participants should be able to:

- ♦ reflect upon the focus on Islamic conceptions of land and property rights.
- ♦ explore the rationale of GLTN's engagement with Islamic dimensions of land.
- ♦ critically consider arguments in favour of focusing upon Islamic law and methodologies.
- ♦ critically consider arguments against focus upon Islamic law and methodologies.

### Facilitator's notes

The trainer/facilitator should anticipate that there could be different perspectives and some resistance from people working on land issues, both Muslims and non-Muslims, on a specifically Islamic land tools focus. This session is designed to enable participants to

understand and appreciate the scope of GLTN's agenda generally and on Islamic land tools, but it also provides also an important opportunity to air in a constructive way the initial responses of participants to this focus, some of which may not be wholly positive.

Given the nature of the discussion, a trainer may find it helpful to divide participants initially into pairs, rather than small groups, to encourage open and frank discussion. Any resistance to the course materials encountered at this stage may surface in later sessions, particularly Module 3 on Islamic Human Rights and Land and Module 6 on Muslim Women and Property. It is helpful, therefore, to encourage a wide-ranging and full discussion on the identification and development of Islamic land tools at an early stage in the course.

The case study of Iran (see below) is at once direct and provocative. It offers an overview of the political, legal and economic factors impacting the relationship/debate of land and Islam. The fact that Iran is a Shi'a country merits a discussion on its distinctiveness, also recognition of its socio-cultural history. Participants can be encouraged to consider any such debates in a Muslim country they are familiar with. The outcome of this debate is likely to divide the group (i.e. spirit vs. letter) but that is fine.

## Group work

### Islamic land debates in Iran

Iran (emerging from Persia and the Islamic Safavid Empire) has a rich socio-historical experience of dealing with land issues. In 1962, the Shah Mohammad Reza Pahlavi initiated significant land reforms referred to as the 'White Revolution'. Land redistribution continued until 1971 covering private, government owned and endowed land. Over 50% of agricultural land is estimated to have been redistributed, but the size of plots received by new peasant landlords was insufficient and unsustainable. The landed class retained the best lands, half of all productive land was in the hands of absentee landlords, and over a quarter of prime lands were in disputed ownership. The chaos and widespread dissatisfaction with the reforms are considered to be one of the factors leading to the Islamic revolution of 1979.

The 1979 Iranian revolution overthrew the secular Western-supported Shah regime and established the Islamic republic. The role of

Islamic doctrines and their interpretation and application have been at the centre of the debate in Iran since. The issue of land reform, in particular, divided the ruling establishment of the Islamic Republic of Iran in the 1980s into two broad factions. On one hand, radicals favoured a redistribution of the lands in the hands of the large landowners as part of Islamic economics, and on the other, conservatives held fast onto the principle of the sanctity of private property under Islam. This was also a struggle between different social classes and interest groups which manifested itself as a conflict between divergent Islamic standpoints. Both sides used arguments based on classical Islamic law on land reform. Ultimately, the conservatives who used the written text of the *Shari'a* defeated the radicals who invoked the 'spirit' of Islam.

### Recommended reading for group work

Bakhash, Sh (1989) 'The politics of land, law, and social justice in Iran' 43 *Middle East Journal* 186-201.

Frings-Hessami, K (2001) 'The Islamic Debate about Land Reform in the Iranian Parliament, 1981-86' 37:4 *Middle Eastern Studies* 136 – 181.

### Possible questions for group work

1. Iran is a Shia-Muslim country. How did this make its experience different from that of Sunni countries?
2. The debate was about two competing Islamic principles – private ownership and greater access to land. Which principle is more important, can the two be reconciled?
3. The debate was about law and politics. Why did the 'text' triumph over the 'spirit' of Islamic law? Could the results be different in other countries, or in different times in Iran?
4. Did religion play a positive role in the land reform debate? What were the other factors which influenced the land debates in Iran?
5. Some saw this debate as essentially between modernisation (free market economic reform) and classical ideas (influenced by socialism). What was the impact of Iran's relationship with the West, and war with Iraq (1980-88) on socio-economic reforms?

## Background Q & A

### Islamic land framework

“Human ownership (of land) is tempered by the understanding that everything, in the last analysis, belongs to God.... What appears to be ownership is in fact a matter of trusteeship, whereby we have temporary authority to handle and benefit (for humanity) from property.”<sup>1</sup>

## Introduction

The Global Land Tool Network (GLTN) is a multi-sector and multi-stakeholder partnership seeking to translate aspirations, principles and policies into inclusive, pro-poor, affordable, gendered high quality and useful land tools that can be replicated in a range of contexts. GLTN recognizes the demand for targeted tools, including culturally or religiously formatted tools, since there are many positions and approaches to conceptualising and delivering secure tenure and access to land. Most communities have deeply ingrained cultural traditions, many religions have firm rules on land and inheritance, and every government faces the challenge of land differently with its own array of laws and degrees of political will.

In most Muslim countries Islamic law, principles and practices make an important contribution to shaping access to land. GLTN has as one of its objectives, therefore, the identification and development of Islamic land tools through a cross-cultural, interdisciplinary and global process, owned by Muslims, but including civil society and development partners. Yet, Islamic approaches to land should not be seen as an internal matter, giving preference to religion over universal or secular approaches to land, but as part of GLTN’s inclusive, objective, systematic and transparent efforts.

## 1 Why are Islamic conceptions of land relevant to security of tenure?

Security of tenure refers to the confidence one has that their land rights will be respected. It includes the right of access to and use of land and property that is underwritten by a known set of rules, which will be legally protected. The tenure can be realised in a variety of ways, depending on constitutional and legal frameworks, social norms, and cultural values and, to some extent, individual preference. GLTN is interested in Islamic conceptions of land as understanding the nature and scope of property rights in Muslim societies could further secure tenure and access to land. Islamic approaches can be used to supplement the application of international standards and goals.

## 2 Does the Islamic framework recognise land and property rights?

The Islamic framework – a plurality of systems (socio-economic, religious, political and legal) - generally promotes private property rights. At the same time, Islam emphasises access to land and the rights of the landless. By assuming the ultimate ownership of God over land, it requires all rights to be exercised within the Islamic legal and ethical framework. The land rights framework emerges from divine edict and the sayings and examples of the prophet. One of the basic aims of Islam is to create an egalitarian society where every person may meet his/her basic rights and enjoy life. Islam is, of course, by no means the only factor in Muslim societies and often co-exists with customary, secular and other influences. However, there are clear foundational Islamic principles relating to land, manifested and applied in different ways throughout the Muslim world.

<sup>1</sup> Abdul-Rauf, M. (1979) *The Islamic Doctrine of Economics and Contemporary Economic Thought: Highlight of a Conference on a Theological Inquiry into Capitalism and Socialism*, Washington: American Enterprise Institute for Public Policy Research. (Abdul-Rauf 1984:19)

### Diversity of *Sunni* Schools of Law across the Muslim world

The *Hanafi* and *Maliki* schools were the first to develop and correspondingly became the most geographically widespread. *Hanafi* originated in Iraq and spread from Afghanistan and India to parts of East Africa. As the official doctrine of the Ottoman world, *Hanafi* jurisprudence is not only prevalent in Turkey but other parts of the former territories such as Syria, the Balkan States, Cyprus, Jordan and Palestine. The *Maliki* School grew out of the city of Medina, spreading through North Africa and on to Sudan, Gambia, Ghana, Nigeria, Senegal and the Arabian Gulf including Kuwait. The *Shafi'i* School started in Cairo, spreading to Yemen and then to parts of East Africa and South East Asia. It predominates in Indonesia, Malaysia, Sri Lanka and the Maldives. The father of this school - Muhammed ibn Idris al-Shafii - is sometimes referred to also as the 'father of Muslim jurisprudence'. The *Hanbali* School is known for its strictness in terms of ritual. It did not prove as popular as other schools, but is most notably the official doctrine in Saudi Arabia. While some schools predominate in particular areas, or particular countries, adherents to more than one specific school may be found in one country.

### 3 How are land, property and housing issues discussed within the Islamic context?

Land, property and housing rights are an integral part of not only Islamic law (as discussed below) but also the religious, ethical and social matrix. Therefore, land is more than an asset, commodity or a claim and is to be addressed in the larger context of socio-cultural and religious norms. Land transactions, for example, are part of the Islamic economic law, or *mu'amalat* (social relations), which emphasizes mutual respect, honour and righteousness of conduct. Islamic positive law encompasses two general categories: the *ibadat* relating to prescribed rules of worship and the *mu'amalat*, which governs everyday human relations. To be a good Muslim is not only to follow Islamic law, but also to equally exhibit good conduct – which includes responsible use of resources and recognition of the rights of others.

### 4 How can traditional Islamic approaches be relevant to contemporary land debates?

Islam is considered by Muslims to be a complete way of life and property conceptions go far beyond theory, impacting to varying degrees on the lived experiences of Muslims. They also often inform the policies of the State and the land rights discourse. In several aspects, Islamic land principles and practices are similar to contemporary international standards, in other ways they offer an alternative paradigm.

There are distinctive Islamic approaches evident in the fields of land administration, land registration, urban planning, water policies and environmental protection. Traditional Islamic practice may not have foreseen the extent or nature of present day problems and purely Islamic solutions may be a utopian model. But there are aspects of Islamic principles, mechanisms and processes that may provide legitimacy and durable solutions through incorporating or at least considering authentic Islamic contributions.

### 5 Do Muslims have a duty towards the poor?

Yes, Muslims have a charitable obligation, which is one of the five pillars of Islam. This finds expression in the form of *zakat* (literally purification), which is a levy on Muslims for distribution to the poor and needy. Calculated in monetary terms on the basis of annual profits or income above and beyond living requirements, this payment is traditionally paid to mosques, needy individuals, charitable institutions or the state. In countries, such as Pakistan, Sudan, Libya and Saudi Arabia an obligatory tax is levied. In others, such as Jordan, Bahrain, Kuwait, Lebanon, Malaysia and Bangladesh the state organises and legally regulates collection of *zakat*.

## 6 How does the ethical dimension of Islam support land rights?

Islamic law and systems are based on the ethical dimension of the divine revelation. There are certain basic Islamic concepts or 'golden threads' that embody the spirit of the *Shari'a*. They include: *haqq* (concepts of rights), *adl* (justice) and *qist* (equity). The importance attached to these principles is evident from the number of times they are reiterated in the *Qur'an*: *haqq* is used 227 times, *qist* 15 times and *adl* 13 times.

## 7 Are we discussing Muslim practices or Islamic practices?

Though Muslim and Islamic are often used interchangeably, there is a vital difference. Islamic norms are those derived from certain divinely inspired principles through a particular methodology. What Muslims practice need not be Islamic, and therefore if certain Muslims abuse Islamic principles, this cannot be

attributed to Islamic doctrines. Muslims may be secular or adopt customary traditions; this may be in contrast (or compatible) to Islamic practices. Therefore, one must be careful before labelling a practice in Muslim communities as an Islamic norm.

## 8 Can Islamic approaches support wider access to land?

Islamic property rights are conditional on the requirement that property not be used wastefully or exploitatively or in a way that will deprive others of their justly acquired property. Land ownership in Islam is based on productive use of land as evidenced from the principle of ownership of dead land (*mawat*) through reclamation. Land rights are, thus, linked to land use. The person who uses the land will have priority over another with access to a patch of land but who has failed to use it. Unworked land in principle cannot be owned. Thus, Islamic principles have potentially important implications for access to land and secure tenure.



Old town, Zanzibar © Asa Jonsson/ UN-HABITAT

## 9 Can Islamic approaches and arguments facilitate access to land for landless?

The concept of property rights in Islamic economics lays stress on responsibility, poverty alleviation and redistribution. The formulation that land is a sacred trust based on the doctrine of unity (*tawhid*), stewardship (*khalifa*) and trust (*amana*) implies that land ownership and enjoyment must be just and responsible. As a result, Islamic doctrines engage with entitlement to land rights for a broad range of beneficiaries including women, children, landless and minorities. For instance, the Qur'an mandates respect for property rights of all persons regardless of religious faith (3:75). The repeated Islamic emphasis on obligations regarding philanthropy, fairness and poverty alleviation are influential in land rights argumentation based on a holistic, authentic, moral, ethical and legal land rights code.

## 10 Does the Islamic framework protect property rights and access to land?

Protection of property rights is well established in Islamic law. Islamic law provides remedies for the individuals wrongly deprived of property by official action. Such is the importance attached to property rights, that theft under Islamic law falls within the crimes which are punishable by a pre-established severe punishment.

## 11 Does the Islamic framework support land redistribution?

Islamic theoretical insistence that ownership of everything belongs to God alone (Qur'an 2:108; 3:190) signifies that ownership is subject to equitable and redistributive principles. The divine ownership is coupled with repeated Qur'anic references to the effect that all of humanity benefits from nature's resources. And charity towards economically dependent members of the family, community and society is one of the five pillars of Islam, which is evident in institutions such as the Islamic endowment (*waqf*). The fixed Qur'anic inheritance rules mandate a broad category of beneficiaries, leading to fragmentation of shares. But the very idea of inheritance rules – apart from guaranteed access to property to a larger number – was to break up land monopolies and large estates. Islamic property rights therefore incorporate a redistributive element.

However, there have been debates in countries from Iran to Pakistan on how to reconcile respect for private property rights with appropriation for land redistribution.

## 12 Are Islamic models relevant to market forces?

While there is a shift away from land redistribution approaches to market-based access to land, Islamic principles offer equitable and durable foundations. Given that land markets have special socio-political aspects, market forces are not a culturally isolated economic mechanism serving to equilibrate supply and demand. While Islamic economics supports market forces, it regulates the same toward a workable and socially acceptable market structure. For example, Islamic economists address market equilibrium through permissible activities, responsibilities and emphasise the concept of 'just market price'. An appreciation of how informal and formal land markets operate in Muslim countries and role of stakeholders are vital to appreciate the gap between Islamic theories and practice. An example for this would be finance for slum upgrading which depends on not merely availability of finance but the supporting environment to use it effectively.

## 13 Are Islamic principles the same throughout the Muslim world?

No, they are not. In fact, there are considerable variations among countries, even within countries. There are two major sects of Islam, Sunni and Shi'a, which means that pluralism is inherent in Islam and Islamic law. Within Shi'a, there are various sects such as the Twelvers, the Ismailis and the Zaidis. Among Sunnis, who constitute the majority of Muslims worldwide there are four main jurisprudential schools (*maddahib*, singular *maddhab*): Hanafi, Maliki, Hanbali and Shafi'i. These schools were named after their leading jurists and each is the dominant authority in different parts of the world. And, legal systems throughout the Muslim world exhibit considerable variety owing to their specific historical and colonial contexts, the State ideology and the extent to which Islamic law is able to trump secular or customary laws.

## 14 Is it important to know which Islamic school is prevalent in a particular country or community?

Recognition of the prevailing Islamic school of jurisprudence is necessary to engage with Islamic law in a particular context. For example Hanafism, the most widespread of the four schools, is considered the most flexible and open to innovative interpretations of its core doctrines.

## 15 Are there divergences of opinion on Islamic law within the schools of law?

There could be variations in practice within schools, for example as between India and Afghanistan where the Hanafi doctrine applies. Both the Hanafi and the Maliki schools have tolerated divergence of opinion. Therefore, ‘best practice’ approaches could lead to cross fertilization and innovative approaches. In any case, there is the methodology of patching (*talfiq*), by which jurists may give authoritative support to the compilation of a legal regulation from the views of more than one school of law, a method used more than once in the creation of modern legal Codes. There are concerns in some societies that patching (*talfiq*) is used to put together the more patriarchal aspects of laws from different schools, picked out by state-appointed committees, with an outcome that is detrimental to the rights of women.

## 16 Does the Islamic framework support land readjustment?

Islamic inheritance law may result in wasteful land subdivisions in some cases, but it creates also opportunities for land readjustment and communal holdings. Communal or tribal lands were a feature of some Muslim countries. One example was *musha* (Arabic for shared) lands, found mostly in rural agricultural contexts, notably for instance in Palestine. The *musha* system involved a periodic reallocation of shares of arable land, to which a customary right attached, amongst members of a village who held the land in common.

Communal land declined under colonial disapproval and the emergence of liberalized property right regimes. *Musha* should not be romanticised, but it reflects the egalitarian principles and respect for equity that are integral to an Islamic way of life and may be supportive to modern land readjustment strategies.

## 17 Does the Islamic framework support land reform designed to enhance security of tenure?

Under Islamic theory, the State in land management is seen as supervising land ultimately belonging to God, for the benefit of the community. The State is mandated to administer land, efficiently and fairly, in accordance with God’s laws and ethical and moral principles. In practical terms, there exists no ideal Islamic State and Muslim States selectively adopt Islamic principles according to their interpretation.

Muslim governments have often sought to derive legitimacy for their land reform measures from Islamic first principles of redistribution or violation of such principles, as in the widespread nationalisation of Islamic endowments (*awqaf*). This adaptation points to the political or pragmatic use of Islamic argumentation. For example, the question of whether a land ceiling or redistribution of land was Islamic was hotly contested by the government and the landed class in Pakistan. However, there is potential within the Islamic framework for States to be proactive in enhancing security of tenure and access to land?

## 18 Do Muslim countries suffer from poor land governance?

UN-HABITAT and FAO define land governance as “the rules, processes and organizations through which decisions are made about access to land and its use, the manner in which the decisions are implemented, and the way that competing interests in land are managed. It encompasses statutory, customary and religious institutions. It includes state structures such as land agencies, courts and ministries responsible for land, as well as non-statutory actors such as traditional bodies.” A land governance perspective facilitates critical insights into the stakeholders, their interests, their sources of influence and their constraints. This perspective can be useful to understand and manage the vested interests

of stakeholders when negotiating complex financing packages for slum upgrading.

It is difficult to generalize on land governance given the sheer diversity of Muslim countries, as well as the lack of systematic and reliable data. However, several Muslim States, as others, need improved land governance. In many societies, both Muslim and non-Muslim, land is seen as a currency of political patronage and corruption. Where land administration is complex or dysfunctional, exploitative rent-seeking behaviour can flourish at the expense of the poor.

## 19 Does Islam facilitate good land governance in Muslim countries?

There may be no 'Muslim' or 'Arab' model of land governance as such. The problems Muslim countries face in land administration, arising out of misuse of limited resources, inefficient structures and the democratic deficit, are not exceptional to the Muslim world or different from other regions. Accountability, particularly against misuse of power and corruption, in both the temporal and religious sense are repeatedly stressed in Islamic literature. The concepts of justice (*adl*) and consultation (*shura*), embedded in Islamic consciousness and administrative practice over centuries, are influential. Islam is not, therefore, an obstacle to good governance. The influence of Islam is varied and may be less than sometimes assumed.

## 20 What part do civil society organizations play in ensuring effective land governance in Muslim societies?

The state was the only serious modern corporate institution in most Muslim countries, unconstrained by active participation from non-state actors. Civil society in most parts of the Muslim world is now expanding and gaining a stronger voice. Contemporary Islamic activism is keen to produce authentic tools true to Islamic principles and values, including the revival and invigoration of such institutions as the endowment (*waqf*), which contrast with Western inspired models.

## 21 Did effective land administration exist in the Muslim world?

Ottoman land history offers an expansive case study of the application of Islamic land principles in its context. Although a product of its times, its cadastre and tax collection systems demonstrate that Islamic principles do not inhibit effective land administration systems. The Ottomans by the mid-sixteenth century covered much of the Middle East, North Africa, and Eastern Europe and through much of their 600 year rule developed an extensive land administration system based on both Islamic and local principles. Land administration was generally carried out through an elaborate network of laws and guidelines. Despite the centralised nature of the Ottoman land and revenue bureaucracy, the vastness of its lands required local management in the many provinces. The role of the state was not static but diverse.

### Muharraq and Manama, Kingdom of Bahrain

A team combining international and local representatives has worked to address widespread deterioration in the traditional urban environment of Muharraq and Manama. Drawing upon Islamic traditions and values a generative process of urban planning, involving the local population was developed, to regenerate and preserve the integrity of these historic cities. This was considered to be more effective than an orthodox blueprint or "master plan".

Capable of shaping interventions, re-establishing the continuity and the compactness of the urban fabric, this structure can facilitate the production of innovative solutions, which are open-ended, responsive to local conditions, and the inventiveness of property owners. It is able to orient a long term and effective process; a control and management structure for property was produced within a framework of locally authentic and acceptable ethical and legal stipulations. This has facilitated the production of innovative, open-ended, locally responsive solutions to urban environmental deterioration. With the passage of time a revived local *Urf* (custom which is valid unless it is in contradiction with Islamic principles) can emerge that is compatible with the realities of the contemporary era.

## 22 Which Islamic principles are particularly relevant to modern land management and administration?

Traditional Islamic principles relating to land could not have foreseen the challenges of urbanization, land conflicts, newer forms of land use, environmental problems as well as the difficulties in access to land and security of tenure. These are at a jurisprudential level matters for personal reasoning (*ijtihad*). At a policy level, a State following Islamic principles has considerable leeway in orienting its land policy towards the benefit of the community through public interest (*maslaha*).

## 23 Do Islamic principles relate to the landless?

In particular, the rights of landless poor, slum-dwellers and squatters could be addressed through the public interest policy tool. Another opportunity could be redistribution or revival of *mawat* (dead) lands or optimizing Islamic endowment (*waqf*) lands. In the Islamic welfare State, the public treasury (*bait-ul-Maal*) has a specific mandate for poverty alleviation, redistribution and support of the landless. The treasury, which in addition to taxes and State revenue is also comprised of charity (*zakat*) and other donations, is expected also to fund access to land for the landless poor.

## 24 How can the principle of public interest (*maslaha*) be understood within the Islamic framework?

Muslim jurists have generally stipulated three requirements for public interest (*maslaha*). First, it must be for the benefit of the community and not the individual. Second, it must be a tangible benefit and not an illusory one and third, it must not conflict in its essence with anything from Islamic law (*Shari'a*). Most jurists classify *maslaha* into three categories each of which must be protected: the essentials, the complements, and the embellishments.

The essentials consist of five elements: the preservation of *din* (religion), *nafs* (life), *'aql* (intellect), *nasl* (progeny), and *mal* (property). In order for any rule of law to be valid and applicable it must not violate any of these five essentials and the ultimate intent of the law. Protection of property interests is therefore subject to public interest considerations as a matter of priority. It is on the basis of *maslaha*, the companions of the Prophet decided to impose *kharaj* (agricultural land tax).



Details from a Delhi building, India © Asa Jonsson/UN-HABITAT

## 25 Do Islamic approaches promote or hinder modern land administration systems, including land registration projects?

One of the significant challenges for land administration is the development of appropriate cadastre systems, which can provide necessary information and clarify legal rights. Cadastre is not an exclusively Western concept. It has been found from the early history of Muslim societies. In the Ottoman period a land registration system flourished containing all available land-related information, for the revenue purposes and resolving land disputes. Many Muslim countries that were colonized experienced Torrens system or equivalent titling programmes. International Federation of Surveyors (FIG) country reports on Muslim countries such as Jordan, Algeria and Morocco show considerable cadastral preparation activity, often with international support. Several other Muslim countries such as Yemen as well as countries with Muslim minorities such as Philippines have received extensive support for land titling projects, with mixed success. Muslim countries attitudes towards cadastre or tiling vary but there is nothing in Islam that frustrates these attempts.

## 26 What role do Islamic approaches play in modern urban planning?

Rapid urbanisation with its accompanying housing and other problems in Middle Eastern and other Muslim cities is a serious issue. These urban management problems are not unlike those faced by non-Islamic cities but the relevance of Islamic planning and rights has permeated the planning debate, underpinning socio-religious dimensions. Muslim societies have been largely urban, with Al-Medina (or city), which was first developed through the planning activities of the Prophet's generation often cited as the Islamic urban model.

Given Islamic architectural splendour, it is easy to romanticize the Islamic city of tree lined broad roads, fountains, bazaars and clear public and private spaces. However, contemporary urban planning faces challenges, both in scale and nature, and limitations of resources perhaps not encountered by pre-modern societies. The characteristics of traditional Islamic cities, themselves diverse owing to varied socio-cultural

factors, have been modified over time particularly during the modern period. The renewed interest in Islamic planning systems may or may not provide wholesome alternative paradigm but should be explored.

## 27 What contributions can Islamic approaches make to modern environmental challenges?

The Qur'anic view holds that everything on the earth was created for humankind. It was God's bounty to humankind, but has to be exercised with care as a trusteeship (*amana*). Land is a part of that holistic, moral and ethical dimension of religious faith (*imaan*) that is, living in a way that is pleasing to Allah, striving in everything to maintain the harmony of our inner and outer environments. Moving from such Qur'anic teachings is the challenge to address environmental issues in the modern context. The state may establish inviolable zones (*al-harj'm*), where use, such as the cutting down of trees, is prohibited. Land grants (*iqta'*) may be made by the state for reclamation and development or special reserves (*hima*) could be established for use as conservation zones. Charitable endowments (*awaqf*) may be established with specific environmental or conservation purposes.

## 28 Is there an Islamic approach to the sustainable use of water?

Water shortages and disputes are critical in the Middle East and other parts of the Muslim world. The *Qur'an* mentions water (*ma*) some 63 times and it is extensively discussed in the documented sayings and actions of the Prophet. Not only did water play a prominent role in Islamic architectural designs and in its settlements, it has a significant role in rituals, particularly obligatory ablution which precedes the five times daily prayer (*salah*) – with the Makkan aquifer *zam zam* having a *Qur'anic* status. Water is constructed as a gift from God and belongs to the community with the right of drink and other uses. But the question of individual ownership over water – in contrast to usufruct or access rights - has been a matter of Islamic debate. In contrast to classical Islamic theory holding all land for the benefit of the community, water rights over individual lands were bought and sold during the Ottoman period.

Land could be sold without water rights and vice versa leading to confusion and speculative practices in most Muslim countries, water is a commodity but the discourse over its use often recalls the religious dimensions of the environmental issue.

## 29 How do *sadaqa* and *zakat* impact land rights?

Islamic philanthropy is a vital factor in facilitating innovative pro-poor land policies. While *zakat* is one of the five pillars and obligations of Islam (which many countries have institutionalized), *Sadaqa* refers to voluntary, meritorious giving. Landless are a category prioritised as beneficiaries.

## 30 How can Islamic principles support slum upgrading?

Muslim countries generally face similar urbanisation issues including concentrations of informal settlements. Slum upgrading programmes are underway in several Muslim countries. For example, the Slum Upgrading Facility (SUF) at UN-HABITAT has pilot projects in Indonesia and Tanzania (where there are Muslim majorities) as well as Ghana and Sri Lanka (with Muslim minorities). There is nothing in Islamic land conceptualisation and practice to inhibit slum upgrading. On the contrary, its flexible tenures, pro-poor community and participatory approaches, and innovative Islamic finance products could stimulate these processes.

Islamic finance alone cannot meet the needs of slum upgrading. But it is accompanied by principles and tenure conceptions that aid slum upgrading. For example, Islamic principles support the elements of land sharing, readjustment, regularisation, simplified planning and improved taxation.

## 31 Is the Islamic framework for land gender sensitive?

In most parts, the Islamic framework for land does facilitate gender sensitive approaches or has the potential to do so. There are aspects of the classical or conservative interpretation of Islamic system that may be more resistant, but need to be engaged with.

## 32 Is the Islamic framework for land consistent with rights based approaches?

As seen above, the Qur'an refers frequently to rights and justice. Islam has a strong socio-economic rights foundation that supports extensive land rights. Though there are differences between classical Islamic conceptions and modern human rights, it is possible and necessary to find areas of complementarity and convergence.

# MODULE 1

## POWERPOINT PRESENTATION



**1**

**LAND, PROPERTY AND HOUSING RIGHTS  
IN THE MUSLIM WORLD (Module 1)**

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**What are the key concepts** **4**

- Private property rights are protected, but ultimate ownership belongs to GOD
- Range of innovative Land, property and housing rights derived from *Qur'an* and *Sunna*
- *Zakat* (charity obligation) and *Sadaqa* (voluntary) as source of pro-poor principles





**Session Learning Outcomes** **2**

1. Reflect upon the focus on Islamic conceptions of land and property rights
2. Explore the rationale of engagement with Islamic dimensions of land
3. Critically consider arguments in favor of Islamic law and Methodologies
4. Critically consider arguments against Islamic law and methodologies





**How can the concepts be used?** **5**

- To prohibit forcible evictions
- To aid good governance and human rights
- To explicitly recognize women's property rights
- To confront conservative gender deprecating interpretations and cultural practices
- To reduce gap between principles and practices





**Your opening thoughts!** **3**

1. What experience do you have of Islamic principles?
2. Why do you think Islamic principles are relevant in Muslim societies?
3. How can Islamic principles support land, property and housing rights?





**Why are these concepts relevant?** **6**

- Land and property falls within the evolving sphere of social transactions
- Underpin specific property rights in detail
- Demonstrate obligations of State to develop and implement policies





### Is Islam relevant to secure tenure?

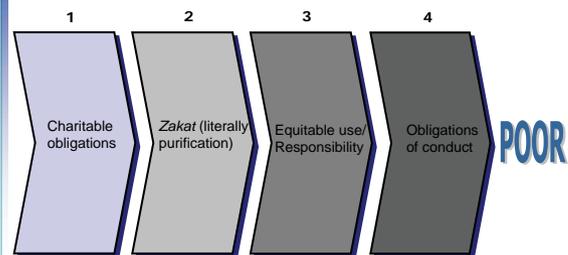
7

- Security of tenure is vital for land rights
- Tenure through variety of ways, faith based systems one of them
- Clarifies the nature and scope of property rights, secure tenure and access to land
- Supplements the application of international standards and goals



### Do Muslims have a duty towards poor?

11



### Does Islam recognize land rights?

8

- Generally promotes private property rights but emphasizes the rights of landless
- Requires all rights to be exercised equitably
- Creates an egalitarian society within the Islamic legal and ethical framework
- Clarifies foundational Islamic principles on land



### What are the “golden threads”?

12

- Islamic law and systems are based on the ethical dimension of the divine revelation.
- There are certain basic Islamic concepts or ‘golden threads’ that embody the spirit of the *Shari’a*.



### How does Islam discuss land issues?

9

Land is addressed in the larger context of socio-cultural and religious norms

**Eg. Land transactions, emphasis on mutual respect, honor and righteous conduct**



### Can Islam facilitate access to land?

13

- Property rights lay stress on responsibility, poverty alleviation and redistribution.
- Formulation based on unity (*tawhid*), stewardship (*khalifa*) and trust (*amana*) implies that land ownership and enjoyment must be just and responsible.
- Islamic doctrines envisage rights for including women, children, landless and minorities.
- Repeated Islamic emphasis on obligations regarding philanthropy, fairness and poverty alleviation are influential in land rights argumentation.



### How Islam can be still relevant?

10

- Is considered to be a complete way of life and property
- Impact to varying degrees on the life experiences of Muslims
- Inform State policies and land discourse
- Distinctive Islamic approaches evident in the fields of land administration, land registration, urban planning, water policies and environmental protection
- Aspects of Islamic principles may provide legitimacy and durable solutions through incorporating or at least considering authentic Islamic contributions



### Muslim = Islamic?

14

- Islamic norms are those derived from certain divinely inspired principles through a particular methodology.
- Muslims practices need not be Islamic, and therefore if certain Muslims abuse Islamic principles, this cannot be attributed to Islamic doctrines.
- Muslims may be secular or adopt customary traditions, this may be in contrast (or compatible) to Islamic practices.



**Are property rights protected by Islam?**

15

- Elaborated in Islamic law
- Remedies for the individuals wrongly deprived of property by official action
- High importance attached to property rights, and theft under Islamic law falls within the crimes which are severely punished



**Do Islamic schools matter?**

19

- Important to know which Islamic school is prevalent in a particular country or community
- Necessary to engage with Islamic law in a particular context

**E.g., Hanafi, the most widespread of the four schools, is considered the flexible and open to innovative interpretations of its core doctrines.**



**Does it support land distribution?**

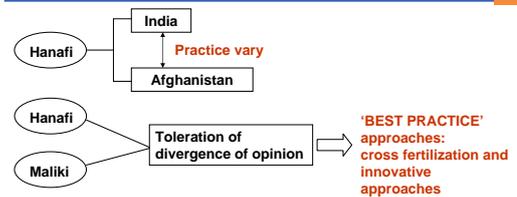
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- Land use is subject to equitable and redistributive principles
- *Qur'anic* references to the effect that all of humanity benefits from nature's resources
- Charitable obligations
- Breaking up land monopolies and large estates



**How do the schools differ?**

20



The methodology of patching (*tafiq*), by which jurists may give authoritative support to the compilation of a legal regulation from the views of more than one school of law, a method used in the creation of modern legal Codes.



**What relevance to market forces?**

17

- Equitable and durable foundations to market-based access to land
- Not a culturally isolated economic mechanism serving to equilibrate supply and demand
- A workable and socially acceptable market structure

**Eg: Islamic economists address market equilibrium through permissible activities, responsibilities and 'just market price' (Prophet's *hadith*)**



**Does it support land readjustment?**

21

**Facts:**

- Land fragmentation may result in wasteful land subdivisions in some cases
- But it creates also opportunities for land readjustment and communal holdings

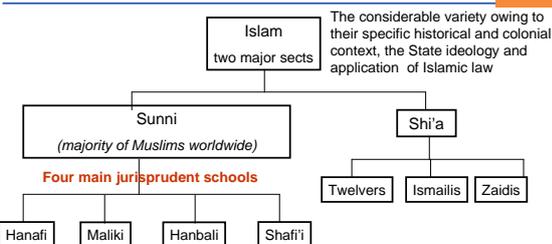
**Solutions:**

- *Musha* system (example of communal rights system in Muslim countries)
- Periodic reallocation of shares of arable land
- Communal or tribal lands were a feature of some Muslim countries



**Are the principles the same?**

18



These schools were named after their leading jurists and each is the dominant authority in different parts of the world.



**Does it support land reform?**

22

- No ideal Islamic State - Muslim States selectively adopt Islamic principles according to their interpretation
- Islamic principles mandated to administer land, efficiently and fairly
- Islam often sought to derive legitimacy for land reform measures



### Support for land administration? 23

Case study: Ottoman land history

↓ Cadastre, tax collection systems

Islamic principles do not inhibit effective land administration systems.

↓ Land administration

through an elaborate network of laws and guidelines

↓ The vastness of land

requires local management

### Is there support for landless? 27

Rights for landless poor, slum-dwellers and squatters could be addressed through public interest policy.

Redistribution, revival or *mewat* (dead) lands or optimizing endowment (*waqf*) lands.

the public treasury (*baitul-Maal*)

- poverty alleviation
- redistribution
- support of the landless
- fund access to land for the landless poor

### Support for land administration? 24

**Facts:**

- Cadastre found in early Muslim history: Ottoman
- Torrens system or equivalent titling programmes in colonized Muslim countries

**Examples:**

- Jordan, Algeria and Morocco: cadastral preparation activity
- From Yemen to Indonesia: extensive support for land titling projects
- Attitudes vary but nothing frustrates these attempts

### Does civil society matter? 28

- A modern institution of vital significance
- In most parts of the Muslim world, CS now expanding and gaining a strong voice
- Contemporary Islamic activism is keen to produce authentic tools true to Islamic principles and values
- Revival and invigoration of such institutions as the endowment (*waqf*)

### What about land governance? 25

- Difficult to generalize Muslim countries
- Need to improve land governance, as in other countries
- Land is seen as a currency of political patronage and corruption
- Exploitative rent-seeking behavior can flourish at the expense of the poor

### What inputs into land management? 29

Traditional Islamic principles

Personal reasoning (*ijtihad*)

Public interest (*masalaha*)

LAND MANAGEMENT

Not foreseeing some challenges

At a jurisprudential level

Considerable leeway on orienting land policy

### What about land governance? 26

- Problems in land administration
- Misuse of power and corruption are repeatedly condemned in Islamic literature
- Justice (*adl*) and consultation (*shura*) concepts influential
- The influence of Islam is varied and may be less than sometimes assumed

### Why public interest matters? 30

Benefit of community

A tangible benefit

Compatibility with Islamic law

Public interest (*masalaha*)

Complements

Embellishments

Essentials

The preservation of *din* (religion)

*Nafs* (life)

*Aql* (intellect)

*Nasil* (progeny)

*Mal* (property)

No rule of law can violate any of these five essentials and the ultimate intent of the law

requirements

categories

**Is there Islamic urban planning?**

31

- Rapid urbanization: a serious issue, similar to cities elsewhere
- Relevance of Islamic planning permeate the planning debate, underpinning socio-religious dimensions
- Guard against romanticizing 'the Islamic city'
- Diversity and evolution over time
- Renewed interest in Islamic planning systems may or may not provide wholesome alternative paradigm but should be explored



**How do Sadaqa and Zakat impact?**

34

- Islamic philanthropy is a vital factor in facilitating innovative pro-poor land policies
- Zakat is one of the five pillars and obligations of Islam (which many countries have institutionalized)
- Sadaqa refers to voluntary, meritorious giving
- Landless are a category priorities as beneficiaries



**Is Islam interested in environment?**

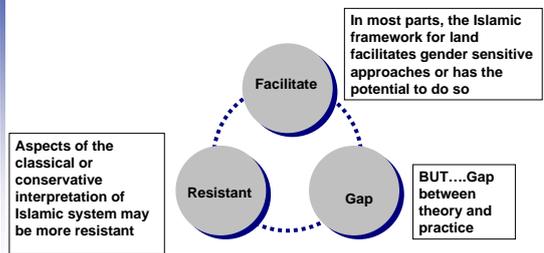
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- Earth has to be exercised with care as a trusteeship (*amana*)
- Inviolable zones (*al-har'ym*)
- Large grants (*iqta*), special reserves (*hima*) as conservation zones
- Charitable endowments (*awqaf*) specific environmental or conservation purposes



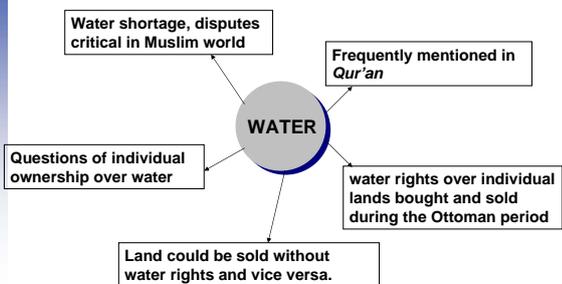
**Is the Islamic land framework gender sensi**

35



**Can water be owned?**

33



**Is the Islamic land framework rights based**

36

- Qur'an refers frequently to rights and justice
- Strong socio-economic rights foundation which supports extensive land rights
- Some differences between classical Islamic conceptions and modern human rights
- Possible and necessary to find areas of complementarity and convergence



## Reference readings

“Insufficient innovative tools exist to deliver affordable security of tenure and property rights at scale for most of Africa’s populations.”

**R1.1** Augustinus C and Deininger K (2005) *Innovations in Land Tenure, Reform and Administration in Africa*

### The importance of land issues

Land and the institutions that govern its ownership and use greatly affect economic growth and poverty reduction. Lack of access to land and inefficient or corrupt systems of land administration have a negative impact on a country’s investment climate. Well-functioning land institutions and markets improve it, reducing the cost of accessing credit for entrepreneurs and contributing to the development of financial systems. Access to even small plots of land to grow crops can also greatly improve food security and quality. Broad-based land access can provide a basic social safety net at a cost much below alternative government programs, allowing governments to spend scarce resources on productive infrastructure. Policies that foster lease markets for land can also contribute to the emergence of a vibrant nonfarm economy.

Increased demand for land may lead to public investment in infrastructure and roads and increased land values. When well-functioning mechanisms to tax land are added, this can contribute significantly to local government revenues and provide resources needed to match decentralization of responsibilities for service delivery. Improving land administration may also contribute to broader public service reform and provide a basis for wider reforms.

### Innovations and options needed

Conventional land administration systems in sub-Saharan Africa do not fit customary structures of group and family rights, do not function adequately or solve land conflicts, and are not useful to most people. Registering a title can take between 6 months and 10 years, records are poorly kept, most people do not have title deeds, and millions of titles await registration. Furthermore, most systems are centralized, inaccessible, too expensive, not transparent, and do not protect women’s land rights

sufficiently. Transforming such systems is a time-consuming and complex task. It normally entails the reform of a number of separate agencies, alterations in power and patronage, and extensive civil society debate at national and local levels. Innovations in land reform and land administration that are adapted to current conditions are being attempted in some countries in sub-Saharan Africa. However, insufficient innovative tools exist to deliver affordable security of tenure and property rights at scale for most of Africa’s populations. New tools need to be developed, but these are not simple, easy to produce, or easily adapted to the diverse needs of various countries.

No single tenure option can solve all problems. Policy on land tenure and property rights can best reconcile social and economic needs by encouraging a diverse range of options, adapting and expanding existing systems when possible, and introducing new ones selectively. Many countries are doing this. Some have passed new laws associated with typical PRSP objectives, offering decentralized local land administration offices, inexpensive or free titles or tenure protection for the poor, adjudication procedures that protect occupants of land, accommodation of forms of legal evidence used by the poor to protect their assets, and protection of women’s land rights (such as prioritized allocation and co-ownership).

Other innovations relate to dispute resolution and the technical design of the land administration system. Such designs must have national application and be affordable to the poor, and they must not override customary and local tenure. Another approach seeks to eliminate gender-based discrimination regarding land, housing, and property rights. This is particularly needed because individualization of land tenure, land-market pressure, and other factors have eroded customary laws and practices that used to protect women. The HIV/AIDS crisis has worsened the situation, and land-grabbing and discriminatory practices have increased evictions of women by their in-laws or husbands. Secure tenure would be a mitigating factor for these women, and would assist those widowed by conflict who meet legal or customary discrimination against widows inheriting land.

Though some African countries have passed land legislation that is advanced in many respects, they are struggling to modernize and equip their land institutions to deal with the demands of implementation. In doing so, they often try to copy unaffordable and sometimes inappropriate approaches (such as high-precision surveying) from other parts of the world that cannot be scaled up quickly.

To reach Millennium Development Goals whose achievement is mediated by security of tenure, more focus is needed on implementation of policy at scale, along with cost-effective and pro-poor land tools that fit the human resource envelope. One example is computerization of land records in some states in India, which, the evidence suggests, can significantly reduce the scope of the exacting of bribes by officials and increase their accountability. The computerization also linked formerly disparate institutions, effected improvements in tenure security, and increased the government's revenue collection.

### Affordable pro-poor tools

Affordable pro-poor tools that are needed include the following:

- ◆ NGO enumeration information that becomes first adjudication evidence for land rights for slum upgrading and post-disaster housing delivery.
- ◆ Gender-friendly approaches to adjudication.
- ◆ Land administration appropriate for post conflict societies.
- ◆ Just-deceased estates administration, especially for HIV/AIDS areas and to protect women's land rights.
- ◆ Expropriation and compensation for the management of urban growth and improved agricultural production.
- ◆ A regulatory framework for the private sector that takes into account poverty issues.
- ◆ Capacity building programs for in-country sustainability of land administration systems, particularly for the poor.
- ◆ An affordable geodetic for Africa, possibly using NASA's information.
- ◆ LIS/GIS spatial units as framework data
- ◆ High accuracy, off-the-shelf GPS units for non professionals.
- ◆ Robust indicators or benchmarks to measure tenure security for the delivery of Millennium Development Goals.
- ◆ Untitled land rights that can be upgraded over time.

Though some African countries have passed land legislation that is advanced in many respects, they are struggling to modernize and equip their land institutions to deal with the demands of implementation. What is needed is a global assessment to establish which tools exist, options for scaling them up and widely disseminating them, and estimates of their cost effectiveness.

New tools also need to be developed. This agenda will take many years, significant funding, and a comprehensive global framework.

Iranian Islamic feminist Mir-Husseini lays out her premises, methodology and approaches toward engaging with Islamic women's rights.

**R1.2** Mir-Husseini, Ziba: (2003) The Construction of Gender in Islamic Legal Thought and Strategies for Reform. In: HAWWA 1,1, Koninklijke Brill.

In this paper I explore ways in which women can pursue and achieve equality and justice in Islamic law. I argue, first, that conceptions of gender rights in Islamic law are neither unified nor coherent, but competing and contradictory; and secondly, that gender rights as constructed in Islamic jurisprudence (*fiqh*) not only neglect the basic objectives of the *shar'ia* (*maq'asid al-shar'ia*) but are unsustainable under the conditions prevailing in Muslim societies today.

I begin by examining constructions of gender rights in Islamic legal thought, with a view to identifying both the legal theories and the cultural assumptions that inform them, and I conclude by exploring the kinds of strategies for reform that are now needed both to reflect the spirit of the *shar'ia* and to embody the principle of justice for women. I ask the following questions: if justice and fairness are indisputable objectives of the *shar'ia*, should they not be reflected in laws regulating relations between, and the respective rights of, men and women? Can there be an equal construction of gender rights in Islamic law? If so, what are the strategies needed to achieve it?

Three preliminary notes are necessary: First, throughout the paper I distinguish between *shar'ia* and the science of *fiqh*.<sup>2</sup> The *shar'ia* is, on the one hand, the totality of God's law as revealed to the Prophet Muhammad; on the other, "in its popular usage it indicates the religion of Islam, God's true religion as it embodies revelation in praxis" (Sachedina 1999a: 15). *Fiqh*, however, is not part of revelation (*wahy*); it is that part of religious science whose aim is to discern and extract *shar'ia* legal rules from the Qur'an and Sunna. Strictly speaking, *Fiqh* is a legal science with its own

distinct body of legal theories and methodology as developed by *fuqah* over the course of centuries and in dialogue with other branches of religious and non-religious sciences. In other words, it is the *shar'ia* that is sacred and eternal, not *fiqh*, which is a human science and changing. It is essential to stress this distinction, since *Fiqh* is often mistakenly equated with *shar'ia*, not only in popular Muslim discourses but also in specialist and political discourses, and often with an ideological intent.

Secondly, I start from the premise that gender rights are neither fixed, given, nor absolute. They are, on the contrary, cultural and legal constructs which are asserted, negotiated and subject to change. They are produced in response to lived realities, in response to power relations in the family and society, by those who want either to retain or to change the present situation. They exist in and through the ways in which we think and talk (both publicly and privately), and study and write about them

Finally, I do not aim to do what a Muslim jurist (*faqih*) does, that is, to extract rules from sacred sources by adhering to *usul-al fiqh* theories and methodologies. Rather, I approach *Fiqh* rules and their underlying theories from a critical feminist perspective, examining their validity in the light of contemporary gender theories and realities. My questions and assumptions are, thus, different from those of the majority of male jurists. Not only do I expose the inherent gender bias of *Fiqh* rules and their inner contradictions but I ask whether these rules reflect the justice of the *shar'ia* and the interests of Muslim individuals and societies. In so doing, I highlight what Sachedina calls “a crisis of epistemology in traditionalist evaluation of Islamic legal heritage”. At the root of this crisis lies a non-historical approach to Islamic legal systems and a male-centred religious epistemology.

### **Gender rights and Islamic legal thought**

Broadly speaking, Islamic legal thought contains three distinct discourses on gender rights. While the first two are premised on various forms of inequality between the sexes, the third argues for equality. The first, which is the discourse of classical *Fiqh* texts, I call Traditionalist. The second, which developed in the early years of the twentieth century and is reflected in modern legal codes in Muslim countries, I call Neo-traditionalist. The third, which I call Reformist, emerged in the last two decades and is still in the process of formation.

# MODULE 2

## ISLAMIC LAW, LAND AND METHODOLOGIES

# MODULE 2:

## Islamic law, land and methodologies

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### Overview

This module explores the distinctive features, sources, substantive principles and application in relation to Islamic land law. Islamic law is a central feature of the lived experiences and consciousness, influencing land tenure in Muslim societies. Foundational principles of Islamic law (*Maqasid al-Shari'a*) recognise property rights protection as a priority. This module explores how Islamic land law and policies enhance land access and security through its emphasis on public interest and welfare.

The module looks at how Islamic law (*Shari'a*) is not a static, medieval 'religious' law, but (despite foundational principles) an evolving, and responsive sphere. Legal systems of Muslim countries vary according to their specific historical and colonial contexts. Islamic law exists in different forms (official/ informal) and interacts with secular or customary norms, therefore manifest in distinct local forms. Islamic law often coexists with other complex, overlapping and competing norms – referred to as legal pluralism. Understanding this legal pluralism helps resolve difficult relationships between particular brands of Islamic law and other forms of law, whether state or customary. Choices Muslims make are not purely religious or juristic but need to be appreciated in their local social and political context.

There is a hierarchy of sources for Islamic law with the *Qur'an* and *Sunna* (traditions) taking precedence, both of which generally support land rights. *Qiyas* (analogy) and *Ijma* (consensus) are the other main sources of Islamic law. Despite the assumed divine origins of the *Qur'an*, it is human endeavour that interprets and implements the law, and therefore *Shari'a* is often open to debate. Independent personal reasoning (*ijtihad*) could further develop Islamic thinking and legal theory in the areas of land, housing and property rights. Interpretation takes place within authentic Islamic methodological interpretive framework (*usul al-fiqh*).

As there is no unified field of Islamic land law, it is necessary to understand relationships between various branches of Islamic law impacting land issues. Islamic law is an important factor influencing land tenure in Muslim societies. Whether or not their States 'officially' implement the law, land tenure regimes and concepts are generally constructed and realised through reference to Islamic law (*Shari'a*), though to varying degrees and with different results.

Islamic legal mechanisms include *Mufti* (issuing *fatwa*), *Mujtahid* (carrying out *ijtihad*), judge (*qadi*) or ombudsman (*muhtasib*). Islamic/Muslim legal mechanisms offer supplemental avenues for managing, reducing and resolving conflicts. Alternate Islamic dispute resolutions include conciliation (*solh*), mediation (*wasta*) and arbitration (*takhim*). Many aspects of Islamic law are in conformity with modern human rights. These offer the framework for clarifying and settling land disputes, alongside more formal processes.

Under Islamic law, women have extensive land and property rights, but limited by conservative, patriarchal structures. *Fiqh* (Islamic jurisprudence) is different from *Shari'a*, and often positions on land rights are based on *fiqh* and easier to resolve. In some cases, it is necessary to differentiate Islamic and customary practices to weed out discriminatory practices. Islamic law is often debated, and presents opportunities to further enhance property rights.

### Reading materials

Buang S (1989) *Malaysian Torrens System* (Kuala Lumpur: Percetakan Dewan Pustaka).

Esposito JL (1982) *Women in Muslim Family Law* (Syracuse NY: Syracuse University Press).

Weeramantry CG (1988) *Islamic Jurisprudence: International Perspective* (London: Macmillan).

## Additional reading

Hirsch SF (1998) *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court* (Chicago: University of Chicago Press).

Kamali HM (1991) *Principles of Islamic Jurisprudence* (Cambridge: Cambridge Texts Society).

Rosen L (1999) 'Legal Pluralism and Cultural Unity in Morocco' in B. Dupret, M. Berger and L. al-Zwaini (eds) *Legal Pluralism in the Arab World* (The Hague: Kluwer ) pp. 89-95.

Sait S and Lim H (2006) pp 29-53.

## Learning outcomes

At the end of this session participants should be able to:

- ◆ understand the formal hierarchy of sources of Islamic law.
- ◆ appreciate the secondary sources of Islamic law and their possibilities for developing land and property rights, as well as the supplemental law generating mediums.
- ◆ recognise the schools of Islamic jurisprudence and appreciate that there is a particular brand of Islamic law that is generally applicable to all parts of the Muslim world.
- ◆ appreciate the fundamental religious dimension to land for Muslims.

## Facilitator's notes

Like Module 1, this is a foundational session, but in this case providing participants with a general, if basic, outline of Islamic law and of the Islamic approach to land. It should offer a welcome contrast to the more reflective nature of the Module 1 discussion since there is consensus on the main sources of Islamic law. Since there is no unified field of Islamic land law, (see Sait & Lim), the relationship between different areas of Islamic law must be explained. The emphasis on *ijtihad* (personal reasoning) and its relevance to land and property issues is important. Note that the appreciation of detail of Islamic law will likely vary according to the background of each participant but all should easily understand broader principles.

**Below** is a complex but intriguing case of Islamic law and pluralism. The Nigerian case study could be provocative as a minority rights issue as well as aspects of criminal law, so retain focus on property rights, which are governed by customary law. The case explains various sources of law, and *ijtihad*, can be reflected upon in a concrete setting.

## Group work

### Islamic law and custom in Nigeria

In Nigeria, Islam was introduced as early as the 13<sup>th</sup> century, and *Shari'a* (Sunni Maliki) was influential even through British colonial rule. Over time, *Shari'a* was codified and consolidated, with the provision that courts were not to impose sentences contrary to natural justice, and humanity. In 1960, Nigeria attained independence, with English law continuing to be of vital influence on the Nigerian legal system. In fact, the Nigerian legal system is a case of 'legal pluralism' where secular laws compete with customary (uncodified) and Islamic laws (codified).

Customary law is followed in the areas of personal and family relations, with diversity among its different social groups. For example, the marriage customs and inheritance rules of the Ibos of the South Eastern Nigeria are different from those of the Yorubas of the South Western Nigeria. It reflects the culture, customs, values and habits of the people. Customary law is unwritten, uncertain and may be difficult to ascertain but it can be flexible and has the capacity to adapt to social and economic changes without losing its character. There have been instances of legislative interventions to modify and at times abrogate rules of customary law. In Southern parts of Nigeria, Islamic law is integrated into and has been treated as an aspect of the customary law. Since 1956, however, Islamic law has been administered in the Northern states as a separate and distinct system.

Recently, the scope of operation of Islamic law has been expanded beyond family law, into all civil and commercial matters even criminal law *except* land tenure where customary law prevails.

As per the 1962 Land Tenure Law, two titles to native land were recognised: customary rights of occupancy administered by traditional authorities that covered all those tenure systems; and statutory rights of occupancy. Since the Land Use Decree of 1978, Nigerian land law is more statute based with greater power in State hands, and has been criticised as inequitable and inefficient.

### Recommended readings for group work

Olayiwola, LM and Adeleye O (2006), Land Reform – Experience from Nigeria: Promoting Land Administration and Good Governance, 5th FIG Regional Conference, Accra, Ghana, March 8-11, 2006.

Tobi, N (1997) Cases and Materials on Nigerian Land Law (Lagos: Mabrochi Books).

### Possible questions for group work

1. The interplay between Islamic, statutory and customary laws is referred to as 'legal pluralism'. Which law takes precedence in Nigeria?
2. Nigerian Muslims follow *Maliki* law. Are they governed by Islamic law in matters of land tenure?
3. In theory, Nigerian Muslim women inherit property through Islamic law and statutory provisions, but not under customary laws. What takes place in practice?
4. There is a debate among Nigerian Muslims on the interpretation of Islamic law. What are the sources of Islamic law? Can *Ijtihad* be applied in Nigeria?

## Background Q & A

### Islamic law and land

'It is impossible to understand the present legal development in the Islamic countries of the Middle East without a correct appreciation of the past history of legal theory, of positive law, and of legal practice in Islam.'<sup>1</sup>

### Introduction

The Global Land Tools Network (GLTN) is a multi-sector and multi-stakeholder partnership seeking to translate aspirations, principles and policies into inclusive, pro-poor, affordable, gendered high quality and useful land tools, which can be replicated in a range of contexts. GLTN recognizes the demand for targeted tools, including culturally or religiously formatted tools, since there are many positions and approaches to conceptualising and delivering secure tenure and access to land. Most communities have deeply ingrained cultural traditions, many religions have firm rules on land and inheritance, and every government faces the challenge of land differently with its own array of laws and degrees of political will.

In most Muslim countries Islamic law, principles and practices make an important contribution to shaping access to land. GLTN has as one of its objectives, therefore, the identification and development of Islamic land tools through a cross-cultural, interdisciplinary and global process, owned by Muslims, but including civil society and development partners. Islamic approaches to land should not be seen as an internal matter, giving preference to religion over universal or secular approaches to land, but as part of GLTN's inclusive, objective, systematic and transparent efforts.

### 1 Is Islamic law important to Muslims?

Yes, it is very important. Islamic law is a central feature of the lived experiences and consciousness of Muslims across the world, helping to shape lives in an Islamic way. And religious norms are formally included within most legal systems in Muslim countries.

### 2 Does Islamic law have substantial contemporary relevance?

Contrary to widespread assumptions, Islamic law (*Shari'a*) is not a static, medieval 'religious' law, but a man made code based on religious principles. The primary sources of Islamic law (*Shari'a*) may be divine (the *Qur'an*) but it is human endeavour or interpretation within an authentic Islamic methodological and interpretive framework (*usul al-fiqh*) that determines how contemporary society actualizes it. Islamic law can be seen, therefore, as an evolving, responsive and assimilating sphere of competing ideologies and interests.

### 3 Is there a field of Islamic land law?

No, there is no systematic field of Islamic land law. However, the foundational principles of Islamic law (*Maqasid al-Shari'a*) recognise property rights, as a priority and State policy through public interest or welfare must operate to promote it. Thus, property and land rights lie at the very heart of Islamic law, but must be approached within the Islamic methodological framework. Much of Islamic law relating to land and property falls within the area of social transactions, which under Islamic law are called *mu'amalat*, as distinct from matters relating to worship (*ibadat*). Social transactions are more open to a greater degree of interpretation than matters of religious observation.

### 4 Does Islamic law influence land tenure?

Yes, Islamic law is an important factor influencing land tenure in Muslim societies. Whether or not their States 'officially' implement the law, land tenure regimes and concepts are generally constructed and realised through reference to Islamic law (*Shari'a*), though to varying degrees and with different results.

<sup>1</sup> Khadduri, M, and Liebesny, H. (1955) *Law in the Middle East, Volume 1*, Washington DC: Middle East Institute

## 5 Are there opportunities for authentic interpretations of Islamic law (*Shari'a*)?

Conservative legal opinions may tend to predominate, but there exist significant prospects for interpretation strategies within Islamic law that can promote access to land and security of tenure. An appreciation of the distinctive features and sources of Islamic law (*Shari'a*), its diversity in application in relation to property and land rights and its dispute resolution mechanisms can contribute towards innovative, proactive and inclusive land tools.

## 6 What are the fundamental sources of Islamic law (*Shari'a*)?

In Islamic law there is a formal hierarchy of sources of law. The two foundational sources of Islamic law (*Shari'a*) are the *Qur'an* and the *Sunna*. Modern day land, property and housing rights within the Islamic framework are still reliant on these primary sources.

## 7 Why is the difference between *Shari'a* and *fiqh* relevant?

*Fiqh* (Islamic jurisprudence) or the theory is man made and is distinguished from the enacted or settled divine law, the *Shari'a* (Islamic law). *Fiqh* deals with the observance of rituals, morals and social legislation and is often relevant to land, property and housing issues. *Fiqh* controversies are easier to resolve than *Shari'a* debates (as these are embedded in State policies). Positive renditions of *Fiqh* can be used to counter more conservative elements of the *Shari'a* and promote human rights.

## 8 In what areas of modern day land and property is the *Qur'an* particularly significant?

The nature of property, the recognition of women's rights and the inheritance regime of compulsory shares are all significant areas of *Qur'anic* stipulation. It is remarkable also how many of the contemporary human rights standards with respect to property and land rights find resonance in the *Qur'an*.

## 9 Is the *Qur'an* open to interpretation?

Muslims believe the *Qur'an* to be the literal revealed word of God. Where an Islamic property regime, such as the compulsory inheritance rules, is dealt with explicitly by the *Qur'an*, most Muslims would not consider it to be subject to independent reasoning (*ijtihad*). The *Qur'an* has to be interpreted as a whole and as such has been viewed by some as fertile ground for reappraising gender rights and developing pro-poor land strategies.

## 10 What is the *Sunna*?

The *Sunna* consists of the records of the words and deeds of the Prophet, in the form of a diverse collection of narratives (*hadith*). Doubts over the authenticity of some narrations, or the narrators, led to the development of limited well-acknowledged *hadith* reports.

## 11 How is a conflict between the *Qur'an* and the *Sunna* resolved?

Where there is a conflict between the *Qur'an* and the *Sunna*, the *Qur'an* prevails. Problems can arise where the *Sunna* is extensive and the *Qur'an* is general and limited. For example, the basis of the Islamic law on maintenance is a verse in the *Qur'an*, (4:34) but there are also several *hadith* on the subject. The challenge in such cases is to counter discriminatory customs that are projected as Islamic truisms, by referring to the gender empowering *Qur'anic* stipulations.

## 12 Are there other sources of Islamic law?

Consensus (*ijma*) and reasoning by analogy (*qiyas*) are two secondary sources of Islamic understanding. Although open to debate, consensus (*ijma*) is commonly taken to mean the unanimous agreement among those who are learned in the religion at a particular time on a specific issue. It is *ijma*, which allowed guardianship over the property of minors. Reasoning by analogy (*qiyas*) is a form of deduction in comparable cases, which links the reasoning back to the original sources of the *Qur'an* and *Sunna*.

### 13 Is there any diversity across Muslim communities with regard to the generation of Islamic law (*Shari'a*)?

There are law-producing mediums such as juristic preference (*istishan*), where discretion can be exercised in cases of miscarriage of justice, which enhance the flexibility and responsiveness of Islamic law (*Shari'a*). A similar general principle is that of necessity or need (*Darura*). These supplemental tools demonstrate the plurality of method in Islamic law (*Shari'a*) since they are closely associated with particular but not all Sunni schools of law. A further example of a supplementary principle is that based on public interest and human welfare (*maslaha*).

### 14 Is independent personal reasoning (*ijtihad*) a source of law?

Independent personal reasoning (*ijtihad*) is an established wing of Islamic jurisprudence. It is strictly not a source of law, but an interpretative method. It is not confined to jurists but is the sacred duty of every competent individual.

### 15 Is independent personal reasoning (*ijtihad*) relevant to enhancing or securing land rights?

It is the validation of independent personal reasoning (*ijtihad*) through consensus of opinion (*ijma*) that converts the fruits of personal reasoning into a discovery or finding for the benefit of society. Through this internal Islamic authentic process Islamic land tenure and property rights can be more systematically clarified. Independent legal reasoning (*ijtihad*) is also one of the keys to making Islam continuously relevant and also explains how Islam can be shaped by society. Since various aspects of land and property rights have not been fully thought out, such as access to land and security of tenure, there is considerable scope through independent personal reasoning (*ijtihad*) to develop Islamic thinking and legal theory in these areas.

### 16 Does Islamic law apply to non-Muslims in Muslim countries?

Islamic law within Muslim countries is sometimes extended to non-Muslims and Muslim minorities in some countries. And, Islamic law is not always uniformly applied within a State and there can be regional or local variations. For instance, in Nigeria and Sudan the application of Islamic law applies to all residents of Muslim concentrated regions regardless of their religion. This has been contentious. However, in other parts of Africa, from Eritrea and Gambia to Kenya and Tanzania Islamic personal law generally applies only to Muslims. The question of application of Islamic laws to Muslims in non-Muslim countries is also controversial. In India there have been calls for the abolition of the Islamic personal status laws that are presently applicable to Muslims.

#### The Tunisian Personal Status Code, 1956

The Tunisian Personal Status Code made some fairly radical changes to family law and the status of women, abolishing polygamy, repudiation and the father's right of matrimonial constraint. Women's rights of custody with respect to their children were also expanded. The Code made notable changes with respect to the structure of inheritance rights, which are regarded as one of the enduring legacies of classical Islamic law (*Shari'a*). The rights of spouses were enhanced to enable them to receive, along with the deceased's close relatives, part of the surplus after distribution of fixed shares. In this regard, the principles of the Maliki School of law, which dominates in Tunisia, were abandoned in favour of those of the Hanafi School. The inheritance rights of collateral, distant kin were limited, thereby increasing the benefits and shares going to the deceased person's children. Overall these changes represented a considerable restriction on the rights of the extended family and a shift towards the nuclear family. Great efforts were made at the time to present the efforts of the Tunisian lawmakers as drawing upon the source and spirit of Islamic law (*Shari'a*), despite the fact that the Code itself made no such reference, and using the principle of independent personal reasoning (*ijtihad*) to renew and rejuvenate Islamic traditions.

## 17 To what extent does Islamic law interact and overlap with State and customary law in Muslim countries?

Saudi Arabia and Iran are exceptional countries that have largely resisted Western legal influences and profess exclusivity of Islamic laws. On the other extreme is Turkey, which has secularized almost its entire laws, including personal status (family) laws. Yet, in Turkey, Iran and Saudi Arabia, the relationship between religious and modern secular laws continues to be debated. Other Muslim countries represent a greater hybridity of legal cultures, including colonial legal systems. For example, from Bahrain and Brunei to Maldives, Pakistan and Bangladesh British common law is an influence but the extent to which Islamic law prevails and the effects varies and changes. And the Yemenis and Indonesians are able to assert their customary laws despite Islamic, colonial and modern laws.

## 18 Are the relationships between particular brands of Islamic law and State or customary law contentious?

There are complex, overlapping and competing norms to be found in Muslim societies. The existence of a variety of different legal spaces and norms can be the cause of conflict. For example, in Indonesia there are some tensions and ongoing debates about the appropriate role for long-standing and local customary traditions (*adat*), Islamic law (*Shari'a*) and State laws. However, conflict or tension is not inevitable. There can be synergy. In Egypt with respect to housing and real estate, people sometimes choose between formal and extra-legal bargaining opportunities using tools offered by law as a complement to a whole range of problem-solving strategies. Choices made regarding Islamic law are not purely religious or juristic but need to be appreciated in their local social and political context.

## 19 Is the existence of legal pluralism in Muslim countries relevant to land issues?

Paying attention to legal dualities/contradictions may enhance our legal understanding of both Islamic law and the complex, overlapping and competing norms to be found in Muslim societies. In some contexts individuals do not shuttle strategically between different legal

orders, but may ignore altogether formally recognised norms. This is important with respect to property rights, particularly in the context of the informal squatter settlements of the world, including the Muslim world. For instance, well-developed land markets are found in such settlements, which are enforceable and legitimate from the perspective of the participants, but which nominally exist outside established legal authorities. The normative systems are sometimes referred to as quasi-legal or informal, but legality and illegality are not so clearly delineated. However, the full picture of law emerges from both internal and external pluralities and this may often include an 'informal' contribution from Islamic legal principles, concepts, structures or forms.

## 20 How are legal conflicts resolved within Muslim countries?

There is a great variety within an Islamic jurisdiction in terms of implementing law. As well as judges dealing with secular matters, Muslim judges (*qadi*), administrative offices such as an ombudsman (*muhtasib*), informal legal authorities such as the mufti, who issues advisory opinions (*fatwa*, plural *fatawa*) and the those exercising *ijtihad* (or personal reasoning) *mujtahids* may be encountered.

## 21 What is the role of the Muslim judge (*qadi*)?

The Muslim judge (*qadi*) within the Islamic legal system balances the 'rights' or duties owed to God with the rights of individuals. Often the *qadi* has to deal with non-Islamic law or a combination of Islamic or non-Islamic norms. It cannot be assumed that a judge in an Islamic legal system will invoke only Islamic legal principles, particularly on matters such as a land contract, or even interpret a statute through Islamic justifications. Rules relating to social relations, such as property relationships, (*mu'amalat*), have a religious legitimation because the *Shari'a* is ultimately based on the authority of God's revelation, but also have a secular aspect. Muslim judges are conscious of moral contexts and the need to gain legitimacy across a range of schools of legal thought. Contrary to general assumptions about 'summary' Islamic justice, the rules of procedure are elaborate in Islamic legal systems.

However, the Muslim judge (*qadi*) is only one of the authorities for implementing and disseminating law. It is a role that will often overlap with that of the *mufti* or other legal offices, sometimes leading to tensions.

## 22 What place does the advisory opinion (fatwa) of a mufti have in the Islamic framework?

Fatawa or Islamic legal opinions are distinctively Islamic. They consist of a formal advice or response to a question, usually asked by a layperson, and issued by someone who is considered knowledgeable on a point of Islamic law or dogma. Fatawa from all periods of Muslim history have influenced and engaged directly with new social situations and challenges. A state seeking religious endorsement of a controversial position can seek also a response from a well-regarded authority. Since there is no formal priesthood or hierarchy in Sunni Islam the mufti may draw from a range of religious backgrounds and provide different conclusions.

## 23 Does the Islamic legal system provide for easy access to justice?

In the past, the Islamic legal system did not generally require any lawyers since the litigants pleaded their own case. Disagreements and disputes were settled within the organic society through the community as well as formal processes. The advent of colonial influences saw the rise of the legal profession but it did not extinguish the informal legal practices. Concepts of mediation or conciliation are found in the Qur'an, as well as in the practice of the Prophet's generation. These include conciliation (*sulah*), where the believers are called upon to settle their disputes amicably, mediation (*wasta*), when compromise is not possible, as well as the more formal arbitration (*takhim*). These indigenous ways of managing, reducing and resolving conflicts remain important. For example, within contemporary local development projects in Lebanon, mediation (*wasta*) is observed as a continuing practice of social exchange and face-to-face contacts in dispute resolution.

## 24 Do women experience particular difficulties in accessing Islamic courts?

There are concerns about women's access to justice in most societies, Islamic, secular or custom based, not least because of patriarchal social structures and attitudes amongst court personnel. Women's experiences with Islamic courts vary but they are not passive or powerless stakeholders. Swahili Muslim women in coastal Kenya, despite the usual attitudes, initiate and win the majority of marital conflicts handled by the local Muslim judge's (*qadi*) court. Historically too, there is evidence that Islamic courts were able to dispense justice across gender and religious lines. Efforts at training Muslim judges in gender sensitivity in post-conflict post-Tsunami Banda Aceh have achieved some success in enhancing women's ability to secure their rights.

Islamic feminists and Muslim women's organizations have sought to enhance women's rights by improving legal literacy of both the national laws and of Shari'a regarding dower, obedience, and inheritance and marriage stipulations via a faith-based discourse

## 25 What role is there for an Ombudsman (*muhtasib*) in the Islamic framework?

One duty of the Muslim state, as well as members of the society, is to promote good (*ma'ruf*) and prevent wrongdoing (*munkar*). This public duty is contained in the institution of *hisba*, created to promote both a justice society and an efficient market economy. From the earliest times, this agency was headed by a learned jurist (*muhtasib*). The *muhtasib* functioned like a market inspector, chief public health officer, receiver of complaints and land use enforcer, but it has declined as an institution. The idea of an ombudsman, with broad oversight, which has worked in many modern contexts with a defined mandate, has its roots in the Islamic framework and could be made effective in contemporary Muslim societies.

### **Ottoman legacy over land: A Palestinian case study**

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Palestine, at the centre of the Arab-Israeli land dispute, underscores the complex and distinctive Islamic and Ottoman legacy. Muslims consider Jerusalem as the second most holy city after Makkah, as recognized in the Qur'an. Caliph Umar, a companion of the Prophet established his rule over the city in 638. Palestine has been since been ruled by numerous Muslim rulers culminating in long reign of the Ottoman over Palestine as Southern Syria (1516-1917).

Palestine experienced most of the Ottoman land surveys, taxation and administration including the Ottoman Land Law of 1858. Palestine also had its own specific laws such as those relating to land registry and foreign land ownership. Like other parts of the Ottoman Empire, a significant proportion of the land were in State ownership which were first transferred to the British in 1917 and then to Israel on its creation in 1948. The British Mandate period brought about new laws regarding registry and land ownership modifying several Ottoman land administration practices.

The successor Israeli State used the legal basis of Ottoman land law as the framework to aid its nationalization of Palestinian land. For example, the Military Order Concerning Abandoned Properties 1967 was used in conjunction with the Ottoman Land Law of 1858 since it conceived that the Custodian of Government Property could declare uncultivated State (miri) and unregistered (mewat) lands, as state domain. Rather than outright confiscation, Israeli policy used selective interpretation of Ottoman and Islamic concepts alongside very high evidentiary rules for proof or property to confiscate these. The Israeli land title registration office is still referred to as 'Tabu' office and title registration certificates as 'Tabu' papers, an Ottoman term in origin. The Ottoman land records endure simply because neither the British nor the Jordanians (who created a new land registration document mujadad in the West Bank) offered anywhere close to a comprehensive registration system. However, any land registration process in such a socio-historical and religiously charged context will always be contentious. As they stand frozen in dispute, Palestinian land documents are a prime example of 'dead capital'.

# MODULE 2

## POWERPOINT PRESENTATION



**1**

**LAND, PROPERTY AND HOUSING RIGHTS  
IN THE MUSLIM WORLD (Module 2)**

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**4**

**What are the key concepts?**

- Islamic law: a central feature of the lived experiences and consciousness
- Islamic law: a evolving, and responsive sphere
- Islamic law: a hierarchy of sources with the *Qur'an*, *Sunna* (traditions) taking precedence
- Islamic law (*Shari'a*) is different from Islamic jurisprudence (*Fiqh*)
- Legal systems vary according to their specific historical and colonial context



**2**

**Session Learning Outcomes**

**At the end of this session participants should be able to:**

- Understand formal hierarchy of sources of Islamic law
- Appreciate secondary sources of Islamic law and their possibilities for developing land and property rights, as well as the supplemental law generating mediums
- Recognize schools of Islamic jurisprudence and appreciate particular brand of Islamic law generally applicable to all parts of Muslim world
- Appreciate the fundamental religious dimension to land for Muslims



**5**

**Why are these concepts relevant?**

- Foundational principles recognize property rights protections as priority
- Human endeavor interprets and implements the law
- Islamic law exists in different forms and interacts with secular or customary norms
- The *Qur'an* and *Sunna* generally provide support to land and housing rights
- Covers areas such as family law, property law, economic law, revenue law as well as public law



**3**

**Your opening thoughts!**

- What experiences do you have of Islamic law?
- Do you think Islamic law is relevant in Muslim societies to land issues?
- How can Islamic law facilitate property and housing rights?



**6**

**How can the concepts be used?**

- Independent personal reasoning (*ijtihad*) could further develop Islamic theory in the areas of land, housing and property rights
- Alternate dispute resolutions include conciliation (*sulah*), mediation (*wasta*) and arbitration (*takhim*)
- Differentiate Islamic and customary practices to weed out discriminatory practices
- Islamic law often coexists with other complex, overlapping and competing norms – referred to as legal pluralism
- Under Islamic law, women have extensive land rights



### Is Islamic law important to Muslims?

7

- A central feature of the lived experience and consciousness, helping to shape lives in an Islamic way
- Religious norms are formally included within most legal systems in Muslim countries
- Property and land rights lie at the very heart of Islamic law, but must be approached within the Islamic methodological framework



### Can Islamic law be positive for tenure?

11

- Significant prospects for interpretation strategies within Islamic law to promote access to land and security of tenure
- Appreciation of the distinctive features and sources of Islamic law (*Shari'a*)
- Islamic dispute resolution mechanisms can contribute towards innovative, provocative and inclusive land tools



### Is Islamic law currently relevant?

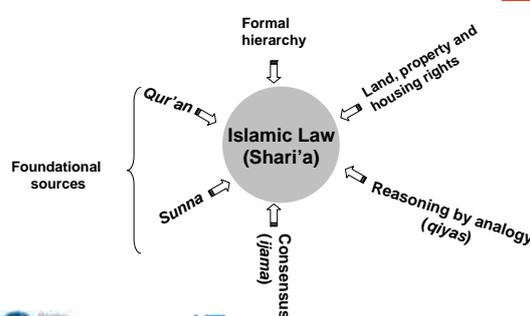
8

- A man made code based on religious principles
- Primary sources are divine (the *Qur'an*), human endeavor or interpretation within an authentic Islamic methodological
- Interpretive framework (*usul al-fiqh*), that determines how contemporary society actualizes it
- Islamic law can be seen, therefore, as an evolving, responsive and assimilating sphere of competing ideologies and interests



### What are sources of *Shari'a*?

12



### Is there a field of Islamic Land Law?

9

- No systematic field of Islamic land law.
- Foundational principles of Islamic law (*Maqasid al-Shari'a*) recognize property rights as a priority
- State policy through public interest or welfare must operate to promote it.
- Much of Islamic law relating to land and property falls within the area of social transactions, which under Islamic law are called *mu'amalat*, as distinct from matters relating to worship (*ibadat*).
- Social transactions are more open to a greater degree of interpretation than matters of religious observation.



### How are *Shari'a* and *Fiqh* different?

13

**Fiqh** (Islamic jurisprudence):

- man made
- deals with the observance of rituals, morals and social legislation
- *Fiqh* controversies are easier to resolve than *Shari'a* debates

**Shari'a** (Islamic law):

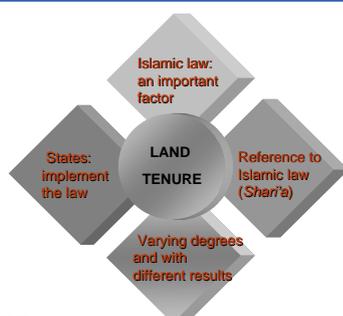
- Enacted or settled divine law
- *Shari'a* debates are more difficult to resolve

**Positive renditions of *Fiqh* can be used to counter more conservative elements of the *Shari'a* and promote human rights**



### Does Islamic law influence tenure?

10



### Does *Qur'an* focus on land?

14

- *Qur'an* has extensive reference to land, property and housing issues
- The nature of property, the recognition of women's rights and the inheritance regime of compulsory shares are all significant areas of *qur'anic* stipulation
- Many of the contemporary human rights standards with respect to property and land rights find resonance in the *qur'an*



**Is Qur'an open to interpretations?**

15

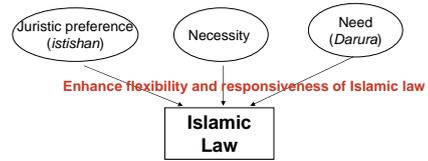
- Muslims believe the *Qur'an* to be the literal revealed word of God
- Where an Islamic property regime, such as the compulsory inheritance rules, is dealt with explicitly by the *Qur'an*, most Muslims would not consider it to be subject to independent reasoning (*ijtihad*)
- The *Qur'an* has to be interpreted as a whole and as such has been viewed by some as fertile ground for reappraising gender rights and developing pro-poor land strategies



**Is there flexibility in Islamic law?**

19

Allow discretion to prevent miscarriage of justice



Supplemental tools demonstrate the plurality of method in Islamic law  
 Another supplementary principles is that based on public interest and human welfare (*maslaha*)



**What are traditions (sunna)?**

16

**Sunna: the second most important source in Islamic law**

1. Consists of the records of the words and deeds of the Prophet
2. In the form of a diverse collection of narratives (*hadith*)
3. Doubts over the authenticity of some narrations, or the narrators, led to the development of limited well-acknowledge *hadith* reports



**Is reasoning (Ijtihad) a law source?**

20

- Independent personal reasoning (*ijtihad*) is an established wing of Islamic jurisprudence
- It is strictly not a source of law, but an interpretative method
- It is not confined to jurists, but is the sacred duty of every competent individual



**Does Qur'an trump Sunna?**

17

- Where there is a conflict between the *Qur'an* and the *sunna*, the *Qur'an* prevails.
- Problems can arise where the *sunna* is extensive and the *Qur'an* is general and limited  
 For example, the basis of the Islamic law on maintenance is a verse in the *Qur'an*, (4:43) but there are also several *hadith* on the subject.
- The challenge in such cases is to weed out spurious gender deprecating customary norms projected as Islamic truisms



**How does Ijtihad help land rights?**

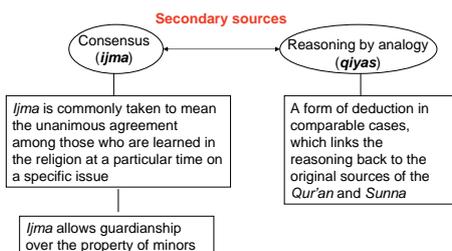
21

- Converts the fruits of personal reasoning into a discovery or finding for the benefit of society
- Through this internal Islamic authentic process, Islamic land tenure and property rights can be more systematically clarified
- *Ijtihad* is also one of the keys to making Islam continuously relevant
- There is considerable scope through independent personal reasoning (*ijtihad*) to develop Islamic thinking and legal theory in new areas



**Are there other sources?**

18



**Does it apply to Non - Muslims?**

22

- Islamic law within Muslim countries is sometimes extended to non-Muslims and Muslim minorities in some countries
- But this is not uniformly applied within a State and there can be regional or local variations
- Application of Islamic laws to Muslims in non-Muslim countries such is also controversial

**Examples:**

Nigeria and Sudan: Islamic law applies to all residents of Muslim concentrated regions  
 From Eritrea and Gambia to Kenya and Tanzania: applies only to Muslims



**Do Islamic and other laws overlap?**

23

- Muslim countries represent a hybridity of legal cultures, including colonial legal systems
- Often, common law is an influence but the extent to which Islamic law prevails and the effects varies and changes

**Examples:**

Saudi Arabia and Iran: largely resist Western legal influences

Turkey: secularized almost its entire laws, but relationship between religious and modern secular laws continue to be debated

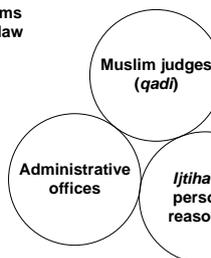
Yemen and Indonesian: customary laws co-exist with Islamic, colonial and modern laws

**How are legal conflicts resolved?**

27

**Great variety within an Islamic jurisdiction in terms of implementing law**

Such as an ombudsman (*muhtasib*), informal legal authorities such as the mufti, who issues advisory opinions (*fatwa*, plural *fatawa*)



Muslim judges (*qadi*) dealing with secular matters

Those exercising *ijtihad* or personal reasoning *mujtahids* may be encountered

**Do Islamic law and custom overlap?**

24

- Complex, overlapping and competing norms to be found in Muslim societies
- Existence of a variety of different legal spaces and norms can be the cause of conflict, but also offer choices, as in Indonesia

**What is the role of a Muslim judge (*qadi*)?**

28

- Within the Islamic legal system balances the 'rights' or duties owed to God with the rights of individuals
- Deals with non-Islamic law or a combination of Islamic or non-Islamic norms
- Rules relating to social relations (*mu'amalat*) have a religious legitimization. Because *Shari'a* have a secular aspect
- Rules of procedure often elaborate, overlap with that of the mufti or other legal offices, sometimes leading to tensions

**Do Islamic law and custom overlap?**

25

- In Egypt with respect to housing and real estate, people sometimes choose between formal and extra-legal bargaining opportunities using tools
- Choices made regarding Islamic law are not purely religious or juristic but need to be appreciated in their local social and political context

**What is advisory opinion (*fatwa*)?**

29

- *Fatwa* or Islamic opinion are formal advice based on Islamic principles
- A response to a question issued by someone who is considered knowledgeable on a point of Islamic law or dogma
- While *fatwas* have been controversial because of some misuse, also a potential pro-poor land rights medium

**Is legal pluralism relevant?**

26

- Individuals shuttle strategically between different legal orders, and sometimes ignore altogether formally recognized norms
- Important with respect to property rights, particularly in the context of the informal squatter settlements
- Well-developed land markets are found in such settlements, which are enforceable and legitimate
- The normative systems are sometimes referred to as quasi-legal or informal, but legality and illegality are not so clearly delineated
- Often an "informal" contribution from Islamic legal principles, concepts, structures or forms

**What is advisory opinion (*fatwa*)?**

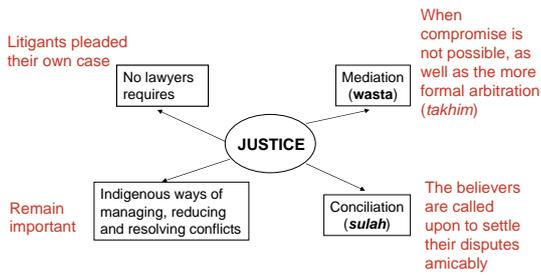
30

- Influence and engage directly with new social situations and challenges
- No formal priesthood or hierarchy in Sunni Islam, so *mufti* (opinion giver) may draw from range of backgrounds and provide different conclusions



Do Islamic systems serve justice?

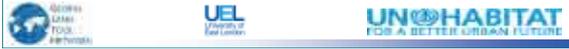
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Do women access Islamic courts?

33

- Historically, Islamic countries were able to dispense justice across gender and religious lines
- Concerns about women's access to justice due to patriarchal social structures and court biases
- Efforts at training Muslim judges in gender sensitivity have achieved some success
- Islamic feminists and Muslim NGOs have sought to enhance women's rights improving legal literacy



What does an Ombudsman (muhtasib) do?

32

- Duty of the Muslim state, as well as members of the society, is to promote good (ma'ruf) and prevent wrongdoing (munkar)
- Agency of hisba, created to promote both a justice society and an efficient market economy, headed by a learned jurist (muhtasib)
- Muhtasib functioned like a market inspector, chief public health officer, receiver of complaints and land use enforcer, but declined as institution
- Ombudsman, with broad oversight, could work in many modern contexts with a defined mandate



Thank you for your attention!

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## Reference readings

In this extract Esposito briefly explains the sources of Islamic law: the Qur'an (the revelation of God, the sourcebook of Islamic values and the primary source of Islamic law or Shari'a, Sunna or Sunnah (the tradition, deeds, utterances and tacit approvals of the Prophet), qiyas (reasoning, deduction by analogy) and ijma (consensus of opinion). It also describes the four main Sunni schools of Islamic law (madhabib, sing. madhabib): Hanafi, Maliki, Hanbali and Shafi'i.

**R2.1** Esposito J. L. (1982) *Women in Muslim Family Law*, Syracuse NY: Syracuse University Press

### The central fact of the Muslim religious experience is Allah.

In contrast to the polytheism of pre-Islamic Arabia, the God of the *Quran* is one and transcendent: “*And your God is One God: there is no God but He, Most Gracious, Most Merciful*” (11:163). This God, the creator and sustainer of the universe, is the overwhelming concern of the believer. Man's duty is obedience and submission (*islam*) to the will of God. The submission incumbent upon the Muslim, however, is not that of mere passivity; rather, it is submission to the Divine imperative, to actively realize God's will in history. Thus, the *Quran* declares that man is God's vicegerent on earth (11:30; XXXV:39). God has given him the Divine Trust (*amanah*) (XXXIII:72; VI:165), and it is on the basis of how man executes his vicegerency that he is to be either rewarded or punished (VI:165). Man's obligation to realize the divine imperative in space and time is communal as well as individual. The Islamic community (*ummah*) is to be the dynamic vehicle for the realization of the divine pattern (IIIJ 10; 11: 148; LVIII:109; CIII:2-3), and, as such, the *ummah* is to serve as an example to other peoples of the world (<sup>1</sup>1:143; VI:72; X:45-46).

The Muslim concern not simply to know the divine will but also to execute it, inspired the early Muslim community's expansion and conquest of Arabia, the Eastern Byzantine Empire in Palestine, Syria, Lebanon, the Persian (Sasanid) Empire in Iran and Iraq, and Egypt. However, the realization of the Muslims' religious vision to transform the world was not a simple task. The geographical expansion of

Islam resulted in many new problems which raised the question, “How is the divine will to be realized in this situation?” Since the *Quran* is not a law book, i.e., not a collection of prescriptions providing a legal system, and because the Prophet was no longer alive to resolve problems, the early Caliphs, and later, during the Umayyad period (661-750), the judges (*qadis*) shouldered the responsibility of rendering legal decisions.

In the eighth century, due to a growing dissatisfaction with Umayyad rule and a belief that its courts had failed to incorporate and implement the spirit of *Quranic* reforms, early schools of law (*madhhab*, pl. *madhabib*) emerged in major cities of the empire. These schools originally consisted of pious Muslims in Mecca, Medina, Kufa, and Baghdad. In time, they attracted followers who associated themselves with one of these great early leaders (*Imams*)—men like Abu Hanifa (d. 767), Malik ibn Anas (d. 796), traditionist movement criticized the *ahl al-ray* schools for their dependence on the practice of their own school and for their free exercise of personal opinion (*ray*) because it produced too much diversity of doctrine. To meet the need for a more systematic legal method, Shafii, who deplored the great variety of doctrine, sought to limit the four sources of law (*usul al-fiqh*), and thus establish a common methodology for all schools of law. As a result of his efforts, by the ninth century, classical theory of law fixed the sources of Islamic law at four: the *Quran*, *Sunnah* of the Prophet, *qiyas* (analogical reasoning), and *ijma* (consensus).

## The Sources of Islamic Law

### The Quran

The *Quran* is the revelation of God, the central fact of the Islamic religious experience. As the very word of God, for Muslims the *Quran* is the presence of the numinous in history (space and time). *Quranic* revelation is not that of the transcendent God, but rather of his Divine Will which man is to follow: “Here is a plain statement to men, a guidance and instruction to those who fear God” (111:138). Thus, the primary material source of the revealed law is quite naturally the *Holy Quran*, the sourcebook of Islamic values. While the *Quran* does contain prescriptions about matters that would rank as legal in the strict, narrow sense of the term, these injunctions, in fact, comprise but eighty verses.

The bulk of *Quranic* matter consists mainly of broad, general moral directives as to what the aims and aspirations of Muslims should be, the “ought” of the Islamic religious ethic.

The *Quran* was revealed to Muhammad over a period of twenty-three years in order to meet the needs of the Islamic society in Mecca and then in Medina. It gradually provided an Islamic ideology for the community and, in the process, modified or supplemented existing customs not meeting Islamic standards. Those verses most important for the development of legal doctrine came about in Medina during the growth of the community-state. Verses were revealed which replaced or revised old tribal customs with new rules. The gradual replacement of existing customs that did not meet Islamic standards is well illustrated by the *Quranic* prohibitions of liquor and games of chance. In the early years the use of alcohol and gambling had not been prohibited and hence, the old custom continued to be followed. The first prescription against the old custom is given in the form of advice: “*They ask thee concerning wine and gambling. Say: In them is great sin and some profit, for man; but the sin is greater than the profit*” (11:219). Later, Muslims were prohibited from offering prayers in drunkenness: “*O ye who believe! Approach not prayers with a mind befogged, until ye can understand all that ye say*” (IV:43). Later still, liquor and gambling were fully prohibited with the explanation: “*Satan’s plan is [but] to excite enmity and hatred between you with intoxicants and gambling, and hinder you from the remembrance of God and from prayer: Will ye not then abstain?*” (V:94).

Some of the most important and fundamental reforms of customary law were made by the *Quran* in order to improve the status of women and strengthen the family in Muslim society. Three main areas of *Quranic* reform were marriage, divorce, and inheritance. In the realm of marriage, for example, the *Quran* commands that only the wife and not her father or other male relatives should receive the dower (*mahr*) from her husband: “*And give the women [on marriage] their dower as a free gift*” (IVA). Thus, the woman becomes a legal partner to the marriage contract rather than an object for sale. In addition, unlimited polygamy was curtailed and the number of wives limited to four. However, a final injunction stressed that if the husband did not believe that he could be equally fair to each of his wives, he should marry only one: “*Marry women of your choice, two, three or four. But if ye fear that ye shall not be able to deal justly [with them] then only one*” (IV:3). And, in another place, the *Quran* continues:

“Ye are never able to be fair and just as between women, even if that were your ardent desire” (IV: 129).

In the area of divorce, in order to provide an opportunity for reconciliation, an important *Quranic* reform calls for a waiting period (*iddah*) of three months, or, if a wife is pregnant, until delivery of her child, before her husband can divorce her: “*Such of your women as have passed the age of monthly courses, for them the prescribed period, if ye have any doubts, is three months, and for those who have no courses [it is the same]: For those who carry [life within their wombs], their period is until they deliver their burdens*” (LXV:4).

Inheritance provides another example of *Quranic* reform of existing practice. The advent of Islam brought a shift from tribal allegiance to the solidarity of the Islamic community (*ummah*), a brotherhood of believers which was to transcend all tribal and racial loyalties. Coupled with this reform was a concern for the strength of the family and the members within it, especially women. These concerns are exemplified in the *Quranic* regulations governing inheritance. Succession in tribal customary law had been solely based on an (male) agnatic system *Casaba* i.e. kinship and thus inheritance through male descent). The *Quran* modified this system by introducing the golden rule of inheritance, the primacy of distribution of certain fixed shares to several categories of *Quranically* designated heirs comprised mainly of the nearest female relatives excluded under the agnatic system. After these *Quranic* claims have been satisfied, the residue of the estate is awarded to the nearest male (agnate) relatives.

### The Sunnah of the Prophet

*Quranic* values were concretized and interpreted by the second material source of law, the *Sunnah* of the Prophet. Just as during the lifetime of the Prophet, Muslims turned to him for decisions, so after his death, they looked to the Prophetic example for guidance. In classical theory, *Sunnah* of the Prophet consists quite simply in the normative model behavior of the Prophet. The importance of the *Sunnah* of the Prophet is rooted in the *Quranic* command to obey and follow Muhammad: “*O ye who believe, obey God and obey the Apostle ... if ye differ in anything, refer it ‘o God and His Apostle*” (IV:59), and again, “*Ye have indeed in the Apostle of God a beautiful pattern of conduct for any one whose hope is in God and the Final Day*” (XXXIII:21).

Technically, *Sunnah* is divided into three categories: (1) al-sunnah al-qawfiyah, the Prophet's statements and sayings; (2) al-sunnah al-f'iliyah, his deeds; and (3) al-sunnah al-taqririyah, his silent or tacit approval of certain deeds which he had knowledge of.

The record of the Prophetic words and deeds is to be found in the narrative reports or traditions (*hadith*) transmitted and finally collected and recorded in compendia. The authoritative collections of *hadith* were not compiled until the middle of the ninth century, by which time a great mass of diverse *hadiths* reflected the variety of legal opinion developed over the past two centuries of juristic reasoning in the legal schools. Recognition that the *hadith* literature included many fabrications led to a concerted effort to distinguish more clearly authentic traditions. These *hadiths* were evaluated through a painstaking attempt which produced the new Muslim science of *hadith* criticism (*mustalah al-hadith*). Criteria were established for judging the trustworthiness of narrators. For example, they had to be adult Muslims, legally responsible, of good moral reputation (rational, just, moral) and known to have good memories. Then a link (*sanad*) by link examination of the transmissional chain was made to trace the continuity of the tradition back to the Prophet. On the basis of this examination of the chain of narrators, *hadiths* were generally classified from the point of view of narration as *mutawatir* (continuous), *mashhur* (well-known), and *ahad* (isolated). *Mutawatir* refers to a tradition whose chain of narrators (*isnad*) is consistent and continuous. *Mashhur* (well-known) refers to those traditions which were widely disseminated and whose narration could be traced back to one or two narrators in the time of the Prophet. *Ahad* (isolated) referred to traditions whose last link (*sanad*) in the chain of narrators was limited to one authority. This last category was inferior to the first two and was thus considered weaker. These categories were divided into subcategories to further distinguish the strength or weakness of traditions.

The second criteria for judging the *hadith*, an examination of its matter or *main*, was used by asking if this matter contradicted the *Quran*, a verified tradition, reason, or the consensus of the community. After the traditions had been subjected to both external (narrators) and internal (subject matter) examination, they were labeled according to the degree of their strength or authenticity as *sahib* (authentic), *hasan* (good) and *daif* (weak). Of the six major collections of *hadith* of the Prophet, the *Sahibs* of al-jukhari (d. 870) and that of Muslim (d. 875) have enjoyed an especially high reputation.

However, as shall be discussed in Chapter IV, questions regarding the authenticity of the *hadith* remained.

### *Qiyas*

Muslims' concern to be true to the material sources (*Quran* and *Sunnah* of the Prophet) of their faith led to the development of *qiyas* (analogical reasoning). *Qiyas*, the third source of law, is a restricted form of *ijtihad* (personal reasoning or interpretation); it is reasoning by analogy. The noted jurist Shihab al-Din al-Qarafi (d. 1285) defined it as "establishing the relevance of a ruling in one case to another case because of a similarity in the attribute (reason or cause) upon which the ruling was based." The key to the use of *qiyas* is the discovery of the *illa* (reason or effective cause) for a *Shariah* rule. If a similar *illa* was judged to be present in the new case under consideration, then the *Shariah* judgement was applied. Among the earliest usages of *qiyas* was the fixing of the minimum dower (*mahr*). An analogous situation was established between the loss of virginity due to marriage and the *Quranic* penalty for theft — amputation of the hand. The sums of the minimum dower in Kufa and in Medina were equivalent to the established values which stolen goods had to reach in Kufan and Medinan teaching, respectively, before amputation was applicable.

### *Ijma*

The fourth source of law, *ijma*, has played a key role in the development of Islamic law. The classical and standard definition of *ijma* is the unanimous agreement of the jurists of a particular age on a specific issue. *Ijma* derived its authority as a source of law from the *hadith* that records the Prophet as saying, "My Community will never agree on an error." In the early community, however, *ijma* was not a formalized practice. It developed after the death of Muhammad and the consequent loss of his guidance in legislative matters. *Ijma* began as a natural process for solving problems and making decisions, depending upon the approval of majority opinion to insure against individual fallible reasoning (*ijtihad*).

Two kinds of *ijma* should be distinguished. The *ijma al-ummah* refers to the consensus of the whole community. It is used in matters of religious practice, as for example, the ritual of pilgrimage to Mecca that is practiced by all pilgrims. However, authority for this *ijma* is not found in early legal texts.

The second type, *ijma al-a immah*, meets with the classical definition, the consensus of religious authorities regarding interpretation of a *Quranic* text or tradition, or a development of legal principle.

*Ijina* contributed significantly to the corpus of law (*fiqh*). If questions arose about a *Quranic* text or tradition, or a problem for which no *sunnah* (practice) of the community existed, the jurists applied their own reasoning (*ijtihad*) to arrive at an interpretation. Over a period of time (perhaps several generations), one interpretation would be accepted by more and more doctors of law. Looking back in time at the evolved consensus of the scholars, it could be concluded that an *ijma* of scholars had been reached on this issue. The general consensus of Muslim jurists (*faqih*, *pl. fuqaha*) has always been that the *Shariah* is concerned with human welfare and based upon justice and equity. Three of the four Sunni schools of law developed and utilized the following subsidiary legal methods whose primary purpose was the guaranteeing of justice and equity: *istihsan* (juristic preference), *istislah* (public interest), and *istishab* (presumption of continuity). All are considered forms of *ijtihad*.

### *Istihsan*

*Istihsan*, juristic preference, is a principle associated with the Hanafi school. Where strict analogical reasoning led to an unnecessarily harsh or rigid result, juristic preference was exercised to achieve equity. Proponents of this principle could cite the *Quran* to support their position: “*Those who listen to the Word and follow the best (absanahu) meaning in it: Those are the ones whom God has guided and those are the ones endowed with understanding.*” (XXXIX:18; XXXIX:55)

### *Istislah*

The second supplementary principle of law is *istislah*, a concept associated primarily with the Maliki school which accepted public interest or human welfare (*niaslaha*) as a source of law. *Al-masalih al-mursalah* denotes public interests which are not covered by any *Shariah* text and are thus not textually specified (*mursal*). The method of *istislah* consists in the determination by the jurist of man’s best interest in a case and the rendering of a judgement that will promote it. *Istislah* is a juristic method, a tool of interpretation and not a material source of substantive law. It is based on the belief that God’s purpose in the *Shariah* is the promotion of human welfare. *Istislah* was not simply utilitarian; it did not develop as a freewheeling principle, but rather as

a disciplined principle of law with definite limits within which it was to function. The case involved must be one which concerns social transactions (*muamalat*) and not one relating to religious observances (*ibadat*). The interest studied must be in harmony with the spirit of the *Shariah*.

### *Istishab*

*Istishab*, continuance or permanence, is the principle of equity most often associated with the school of al-Shafii although it was also emphasized by the Hanbalis. The term *istishab* refers to the presumption in the law that conditions known to exist in the past continue to exist or remain valid until proven otherwise. For example, a missing person (*nitrfaqud*) is presumed to be alive until the opposite is proved, either through proof of his demise or a judicial decree to that effect based on the elapsing of the number of Years necessary to complete a normal life span. The history of Islamic law contains numerous examples in which Muslim sovereigns interpreted and enacted laws in view of justice or the general welfare. Such actions were founded in the very sources of law (*usul al-fiqh*), the *Quran*, *Sunnah* of the Prophet and *ijma*.

Weeramantry explains in the following extract how Islamic law relating to land is inspired by the concepts of the sanctity of land, divine ownership and righteousness of use. Therefore, land is a sacred trust, rather than just property or a commodity.

**R.2.2** Weeramantry C. G. (1988) *Islamic Jurisprudence – An International Perspective*, London: Macmillan

Since all property belongs to God, its holders are only trustees. They must not use it selfishly without regard to the social purposes which it should serve. Thus, while legal ownership was permitted and protected by the law, it was subject to an overall social orientation. A landowner who neglected to cultivate his land for an inordinate period of time might lose his right to retain his property and his neighbours might acquire the right to purchase and cultivate it.

Such concerns become important particularly in the modern age, with its emphasis on environmental concerns. The planet was inherited not by any one generation but by mankind and all its posterity from generation to generation.

'Do you not see that God has subjected to your use all things in the heavens and on earth and has made his bounties flow to you in exceeding measure, both seen and unseen (Qur'an, xxxi:20.) Each generation is only the trustee. No one generation has the right to pollute the planet or to consume all its natural resources in a manner that leaves for posterity only a polluted planet or one seriously denuded of its resources.

Muslim countries do not present a simple dichotomy of Islamic and non-Islamic laws. Islamic laws function alongside a host of other legal cultures, including customary norms and state secular laws, sometimes absorbing or negotiating with them, while at other times there may be conflicts. In the consciousness of much of the Muslim world, especially those parts which were once under Ottoman rule, land tenure regimes and concepts are generally constructed or realised, to a noticeable degree, by reference to Islamic law. However, outside these areas the Islamic content of modern land tenure regimes is not always easily perceived. The following extract, from Haji Salleh Haji Buang, contains the contention that even in countries like Malaysia, where the legal system with respect to land rights is driven largely by the seemingly wholly secular demands of the strict 'Torrens' registration system, there is an Islamic dimension.

**R2.3** Buang, Salleh H. (1989) *Malaysian Torrens System*, Kuala Lumpur: Percetakan Dewan Bahasa dan Pustaka

It is generally believed that the law of real property in Malaysia is totally devoid of Islamic content. An in-depth study of our early land law reveal(s) the existence of a substantial body of Islamic legal principles, a historical fact which contemporary scholars find themselves in difficulty to accept, having been so engrossed with the civil law system introduced in these shores after the arrival of the English administrators towards the close of the eighteenth century. This important point needs to be re-emphasised if we are to consider seriously the possibility of re-introducing Islamic precepts into the law of property in Malaysia...

In the Qu'ran, Allah says that everything in this universe vests absolutely in Allah (Sura al-Maidah, ayat 17) and that the State is but a mere Trustee. The State has powers to alienate the rights of possessions to such 'deserving grantees' (the deserving grantees,

according to Islamic law, are the landless, the warriors and others who serve the State, those who can actually cultivate the land, and those who have just embraced Islam) who are able to put the land to productive use and to be of benefit to the society at large. Although such possessory rights are capable of being disposed *inter vivos* and can devolve to one's heirs upon death, the cardinal rule in Islam is that the State can at any time repossess the land if such land is required for the public good. Historical precedents abound in Islam.

Within the following extract the different theoretical bases of the Western human rights tradition and Islamic human rights are set out. Islamic arguments on property rights are ordered, like other Islamic human rights, within a vertical relationship governing the way in which a human being discharges his duties towards God in dealing with other human beings.

**R2.4** Weeramantry C G (1988) *'Islam and Human Rights, in Islamic Jurisprudence*, London: Macmillan

Human rights doctrine in Islam was a logical development from its basic postulates, namely the sovereignty of God and the revelation to the Prophet. From these postulates the basic principles of human rights such as are now enshrined in international documents followed logically as a necessary part of Islamic law. The literature of Islamic law taken by itself even without the aid of modern documents was therefore sufficient to yield the principles necessary to work out a Universal Islamic Declaration of Human Rights. It is remarkable that every one of the principles set out therein, with its great similarity to the most modern formulations, can be supported on the basis of specific Islamic texts.

A point that must be made at the outset is that the concept of human rights in Islam rests upon a foundation theoretically different from the traditional Western one in at least two fundamental ways. In the West, human rights were fought for and extracted from those in authority through a bitter series of tussles by man against man. Rulers stubbornly withheld privileges. Subjects stubbornly fought for them. Revolutions took place and with each revolution fresh concessions were made. Further struggles built further concessions upon those initial hard-won concessions, and in this way a growing body of rights evolved through the ordeal of bloodshed and struggle.

These were hard-won secular rights and are naturally greatly prized. They represent a remarkable advance upon the pre-existing situation where even such fundamental rights as the right to life were denied. In Islam, however, one does not view the problem against such a secular setting. The problem is not how man asserts his rights against man but how man discharges his duties towards God. It is not preoccupied with the horizontal relationship of man with his fellow man but with the vertical relationship that subsists between each man and his Maker. If the vertical relationship is properly tended, all human rights problems fall automatically into place.

These are thus two very different relationships. Islamic human rights doctrine deals primarily with God and man and is theocentric rather than anthropocentric. Secondly, it emphasises the concept of duty rather than that of rights. These make for fundamentally different approaches to what is otherwise in the main a commonly agreed body of accepted principles. The result may now be very much the same but the route by which it is reached is different. However, the Islamic stress on relationship with the divine, and on the concept of duty, could well lead to a more dedicated and purposive commitment to human rights than might be possible in a system which depends on concessions grudgingly granted under compulsive pressures.



# MODULE 3

## ISLAMIC HUMAN RIGHTS AND LAND

# MODULE 3:

## Islamic human rights and land

### Overview

This module examines how despite differences in formulation, there is widespread recognition in Islam of the universal human rights relating to land, property and housing rights. International human rights are generally considered by the community of nations to be universal, indivisible and interdependent and applicable to all societies, including Muslims. Islamic rights are horizontal human relations and vertical relationships with God. The module explores how Islamic human rights approaches offer possibilities and tools of empowerment which can be incorporated into contemporary strategies to enhance property rights.

A large and increasing number of Muslim governments (member States of the 57 member Organization of Islamic Conference) have ratified the relevant international human rights. Thus they have obligations under these treaties to respect human and property rights, including the prohibition against discrimination and forcible eviction. Though there are reservations (opt-out clauses) regarding treaties ratified by Muslim governments (particularly on women's rights), these are not specifically regarding land, property or housing rights. This is because these concepts find resonance in strong Islamic foundations of socio-economic rights. This is a strong socio-economic rights ethos covers equitable distribution of resources, and extensive rights for landless.

The 1981 Universal Islamic Declaration on Human Rights (UIDHR) and 1990 Cairo Declaration are influential, but not binding or enforceable. The 2004 Arab Charter on Human Rights (by the Arab League), Cairo Declaration and UIDHR bear a striking resemblance to universal land, property and housing rights. Classical Islamic rights and modern human rights differ in formats, in effect. There is a need to find areas of convergence regarding property rights.

Despite reservations (opt out clauses) of main international treaties by some Muslim governments, the women's rights treaty (CEDAW) provides an agenda for Muslim countries to enhance women's property rights. There is also extensive support for the rights of children, minorities and the displaced.

Islamic human rights conceptions are important as a way of understanding the scope and implementation of human rights treaties, but they do not substitute for them. While Islamic human rights with respect to land could potentially enrich human rights implementation, there is, as yet, no consensus over them. There is a vibrant debate in Muslim societies over a responsive Islamic human rights framework, through independent personal reasoning (ijtihad) and political activism. This module will consider how Islamic human rights can be applied to the challenges faced by Muslim societies with regard to land, housing and property rights.

### Reading materials

- Universal Islamic Declaration of Human Rights
- Cairo Declaration on Human Rights in Islam
- Selected international human rights documents

### Additional reading

- Baderin, M (2003) *International Human Rights and Islamic Law* (Oxford: OUP).
- An-Naim, A (1990) *Toward an Islamic Reformation: Civil Liberties, Human Rights, And International Law* (Syracuse: Syracuse University Press).

Arzt, D (1990) 'The Application of International Human Rights Law in Islamic States' 12 *Human Rights Quarterly* 215-217.

Sait. S and Lim.H (2006) pp 80-106.

## Learning outcomes

At the end of this module participants should be able to:

- ♦ appreciate the participation of Muslim countries within the International Human Rights Framework.
- ♦ explore the differing conceptions of rights under universal human rights and Islam.
- ♦ compare international and Islamic rights standards with respect to the current land rights of women, men, children, minorities and migrants.
- ♦ consider strategies for empowerment through a human rights approach.

## Facilitator's notes

During this module the facilitator will address any perceived gaps between concepts of universal human rights and Islamic human rights in regards to land. While the enforcement of human rights, as opposed to rights on paper, is always a matter of debate, the extract from Weeramantry in the readings section, suggests that the religious dimension may make Islamic human rights more effective. In terms of leading discussions it is noteworthy that Muslim countries have not entered reservations (exemptions) to any treaties in the name of religion with respect to property rights. However, the area of concern which is usually highlighted with respect to Islamic human rights principles and land is the extension of these rights to women, minorities and migrants. For instance, there are widespread reservations by many Muslim states to CEDAW, particularly regarding Article 16 which stipulates equality of the sexes in marriage and family matters. Facilitators may pursue with participants the extent to which such reservations are a matter of Islamic belief, or whether other political or cultural considerations are at work.

Conflict torn Somalia represents practical challenges for the human rights field. Identifying human rights violations is likely to be easy but their causes and resolution more difficult. Consider how the Islamic dimension matters, with respect to Cairo and UIDHR. Also relevant is Somalia's poor record in signing UN human rights treaties.

## Group work

### Human rights in post-conflict Somalia

Since the fall of the Barre government in 1991, the Somali civil war has led to more than half a million dead, and hundreds of thousands displaced. Land, Islam and clans have been at the centre of the conflict. The Barre regime's land reforms (and in particular the title registration introduced by the 1975 land law) not only eroded the customary land tenure arrangements but disturbed traditional agricultural patterns and spawned widespread land grabbing. With the collapse of formal land laws, a combination of Islamic law, Somali customs and some remnants of the pre-1991 law now operates. Claims of *deegan* (homelands, or land and its resource base) are often driven by competing clans or sub-clans with the customary law of *Xeer* and the accompanying elder dispute resolution having limited effect. Vast public and private lands have been appropriated by warlords and there is little security of tenure.

Since the seventh century, Somalia has experienced Islamic law as well as indigenous customary and Western derived laws. Interestingly, the influential Sunni Sufi orders are the Qadiriya and Ahmadiyah-Idrisiyah which are the oldest and more liberal spiritual traditions. In April 2009, the Somali Transitional Federal Government initiated a bill to adopt Islamic law as national legislation which the Somali parliament unanimously passed. According to commentators, the move was meant to appease the powerful coalition of Islamic organizations (headed by the extremist group Al Shabaab, meaning "the youth"). The question is how Islamic law will be interpreted and applied. The Islamic Courts Union had achieved considerable respect for imposing law and order and standing up to the warlords, but their conservative agenda has divided Mogadishu.

Looting, land seizure, and forced entry into private property continues in Mogadishu and elsewhere in Somalia with impunity. In his March 2008 report, the UN Independent Expert on Human Rights in Somalia notes a dismal state of human rights including denial of fair trial, restrictions on freedoms of speech, association, religion, and movement. Discrimination and violence against women, child abuse, trafficking in persons and discrimination against clan and religious minorities were also problems.

Somalia has acceded to only four of the seven major UN conventions concerned with human rights, namely: the two Covenants on Civil and Political Rights; on Economic, Social and Cultural Rights (in 1990), the Convention on Racial Discrimination (1975), and the Convention Against Torture (1990). Somalia also signed the Convention on the Rights of the Child (2002) but did not ratify it. Somalia has agreed to the “Cairo Declaration on Human Rights in Islam” issued in 1990 by foreign ministers of Muslim countries. Somalia also acceded to the “Arab Charter of Human Rights/Amended” prepared by the Arab Summit in Tunisia in May 2004, but did not ratify it like most Arab states.

### Recommended reading

Besteman, C Cassanelli, L (2000) *The Struggle for Land in Southern Somalia: The War behind the War* 2nd edition. (London: HAAN).

UN-HABITAT (2008) *Land, Property, and Housing in Somalia* (Nairobi: UN-HABITAT)

### Possible questions for group work

1. Somalia is often referred to as having the “worst human rights record in the world.” What are the causes?
2. The clan system is a key but controversial feature of Somali society, which both divides and unites, depending on context. How can one respond to the clan system in the context of human rights?
3. Somalia has not signed all the UN human rights treaties. If a person’s private property is seized, what can he or she do?
4. Somalia has adopted Islamic law, and also agrees with the Cairo Declaration of Human Rights in Islam? What difference does this make?



Photo © Claudio Acioly/UN Habitat

## Background Q & A

### Islamic human rights and land rights

Human rights in Islam [are] not about how man asserts his rights against man but how man discharges his duties towards God<sup>1</sup>

#### Introduction

The Global Land Tool Network (GLTN) is a multi-sector and multi-stakeholder partnership seeking to translate aspirations, principles and policies into inclusive, pro-poor, affordable, gendered high quality and useful land tools, which can be replicated in a range of contexts. GLTN recognizes the demand for targeted tools, including culturally or religiously formatted tools, since there are many positions and approaches to conceptualising and delivering secure tenure and access to land. Most communities have deeply ingrained cultural traditions, many religions have firm rules on land and inheritance, and every government faces the challenge of land differently with its own array of laws and degrees of political will.

In most Muslim countries Islamic law, principles and practices make an important contribution to shaping access to land. GLTN has as one of its objectives, therefore, the identification and development of Islamic land tools through a cross-cultural, interdisciplinary and global process, owned by Muslims, but including civil society and development partners. Islamic approaches to land should not be seen as an internal matter, giving preference to religion over universal or secular approaches to land, but as part of GLTN's inclusive, objective, systematic and transparent efforts.

#### 1 What are human rights?

Human rights are considered to be enforceable claims or entitlements inherent in every individual simply by virtue of being human. Therefore, every person is entitled to minimum standards of treatment which he or she can expect from others. The social, moral, political and religious aspects of human rights are part of a philosophical or academic debate,

but human rights are now established as enforceable legal rights. We are said to live in an “age of rights”, where human rights are the “new standard of civilisation”.

#### 2 Why are human rights important?

Human rights are important because they define basic standards, as well as create obligations for the State to fulfill. The State has a duty to ensure non-discrimination (including gender) and fairness in procedure, as well as positive actions to respect, protect, provide and facilitate land rights. These rights are inalienable - so they cannot be overridden or taken away arbitrarily. For example, there cannot be forcible eviction except through legal process.

#### 3 How are human rights relevant to property, land and housing issues?

At the international level there is a well-established set of rights relating to land, property and housing. These human rights include the right to own and enjoy property, as well as the prohibition on any arbitrary interference with property. For example, the right to adequate housing is one of the main elements of the right to an adequate standard of living, as seen in Article 25 of the 1948 Universal Declaration of Human Rights. This right to adequate housing comprises of legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy.

#### 4 Are human rights enforceable?

At first glance, land rights as socio-economic principles have limitations with respect to resources and capacity of the State but far from being called upon to do their best, there are basic minimum thresholds and obligations of conduct. Some emerging rights declare high-priority goals and assign responsibility for their progressive rather than immediate realisation. While the mere existence of human rights does not guarantee their implementation, there are continuous efforts at the local, the national and international levels to strengthen respect and implementation of these rights.

<sup>1</sup> Weeramantry CG (1988) *Islamic Jurisprudence: International Perspectives* (London: Macmillan) 116-117

For example, since 2004 the Economic and Social Commission for Western Asia (ESCWA) Centre for Women has conducted training workshops on the preparation of national reports for Beijing + 10 for 22 Arab countries. It has also provided technical assistance to countries like Yemen on gender concepts and CEDAW report-writing. In 2007 ESCWA launched a workshop on the role of judges and parliamentarians in the role of judges and parliamentarians in implementing the Convention. Enforcement of human rights depends on awareness and political will.

## 5 Where are human rights principles found?

Human rights principles can be found in several documents, as well as practice. These rights arise out of a variety of constitutional and legal principles, international and regional human rights treaties, political declarations, customary practice and international standards. There are also specific global treaties and declarations relating to social and economic rights, women and children and other particular human rights issues. These treaties often provide clear principles relating to land, property and housing rights as well as implementation mechanisms.

## 6 Why is interdependence of rights important?

States sometimes pick and chose the rights they support and reject others. This undermines the holistic impact of combination of rights. Therefore, it has been emphasised that rights are inalienable and interdependent. Developing countries often complain that civil and political rights are prioritised over socio-economic rights. In the past 15 years interest in promoting and protecting economic, social and cultural rights has grown. NGOs, academia, Governments and the judiciary are paying increasing attention to the protection of these rights in their programmes, policies and case law, and highlighting the need to respect them as a key to ensuring greater overall enjoyment of human rights.

## 7 What are the main international human rights treaties?

The main treaties include the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 International Convention on Civil and Political Rights (ICCPR), 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1989 Convention on the Rights of the Child (CRC), the 1951 Convention relating to the Status of Refugees (CSR) as well as the 1990 International Convention on the Protection of the Rights of All Migrant Workers (CMW) all which contain specific guarantees regarding property rights. There are also others such as the 1989 ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries that are relevant. There is also a recent Convention on the Rights of Persons with Disabilities (2006).

### Office of the Human Rights Commissioner – Human Rights Programme for the Middle East and Northern Africa Region (2008-2009)

In recent years, many States in the Middle East and North Africa region have taken steps towards legal, economic and social reforms, including holding multi-party legislative and municipal elections, establishing national human rights institutions, and improving the status of women. The number and diversity of activities of civil society organizations has increased, with human rights NGOs focusing their activities on raising awareness, promoting human rights education, documenting human rights violations and providing legal assistance and research services to right-holders. In addition, new independent media outlets have emerged in many countries.

Many States in the region have ratified the major international human rights instruments. A growing number of these countries have been fulfilling their human rights treaty by reporting obligations and taking steps to follow up on the implementation of both treaty body and special procedures recommendations and concluding observations. While several countries in the region have demonstrated a greater commitment to human rights, the record in most countries still needs improvement.

## 8 How do these international treaties deal with land rights?

Each treaty deals with land and property rights according to its own focus and emphasis. For example, the ICESCR calls for non discrimination and progressive realisation of the Covenant rights (Article 2), stipulates gender equality in the enjoyment of all economic, social and cultural rights (Article 3), in particular “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions” (Article 11). And, the ICCPR in Article 17 prohibits “arbitrary and unlawful interference” with one’s privacy, family, home or correspondence. This is guaranteed through the process of non-discrimination (Article 2), gender equality (Article 3) during and at dissolution of marriage (Article 23), choice of residence (Article 12), equality before courts (Article 14) and equal protection before the law (Article 26).

## 9 What is the relevance of international human rights treaties?

Human rights treaties relevant to land rights have created monitoring committees to supervise their compliance by States. Some like the ICCPR have an individual complaints system with respect to States who have agreed to it, but the international supervision of land, property and housing rights as part of the economic, social and cultural rights paradigm is based entirely on the reporting system. The ESCR Committee has developed a new range of its own monitoring procedures and practices. The participation of Muslim States, who are members of the treaty, has produced a rich record of their progress in securing international land rights.

## 10 Have Muslim countries signed up to International Human Rights?

A number of Muslim countries (member States of the 57 member Organization of Islamic Conference (OIC)) have ratified the relevant international human rights treaties, although others have not done so. 46 of the 57 Member States of the OIC have signed the ICESCR and ICCPR. Muslim States have also participated in the political process towards augmenting promotion and protection of housing and land rights.

They subscribe to the United Nations Charter, which refers to human rights, and are amenable to customary international human rights norms and developing general international standards relating to land and housing rights.

## 11 How do reservations to human rights treaties affect the obligations of Muslim States?

Several Muslim countries ratifying international human rights treaties have entered reservations (exemptions) against some of the provisions of those treaties, usually in the name of religion. While some commentators argue that the reservations reflect conflict between Islamic and universal positions, others say that the reservations reflect the political views of governments. The State lodging a reservation against a particular provision of a treaty it has signed is not bound by that provision.

## 12 Have Muslim countries entered reservations on land rights?

While some States have entered reservations with regard to provisions in several treaties, there are none specifically relating to land, property or housing rights. A comparative study of Islamic and International human rights regimes demonstrates that there is little conflict with respect to land, housing and property rights. This is not surprising because Islam has a strong socio-economic rights ethos and promotes equitable distribution of resources.

## 13 What is CEDAW and how is it relevant to land rights?

CEDAW is frequently called the international bill of rights for women. CEDAW defines discrimination against women and establishes an agenda for national action to end discrimination. The convention also outlines the rights of women in reference to land issues. It establishes that State Parties shall provide “the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property [...]” (Article 16(h)). More broadly, CEDAW clearly establishes that domestic laws and traditional, religious or cultural practice cannot justify violations of the Convention.

## 14 Have Muslim countries entered reservations on the Women's Convention (CEDAW)?

A number of Muslim countries have enlisted reservations – most notably to Article 2 and 16 which embody the ‘object and purpose’ of CEDAW – on the basis of *shar'ia*. For example, Bangladesh justifies its reservation on Article 2 by arguing that the provision “[...] conflicts with *shar'ia* law.” Similarly, Bahrain cites its reservation on Article 2 “[...] in order to ensure its implementation within the bounds of the provisions of the Islamic *Shar'ia*.”

However, in aiming to set an example amongst Arab states, Morocco withdrew all reservations to CEDAW last December in parallel with the 60<sup>th</sup> anniversary of the Universal Declaration of Human Rights.

## 15 Is there a human rights enforcement mechanism particularly for Muslims?

No, there is no global Muslim human rights treaty mechanism. The UIDHR and Cairo Declaration do not have an implementation or monitoring body. There is an Arab Charter on Human Rights which was adopted at the sixteenth meeting of the League of Arab States at Tunis, in May 2004. The Arab Charter on Human Rights has been ratified by a number of countries in the Arab world including Tunisia, Morocco, Saudi Arabia and Palestine. The land and housing rights in the Arab Charter bear a striking resemblance to international human rights treaties, including the principle of non-discrimination.

## 16 Are Universal Human Rights applicable to Muslims?

Yes, these rights are generally considered by the community of nations to be universal, indivisible and interdependent and applicable to all societies, including Muslims. Muslim societies face similar kind of human rights and development issues, as do non-Muslim countries. However, there is an ongoing debate between universalists (who believe that human rights are applicable the same everywhere) and cultural relativists (who argue that human rights to an extent depend on the context and subscribers). And there is an Islamic critique of universal human rights that Islamic conceptions on human rights must apply to Muslims.

## 17 Are Muslims opposed to Universal Human Rights?

There may be differences in some areas between the articulation of classical Islamic conception of rights and modern human rights expectations. This has led to a diversity of opinion and practice regarding universal human rights in Muslim countries but there is an increasing receptivity to the human rights norms and standards. There is also a vibrant internal debate within Muslim societies over the role of modern human rights.

### Diverse approaches to human rights within Muslim contexts

Bielefeldt (1995:616) refers to the internal debate within Muslim societies of the role of modern human rights:

A great variety of Islamic positions in the area of human rights exist. There are conservatives who deny all conflicts between tradition and modernity, thereby simply merging the language of human rights with the classical *sha'ria*. Some liberal reformers, by contrast, suggest that only a self-critical reevaluation of the *sha'ria*, which in their view originally was intended to provide normative guidance rather than serving as a comprehensive legal code, facilitates a genuine reconciliation of the requirements of Islam and human rights. Besides the positions held by conservatives and liberals, intermediate approaches exist as well, resulting from the pragmatic humanitarianism that has largely shaped the *sha'ria*.

## 18 Are regional human rights frameworks relevant to Muslims?

Muslims live in many different parts of the globe. The 1969 Inter-American Convention on Human Rights (Article 21) and the 1950 European Convention on Human Rights (see Article 1 of Protocol 1) are supervised by courts. The 1981 African Charter on Human and Peoples' Rights has been ratified by 10 Muslim States though it makes no specific mention of the right to adequate housing but it speaks of other property and land rights and is supervised by a regional Court. But some areas are without regional human rights standards and monitoring mechanisms, such as Asia, therefore the international system is important.

## 19 How do political resolutions on land rights affect Muslim countries?

Muslim countries have generally participated in the promotion of land, property and housing rights through global initiatives seeking to prioritise and mainstream these rights. These initiatives include the UN Conference on Human Settlements in 1976, the Second United Nations Conference on Human Settlements (Habitat II) in 1996, which led to the Istanbul Declaration and the Habitat Agenda and the Millennium Development Goals from the 2000 Millennium Declaration. Taken together, these provide the framework and general consensus forming part of a 'soft law' creating various levels of recognition and obligation on the part of States.

## 20 Where are Islamic human rights found?

Islamic human rights are derived from the main sources of Islamic law and practice (see Briefing Paper No. 3 on Islamic law), particularly the *Qur'an* and the *Sunna*. These principles are reiterated in the 1981 Universal Islamic Declaration of Human Rights (UIDHR) adopted by the Islamic Council of Europe and the OIC 1990 Cairo Islamic Declaration on Human Rights in Islam.

## 21 Is there a conflict between international treaties and the UIDHR or Cairo Declaration?

Though there is a different emphasis and formulation in the UIDHR and Cairo Declaration in comparison to international treaties, the former also offer a wide range of property rights. Land rights as declared by these documents are generally compatible with international treaties. Though the UIDHR and Cairo are declarations that cannot substitute the binding international norms, they could support the arguments for fuller Islamic property, housing and land rights conceptions.

## 22 Do Islamic human rights support women's property rights?

Yes, Muslim women have a range of rights to property under Islamic law and human rights. They possess independent legal, economic and spiritual identity, supported by *Qur'anic* injunctions that facilitate access to land. Despite complexities in terms of both fixed Islamic inheritance rules and the prevalence of patriarchal or gender deprecating practices in the name of Islam, there are opportunities to work out a far more gender egalitarian Islamic approach to women's property rights through independent reasoning (*ijtihad*).

## 23 Do Islamic human rights support children's property rights?

Yes, Muslim countries have widely ratified the 1989 Convention on the Rights of the Child and therefore support the child centred guarantees and rights in the CRC. Islamic conceptions of child rights contain several strengths, such as the rights of orphans. Further change has taken place improving the position of 'adopted' children and orphaned grandchildren, justified on the basis of the *Qur'anic* verse of bequest, though property rights of illegitimate children are more complex.

## 24 How does Islam deal with child rights?

The *Qur'an* recognises child rights in several dimensions. It assumes divine responsibility for the creation of every child - "*God creates what He wills (and plans). He bestows children female or male according*

*to his will... and He leaves childless whom He pleases"* (*Qur'an* 42:49-50). The *Qur'an* recognises the life of the unborn and is categorical about the physical integrity of every infant by stating in *Qur'an* 17:31 "*Kill not your children for fear of want (poverty). We shall provide sustenance for them as well as for you. Verily the killing of them is a great sin*". It emphasises the equal preference of both sexes by criminalizing the practice of female infanticide by raising the question of justice "*And the (female) buried alive shall be asked for what reason was she killed when the scrolls are laid open*" (*Qur'an* 81:8-9).

God would hear evidence on the crime against the child from the victim herself castigating those who grieve over the birth of a female child instead of a male (as was the pre-Islamic attitude), the *Qur'an* warns that “indeed, wrongful is their judgement” (*Qur'an* 16: 58-59).

Every child is born innocent without any carry over sin and childhood is considered a state of purity. All children who die young are considered to belong to *ala' l fitrah* (state of nature) and are guaranteed Paradise irrespective of the religion of their parents. The *Qur'an* not only confers the basic rights of name, identity and paternity but reiterates a broad framework for the physical, material (such as the right to property), emotional and spiritual rights of the child. Islamic theory relies on both mental maturity and physical development in determining the various stages of childhood.

## 25 Do Islamic human rights support the property rights of minorities?

Both the UIDHR as well as the Cairo Declaration emphasise minority rights. In theory, non-Muslim minorities or the ‘protected’ or ‘covenanted’ people (dhimmis) who live in an Islamic State ‘are guaranteed irrevocable protection of their life, property and honour’ in exactly the same manner as Muslims.

## 26 Do Islamic human rights support property rights of migrants and refugees?

The 1951 Convention on the Status of Refugees, which has over 150 State ratifications, has been controversial for Muslim States due to its exclusion of Palestinian refugees. However, the Organization of Islamic Conference (OIC) emphasises that ‘Islam laid the foundations for the institution of asylum in its public law through the holy Koran and the Tradition (*Sunna*)’ and that ‘respect for migrants and those seeking refuge has been a permanent feature of the Islamic faith.’

## 27 What kind of obligations do Muslim States have?

All States have two types of obligations with respect to land rights. First, there are negative obligations where the State has to abstain from interfering in the enjoyment of rights, while at the same time recognizing and protecting them. Second, there are positive obligations that impose the duties to provide and fulfill, which require State intervention.

## 28 Why is the ‘convergence approach’ important for the debate between Islam and human rights?

The relationship between Islamic and International human rights conceptions has often been cast as dichotomous and incompatible. Given the classical period of the formulation of Islamic law, it is not surprising that there are differences with recent human rights formulations. There is some Islamic divergence in positions regarding international civil and political rights standards, but Islam has strong foundations in socio-economic rights. As such, it is not surprising that all the major human rights documents – UIDHR, Cairo and the Arab Charter – support extensive property rights.

Despite divergences, harmonization of universal and Islamic rights often takes places, where communities see rights i.e., pertaining to land and property, are found in their own faith and are not imposed by external others. This process of recognising convergence looks to positive engagement, authenticity and diverse methods of support commonly shared human rights – which form the bulk of universal human rights.

## 29 Can Islamic human rights be beneficial?

There is a vibrant debate in Muslim societies over a responsive Islamic human rights framework, through independent personal reasoning (ijtihad) and political activism. Islamic land rights principles are seen as offering a broader net of protection since these are not merely temporal rights but obligations owed to God. Likewise the Muslim welfare state, acting in the public interest and carrying out faith based principles, is mandated to work towards achieving equitable distribution of wealth and rights for all.

## 30 Can Islamic human rights substitute international human rights?

Islamic human rights conceptions are important as a way of understanding the scope and implementation of human rights treaties, but they do not substitute for them. While Islamic human rights with respect to land could potentially enrich human rights implementation, there is, as yet, no consensus over them. Moreover, Islamic human rights documents such as the UIDHR and Cairo Declaration neither bind Muslim States nor do they provide enforcement mechanisms.

## 31 What can be done to improve land rights in Muslim countries?

Muslim countries that have signed international human rights treaties should be held to account, just as other States, over their obligations, and those who have not signed them must be encouraged to do so. State obligations have been clarified as ranging from the duties to recognise and respect to those of facilitation and fulfillment. There are clearly basic principles such as non-discrimination, as well as equal access, which are part of minimum core obligations, some of which are immediate and evaluated on the basis of results rather than conduct.

## Module 3

### Powerpoint presentation



**1**

GLOBAL  
LAND  
TOOL  
NETWORK

**LAND, PROPERTY AND HOUSING RIGHTS  
IN THE MUSLIM WORLD (Module 3)**

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**How can these concepts be used?** **4**

- Universal rights are applicable to all people, including Muslims
- Need to find convergence regarding property rights
- There is no Islamic debate over land rights because Islam has a strong socio-economic rights ethos
- Arab Charter, Cairo Declaration, UIDHR bear striking resemblance to universal land rights
- Some have access to regional monitoring mechanisms, others rely on domestic or international
- Vibrant Muslim debate over the Islamic human rights scope and strategies will eventually work out



**Session learning outcomes** **2**

1. Appreciate the participation of Muslim countries within the International Human Rights Framework
2. Explore the differing conceptions of rights under universal human rights and Islam
3. Compare international and Islamic rights standards with respect to the current and migrants
4. Consider strategies for empowerment through a human rights approach



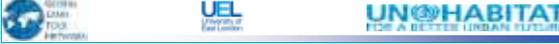
**What are the key concepts?** **5**

- Rights relating to land, property and housing are globally well established
- Muslim societies face similar kind of human rights and development issues, as do non-Muslim societies
- Rights of minorities, children and migrants are well protected under Islamic law
- Reservations (opt-out clauses) regarding treaties ratified by Muslim governments are not specifically regarding land, property and housing rights
- There is no alternate global Muslim human rights treaty mechanism



**Your opening thoughts!** **3**

- What are your experiences of land rights in the Muslim world?
- Do you think Islamic human rights are relevant in Muslim societies in dealing with land issues?
- How can Islamic rights facilitate land, property and housing rights?



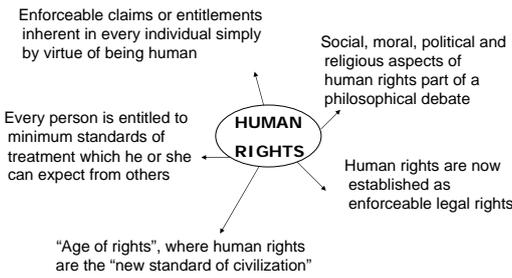
**Why are these concepts relevant?** **6**

- Classical Islamic rights and modern human rights differ in formats, effect
- Similarities between Islamic and International human rights conceptions with respect to land, housing and property rights
- Universal Islamic Declaration on Human Rights (UIDHR) and Cairo Declaration are influential, but not enforceable
- Diversity of opinion, but increasing receptivity to the human rights norms and standards



**What are Human Rights?**

7



**Where are human rights set out?**

11

Human rights principles can be found in several documents, as well as practice:

- A variety of constitutional and legal principles, international and regional human rights treaties, political declarations, customary practice and international standards
- Specific global treaties and declarations relating to social and economic rights, women and children and other particular human rights issues

These treaties often provide clear principles relating to land, property and housing rights as well as implementation mechanisms



**Why are Human Rights important?**

8

1. Human rights define basic standards, as well as create obligations for the State to fulfill
2. The State has a duty to ensure non-discrimination (including gender) and fairness in procedure, as well as positive actions to respect, protect, provide and facilitate land rights
3. These rights are inalienable – so they cannot be overridden or taken away arbitrarily. For example, there cannot be forcible eviction except through legal process



**Why interdependence of rights?**

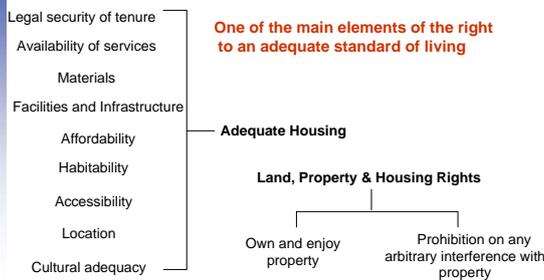
12

- Pick and choose the rights they support and reject others, undermining the holistic impact of combination of rights
- Rights are inalienable and interdependent
- Developing countries often complain that civil and political rights prioritized over socio-economic rights
- Interest in promoting and protecting economic, social and cultural rights has grown
- NGOs, academia, Governments and the judiciary paying increasing attention to the protection of these rights



**What are property, land and housing rights?**

9



**What are the main treaties?**

13

- 1966 Int. Covenant on Economic, Social & Cultural Rights (ICESCR)
- 1966 Int. Covenant on Civil and Political Rights (ICCPR)
- 1965 International Convention on the Elimination of Racial Discrimination (ICERD)
- 1979 Convention on the Elimination of Discrimination against Women (CEDAW)
- 1989 Convention on the Rights of the Child (CRC)
- 1951 Convention relating to Status of Refugees (CSR)
- 1990 International Convention on the Protection of the Rights of All Migrant Workers (CMW)



**Are human rights enforceable?**

10

- States have basic minimum thresholds and obligations of conduct
- Mere existence of human rights does not guarantee implementation, continuous efforts at the local, the national and international levels to strengthen rights
- Enforcement of human rights depends on awareness and political will
- For examples, ESCWA conducts training workshops on the preparation of national reports for Arab states
- Technical assistance to countries on gender concepts and CEDAW report-writing



**Do treaties deal with land rights?**

14

Each treaty deals with land and property rights according to its own focus and emphasis

**ICESCR**

- Calls for non discrimination and progressive realization of Covenant rights
- “The rights if everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions” (Article 11)

**ICCPR**

- Article 17: prohibits “arbitrary and unlawful interference” with one’s privacy, family, home or correspondence



### How are these treaties relevant?

15

- Have created monitoring committees to supervise their compliance by States
- Some like the ICCPR have an individual complaints system with respect to States who have agreed to it
- International supervision of land rights is based mostly on the reporting system
- The ESCR Committee has developed a new range of its own monitoring procedures and practices
- The participation of Muslim States, in the reporting system, has produced a rich record of their progress in securing international land rights



### Why is CEDAW key to land rights?

19

#### International bill of rights for women (CEDAW):

- Defines discrimination against women
- Establishes an agenda for national action to end discrimination
- Outlines the rights of women in reference to land issues
- "The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property [...]" (Article 16(h))
- Establishes that domestic laws and traditional, religious or cultural practice cannot justify violations of the Convention



### Have Muslim states signed treaties?

16

- A large number of Muslim countries have ratified the relevant international human rights treaties, although others have not done so
- Most have signed ICESCE and ICCPR
- Also participated in the political process towards augmenting promotion and protection of housing and land rights
- Subscribe to the United Nations Charter which refers to human rights and to general international standards relating to land and housing rights



### Are there reservations to CEDAW?

20

A number of Muslim countries have enlisted reservations on the basis of *shar'ia*

- One state justifies its reservation on Article 2 by arguing that the provision "[...] conflicts with *shar'ia* law". Similarly, another has a reservation on "[...] in order to ensure its implementation within the bounds of the provisions of the Islamic *shar'ia*"
- However, in aiming to set an example amongst Arab states, Morocco withdrew all reservations to CEDAW last December



### Do reservations affect obligation?

17

- Ratified international human rights treaties but also entered into reservations (exemptions)
- Targeting provisions of those treaties, usually in the name of religion
- Some commentators argue that the reservations reflect conflict between Islamic and universal positions, others say that the reservations reflect the political views of governments
- The State lodging a reservation against a particular provision of a treaty is not bound by that provision



### Is there a Muslim human rights treaty?

21

- No global Muslim human rights treaty mechanism
- The Universal Islamic Declaration on Human Rights and Cairo Declaration do not have an implementation or monitoring body
- The revised Arab Charter on Human Rights of the League ratified by number of States
- The land and housing rights in the Arab Charter bear a striking resemblance to international human rights treaties, including the principle of non-discrimination



### What are reservations on land?

18

- Reservations with regard to provisions in several treaties, not specifically relating to land, property or housing rights
- Little conflict with respect to land, housing and property rights
- Islam has a strong socio-economic rights ethos and promotes equitable distribution of resources



### Are universal rights for Muslims too?

22

Human rights generally considered to be universal, indivisible and interdependent and applicable to all societies, including Muslims

Muslim societies face similar kind of human rights and development issues, as do non-Muslim countries

Universalists ↔ Cultural relativists

who believe that human rights are applicable the same everywhere

who argue that human rights to an extent depend on the context and subscribers

Islamic critique of universal human rights that Islamic conceptions on human rights must apply to Muslims



**Do Muslim oppose human rights?**

23

- Differences in some areas between the articulation of classical Islamic conception of rights and modern human rights expectations
- Diversity of opinion and practice regarding universal human rights in Muslim countries
- An increasing receptivity to the human rights norms and standards
- A vibrant internal debate within Muslim societies over the role of modern human rights



**Do Islam and human rights conflict?**

27



Different emphasis and formulation compared to international treaties

Also offer a wide range of property rights

Land rights as declared by these documents are generally compatible with international treaties

Support the arguments for fuller Islamic property, housing and land rights conceptions



**Are regional frameworks relevant?**

24

- Muslims live in many different regions, some of them have effective human rights mechanisms
- Two conventions are supervised by courts
- The 1981 African Charter on Human and People's Rights has been ratified by 10 Muslim States and is supervised by a regional Court
- The importance of international system: other areas are without regional human rights standards and monitoring mechanisms, such as Asia



**Are there Islamic women's rights?**

28

- Have a range of rights to property under Islamic law and human rights
- Possess independent legal, economic and spiritual identity
- Complexities in terms of both fixed Islamic inheritance rules and the prevalence of patriarchal or gender deprecating practices in the name of Islam
- Opportunities to work out a far more gender egalitarian Islamic approach to women's property rights through independent reasoning (*ijtihad*)



**Do political resolutions matter?**

25

- Muslim countries have generally participated in the promotion of land, property and housing rights through global initiatives
- These include the Habitat Agenda and the Millennium Development Goals from the 2000 Millennium Declaration
- Taken together, these provide the framework and general consensus forming part of a 'soft law' creating various levels recognition and obligation on the part of States



**Does Islam supports child rights?**

29

- **CRC:** Widely ratified by Muslim countries; support guarantees and rights to child
- **Child rights:** Islamic conceptions contain several strengths, such as the rights of orphans
- **Reforms:** Improve the position of 'adopted' children and orphaned grandchildren, on the basis of the *Qur'anic* verse of bequest



**Where are Islamic rights found?**

26

- Islamic human rights are derived from the main sources of Islamic law and practice, particularly the *Qur'an* and the *Sunna*
- These principles are reiterated in the 1981 Universal Islamic Declaration of Human Rights (UIDHR) adopted by the Islamic Council of Europe and the OIC 1990 Cairo Islamic Declaration on Human Rights in Islam



**How does Islam deal with children?**

30

- *Qur'an* recognises child rights in several dimensions. Emphasis on the equal preference of both sexes, against female infanticide
- Confers the basic rights of name, identity and paternity
- Provides a broad framework for the physical, material, emotional and spiritual rights of the child
- Islamic theory relies on both mental maturity and physical development in determining the various stages of childhood



## Do Islamic rights cover minorities?

31

- Both the UIDHR as well as the Cairo Declaration emphasize minority rights
- **In theory** non-Muslim minorities or the 'protected' or 'covenanted' people (*dhimmi*s) who live in an Islamic State 'are guaranteed irrevocable protection of their life, property and honor' in exactly the same manner as Muslims
- **In practice** there are sometimes tensions



## Why is 'convergence' important?

34

- Relationship between Islamic and International human rights often cast as dichotomous and incompatible
- Differences with recent human rights formulations
- Islam has strong foundations in socio-economic rights
- Convergence looks to positive engagement, authenticity and diverse methods of support commonly shared human rights



## Are rights of migrants recognized?

32

- The 1951 Convention on the Status of Refugees, with over 150 State ratifications, including Muslims
- But controversial for Muslim States due to its exclusion of Palestinian refugees
- Organization of Islamic Conference (OIC) emphasizes that 'Islam laid the foundations for the institution of asylum in its public law through the holy Koran and the Tradition (*sunna*)' and that 'respect for migrants and those seeking refuge has been a permanent feature of the Islamic faith'



## Can Islamic rights be beneficial?

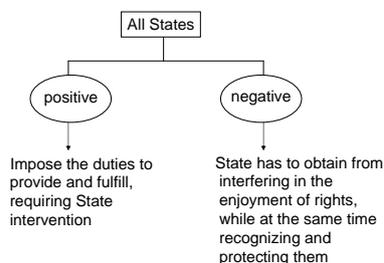
35

- Vibrant debate in Muslim societies over a responsive Islamic human rights framework
- Fusion of independent personal reasoning (*ijtihad*) and political activism



## What kind of obligations?

33



## Can Islamic rights be beneficial?

36

- Islamic land rights principles are seen as offering a broader net of protection since these are not merely temporal rights but obligations owed to God
- Muslim welfare state, acting in the public interest, is mandated to work towards achieving equitable distribution of wealth and rights for all



**Can we substitute human rights?****37****Not a substitute for human rights:**

- A way of understanding the scope and implementation of human rights treaties
- UIDHR and Cairo Declaration neither bind Muslim States nor do they provide enforcement mechanisms
- While Islamic land rights potentially enrich human rights implementation, there is no firm consensus over them

**How can land rights be improved?****38**

- Basic principles
- Encourage to sign human rights treaties
- State obligations
- Hold to account over their obligations

**Thank you for your attention!****39**

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## Reference readings

Weeramantry explains in the following extract how Islamic law relating to land is inspired by the concepts of the sanctity of land, divine ownership and righteousness of use. Therefore, land is a sacred trust, rather than just property or a commodity.

**R3.1** Weeramantry C. G. (1988) *Islamic Jurisprudence – An International Perspective*, London: Macmillan

Since all property belongs to God, its holders are only trustees. They must not use it selfishly without regard to the social purposes which it should serve. Thus, while legal ownership was permitted and protected by the law, it was subject to an overall social orientation. A landowner who neglected to cultivate his land for an inordinate period of time might lose his right to retain his property and his neighbours might acquire the right to purchase and cultivate it.

Such concerns become important particularly in the modern age, with its emphasis on environmental concerns. The planet was inherited not by any one generation but by mankind and all its posterity from generation to generation. ‘Do you not see that God has subjected to your use all things in the heavens and on earth and has made his bounties flow to you in exceeding measure, both seen and unseen (Qur’an, xxxi:20.) Each generation is only the trustee. No one generation has the right to pollute the planet or to consume all its natural resources in a manner that leaves for posterity only a polluted planet or one seriously denuded of its resources.

In the following piece, Moosa explores how reconciliation between Islamic and Universal human rights conceptions may be achieved

**R3.2** Moosa, E (2001-2) The dilemma of Islamic rights schemes, in 15:1 *Journal of Law and Religion* 185-215.

One of the weaknesses in contemporary Muslim human rights literature is the attempt to conflate the two very different legal, ethical and moral traditions so that they look instantly compatible. I concede that there is considerable overlap in some of the concerns

and objectives that both rights traditions address. However, these similarities do not in themselves justify the grafting of presumptions from one system to the other and in so doing packaging Muslim notions of rights as compatible to modern human rights practices. To the extent that these perspectives can be shared, rejected, appropriated or modified depends on the cross-cultural dialogues that are made possible by concrete contexts.

Without such a dialogue and the careful calibration of the two systems there are obvious risks involved. One danger is that when put to the test, Islamic rights schemes are found lacking in protecting people’s rights after having announced that Islam had endorsed “human rights.” In several cases involving freedom of speech in the last few decades of the twentieth century, Muslim human rights proclamations and declarations have by and large capitulated in favor of authoritarian and anti-rights tendencies. The persecution of reformist politicians, writers in Iran, as well as the violation of women’s rights in Iran and Afghanistan, are well known examples. Often these violations are justified in terms of particularistic Islamic human rights claims. These crises demonstrate the weakness and problems inherent in Muslim adaptations and formulations of human rights schemes. Rhetorically, Islamic and secular human rights formulations may sound the same, but they have very different theoretical assumptions and practical applications.

### The modern concept of human rights

The notion of human rights as we know it today arises in the context of the evolution of the nation-state as a political system, even though some claim a more ancient pedigree than for it to only date back to the Magna Carta and the French Revolution. The legal culture generated by the nation-state increasingly imposed its own logic of social behaviour and social conditions in societies receptive to it. A crucial feature of this model of statecraft is the relationship between the individual and the state, which brought about an awareness of the individual’s encounter with a powerful and dominant entity, unknown in pre-modern times. The state is a permanent legal entity, which exercises its claim over a territory and community through a legal order and organized government, and also demonstrates a measure of political identity. Those rights, now known as “first generation” human rights were especially designed to protect the individual from the overwhelming powers of the modern bureaucratic state. Since then human rights, have already advanced to second and third generation rights that cover socioeconomic and political rights as well as environmental rights.

The most critical development in the nation-state polity model was the conferral of citizenship on the individual. In theory this bestowal entitled the bearer of citizenship to claim certain rights as well as to fulfil certain duties. The individual was no longer subject to the discretion of a ruler or a system of governance, but instead had claims against such authority in the form of rights, some more fundamental than others that precede one's social status, ethnic or religious affiliation. Human rights in this context are thus inviolable rights that one has "simply because one is a human being."

They also have a secular character, having been derived from the jurisprudence of natural rights when natural law separated itself from religion. Here the word "right" distinguishes between two concepts that have political and moral significance: being right and having a right. In the first instance "right" refers to moral righteousness and in the second it may refer to entitlement. Human rights are rights of entitlement and the failure to discharge a duty or fail to respect rights is an affront to the person. In the secular human rights scheme, rights revolve around an ethical and moral system where one's personhood or the humanity of a person is of consequence. At least in theory, limitations of religion, politics or economics can not impede the protection of human rights. In practice however, it is a different matter in that we know that a range of political, economic and cultural factors impinge on the rights discourse.

Notion of rights in Muslim jurisprudence in order to gain a better overview of the evolution of Muslim thought on the subject of "rights" I will examine the views of mainly early jurists and then briefly contrast these with those of more contemporary writers. In Arabic a "right" or "claim" is called haqq (pl. *huqāq*), but also has a wider meaning. While the original Arabic root of the term "haqq" is somewhat obscured it can be recovered from its corresponding Hebrew root. It means among other things "to engrave" onto some object, "to inscribe or write," "to prescribe and decree." And, it also means that which is "due to God or man." *Haqq* means "that which is established and cannot be denied," and therefore it has more in common with the terms "reality" and "truth." For this reason the opposite of haqq is "falsehood" (*b-til*). The term *haqq* is considered polysemous or multivalent and thus could mean right/claim/duty/truth depending on context and the use of the word in a specific context.

Muslim jurists or jurist-theologians have provided a general meaning for *haqq* in their legal, theological and political treatises. The Egyptian jurist, Ibn Nujaym (d. 970/1563),<sup>15</sup> in discussing property rights made a very clear case that human beings are bearers of rights, without stipulating a reciprocal duty. He argued that a "right" is the "competence" or "capacity" (*ikhtis-s*) conferred upon an individual or a collective entity. Thus the individual or entity becomes the subject of a right.<sup>16</sup> From very early on, dating back to the medieval period, Muslim scholars delineated typologies of rights or claims. They differentiated between three primary kinds of rights: the "rights of God" (*huqāq Allah*), the "rights of persons" (*huqāq al-'ib-d*) and "dual rights" shared by God and persons.

"Rights of God" are those rights and duties that have a revealed imperative and a religious rationale. They can be both mandatory obligations of a devotional kind such as ritual obligations, or they could involve the performance of actions that benefits the entire community. Observing the five pillars of Islam for instance, such as belief in one God, praying five times daily, paying charity, observing the annual fasting, and performing the pilgrimage would be considered to be fulfilling the rights of God. The provision of services that result in the protection of the community from harm and the promotion of good in the broadest sense can also be included in the category of "rights of God."

"Rights of persons" are overtly world affirming—secular and civil—in their imperative and rationales. They are attached to individual and social interests. Such rights can be general, like the right to health, to have children, to safety or, they could be specific, such as protecting the right of a property-owner or the right of a purchaser and seller in commercial transactions. "Dual rights" are a hybrid of both religious and secular imperatives and rationales. The mandatory waiting-period of three menstrual semesters to check for pregnancy immediately after a divorce or death of a husband, for example, is viewed as an instance where dual rights apply. The logic is that God demands that lines of kinship are maintained by means of paternity within wedlock and hence it is imperative that a pregnancy test is applied by requiring the divorcee or widow to wait a mandatory period before re-marrying. In this case, the "right of persons" are the right of parents and offspring to know that paternity had been established with certainty in order to avoid the social stigma of illegitimacy.

The significance of this rights scheme in traditional Muslim jurisprudence is that civil and devotional obligations are accorded the same moral status. Muslim law deems certain collective civil rights and specific individual religious rights as inviolable and disallows their forfeiture, especially when they involve the right or claim of another person. There are however, some types of rights that can be transferred while others can be forfeited by the consent of the owner of such rights. The relationship between rights and duties is an interpersonal and correlative one. In the enforcement of a right jurists understand that one party has a claim to have a “right” (*haqq*) and another “obligation” (*wajib*) to honor a right: every right thus has a reciprocal obligation.

The *sharia* is the source of rights and obligations in Islam. The *sharia* also defines practices of rights as derived from the teachings of the Qur’an, the prophetic tradition (*sunna*), jurists’ consensus and reason. Clearly, rights are framed within a religious- moral framework where the omission of a duty/right is subject to religious sanction and its commission results in the acquisition of virtue. The crucial point in the Islamic rights scheme is that God is the one who confers rights on persons, via revealed authority although human authority mediates these rights. The rationales underpinning Islamic rights may be derived from reason, a divine order and public interests. The latter category are essentially the policy objectives of the revealed law (*maqsid al-sharia*) that jurists take into consideration when developing law. These goals that the *sharia* advances are the protection of religion, life, progeny, intellect and wealth. In modern times this public policy aspect of Muslim jurisprudence has gained greater currency and acceptance. So the modern jurist, Mustafa al-Zarqa’ (d. 1999) argues that in addition to a right as being conferred by the law (*sharia*), political authority (*sulta*) and the recognition of a moral responsibility (*taklif*) can also become the grounds for conferring rights.

There is thus a greater openness to rights being created by means of a political process, rather than exclusively by scriptural or juristic authority. While Islamic law does have a ritual function one cannot ignore it is equally cognizant of “worldly”—secular and civil concerns—and social needs based on pragmatism. In order to establish a credible discourse within Muslim jurisprudence, closer attention should be given to methodological issues as well as the underlying juridical theology and legal philosophy. It may be convenient to employ an eclectic method in order to validate a particular point of view, but it does not provide a rigorous theoretical framework for a debate such as human rights.

One of the problems that the human rights debate exposes is the fact that it is extremely difficult to talk of Islamic rights as if it is a monolithic and undifferentiated category. For instance, early eighth century humanist interpretations by an influential theological group called the Mu‘tazilis, privileged reason and freedom to produce universalist discourses in Islam. On the opposite side was the Ash‘ari theological tradition whose hallmark was to limit human freedom and to defend theocentrism and advocate divine voluntarism in both theology and law. More extreme than the Ash‘aris were the Hanbalis for whom the authority of the literal meaning of the Scripture was supreme. Each one of these theological traditions produced different assumptions about what a “right” is and how it is implemented in law since they are based on different legal philosophies.

Another error frequently committed by both “insiders” and “outsiders” to the study of Islamic law, is the tendency to accept the medieval constructions and interpretations of law as final and immutable normative statements. These normative statements are then held out as ready-made solutions for application in the contemporary world without any interpretative mediation. The claim that Islamic law is immutable denies the historical evolution of the legal system over centuries. This easily translates into the popular mindset that Islamic rights schemes are absolutist, unchangeable and based on ineffable religious norms. Such a view is entirely inconsistent with the history and practice of Muslim jurisprudence. In contemporary times there is no shortage of legal sloganeering on the part of advocates of Islamic revivalism who circulate such simplistic and reductionist notions as gospel. This trend has become so pervasive that even traditional Muslim jurists, who once treated the legal tradition with great subtlety and complexity, have succumbed to such reductionist views.

# MODULE 4

## ISLAMIC LAND TENURES AND REFORM

# MODULE 4:

## Islamic land tenures and reform

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### Overview

This module looks at the land tenure concepts, categories and arrangements within the Islamic world that are multifaceted, generally distinctive and certainly varied. There is a complex interplay between Islamic land approaches, state interventions, customary practices and external pressures. This module addresses the key Islamic land tenure concepts found in many Muslim countries, which are often dismissed offhand as rigid or outdated. Yet, there are important in engaging with land discourses in Muslim countries

Land tenure in Muslim countries is to be considered in the context of their socio-political and historical background. These could include pre-Islamic, early Islamic, Ottoman, colonial and modern reforms. Islamic principles provide distinctive land tenure categories and relationships. Over 600 years of Ottoman land administration developed highly sophisticated tenure regimes. The Ottoman Code recognised private (*mulk*), state (*miri*), public (*metruke*), empty (*mewat*) and endowment (*waqf*) lands. “*Milk*” refers to property of any kind, anything that may be owned. One has “*mulk*” (ownership) over “*milk*”. *Milk/mulk* more than property; implies home, identity and permanent temporal abode. The concept of enlivening dead (*mewat*) land once important is now restrictively applied. The doctrine is important conceptually (creating rights for users) as well as in practical models.

Islamic land tenure’ implies the religious foundations of models. The concept of ‘divine ownership’ of all lands makes a distinctive contribution to Islamic land tenure. Thus, private ownership is not unbridled, but is to be exercised through respect and responsibility towards others rights.

The private right to land is generally subject to productive use and cannot undermine other users. Underpinning Islamic tenure principles such as sustainability and non-exploitation are important.

One of the features of Islamic land is pre-emption (*shuf’a*), preferential purchase right of neighbour or co-owner. Plain land (in its natural state) is under state ownership, though there is diversity of models such as public use land. With inheritance creating fragmentation, complex co-ownership patterns and group rights, such as the customary shared (*musha*) on agricultural land, mostly by women emerged throughout Muslim history. Traditional categories often persist, despite variations in land reform patterns. Islamic tenure models are generally gender responsive and rights based. Women would be beneficiaries under most, if not all, types of Islamic tenure, but the practice is varied.

Islamic principles also directly or indirectly influence tenure models. Islamic interactions with customary and modern practices create ‘web of tenure’ regimes. These combinations lead to formally recognized rights to land and processes of transfer or can create ‘extra-legal’ forms of land ‘ownership’ and markets. In informal or squatter settlements, tenure relations arise from ‘beyond’ and ‘below’ formal legal systems, sometimes rooted in religious norms and ethics. This module will review how appreciation of the land tenure dynamics in Muslim societies and the range of land tenure forms enhancing access to land and land rights.

## Learning outcomes

At the end of this module participants should be able to:

- appreciate the basic forms of land tenure derived from the Islamic legal framework.
- examine the phenomenon of the postcolonial tenure web.
- evaluate fragmentation of land ownership in Muslim countries.
- consider strategies for securing rights through Islamic land tenure approaches.

## Reading materials

Forni N (2005) *Land Tenure Policies in the Middle East* (Rome: FAO)

Bukhari SM(1982) 'Squatting and the Use of Islamic Law' 6 *Habitat International* 555-563

Razzaz O (1998) 'Land Disputes in the Absence of Ownership Rights: Insights from Jordan' in Fernandez E and Varley A *Illegal Cities* (London and New York, Zed Books)

### Additional reading

'Abd Al-Kader A (1959) 'Land, Property and Land Tenure in Islam' 5 *Islamic Quarterly* 4-11

Jorgens D (2000) 'A Comparative examination of the provisions of the Ottoman Land Code and Khedive Said's law of 1858' in R. Owen (ed) *New Perspectives on Property and Land in the Middle East* (Cambridge, Mass: Harvard University Press)

Sait S and Lim H (2006) pp 54-79

Ziadeh FJ (1985) 'Land Law and Economic Development in Arab Countries' 33 *The American Journal of Comparative Law* 93.

## Facilitator's notes

This module is designed to introduce participants to key land tenure concepts and the idea of the 'tenure web', which is prevalent in many Muslim contexts. Here the socio-cultural histories are important, but avoid getting caught up in detail. There are some interesting illustrative case studies introduced in the materials, one of which is highlighted in the suggested discussion. Within the reading, the aspect of the Islamic approach to land which places emphasis on its productive use is also raised, although already introduced in Module 2, and the potential that such an approach has with respect to the phenomenon of 'squatting'. This could be a further area where facilitators may lead the discussion. Participants should be encouraged to draw any parallels with their own experiences that could be relevant in developing Islamic land tools.

Titling, or joint titling, has been chosen to demonstrate how tenure choices are made in pluralistic Muslim countries. The example of Aceh helps identify the land framework, the legal pluralism, as well as the socio-economic context. The emphasis is on how Islam correlates to customary or modern tenures. The point likely to emerge will be why support joint tenure (except for marital property) when Islam promotes individual title. In post-conflict, post-tsunami, Banda Aceh, for instance, sustained discussions with, and training of, Shari'a judges has achieved considerable success in ensuring women's inheritance rights and in establishing legitimacy within the Islamic framework of co-ownership, by brothers and sisters, husbands and wives, of legal titles to land.

## Group work

### Joint titling in Aceh, Indonesia

Under Indonesian law both women and men have equal rights to acquire and own land. According to the 1960 Basic Agrarian Law, "Every Indonesian citizen, man or woman has equal opportunity to obtain a certain right on land to acquire its benefits and yields thereof for himself/herself as well as his/her family." This law also calls for registration of all land, but only about 25% of land parcels in Indonesia have been registered. Under Indonesian law, all marital

land (property jointly acquired in the course of a marriage) should be registered in the names of husbands and wives. Women do acquire and register property in their own name but a common property transmission route is by inheritance where the land registration system facilitating registration in the name of the spouse who inherited the property.

Decree No. 114-II.2005 *On the Land Registration Manual in Post Tsunami Areas*, highlights that where land is joint matrimonial property, the land certificate 'will be made jointly in both the husband's and the wife's name'. In practice, between 20-30% of lands registered women as landowners, 65% or more in the names of men, and 4-5% in multiple names (this last category includes both married couples registering land jointly and siblings registering inherited land jointly). The most common reasons for limited joint titling are lack of awareness of possibility of joint names, customary practice to list husband as head of family and that the title is not definitive evidence on ownership. NGOs play an important role in spreading awareness and in projects such as community mapping.

Indonesia is governed by *adat* (Dutch colonial law which recognised customary) and Islamic law. In Aceh, the *qanun* (law) in Aceh is based on the principles of Empowerment (*Pemberdayaan*), *Perlindungan*/Protection, and Gender Equality and Justice (*Kesetaraan dan Keadilan*). It is premised on principles of Islam and respect for universal human rights which are among the seven core values (*nilai-nilai*). Women have right to individual land ownership, and according to most commentators, there is no bar to joint ownership. The Islamic theory and practice of joint ownership arises out of several land tenure arrangements. First, land fragmentation owing to fixed inheritance rules often leads to co-ownership and co-tenancy, though shares are fixed and in individual names. Second, the pre-emption (*shufa*) or priority right of co-owner to purchase land indicates a developed co-ownership doctrine. Third, collective land rights such as *Musha* (shared lands) are compatible with Islamic law.

### Further reading

Fitzpatrick D (2008) *Women's Rights to Land and Housing in Tsunami-Affected Aceh, Indonesia* (Asia Research Institute Aceh)

Lastarria-Cornhiel, S et al (2003) *Joint Titling in Nicaragua, Indonesia, and Honduras: Rapid Appraisal Synthesis* (Land Tenure Center: University of Wisconsin-Madison)

### Possible questions for group work

1. Less than 5% of lands in Aceh are jointly registered. What are the factors inhibiting joint titling?
2. Muslim women are entitled to property in their own name as well as jointly with others. Why is joint titling significant for Muslim women?
3. Some inherited land is registered in the name of heirs who are children. What are the advantages of properties registered under children, particularly under Islamic law?
4. Mewat is another Islamic tenure that supports the notion of property rights for users. How can other innovative Islamic tenures enhance access to land?

## Background Q & A:

### Islamic land tenures

“It may be something of a surprise that in Madinah Munawara, the fourth largest city of the oil-rich Saudi Kingdom, squatting is (was) almost as common as in most other cities of the less developed countries ... [and] the process is viewed by the squatters as a continuation of their traditional and legal rights.”<sup>1</sup>

### Introduction

The Global Land Tool Network (GLTN) is a multi-sector and multi-stakeholder partnership seeking to translate aspirations, principles and policies into inclusive, pro-poor, affordable, gendered high quality and useful land tools, which can be replicated in a range of contexts. GLTN recognizes the demand for targeted tools, including culturally or religiously formatted tools, since there are many positions and approaches to conceptualising and delivering secure tenure and access to land. Most communities have deeply ingrained cultural traditions, many religions have firm rules on land and inheritance, and every government faces the challenge of land differently with its own array of laws and degrees of political will.

In most Muslim countries Islamic law, principles and practices make an important contribution to shaping access to land. GLTN has as one of its objectives, therefore, the identification and development of Islamic land tools through a cross-cultural, interdisciplinary and global process, owned by Muslims, but including civil society and development partners. Yet, Islamic approaches to land should not be seen as an internal matter, giving preference to religion over universal or secular approaches to land, but as part of GLTN's inclusive, objective, systematic and transparent efforts.

## 1 Is it possible to own land in Islamic law?

There are scores of references to land in the *Qur'an* and to respect for private property rights, but constructed as a sacred trust for human beings based on the doctrine of unity (*tawhid*), stewardship (*khalifa*) and trust (*amana*). The *Qur'an* makes it clear that the earth belongs to God and that God ‘provides to whom He chooses’ (7:28). There is some theoretical or philosophical debate as to whether land itself can be ‘owned’, but little dispute that there are Islamic rights to use and possess land. The right to land is linked to land use and unused land cannot be owned. Property and land vest in God, but may be enjoyed by men and women through responsibility and trust.

## 2 What is meant by Islamic land tenures?

Islamic principles contribute to a distinctive tradition of land tenure categories and use of land. Contemporary land tenure regimes in the Muslim world evolved from, or are influenced by, a complex, dynamic and overlapping web of these Islamic principles, state and international legal frameworks, customary norms and informal legal rules. Traditional categories have remained important in many countries, despite variations in the histories of individual Muslim countries, doctrine and land tenure practice. Modern land regulation laws in most parts of the *Sunni* Muslim world are derived, at least in part, from land classifications in classical Islamic law and Ottoman land law. The term ‘Islamic land tenure’ is recognition that these systems ultimately, if indirectly, have religious foundations.

## 3 Which key Islamic principles shape rights in land in the Muslim world?

Property rights should not be used exploitatively, wastefully, to deprive others of their rights or lead to the hoarding of land. Islamic principles emphasise that land should be put to continuous productive use. Similar to the well-known Islamic prohibition on usury (*riba*), which stipulates that money by itself should not create money; unproductive land should not create wealth.

<sup>1</sup> S. M. Bukhari, (1982) ‘Squatting and the Use of Islamic Law’, 6 (5/6) *Habitat International* 555-563, at page 555

These principles are part of a broader framework that assures respect for property rights of all persons regardless of religious faith. The *Qur'an* also has rules ranging from the guardianship of property of orphans, and warnings against its misuse, to the provision of clearly defined inheritance rights.

#### 4 Why does Ottoman land law remain important in the modern context?

Despite its strong religious and theoretical base of property rights, the *Qur'an* did not elaborate on land tenure -its regulation, administration or the mechanics for its protection. Modern land tenure regimes in the Muslim world owe much to the 600 years of extensive land administration involving detailed record keeping and statistics and highly developed land tenure regimes in the Ottoman Empire that stretched across the Middle East, North Africa and Eastern Europe.

This system was based on Islamic and local principles, with each area or province having a distinctive system. Over time there was some unification of principles and legal categories throughout much of the area under Ottoman rule supported by the Ottoman Code of 1858. The guidelines, categories and records developed in the Ottoman period inform land classifications which exist today.

#### 5 Which land tenures derived from Islamic theory?

Three broad types of land tenure and land emerged from Islamic legal texts and were recognised in the Ottoman Code of 1858: land in full ownership (*mulk*); state-owned land (*miri*); and *waqf* or endowed land. These categories are closely linked to the classical Islamic division between Muslim owned land on which a tithe is paid (*'ushr*) and land under state control upon which a tax is paid (*kharaj*) by those in possession.



photo © Asa Jonnson/UN-HABITAT

There are other classifications such as unused state land liable to be confiscated (*mehlul*) and unused or dead land (*mewat*) that can be converted into private land through reclamation, as well as common land (*metruke*). In practice, communal land (*musha*) and other forms of collective ownership based on custom are also recognised. Islamic conceptions of property offer a range of land rights and a choice amongst land tenure arrangements, which are still of importance in modern Muslim societies.

## 6 What is land in full ownership (*mulk*)?

*Milk* refers to property of any kind, anything that may be owned. One has “mulk” (ownership) over “milk”. Historically *mulk* or *milk* land was that on which *‘ushr*, a religious land tithe, was collected. *Mulk* land was found principally in or close to towns, consisting of land with buildings on it, commercial premises or fruit and vegetable gardens. The tithe was part of the more general payment of *zakat*, levied on all property and required of all Muslims to purify both themselves and their wealth. *Mulk* or *milk* land is sometimes translated as full private ownership or in Western terminology as freehold. In many societies, Muslims take their name from the land they come from. The term *milk* or *mulk* in relation to land signifies more than an individual’s property; it is their permanent temporal abode.

## 7 Are there any limits on rights in *mulk* land? Is *mulk* land identical to freehold tenure?

Individual property rights are protected in the Islamic framework, subject to an overall social responsibility, and the extensive rights in *mulk/milk* land can be acquired through sale (*bay*), gift (*hiba*) or inheritance through the Islamic law of succession. The private property rights relating to *milk* land are similar to freehold rights in the Western legal system. Unlike freehold, one barrier upon the free disposal of *milk* land is pre-emption (*shuf’a*), which is the means by which a co-inheritor or neighbour may use a privileged option to purchase land when it is for sale. This process can keep strangers to communities on the outside, limiting certain kinds of economic development.

## 8 What is state land (*miri*)?

It is widely held amongst Islamic scholars that plain land (in its natural state) is under state ownership. In the case of state land – *miri* or *emir* land – the state owns the land in trust for the community of Muslims (*umma*), as a representative of God, creating a range of access and usufruct rights for individuals through cultivation or payment of taxes. State land was the most important form of landholding in Islamic history, but it is also an umbrella term, covering a complex set of different kinds of land holding and conditions of tenure. State land can also be converted by the state into property for general public use (*metruke*) such as roads or into property for use by a particular community such as marketplaces and cemeteries.

## 9 Are rights in state land similar to full ownership?

In the past the conditions placed on state grants of possession to individuals varied and were far from uniform. It is important to distinguish between different land categories, but from the perspective of the individual granted usufruct rights on state land, the practical differences between those rights and those with respect to *mulk* land in full ownership are now fairly narrow. One key difference is that traditionally state land (*miri*) lies outside the compulsory succession rules of Islamic law (*Shari’a*).

## 10 Can state land be inherited?

State land can be inherited but is devolved, in the main, through customary or statutory principles, with rights often subject to lifetime transfers from father to eldest son. Rural women often find themselves under great pressure as a consequence, denied the fixed shares to which they are entitled under the Islamic compulsory succession rules governing the inheritance of land held in full ownership (*mulk*).

## 11 Is state land equivalent to crown land or land in the public domain?

The Islamic concept of state land (*miri*) is much broader than western conceptions of state or crown land. However, colonial administrators did try to construe land held as *miri* as land in the public domain, with the effect of further complicating Islamic land tenures. The central role given to the Muslim state, in which ownership of land is vested on behalf of God, lends itself to the deployment of Islamic principles in order to legitimate land reform programmes.

## 12 What is meant by the term 'dead land' (*mewat*)?

Empty or dead land (*mewat*) is unused or uncultivated land that can be converted into private land by reclamation. Inspired by Islamic principles, the concept of dead (*mewat*) land was important in the Ottoman world, where the state was concerned to ensure that land produced a regular supply of food. It was undeveloped land at a distance from towns or villages that, in accordance with Islamic legal theory,

could be 'enlivened' through cultivation or irrigation. The occupier who reported effective use of such land could be granted rightful possession by the state.

Ottoman land strategies ranged from realizing Islamic first principles to openness towards customary practices. This is well evidenced by Ottoman approaches to empty or *mewat* land, which exhibited both creativity and flexibility. In contrast to the modern situation in many Muslim countries, the Ottoman state was not concerned with any 'shortage of land'; rather, it was keen to encourage the cultivation and use of land to ensure the continuance of subsistence farming and a regular supply of provisions to urban dwellers. In the Ottoman world *mewat* land, that is undeveloped land at a distance from any town or village, in accordance with Islamic legal theory could be 'enlivened' through cultivation or other acts such as irrigation. The occupier who reported effective use of such land and received the permission of the state would be granted rightful possession.



The Dome of the Rock © Republicdomain.com

### 'Squatting' in Al-Madinah, Saudi Arabia

The concept of empty (*mewat*) land was important in legitimizing large scale modern 'squatting' in Al-Madinah in Saudi Arabia. Occupiers of unused and unclaimed land built fences and/or shelters on it. Occupiers viewed this as part of their legal and social tradition and the Islamic legal concept of *mewat* land helped them to 'think through' their actions. This 'squatting' led, after appropriate investigations by local courts into whether the land was in fact unused, to registration of the land in the names of the occupiers. Locally the word 'squatting' was not used to describe these occupations.\*

### 13 Does dead land (*mewat*) have any modern significance?

There were disputes between Muslim jurists of different periods as to the means by which dead land is brought to life and as to the requirement of the permission of the relevant Imam. However, there is no dispute as to the overall view that since land was given to the whole Muslim community by God, that if a Muslim can actually cultivate empty land he would normally be allowed to continue to use it productively. The dead land (*mewat*) concept is important in a material sense and in the way that Muslims conceive their relationship with land.

### 14 What is endowed (*waqf*) land?

Under the Islamic endowment (*waqf*, plural *awqaf*), an owner permanently settles property, usually although not exclusively land, its usufruct or income, to the use of beneficiaries for specific purposes. The beneficiaries may be exclusively family members of the founder or creator (*waqif*), or devoted to general welfare. There is no specific reference to the *waqf* in the *Qu'ran*. Jurists have developed it over centuries. The *waqf* is connected firmly with the charitable obligation for Muslims, which is one of the five 'pillars' of the faith and through this institution a redistributive element is incorporated within Islamic property rights. It was intended by classical Islamic jurisprudence to be a 'third sector' of philanthropy or civil society, which existed independently of both the state and the profit-making private sector.

### 15 How important was the Islamic endowment (*waqf*) as a form of land tenure?

The Islamic endowment is a highly significant legal mechanism and a key Islamic institution. Over time it has involved the contributions of hundreds of rulers, thousands of families and millions of ordinary citizens. These endowments amounted to one third of the Islamic Ottoman Empire. Wherever there was a Muslim community there would be a *waqf*. Several factors, both economic and political, led to the decline of the *waqf*, including attacks on the institution by the colonial powers that saw the endowed property as a vast resource of 'non-private' land.

### 16 Is the Islamic endowment (*waqf*) still important in the modern Muslim world?

Several modern states, such as Egypt, in the name of land reform, abolished or severely limited the *waqf*, particularly the family endowment. Elsewhere, as in India, the *waqf* was nationalized, with the land brought under the control of specific ministries or boards. However, there is growing contemporary interest in the revival and reinvigoration of existing Islamic endowments and new endowments adapted to modern management and regulatory frameworks. It remains an important form of land tenure.

### 17 Can the state intervene to control rents?

Islam recognizes contractual rights and commands followers to fulfil their contractual promises and obligations. At the Sixteenth Session of Islamic Jurisprudence there was broad agreement that the state could intervene into the lease relationship in order to prevent exploitation and set a rent that would be affordable for the tenant, while also permitting the landlord a reasonable profit.

## 18 Is sharecropping permitted within the Islamic framework?

The legal prohibition against hoarding has led to considerable debate amongst Islamic scholars concerning the appropriate use of land, not only with respect to the question of rent, but also with respect to the related issue of sharecropping. A distinction between sharecropping where the owner provides only the land and the more common form of sharecropping in much of the Muslim world where the owner provides both land and seed for the crop (*muzara'a*). The former may not be permitted, unless perhaps the owner is engaged with non-Muslims, but the latter appears to be widely regarded as acceptable.

## 19 Does the Islamic framework facilitate co-ownership and collective forms of tenure?

A range of group rights also exist, including community rights and cooperatives in Muslim countries. One effect of the Islamic inheritance rules, with fixed specified shares for particular individuals within the deceased's extended family, is the tendency towards many patterns of often quite complex co-ownership and the break up of land monopolies or large estates. In addition, there is considerable interplay between Islamic conceptions and customary practices mostly relating to rural agricultural land or pasture land. An example is *musha* (Arabic for shared) or communal landholding, involving the periodic reallocation of shares giving access to the land amongst members of the community or village. Despite colonial disapproval and attempts at abolition, this form of communal tenure endured for hundreds of years, although in the modern period it became less important as a means for individuals to identify with their community. However, collective or communal elements form part of the picture concerning land tenures in some contemporary contexts.

## 20 How does the range of tenures affect access to land?

Landholders may access land through complex combinations of interrelated tenure relationships. The convergence of Islamic principles, Ottoman law, colonial interventions, custom and unofficial norms mean that there are few clean patterns or categories. This contributes also to the fragmented ownership of land in many Muslim countries, often with one individual holding small parcels of land in multiple tenures. In informal or squatter settlements these tenure relations may be formed in part from norms that exist 'beyond' and 'below' the formal legal system, sometimes rooted in religious norms and ethics.

## 21 Do Islamic tenures facilitate land financing?

Islamic finance, and conventional finance, has responded innovatively to the challenges of affordable loans in several Muslim countries. The legitimacy and durability of Islamic tenures makes them more amenable to Islamic financial responses (as discussed in Briefing Paper No. 8).

## 22 How do Islamic tenures impact women?

There are a range of gender-neutral tenure arrangements that could be particularly useful for women, though in practice there are patriarchal obstacles. For example, history shows how the *waqf* can be seen as a gender responsive model, *mewat* being based on productive use can favour agricultural women workers, who can also access *miri* land, and also have access through collective models such as *musha*. The advantages of sharecropping include enabling access for women to arable land where ownership rights are vested only in men.

# Module 4

## Powerpoint presentation


1

### LAND, PROPERTY AND HOUSING RIGHTS IN THE MUSLIM WORLD (Module 4)

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### What are the key concepts?

4

- 'Islamic land tenure' implies a religious foundation
- Land tenure in Muslim countries present overlapping web of Islamic customary and modern principles
- Ottoman land law ideas often remain important in the modern Muslim context
- Several (Ottoman-origin) tenure classification – private (*mulk*), state (*miri*); and endowment (*waqf*)
- Empty or dead land (*mawat*) as unused or uncultivated land which can be converted into private land by reclamation
- Islamic tenure models are generally gender-responsive





### Session learning outcomes

2

- Appreciate the basic forms of land tenure derived from the Islamic legal framework
- Examine the phenomena of the postcolonial tenure web
- Evaluate fragmentation of ownership in Muslim countries
- Consider strategies for empowerment through Islamic land tenure approaches





### Why are these concepts relevant?

5

- Private ownership through respect and responsibility
- Islamic principles provide distinctive land tenure categories and relationships
- Despite colonial interventions and modernist reforms, Ottoman conceptions are often influential
- *Milk/mulk* more than property; implies home, identity and permanent temporal abode
- Some State land can be inherited through customary or statutory principles, such as lifetime transfers from father to eldest son





### Your opening thoughts!

3

- What are your experiences of land tenures in the Muslim world?
- Do you think Islamic land tenure models are relevant in Muslim societies?
- How can Islamic tenures facilitate land, property and housing rights?





### How can they be used?

6

- The private right to land is generally subject to productive use and cannot undermine other users
- Underpinning Islamic tenure principles, such as sustainability and non-exploitation useful
- In informal or squatter settlements, tenure relations arise from 'beyond' and 'below' formal legal systems, sometimes rooted in religious ethics
- *Mawat* (dead land reclamation) doctrine is important conceptually (creating rights for users) as well as in practical models
- Communal landholding, collectives compatible with Islamic principles
- Women beneficiaries under most Islamic tenure





### Is land ownership allowed in Islam?

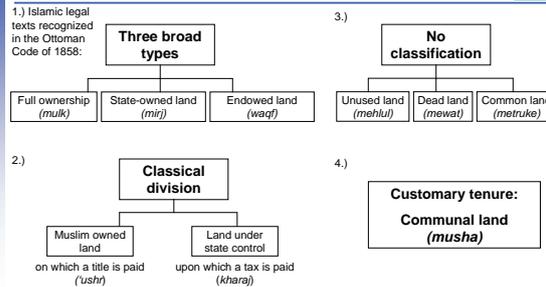
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- Scores of references to land in the *Qur'an* and to respect for private property rights.
- Land is sacred trust for human beings based on doctrine of unity (*tawhid*), stewardship (*khalifa*) and trust (*amana*).
- Some theoretical debate as to whether land itself can be 'owned', but Islamic property rights exist.
- The right to land is linked to land use and unused land cannot be owned.
- Property and land vest in God, but may be enjoyed by men and women through responsibility and trust.



### Which are the main Islamic tenures?

11



### What are 'Islamic' land tenures?

8

- **Sunni Muslim:** Modern land regulation laws are derived, at least in part, from land classifications in classical Islamic law and Ottoman land law
- **Islamic land tenure:** Recognition that these systems ultimately, if indirectly, have religious foundations
- **Contemporary land tenure regimes:** Evolved from, or are influenced by a complex, dynamic and overlapping web of these Islamic principles, state and international legal frameworks, customary norms and informal legal rules



### What is 'full ownership' (mulk)?

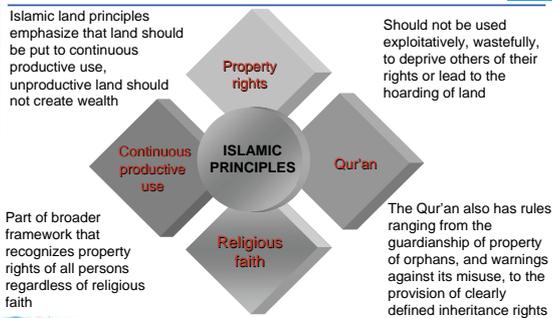
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- *Mulk* refers to property of any kind, anything that may be owned, one has "mulk" (ownership) over "milk"
- Historically *mulk* and *milk* land was that on which 'ushr', a religious land title, was collected
- *Mulk* or *milk* land is sometimes translated as full private ownership or in Western terminology as freehold
- In many societies, Muslims take their name from the land they come from
- The term *milk* or *mulk* in relation to land signifies more than an individual's property, it is their permanent temporal abode



### What are key Islamic principles?

9



### Are there limits on milk land?

13

- Individual property rights are prospected, but subject to an overall social responsibility
- Extensive rights in *mulk/milk* land can be acquired through sale (*bay*), gift (*hiba*), or inheritance
- Private property rights relating to *mulk* land are similar to freehold rights in Western legal system
- One barrier upon the free disposal of *mulk* land is pre-emption (*shuf'a*)



### Why is Ottoman land law relevant?

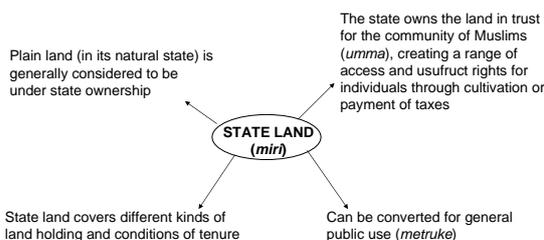
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- 600 years of extensive land administration experience of Ottomans
- *Qur'an* did not elaborate on land tenure, regulation, administration or the mechanics for its protection
- System evolved from Islamic and local principles, over time unification through the Ottoman Land Code of 1858
- The guidelines, categories and records developed in the Ottoman period inform land classifications which exist today



### What is state land (miri)?

14



Can rights in state land be 'owned'?

15

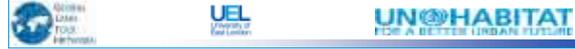
- Conditions placed on state land grants to individuals far from uniform
- In theory, State and private are different land categories
- Practical differences between usufruct rights over State land and those with respect to *mulk* land in full ownership could be narrow
- One key difference is that traditionally state land (*miri*) lies outside the compulsory succession rules of Islamic law (*Shari'a*)



Does *mawat* still have significance?

19

- Dispute between Muslim jurists. E.g.: requirement of the permission of the relevant Imam
- No dispute since land was given to the whole Muslim community by God. Consequently, if a Muslim can actually cultivate empty land he or she may continue to use it productively
- The dead land (*mawat*) concept is important in a material sense and in the way that Muslims conceive their relationship with land



Can state land be inherited?

16

- State land can be inherited but is developed through customary or statutory principles
- Rights often subject to lifetime transfers from father to eldest son
- Rural women often find themselves under great pressure as a consequence
- Fixed shares to which women are entitled to under the Islamic compulsory succession rules restricted to inheritance of land held in full ownership (*mulk*)



What is endowment (*waqf*) land?

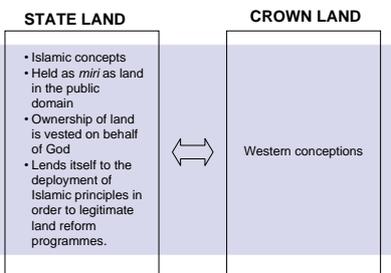
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<b>Definition</b>	Under the Islamic endowment, an owner permanent settles property, usually although not exclusively land, its usufruct or income, to the use of beneficiaries for specific purposes
<b>Beneficiaries</b>	may be exclusively family members of the founder or creator or devoted to general welfare
<b>Features</b>	Connected with the charitable obligation for Muslims, which is one of the five 'pillars' of the faith and creates a redistributive element for Islamic property rights  A 'third sector' of philanthropy or civil society, exists independently of both state and profit sector.



Is state land same as crown land?

17



Is endowment (*waqf*) significant?

21

- A highly significant legal mechanism and a key Islamic institution
- Widespread, comprising about one third of the Islamic Ottoman Empire
- Several factors, both economic and political, led to the decline of the *waqf*
- Attacks on the institution by the colonial powers which saw the endowed property as a vast resource of 'non-private' land



What is 'dead land' (*mawat*) ?

18

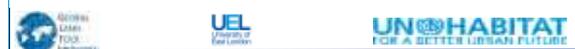
- Empty or dead land (*mawat*) can be converted into private land by reclamation
- Dead (*mawat*) land was important in the Ottoman world, where the state was concerned that land produced a regular supply of food
- Undeveloped land at a distance from towns or villages, could be 'enlivened' through cultivation or irrigation. The occupier who reported effective use of such land could be granted rightful possession by the state
- Ottoman land strategies ranged from realizing Islamic first principles to openness towards customary practices



Is endowment (*waqf*) still relevant?

22

- Several modern states, through land reform, abolished or severely limited *waqf* (eg. Egypt)
- Elsewhere, the *waqf* was nationalized, with the land brought under the control of specific ministries or boards (e.g. India)
- Growing contemporary interest in the revival and reinvigoration of existing Islamic endowments and new endowments adapted to modern management and regulatory frameworks
- It remains an important form of land tenure



### Can the state control rents?

23

- Recognizes contractual rights and commands followers to fulfill their contractual promises and obligations
- State could intervene in lease relationship
- Could regulate affordable rent for tenants, also permit the landlord a reasonable profit



### Do range of tenure help access?

26

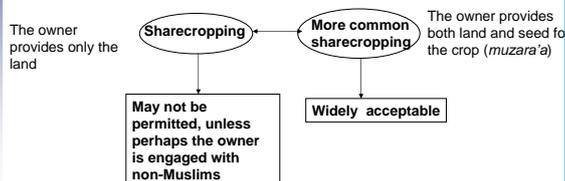
- Landholders may access land through complex combinations of interrelated tenure relationships
- Convergence of Islamic principles, Ottoman law, colonial interventions, custom and unofficial norms mean that there are few clean patterns or categories
- Fragmented ownership of land in many Muslim countries, often with one individual holding small parcels of land in multiple tenures
- In informal or squatter settlements these tenure relations may be formed in part from norms that exist 'beyond' and 'below' the formal legal system, sometimes rooted in religious norms and ethics



### Is sharecropping permitted?

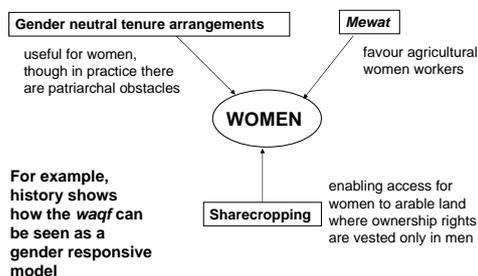
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Debate amongst Islamic scholars concerning the appropriate use of land, regarding rent and sharecropping



### How do these tenures impact women?

27



### Does Islam facilitate co-ownership?

25

- Fragmentation through Islamic inheritance rules creates patterns of often quite complex co-ownership and the break up of land monopolies or large estates
- Interplay between Islamic and customary practices relate to rural agricultural land or pasture land
- An example is *musha* (Arabic for shared) or communal landholding involves periodic reallocation of shares giving access to land amongst community members
- Collective or communal elements form part of the complex land tenures in Muslim countries



Thank you for your attention!

28

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## Reference readings

In the following extract Forni describes some of the most basic forms of land tenure found in the Near East and most particularly Egypt, including land in full ownership (milk or mulk) and state land (miri), as well as key concepts such as dead or empty land (mewat/mawat) and Islamic Endowment (waqf) land. Although these forms of tenure have their roots in Islamic principles, it is explained that Islamic influences are usually indirect or 'subjoined' to national legal systems. These extracts draw specifically upon the Near East and in particular the Egyptian context, but they explain a 'web of tenures' which is common to many Muslim contexts, as well as exploring other recurring issues such as the fragmentation of ownership. In particular it is considered whether Islamic inheritance laws are the primary cause as widely alleged of such fragmentation, as well as attitudes towards modern land reforms.

### R4.1 Forni N, (2005), *Land Tenure Policies in the Middle East*, Rome: FAO

The Near East covers a vast and diverse area. The predominance of Islam, in its various streams, is one of the unifying factors in the region. The egalitarian traditions of Islam informed the early systems of land tenure with tenets of social justice and equality. In the nineteenth century, the Ottoman administration codified the prevailing land tenure systems into a set of regulations that are still followed in much of the region, but many of the independent states that emerged in the twentieth century embarked upon redistributive land reforms without first examining the land privatization trends prevailing elsewhere. At the same time, historically developed customary tenure continues to regulate a large part of access to, and use of, the land.

Current land tenure systems are failing to address age-old problems: landless households and small farmers continue to compete for limited and fragmented cropland, and pastoralists are losing control of their traditional grazing areas. Access to water is becoming an increasingly important issue as the number of users grows. Major issues such as these are often perceived differently by governments on the one hand and citizens on the other.

It is therefore essential that efforts are made to ensure a participatory approach to decision-making that involves the rural populations concerned.

A comprehensive overview of the theoretical and descriptive aspects of land tenure in the Near East region has been prepared for the Food and Agriculture Organization of the United Nations (FAO) (Rae, 2002). It outlines the historical background and major arguments in the land-tenure debate; implicitly (and sometimes explicitly) it leads to policy conclusions. The present article will therefore focus directly on some major policy issues without analysing in detail all of the conditions related to land tenure in the Near East, which may facilitate discussions on policies and programmes. For ease of reference, a working definition of "tenure" is provided here, keeping in mind that in this region, one is always speaking of both land and water tenure. Water and access to water are vital factors not only in the arid zones, but also in the most fertile cropping areas of the region, which are often dependent on irrigation.

Land tenure can be defined as the group of rights of individuals, households or communities with respect to land. Water also can be accessed under different types of rights. Tenure includes not only property rights, but also use rights of a permanent or seasonal nature. A tenure system may include rights sanctioned both by law and by custom. That is, alongside the formal legal systems, following defined administrative procedures, there also exist customary rules accepted by the majority of users (Forni, 2001<sup>3</sup>).

The term "Near East" is used here to correspond to the country coverage of the Regional Office of FAO, which goes well beyond a strictly geographical connotation of the term and extends from Afghanistan to Morocco, from east to west. The Near East is thus used in its broadest connotation, including what used to be called the Middle East, or the area east of the Mediterranean and south of Central Asia, as well as North Africa (for various definitions of Middle East and Near East, see Shimoni and Levine, 1972<sup>4</sup>).

2 Rae, J. 2002. *An overview of land tenure in the Near East Region. Part I; Part II, individual country profiles; and Bibliography*. Rome, FAO. (mimeo)

3 Forni, N. 2001. *Land tenure systems: structural features and policies*. FAO Technical Report GCP/SYR/006/ITA. Rome, FAO

4 Shimoni, Y. & Levine, E., eds. 1972. *Political dictionary of the Middle East in the twentieth century*. London/Jerusalem, Weidenfeld and Nicolson

The Near East region defined in this way covers a vast domain. It includes the Arab world, but extends well beyond: on the east it borders on central Asia and shares the land-tenure characteristics of those areas; in the west and south it includes the Maghreb countries and the Sudan, bordering on the African region with its own specific land-tenure traditions.

In spite of wide intra-regional diversity, the predominance of Islam in its various streams is an important unifying factor in the region. The Islamic contribution to systematizing land tenure, taking into account the subjacent tribal traditions of the settled and nomadic populations from the Himalayas to the Atlantic Ocean, cannot be overemphasized. The nature of Islamic tradition and organization can be either structured and hierarchical, as in Shi'a areas, or non-hierarchical, usually in Sunni areas. In various parts of the region, religious leaders sometimes intervene directly on matters related to land tenure. For instance, after the Islamic revolution of 1979 in Iran, the rights to be paid for using pasture were abolished after a number of theologians affirmed that access to pasture land was to be considered free (Papoli-Yazdi, 1991<sup>5</sup>). However, on tenure issues, in most cases the influence of Islam and of its different representatives is indirect only. Islam provides rules of life and, along with the pre-Islamic customs it incorporates, it is subjacent in the legal systems in most countries of the region, or at least in the interpretation of legal systems.

It is significant that in Egypt, when the 1992 law that repealed the core of Nasser's land-reform legislation was being formulated, discussions were held with the Al-Azhar Sheikh on the conformity of the proposed law to Islamic Shari'a. The fatwa high committee of Al Azhar adopted the government position, but the radical Islamic group Gamaa el Islamia stated, on the contrary, that any legislation that further impoverished poor farmers must be opposed as being un-Islamic. The unrest following approval of this law was labelled as "Islamist" (see R. Saad and R. Bush in Bush, 2002<sup>6</sup>). This underlines that any tenure regulation should conform to Islamic rules, as they represent a higher "social sanction" that is a prerequisite for enforcement of the regulations, but it also means that Islamic interpretation is not univocal.

5 Papoli-Yazdi, M.-H. 1991. *Le nomadisme dans le Nord du Khorassan*. Paris/Teheran, *Institute Français de Recherche en Iran*.

6 Bush, R., ed. 2002. *Counter-revolution in Egypt's countryside: land and farmers in the era of economic reform*. London, Zed Books.

Some of the characteristic types of "official" tenure prevailing in the Near East will be presented here. However, it is important to keep in mind that, in this region, the difference between customary law, 'Urf, and national law is sometimes very wide. In the cases of both land and water tenure, as Rae (2002, p. 35<sup>7</sup>) underlines, the region is characterized by legal plurality where national law and 'Urf coexist in the presence of several types of communal and individual rights and a "patchwork of tenure niches with varying rights" (*ibid.*). State law is often very similar throughout different countries of the region, and is also similar to the laws prevailing in European countries. This is primarily because of common derivation from the Ottoman code of 1858 and the precedents derived from European legal systems, and also because state law was compiled, and is now applied, by people who have broadly the same education and forms of expression. Customary law, on the other hand, is extremely rich and varied; it is unwritten, however, and publications or other documental sources are scarce, and the scope for local research is therefore very broad.

One peculiarity of the region is the prevalence of the state as the ultimate owner of the land. State land covers most uncultivated, so called "dead" land, or *mawat*, which includes grazing lands operated under common property regimes. It also covers land in cultivated areas, usually referred to as *miri*, mainly derived from what had been community land in pre-Islamic times, with the state later representing the community. A related peculiarity is the importance of possession versus legal property, where rights of use are possibly as important as ultimate ownership, and can in fact often be sold. The tendency throughout the region in recent years has been towards a constant and deliberate withdrawal of the state from land ownership, and from direct operation where it existed, in favour of private property and operation.

### Land tenure types and their evolution

Different types of customary or legally sanctioned land tenure can be found, ranging from community to fully private. Until well into the twentieth century, group or clan organization prevailed over individual ownership. It has often been maintained that the Ottoman land code of 1858 never succeeded in the general registration of individual titles to land, because it was not compatible with communal village organization and because of the extent of marginal

7 Rae, J. 2002. *An overview of land tenure in the Near East Region. Part I; Part II, individual country profiles; and Bibliography*. Rome, FAO. (*mimeo*)

cultivation. The definition of cultivated land in marginal areas of the region is still an issue, and a “grey area” exists in which individuals try to obtain title to land through occasional, often ecologically harmful, cultivation of previous grazing land. The Ottoman code provided for the existence of the following types of tenure:

- Private land, *mulk*: right of full ownership and alienation, as well as right to the usufruct of the land.
- State land, *miri*: suitable for agricultural use where the ultimate owner is the state but the usufruct belongs, in most cases, to individuals. The codification of *miri* land in Ottoman times was often read as an attempt to centralize power against the large landlords and tribal groups by establishing individual rights for a large number of small individual cultivators.
- Public land, *waqf*: reserved and immobilized, for some public (e.g. charitable) purpose, and usually leased, as it was in the past.
- So-called “dead”, unreclaimed land, *mawat*: mainly used for grazing under common property regimes, and often a grey area with political undertones. Occasionally, individuals or tribal groups try to obtain title with varying results.

Current state legislation on land tenure is derived mainly from the Ottoman code, with changes drawn from western European civil codes. In most Near Eastern countries today, land can be classified, from the tenure point of view, as either state/crown land, private land or communal land – the latter mainly in places where *Urf* prevails. The use of these terms refers to situations that differ somewhat from those found in Europe, for example (particularly the notion of state land). Private *mulk* and public *miri* land are often very similar from the point of view of tenure and operation. People using *miri* land can subdivide it among their heirs and have tenants.

**State land** (*miri*) used for farming was often given in concession; it eventually became hereditary and was divided up according to Islamic inheritance laws: estates divided into individual lots paved the way for privatization. In general, occupation rights are inheritable both for the direct assignee and for the cultivating tenants, so that according to *Urf* law, tenants may also transmit occupancy by sale and by inheritance.

However, throughout history assigned land could in principle be confiscated and returned to the ruler (crown or state). Thus a certain margin of insecurity remained.

**Communal land** and its management were a peculiarity of many parts of the region, where erratic climatic conditions made production risky and therefore the community was used as security. Jointly owned villages practising crop farming were known as *musha* when the whole territory was undivided. When individual holdings were defined, they were known as *mafruz*. In general, the cadastres for *musha* villages followed a system of registering each villager’s share of the land as a fraction of the total, while those who occupied land sometimes continued to exchange their shares. As a consequence, although the system is rapidly disappearing in most countries, there is considerable confusion regarding actual ownership rights.

Pastures are also largely managed as communal land operations. Common property resources are managed and customarily owned by a certain community according to sets of rules and rights, including individual usufruct but not individual disposal (Forni, 1999<sup>8</sup>). The definition of common property is, however, sometimes confused with state or public property by the authorities, whether deliberately or not.

Today’s systems of land tenure are thus the inheritance of a long historical tradition, but they have also been heavily influenced by European legislation during the twentieth century, and are currently in full evolution.

According to traditions of communal ownership in the villages, under the *musha* system, each household held an equal share of land in accordance with the egalitarian traditions of Islam. However, the social consensus on this system has been weakening in favour of private title to a specific parcel of land. In the 1950s and 1960s equity in land distribution was sought at the national level, as indicated by redistributive land reforms that gave private right of possession to a large number of poor rural households.

8 Forni, N. 1999. *Technical note on pastoral land tenure. Common property regimes and their relevance to grazing areas. Paper prepared for FAO Project No. GCP/SYR/003/IITA, Range Rehabilitation and Establishment of a Wildlife Reserve. Rome, FAO.*

They were not usually given full private ownership and disposal rights, but inheritable rights of use but not to alienate (see Forni, 2001 for the case of the Syrian Arab Republic<sup>9</sup>). Although the reforms were inspired by a desire to help the underprivileged, a top-down approach prevailed. While this is not limited to the Near East, it has often been noted in the region that the perceptions and opinions of farmers, and more particularly of tenants and sharecroppers, are rarely elicited (with respect to Egypt, see the research carried out by Saad, in Bush, 2002<sup>10</sup>).

As underlined by Rae (2002<sup>11</sup>), recent emphasis in the region has been towards increasing the privatization of property rights to land with legally registered titles. In conjunction with structural adjustment principles, the emphasis has in fact shifted from equity to efficiency, and this change is reflected in tenure relations, which today tend to favour the full legal owners of the land over other types of right-holding, such as inheritable tenancies, on the grounds that this will facilitate investment and hence overall growth.

### Land reforms and their follow-up

The Egyptian agrarian reform of 1952 spearheaded a series of similar legislation elsewhere in the region, and it would be useful to examine what took and is still taking place in that country. Land reform programmes in the 1950s and 1960s redistributed resources for both equity and efficiency purposes, with substantial results in terms of equity. These were redimensioned, but never dwarfed, by continuing population pressure on land and administrative rigidities. Efficiency results, particularly in terms of marketable surpluses, were often below expectations for a variety of reasons, including increasing autoconsumption of beneficiary households, but also because of inadequate planning systems and mismanagement. Land expropriated from private owners above a certain ceiling in most countries was declared state land before being given to beneficiary households, who became owner-like possessors.

In Egypt, the reform law maintained the private property of the original owners, but the beneficiaries received inheritable tenancy rights where the rent was fixed at seven times the land tax (Ray, in Bush, 2002<sup>12</sup>). More than half of the country's cultivable land was redistributed from large landowners to smallholders, tenants and landless households. The large estates with more than 200 *feddans* (1 *feddan* = 0.42 ha) disappeared. Tenants could be evicted only if they did not pay the rent, and they were registered in agricultural cooperatives as holders, farming the land as if it were their own. Landowners were unable to sell their land because rents were not re-evaluated and over time they fell to levels that were much lower than market values, with the added burden of a tenant who could not be evicted. In short, there was not a free market.

From the government's point of view, reform also required heavy state spending for services. The intention of the economic adjustment policy finally enacted in the 1990s was therefore to withdraw the state as much as possible from economic activity and to stimulate a free market. Law 96 of 1992, effective from October 1997, reformed relations between landlords and tenants and revoked Nasser's agrarian reform law of 1952. New tenancy contracts were now only of annual duration. Landowners could finally dispose of their land.

The new law was consistent with the privatization and economic liberalization policies of the government, and did provide the basis for a better land market. However, there were obstacles to the establishment of a land market, one of which was lack of registration and proof of property. Therefore the government, with outside advice and assistance, pressed for land titling. Attention to access to land and landlessness thus became secondary. To obviate the problems of the newly dispossessed tenants, the distribution of reclaimed land was offered. But this had limited results because, *inter alia*, the two types of agriculture were too different, and because of lack of capital.

The inability to conjugate efforts in view of equity and efficiency is evident in most countries. The issue is how to save the equity gains without condemning the entire reform effort, which is not *per se* responsible for lack of efficiency.

9 Forni, N. 2001. *Land tenure systems: structural features and policies*. FAO Technical Report GCP/SYR/006/ITA. Rome, FAO

10 Bush, R., ed. 2002. *Counter-revolution in Egypt's countryside: land and farmers in the era of economic reform*. London, Zed Books.

11 FAO. 1992. *Report of the Round Table on Pastoralism*. FAO Paper TCP/IIRA/2255(C). Rome

12 Bush, R., ed. 2002. *Counter-revolution in Egypt's countryside: land and farmers in the era of economic reform*. London, Zed Books.

## The tenure web and fragmentation

A general discussion over landowners and land reform beneficiaries, as in the previous section, covers only part of the tenure relations in the region. In the Syrian Arab Republic, for instance, field investigations have demonstrated the existence of a substantial overlap of different types of tenure within one farm household, where a land-reform beneficiary may also manage other operations under a different title, i.e. as owner–operator, squatter, sharecropper or any combination of these (Forni, 2001<sup>13</sup>). Mohamed Abdel Aal (Bush, 2002<sup>14</sup>) calls this a “web of tenancy”. That is, agricultural holdings cannot be reduced to neat categories of tenants, sharecroppers, owners (so-called “clean patterns”): there are multiple interrelated tenancy relationships in which the landholder accesses land through combinations of more than one pattern. This multiplicity of tenures is also common in Jordan. Patrick stresses also the multiplicity of actors – different individuals and groups within the kinship group – as regards rights of use and alienation (Rae, 2002, Jordan Country Profile<sup>15</sup>). This makes official policies in favour of individual land–titling rather abstract and not rapidly conducive to fostering a land market, as intended by governments. There is also a tendency for those with multiple tenures to hold highly fragmented parcels. Fragmentation, that is, numerous plots regardless of the size of the holding, is indeed another common characteristic of farming in the region.

In most cases, land redistribution following agrarian reform legislation has not stopped fragmentation. In some cases, as is claimed for the case of Iran, land reform distribution itself results in small fragmented holdings consisting of non-contiguous plots (see Marcouiller, Iran Country Profile, in Rae, 2002<sup>16</sup>). In other cases, even where holdings were assigned as one plot, inheritance has eventually broken them down. Most analyses use Islamic inheritance law as the explanation; however, this law does not differ from most other inheritance laws.

Warriner (1948<sup>17</sup>) noted that while, according to accepted wisdom, subdivision and fragmentation is

due to Islamic law, it tends not to happen among larger landowners, who obviously find a way to compensate heirs who do not receive land. In fact, a system of plot exchanges and other forms of compensation traditionally exists in most countries. According to some sources for Turkey (Rae, 2002, Turkish Country Profile<sup>18</sup>), excessive fragmentation, which would prevent economies of scale, is counteracted by increasing leasing to create larger holdings, and by swapping plots among owners.

The extract below explores the concept of empty (mewat) land and a modern example of squatting. Within the Islamic framework an individual may claim ‘virtually dead’ land, based on the saying or deeds of the prophet Muhammed (*hadith*) that ‘he who turns dead land into life becomes its owner’. Bukhari explains how large-scale modern ‘squatting’ in Al-Madinah in Saudi Arabia was ‘thought through’ by those on the ground who built a shelter or put up a fence as a continuation of their rights in Islamic law. He further describes how this ‘squatting’ achieved formal legal recognition by the courts. Despite his use of the term squatting, Bukhari recounts that no such ‘popular’ word was deployed to describe these occupations because it was considered as part of the legal and social tradition.

### R4.2 Bukhari S. M. (1982) ‘Squatting and the Use of Islamic Law’, 6 5/6 *Habitat International* 555-563

It may be something of a surprise that in Madinah Munawara, the fourth largest city of the oil-rich Saudi Kingdom, squatting is almost as common as in most other cities of the less developed countries. In Al-Madinah, a city of about 250,000 inhabitants, it is estimated that about 20% of the population live in dwellings that are built on land that had been initially occupied illegally. This is comparable in scale to some of the poorest countries: for example, Dakar and Jakarta in 1974 had squatter populations of between one-quarter and one-third of their total populations.<sup>19</sup> In Karachi, at the same time, about 20% of the population was living in sub-standard and illegal shelters.<sup>20</sup>

13 Forni, N. 2001. *Land tenure systems: structural features and policies*. FAO Technical Report GCP/SYR/006/ITA. Rome, FAO

14 Bush, R., ed. 2002. *Counter-revolution in Egypt’s countryside: land and farmers in the era of economic reform*. London, Zed Books.

15 Rae, J. 2002. *An overview of land tenure in the Near East Region. Part I; Part II, individual country profiles; and Bibliography*. Rome, FAO. (mimeo)

16 Rae, J. 2002. *An overview of land tenure in the Near East Region. Part I; Part II, individual country profiles; and Bibliography*. Rome, FAO. (mimeo)

17 Warriner, D. 1948. *Land and poverty in the Middle East*. London, Royal Institute of International Affairs.

18 Rae, J. 2002. *An overview of land tenure in the Near East Region. Part I; Part II, individual country profiles; and Bibliography*. Rome, FAO. (mimeo)

19 World Bank

20 Karachi Master Plan, 1978

## Squatting

In the Saudi Kingdom, the legal system is based on Islam. The Islamic legal provision used by the squatters is based on the *Hadith* (saying or deeds of the Prophet Mohammed): that “*he who turns a dead land unto life becomes its owner*”.<sup>21</sup> Therefore, the squatters usually occupy land that is virtually ‘dead’. They choose land that is not owned by private individuals, institutions or government departments and is not being used at the time or wanted in the future for any public use such as roads, schools, clinics.

In Al-Madinah, local authorities discourage land occupation as it complicates future planning, laying of services and roads in the city, and therefore appoint guards to keep watch. However, during the weekends when the guards are away, the squatters seize a piece of ‘dead’ land, build a blockwork fence, and place some personal belongings to mark the possession of the piece of land. In the following days, one or more rooms are built according to the financial capability of the family. Some squatters, usually Bedouin, without sufficient means, just build a fence around the land and set up their tents inside.

After occupation, the squatters take their case to the religious court for legislation of their possession. The court investigates to establish whether the land is privately owned and requires two witnesses and the local mayor to solemnly declare that ‘useless’ and a dead piece of land has been made habitable by the applicant. The court also enquires of the government agencies concerned, to confirm that they have no claim on the land and that it does not fall within any present or future planning proposal. If no answer or a claim is received within two months, the land is officially registered in the name of the applicant.

It is interesting to note that the size of average plots in the new squatting areas are very similar to the plots in the old traditional quarters of Al-Madinah. Also, the squatting areas in their initial stages of plot layout and house construction are not controlled by the planning and building regulations. In the absence of such controls, the inhabitants of these areas, who are mainly in-migrants from the hinterland, rely on their own strong traditional values and *mores*, application of which implies the use of

21 The Prophet gave one of his companions land in Wadi Aqiq in Al-Madinah. Some years later when a portion of it was not being used, the second caliph Omar took that portion from his ownership. In this instance, both the giving and the taking away of the ownership rights were related to the land being used. In one of the interpretations of this Hadith “dead land” is identified as one which, apart from not being owned, is also not being used for the benefit of a town or village for grazing or the keeping of livestock.

the same *principles* of urban settlement as used in the traditional *medina* of the Islamic/Arab cities. The *form* is superficially different because of use of motor cars and modern house building technology; but the functional requirements of privacy, rights of proximate neighbours, neighbourhood formations, etc., lead to all environment, directly comparable to that of the traditional *medina* urban fabric.

## Social equity

In other countries the impact of the inflation on the prices of urban residential land in relation to the household incomes has been distressing, because housing is a very basic necessity and increases in its price adversely affect low and middle-income groups. In search of cheaper shelters they are either left in the dilapidated surroundings of the city core or have to settle in those parts of the city where land is cheaper but that implies more traveling time from home to place of work and more transportation costs.

In Madinah Munawara, the increase in land prices at 10%-14% *per annum*, incomes lagging behind at 4.1% *per annum* and the rapid population growth at about 6% *per annum* could have led to large numbers of Saudis living in subhuman conditions, such as sleeping on footpaths, overcrowding and in substandard shelters of mud, corrugated sheeting, timber etc. This has, however, not happened.<sup>22</sup> In Al-Madinah there are no shacks, no sleeping on footpaths and the standard of accommodation in the squatting areas is similar to that as in the whole of the city. For instance, the density of occupation at 1.2 persons per room is the same in Al-Madinah, as a whole, as in the squatting areas.

It is extremely surprising that, in a city with a large gap between incomes and land prices, there is no housing problem and that there is, instead, a housing surplus, both in the squatter as well as the planned areas.

22 This article discusses the Saudi population only, as only they can own land. In Al-Madinah, 16% of the population is non-Saudi and the majority of these consist of single male low-paid workers. They walk to work (which is mainly within the central urban area), and save as much money as possible to send home to their families. It is primarily this group that occupies the dilapidated buildings surrounding the city core at gross overcrowding of 7-10 persons per room. These properties are vacated during the pilgrimage season and the pilgrims wanting very cheap accommodation live there at the same densities as the poor labourers.

Moreover, both the rich and poor Saudis appear to have sufficient access to house-ownership. There are two main reasons for this phenomenon.

The first is the availability of ‘free’ land for the potential users. The existence of Islamic law has enabled a form of squatting to develop so that land can be acquired legally by the poor city dwellers and in-migrants from the hinterland.<sup>23</sup> The second is the availability of *cheap money*. The Government gives loans at cut price rates.<sup>24</sup> The only condition for borrowing money is the ownership of the land where construction is to take place. The ability to acquire land — an extremely expensive commodity — free of charge and to get a cheap loan with which to build a house on it, have thus enabled every potential household access to own a house. In addition, this process has also become a major means of distribution of wealth to the low and middle-income sections of a society, especially the poor immigrants who otherwise would not have been able to accumulate capital in the free enterprise economy of Saudi Arabia.

The Saudi Kingdom has obvious advantages in the implementation of this policy. The number of persons in towns is relatively small in comparison with other LDCs and also the total potential Saudi in-migrants to the cities are relatively few. Therefore, the whole scale of the housing problem is small and at the same time, funds available to the authorities to tackle the problem are substantial.

This example in Madinah Munawara shows that, where the law and regulations are clear, the squatters usually encroach upon land that is apparently free from legal implications. They lay out the areas to meet their own traditional and cultural needs and initially cause minimum development costs to the authorities.

Similarly, the buildings are also erected in accordance with the mutually adjusted requirements of privacy, rights of proximate neighbours, communal facilities, *etc.* The squatters invest their own money and labour heavily in their houses and the resulting environment is optimistic and dynamic.

In this period of rapid urbanisation, the basic Islamic Law providing for the land ownership based on land being used, could have far-reaching effects. As is indicated above, the result of the application of the law has been that the possible escalation of land prices caused by the large-scale land speculation has been dampened. In general, there is little difference in the price of land in the city, and it declines gradually from the centre to the edge of the built-up area. In most of the countries of the world the development of both urban and rural areas need to be undertaken while the resources are scarce. Policies are required whereby large numbers of rural in-migrants can be accommodated in cities and towns of these countries. In this context, the application of the Islamic Sharia Law in Saudi Arabia is of considerable significance and especially so for all the Muslim countries which are at present examining their own cultural background, legal framework and historical case studies to formulate housing policies for the poor and needy in their cities.

Razzaz evokes in the next extract the complexity of norms, rules, roles, customs, cultural expectations and networks, which Islamic legal principles interact with and help to shape. His concern is with so-called informal and illegal settlements, within which unofficial land transactions exist ‘in the shadow of law’. He describes how the Bani Hassan tribe in Jordan sought to ‘cash-in’ on some land which they occupied, through a process of ‘illegal’ sub-division and sale to lower-income groups. Of particular note is the use of *hujjas*, traditional documentation which acquires its legitimacy in part because of an association with contracts of sale in land based on Islamic principles. However, Razzaz argues that the *hujjas* are not a ‘continuation’ from the past, but should be understood largely as a response to contemporary opportunities, conflict and constraints imposed by the State. He gives examples of dispute resolution around these sales which, despite the fact that each land transaction concerned had no official recognition and the parties enjoyed no formally recognised rights of ownership, involved intervention in the ‘litigation process’ by state agents or even a court of law.

<sup>23</sup> It is important to point out that the law is open to all. The income of a person is not taken into account by the Court in deciding whether or not to allot a piece of land to him. A rich man is treated the same as a poor man and the only considerations by the Court are whether a man has made habitable for his own use, a piece of land that was otherwise dead and unused.

<sup>24</sup> Every Saudi head of household can apply for a loan of up to SR.300,000 from the Housing Bank to build his house, the only condition being that he should own a piece of land where construction is intended. Money is repayable over 25 years and only 80% of the loan is required to be returned, i.e. if SR.300,000 is borrowed, a total of only SR.240,000 needs to be paid back over 25 years. If the repayment is made within a short time only 70% of the loan needs to be returned to the Housing Bank.

**R4.3** Razzaz O, (1998) *'Land Disputes in the Absence of Ownership Rights: Insights from Jordan'* in E. Fernandez and A. Varley, *Illegal Cities*, London and New York, Zed Books

Legality and illegality have preoccupied scholars working on urban housing and land markets in developing countries. This is hardly surprising given that more than 50 per cent of the urban dwellers of many major cities of the developing world occupy housing which, in one form or another, violates laws and regulations. The focus on legality and illegality as mutually exclusive categories, however, has led many scholars to extend these categories beyond the law to describe urban dwellers, developers and neighbourhoods as either 'legal', or 'illegal'. Hardoy and Satterthwaite (1989: 6)<sup>25</sup>, for example, describe third world cities as divided into 'legal' and 'illegal' parts with a 'gap' separating the two. As a result, 'most poor people have little faith in laws. Many may know little or nothing about existing laws' (Hardoy and Satterthwaite 1989<sup>26</sup>).

The poor may know little about the letter of the law, but they are often conscious of its function (Azuela 1987<sup>27</sup>; Holston 1991<sup>28</sup>). Recognizing that squatters are conscious of the law does not, however, mean that they conform to it, nor does it mean that law determines their actions. In a seminal article, Santos (1987: 298-29) captures the porous boundaries of legality and illegality: 'We live in a time of porous legality or legal porosity, of multiple networks of legal orders forcing us to constant transitions and trespassings.'

Most studies of urban land legality and illegality focus on the implications for residents *vis-a-vis* the state: the likelihood of eviction, demolition, regularization of title, delivery of services and so on.

I have dealt with these questions elsewhere (Razzaz 1992; 1993; 1994<sup>30</sup>). This chapter examines a different problem: in the absence of *de jure* property rights, how do illegal markets function and how are local disputes resolved in cases where land is being subdivided, sold, bought and developed illegally? In a seminal work on dispute settlement between neighbouring cattle farmers, Ellickson (1991)<sup>31</sup> provides evidence of how little formal legal rules and procedures matter in providing norms of fairness and principles for dispute settlement.

### Yajouz: the contested land

While Jordanian law (and before it British and Ottoman laws) recognized cultivators' claims to land, it did not recognize claims by pastoral communities. As a result, cultivated land in Jordan was formally registered to its traditional holders, while pastoral land was registered, for the most part, as state land. For several decades this did not create problems, as pastoral communities continued to use the land for residence and herding and were not interested in formally claiming legal ownership, as they were aware of the registration fees and property taxes that registration would bring. This *detente* was not long lived, however, in areas close to urban centres.

Yajouz, now a low-income suburb to the north-east of Amman, was part of the pastoral domain of the Bani Hasan tribe, one of the largest tribes in Jordan. In the 1970s, the eastern suburbs of Amman grew to within close proximity of these lands. There was considerable pent-up demand by lower-income groups for affordable land on the eastern and north-eastern outskirts. Members of the tribe attempted to register the land formally so that they could 'cash in' on growing urban demand, but the government was not responsive to their demands: granting the land to the tribes would create a precedent that the government was unwilling to establish, and the government had its own plans for developing the northeast with large-scale industrial and public service areas.

25 Hardoy, J. E. and Satterthwaite (1989) *Squatter Citizen: Life in the urban Third World*, Earthscan, London.

26 Hardoy, J. E. and Satterthwaite (1989) *Squatter Citizen: Life in the urban Third World*, Earthscan, London.

27 Azuela, A. (1987) *Low income settlements and the law in Mexico City*, *International Journal of Urban and Regional Research*, Vol. II, No. 4, 522-42

28 Holston, J. (1991) *The misrule of law: land and usurpation in Brazil*, *Comparative Studies in Society and History: An International Quarterly*, Vol. 33 no. 4, 695-725

29 Santos, B. (1977), *The law of the oppressed: the construction and reproduction of legality in Pasargada*, *Law and Society Review*, Vol. 28, no. 1, 5-126

30 Razzaz, (1992), *Contested Space: Urban settlement around Amman*, *Middle East Report Vol 23, no. 2*, 10-14

Razzaz, (1993), *Examining property rights and investment in informal settlements: the case of Jordan*, *Land Economics*, Vol. 69, no 4, 341-55.

Razzaz, (1994), *Contestation and mutual adjustment: the process of controlling land in Yajouz*, *Jordan, Law and Society review*, Vol 28, No 1, 7-39

31 Santos, B. (1977), *The law of the oppressed: the construction and reproduction of legality in Pasargada*, *Law and Society Review*, Vol. 28, no. 1

The rival claims of the state and the tribe quickly degenerated into conflicts on the ground, claims and counter-claims of corruption and greed, and a competition between the government's ability to enforce property rights over vast areas of land, and the tribe's ability to create *de facto* possession which is legally very difficult to reverse. Economic and political factors during the 1970's and 1980's made it extremely difficult for the government to follow a consistent policy on the issue, and tribal members developed elaborate mechanisms to undermine enforcement and manipulate laws and regulations. By the end of the decade, the government had been able to fence and develop limited segments of land along the main roads. The rest of the landscape was littered with small, 'illegal', housing plots and farms which tribal members had managed to subdivide and sell to lower-income groups who could not afford land and housing elsewhere in the city.

As I demonstrate in the following sections, neither the vendors of plots (the Bani Hasan members) nor the buyers (mostly Palestinian refugees from nearby camps) had *rights* to the land or rights to transfer it. What they had were property *interests* which were supported not only by informal norms and rules but also by the selective use and application of formal rules, procedures and state agents (Razzaz 1992<sup>32</sup>; 1993<sup>33</sup>; 1994<sup>34</sup>).

## Elements of an informal land market

### Territorial clusters and the role of middlemen

Territoriality and the clustering of communities are important means to minimize the risk of future conflicts. In one of my visits to Yajouz, I was searching for the house of a man involved in a dispute I had been investigating. There were no street names, no house numbers, and very few landmarks. All I knew was the man's name, and that he lived north of Yajouz road. I stopped by a grocer on the main road and asked him if he knew the man.

He asked: 'Is he from Hebron? ... his family name sounds like he is. Most of the [people from Hebron] live up on that hill. You should ask there.' Indeed, once I reached the hill, I was immediately shown to his house. The man I was visiting explained: 'It is important to know who your neighbours are, a good and trusted neighbour can save lots of headaches in the future ... One bad neighbour is like a bad tomato, he could ruin the life of everybody around.' He gave as an example how everybody in the neighbourhood pitched in to get a contractor to cover a muddy road with gravel. He said: 'If our hearts were not together, this would have never happened.' It turns out that Yajouz has several kinship- and place-of-origin-based neighbourhoods.

One of the main community roles in facilitating clustering is that of a *wasta* (a go-between). A *wasta* is an outsider to the Bani Hasan tribe who buys land from the Bani Hasan, moves in, and then takes on the role of a trusted go-between, arranging land deals between the tribal land holders and members of the *wasta's* community. The *wasta* does not generally charge for his services. He gains simply by getting 'good neighbours' around him who share family ties or a common geographical background. If financially able, a *wasta* might sometimes buy the land adjacent to his plot from tribal members and sell it to relatives, people from the same village or acquaintances. Buying land through the *wasta* minimizes the problem of information asymmetry in such a market.

Another emerging role in the area is that of the *mu'azib*. A *mu'azib*, literally a host, is a tribal member with a reputation for honest dealing. He usually has land of his own to sell, but is also known to direct buyers to and facilitate deals with trustworthy members of the tribe. One of the well known *mu'azibs* boasted that none of the land sales he had seen through had been abrogated, attributing this to his earnest efforts to resolve any problems by making sure the buyer is satisfied. He said: 'When a dissatisfied buyer comes back to me asking to annul the sale, I don't even ask for reasons. I return his money and take back my land.' Although there is some exaggeration about the extent to which vendors are willing to accommodate buyers, there is no question that by making such claims, tribal members try hard to allay any fear or hesitation on the part of buyers!

32 Razzaz, (1992), *Contested Space: Urban settlement around Amman*, *Middle East Report* Vol 23, no. 2, 10-14

33 Razzaz, (1993), *Examining property rights and investment in informal settlements: the case of Jordan*, *Land Economics*, Vol. 69, no 4, 341-55.

34 Razzaz, (1994), *Contestation and mutual adjustment: the process of controlling land in Yajouz, Jordan*, *Law and Society review*, Vol 28, No 1, 7-39

The *mu'azib* acknowledged that disputes do sometimes occur, but argued that they are rare, and that they can be avoided by applying some caution. He mentioned as an example of a bad strategy those who choose a suitable plot first and then seek out its owner. In Yajouz, it is more important to find a trustworthy *mu'azib* or *wasta* first and a suitable plot second. The roles of the *mu'azib* or *wasta* have evolved over time and changed in importance as the market has developed. The *wasta's* role is based on mutual trust. In addition to material benefits in cases where the *wasta* is party to the transaction, the *wasta* benefits by helping to forge a cluster of neighbours with family and village links thus increasing the chances for co-ordinated action and lowering the probability of disputes within the cluster. The *mu'azib's* role *vis-a-vis* prospective buyers is based not so much on trust (since no connections bind him to buyers) as on reputation. The role has evolved to address the asymmetric information problems relating to the honesty of the vendor, the location of the plot and settling of *ex-post* disputes.

### Contractual obligations: the *hujja*

In the process of establishing land markets with no *de jure* rights, not only have community roles had to develop to address new needs, risks, and opportunities, but land sales contracts have had to acquire a new role and meaning. Historically, the *hujja* was the only document required for land transactions between buyers and vendors in the region. Ottoman reforms, however, and later British-based laws required that a title deed be obtained along with the *hujja*. Today, the use of *hujja* for land transaction, without transferring the title and obtaining a title deed is illegal<sup>35</sup>. In Yajouz, however, the *hujja* continues to be used as the only document for transferring possession of land. As land markets in Yajouz have evolved, the *hujja* has acquired a new meaning and new functions, including new conditions that were never part of the traditional *hujja*. While formal land sales contracts in Jordan represent discrete transactions, the *hujja* in Yajouz has increasingly become an on-going relational contract. A tribal member explained: "We do not think of a *hujja* as a regular sales contract.

It is more like a marriage contract, binding both the buyer and vendor for good. I am expected to intervene whenever there is any dispute over the ownership of any piece of land that I have sold ... In some cases I am called upon to re-establish the boundaries, in others I am called upon to identify the person who bought the land and paid me for it ... If I stopped performing this role, I would be reneging on my commitment in the *hujja*, and people would have no trust in me, I wouldn't be able to sell."

The tribal vendor is thus a lifetime guarantor of the buyers' possession of the land. This is almost always explicitly mentioned in *hujjas*: 'the vendor is responsible for the protection of the buyer against the intrusion of tribal members and adjacent neighbours.' Modifications to this provision, however, started appearing after 1977: 'with the exception of the state' was added to the provision, absolving the vendor from protecting the buyer against demolition or appropriation of land by the state. By the mid 1980s, almost all *hujjas* examined included this distinction.<sup>36</sup> This change came at a time when the state had stepped up its policing of the area in an attempt to prevent further expansion of settlement.

Thus, the *hujja*, in its content and function, has not been a 'continuation' of a traditional or customary practice. It has evolved, rather, to address changing conditions and to reflect realistic obligations between contracting parties. In its form, the *hujja* has increasingly resembled official sale contracts: two witnesses are required to sign the *hujja* along with the buyer and vendor. Increasingly, standardized *hujja* 'forms' in which specific information can be included (such as names, dates, location) are sold in the market. In some cases, a *hujja* is handwritten on paper bearing the state emblem, with the wording and arrangement of text resembling official contracts. Sometimes official stamps used as fees for administrative documents are added to the *hujja*. All these elements — the standard form, the state logo and the stamps — provide an aura of officialdom to the ratification process.

35 A *hujja* (proof) is, however, a legally adequate means of transferring ownership in areas where rights to land have not been settled and registered by the Department of Lands and Surveys. By contrast, for land that has been settled, land transactions require the transaction to be registered at the land Registry Department and a title deed to be obtained. Yajouz is registered as state property. The *hujja* is therefore null from a legal point of view.

36 Examining the terms of the contract in *hujjas* dating between 1970 and 1988, I found that none of the *hujjas* written before 1977 had a provision for the case of state intervention, be it for demolition, fines, eviction or appropriation. The first *hujja* I examined with a specific provision absolving the vendor from any responsibility was dated 1977. About 60 per cent of *hujjas* dated between 1977 and 1983 had an explicit provision absolving the vendor from responsibility in the case of state intervention, and almost all *hujjas* dated after 1983 had such a provision. In all, I reviewed 93 *hujjas*.

The inclusion of such symbols ‘is aimed at investing transactions with a load of normativity which will increase the security of contractual relationships’ (Santos 1977: 51).<sup>37</sup>

The *hujja* asserts the legitimacy of land transactions in Yajouz in more than one way. First, it spells out in a functional way the mutual obligations of buyer and vendor and serves as a reference for future disputes. Second, by using the traditional term for land sale contract *hujja* instead of the generic legal term ‘*aqd*’, the contracting parties invoke the historical legitimacy of this form of contract, while at the same time appealing for official recognition by endowing the *hujja* with the symbols of legitimacy of the modern contract.

In content, the only ‘traditional’ aspect of the *hujja* is the term itself. As with the emerging community roles of *mu’azib* and *wasta*, the *hujja* is essentially a ‘modern’ response to the new needs, opportunities and risks posed by the market and the conflict with the state. As I show in the next section, however, the Yajouz community is not ‘self-contained’ within its own institutional arrangements but can selectively appeal to and invoke rules and enforcement mechanisms from a wider context, including formal rules, procedures, and state actors. Indeed, transacting ‘in the shadow of the law’ has unintended effects: the threat of formal intervention acts as a deterrent to internal strife and strengthens local arrangements.’

### The role of the state

The presence of the state’s coercive power not only influences power relations between state agencies and Yajouz residents, but also influences power relations among residents themselves. In an interview with one of the new buyers in the area, I asked him why he thought the tribal vendor was going to fulfil his obligations made in the *hujja*. The buyer said: ‘the last thing tribesmen want is to have me complain to the governor or the police. They know that the authorities are looking for excuses to clamp down on them.’ The authorities’ sentiments were reflected in the barrage of anecdotes I was confronted with on my visits to the governor’s office or the Department of Lands and Surveys. Banff Hasan members were portrayed as usurpers of state land.

The situation in Yajouz was described as chaotic, a ‘grave threat to law and order’, a ‘potentially explosive situation where disputes between neighbours, heirs, and contesting claimants, could turn bloody and set the place on fire’. These portrayals of ‘lawlessness’ and chaos serve to justify the various measures used by authorities to clamp down on the residents ‘in defence of law and order and the public interest’ (Razzaz 1993; 1994<sup>38</sup>)

Ironically, such a campaign to undermine tribal control over land proved effective in deterring land vendors from cheating.’ In fact, it seems to have contributed to an ‘offensive’ of good-will in which tribal members and families compete to prove their worthiness as dependable parties to deal with. This suggests that external coercive power triggered by local complaints can unintentionally serve to strengthen local obligations and arrangements.

### The role of the courts

Going to court over property is largely a last resort used when all else fails. ‘Litigation over property is not very common in Yajouz’, a lawyer said, ‘but it is on the rise.’ People in the area agree. A shopkeeper who was suing the vendor of his property said: “I never knew I could take someone to court over land in Yajouz. We were always warned by the government that if we buy land through a *hujja* and without proper registration the sale would be unrecognized by the government and would have no legal value.” People have, however, become aware that despite the ‘illegality’ of the transaction, there are avenues for restitution available, especially in cases of *hujja* abrogation and obtaining injunctions against encroachment. In fact, many lawyers seeking clients have been promising restitution in return for 10 per cent of the damages collected as their legal fee.

A series of Supreme Court decisions during the late 1970s and early 1980s have helped to enhance the legal positions of buyers *vis-à-vis* vendors in these settlements (Razzaz 1991a<sup>39</sup>).

38 Razzaz, (1992), *Contested Space: Urban settlement around Amman*, *Middle East Report* Vol 23, no. 2, 10-14

Razzaz, (1993), *Examining property rights and investment in informal settlements: the case of Jordan*, *Land Economics*, Vol. 69, no 4, 341-55.

37 Santos, B. (1977), *The law of the oppressed: the construction and reproduction of legality in Pasargada*, *Law and Society Review*, Vol.28.no.1, 5-126

39 Group Non-compliance, a strategy for transforming property relations: the case of Jordan *The International Journal of Urban and Regional Research*, vol 16, no 3, 408-19

These shifts in the legal status of the buyer, together with an increased awareness of the legal options available, seem to have influenced the outcome of disputes processed outside the courts. As one settler put it: 'previously, when a vendor was stubborn and refused to negotiate, he would say contemptuously: sue me in court why don't you? Now he would have to think twice before saying that.' Thus, it is not only through litigation, but through the *threat* of litigation, and the relative power of disputants, that the outcomes of some disputes are determined.

### Contracts, disputes and dispute processing

The land market institutions and the roles of the various actors in Yajouz have evolved to address problems of information, fulfilment of contract, enforcement of contract conditions, and dispute processing. A better understanding of the functioning of these institutions can be obtained only through examining contractual relations and dispute processing in action. The following cases were selected out of forty-one cases documented in the field. The cases selected do not reflect frequency of occurrence, but rather the range of issues to be addressed in informal land transactions. With no legal title or proof of ownership, how does a vendor prove his legitimate claim to the plot? How does the buyer verify that the vendor has the power to transfer the land? How does the buyer ensure that the vendor will not renege on the sale after the transaction is complete, or sell the same plot to someone else? How does the buyer verify the location of the plot he or she bought? How can the buyer be protected from future intruders? This section will show that all these issues can and do lead to disputes. The norms, rules, procedures, and enforcement mechanisms invoked in these disputes vary tremendously.

## Disputes over reversing the land sale:

### CASE No. 1

A returning migrant looking for a piece of land to buy, stopped by B's restaurant to inquire about plots for sale. B showed him a 500 m<sup>2</sup> piece of land he was planning to sell. They bargained extensively over the price, and finally agreed on JD 2,000." The buyer had only JD 1,000 in cash, which he gave B as a down payment. B gave him a receipt, but refused to give him a *hujja*. B commented to me: 'To give a *hujja* is to transfer the land. How can I guarantee that he will pay me the remaining amount once he has received

the *hujja*?' The migrant came back one week later, bringing along JD 1,000, only to realize that B had sold the plot to someone else for a higher price (or that at least is what B claimed). When the migrant protested that he had made a down payment, B told him that he could have his JD 1,000 back, but that he had no other claims to make.

The fact that the returning migrant was a stranger and did not seek a *wasta* or a *mu'azib* contributed to the abrogation of this deal: B did not know the migrant, and did not trust him enough to give him a *buya* before the full amount was paid-, and once B sold the land to someone else, the migrant could not activate any community pressure on his behalf. It is well established that a written *hujja* is an essential element in land transactions in the area. As the following case will show, however, the *hujja* is necessary but not sufficient to conclude a transaction.

### Invoking state power

There are instances of dispute when one or both disputants are not satisfied by either the process or the outcome. There are other instances when the dispute involves a state agency, either as a party to the dispute or as the only possible mediator. In any of these cases, state power can be invoked.

### CASE No. 5

Two neighbours, B and C, approached the original owner of the land, A, to settle their dispute over the boundary dividing their respective plots. In the *hujjas*, the area of B's plot was recorded as 700 m<sup>2</sup>, and C's plot as 500 m<sup>2</sup>. B claimed that once C fenced his plot, B was left with less than 500m<sup>2</sup>. When the original owner A came to establish the boundary, he supported B's claim and demanded that C move his fence back, but C insisted that the area of his plot was only 500 m<sup>2</sup> and that moving back the fence would mean the area would become less than that recorded in the *hujja*. Several neighbours interfered to try to 'split the difference', but C adamantly refused to negotiate. Finally, C offered to pay the municipal surveyor to come and measure the plots and establish the boundary. A and B accepted. The surveyor found C's plot to be just about 500 m<sup>2</sup> but found B's plot to be about 550 m<sup>2</sup>, much less than the 700 m<sup>2</sup> recorded in his *hujja*. The municipal surveyor announced that the total area of the plots was less than that recorded in both *hujjas*. He said: 'A sold B the plot thinking that it was 750 m<sup>2</sup> when it was only 550 m<sup>2</sup>. A did not challenge the findings of the surveyor, but challenged instead the practicality of such an exercise. He told

the surveyor: 'Measurements have always been approximate between vendors and buyers. We never even used measuring tape. If everyone was to go back and measure his plot in centimetres, we would see fights and feuds breaking all over the area. The surveyor responded: 'I agree, but discrepancies are usually about 50 m<sup>2</sup> or less. In your case, there is more than a 150 m<sup>2</sup> difference. It is significant.' Armed with the surveyor's statement, B demanded that A pay him back JD 450. A at first refused, but the surveyor said: 'If this case reaches the governor's office, they will probably come down hard on both of you. Why don't you avoid the insult and affront and settle it between you?' After some bargaining, B agreed to settle for JD 300 which A paid in cash. A new *hujja* between A and B was written, specifying the area as 550 m<sup>2</sup>.

This case demonstrates the curious role of the state agent, the surveyor, in the dispute. Although the surveyor was not acting in his official capacity (as a public employee he is not supposed to provide private services or earn outside money), the aura of officialdom was obvious in his attitude. An implicit threat to report the case to the governor's office induced A and B to reach a settlement. In that sense, the surveyor's role was more akin to the fluid yet influential role of the 'cultural broker' described by Antoun (1980)<sup>40</sup>.

### Resorting to court

How can a court of law be involved in a land dispute between two parties, neither of whom has ownership rights to the land? The answer is it can and does happen because of the indeterminacy of law and procedural loopholes."

### Abrogating the *hujja*

The courts argue that *hujjas* used in Yajouz are void because the vendor does not legally *own* the object of transaction – 'state' land – and because all legal land transactions have to take place and be recorded in the Land Registry. In 1975, however, a Supreme Court ruling stated that 'an unofficial land sale contract has no legal relevance. However, the buyer has the limited right of demanding the return to the *status-quo-ante*, and to recover the price he paid to the vendor.' This latter part of the ruling became an opening for dissatisfied buyers to abrogate *but as* the following case shows.

### CASE No. 6

B purchased a 3.5 *dunum* plot from tribal member A in 1981. Several months later, B discovered that the plot was designated by the municipality for a school. This meant that the municipality would eventually take the land without paying any compensation (as the land legally did not belong to B but to the state). B accused A of selling the land in bad faith, knowing that it had been designated for a school. A denied any knowledge of the designation and refused to return B's money. B approached friends who were relatives of A to try to persuade A to negotiate a settlement. A, however, rejected their efforts to mediate, telling the group he had no compromises to offer and that if B did not like it, he could take A to court. If B did not have enough money to hire a lawyer, A would even lend him some. A's suggestion to lend B money to enable B to sue him was taken by the group as an insult to their attempts to intervene. They left A's house and pledged not to enter it again. When B learned what had happened, he commented: 'I told [A]'s relatives: now that your good-will mediation efforts have failed, can I take [A] to court?' They answered: you have the freedom now to grab him by the neck and bring him to his knees.

B consulted a lawyer. The lawyer was sure he could obtain a court ruling for B to recover the money he paid for the plot. What the lawyer was not sure about, however, was whether or not A had any property registered officially in his name for the court to confiscate in case A claimed that he had no money and had to pay back in small instalments (a lengthy process, often very hard to enforce). After some investigation, the lawyer found out that A had grain silos and warehouses officially registered in his name. He immediately initiated a case in the court of first instance, and agreed with B on fees of 10 per cent of the recovered money.

When A was informed of the case, he offered to return half of the money to B, but B refused and insisted that unless A paid back the full amount, the court action would proceed. Later, A's business partner came to B and offered to swap the plot for another one in the same area. By that time, however, B's lawyer had advised him not to settle for anything short of the full amount he paid for the land, so B refused to negotiate. The case was introduced in the court of first instance in mid-1989. By May 1980, the case was decided: The court found that the plaintiff had purchased a plot of land from the defendant ... through a *hujja*, and that the defendant had received ... [a total of JD 3,500] whereas the sale [of land] outside the Land Registry Department [that

<sup>40</sup> Antoun, R.T. (1980) *The Islamic Court, the Islamic judge, and the accommodation of traditions: a Jordan Case Study*, *International Journal of Middle East Studies*, Vol. 12, no. 4, 455-67

is, without recording the transaction] is a void sale with no legal consequences; and whereas the vendor in such a case has to return the amount paid, the court resolves to commit the defendant ... to return the amount of JD 3,500 to the plaintiff ... in addition to the lawyers' and court fees. The courts' willingness to abrogate the *hujja* and return the buyer's payment greatly improved the bargaining position of buyers in the area. Dissatisfied buyers none the less went to court only as a last resort.

### The court provides injunctive relief

If evidence of possession and permanent land improvement are present (construction, agriculture or other investments), the law protects the first possessor against a more recent possessor, even though the first possessor is not the legal owner. Such a case is referred to in court as 'enjoining someone from interrupting possession rights'. In a landmark decision by the Supreme Court in 1979, the court treated the plaintiff, a holder of state land in the Yajouz area, as a possessor rather than a usurper, thus awarding him the protection due to a prescription by law. The court's decision stated: "The mere act by the plaintiff of prescription of 'state land' does not accord him ownership rights to that land. What it does accord him, though, is the position to request the government to grant it to him for an 'equivalent' payment. It is his right, as well, to request [the court] to enjoin the defendant from interrupting his right of possession, but not that of ownership.

This decision, several lawyers maintained, has significantly encouraged aggrieved residents in Yajouz to take their disputes to court. In an interview with a legal scholar, I asked him how A could sue B for interrupting his right of possession if A's right to possession was itself challenged by the state. He said: The court, as a matter of principle, only looks at the case at hand, on the claims brought forward by the plaintiff and the defendant. When the state brings a case against A, the court would adjudicate based on balancing the state's right versus A's rights. But when A brings a case against B [a more recent possessor], then the court would adjudicate based on balancing X's rights versus B's rights. In the latter scenario, the state is not a contender. Focusing on the case at hand to the exclusion of other, related, issues is a typical characteristic in legal processes. Santos points out that 'to fix the object of a dispute is to narrow it ...

The evaluation of those issues selected is accompanied by an implicit and parallel evaluation of those that are excluded' (Santos 1977: 18).<sup>41</sup>

This short extract from an article by El-Ghonemy highlights the fact that the market in many Muslim societies is of marginal importance to land ownership, when compared to other non-market land transactions, such as inheritance.

**R4.4** El-Ghonemy M. R., (2005) *Land Reform Development Challenges 1963-2003 Continue into the Twentieth Century*, Rome: FAO

In my study of the Egyptian land market (El-Ghonemy, 1992<sup>42</sup>), I found it necessary to make a distinction between market and non-market land transactions. I found the latter to be the dominant way to land ownership, comprising inheritance, interfamily marriage, the land reform laws of 1952 and 1961, land extortion by virtue of official status and the granting of land under concessional arrangements. An empirical study on the origin of land ownership in Egypt showed that only 14 percent of all households had ever purchased agricultural land in their lifetime and that they were larger landowners. On the other hand, the sellers were largely very small landowners in the farm-size group of less than 0.4 ha who sold their land in distress and became landless workers (Radwan and Lee, 1986<sup>43</sup>). Similarly, I found inheritance and interfamily marriage to be the main mode of securing property rights in arable land in Yemen and Malawi, respectively (El-Ghonemy, 2001, p. 105 - 133<sup>44</sup>). In Muslim societies, the legal rules concerning the proper devolution of property upon death are deeply embedded in popular consciousness, being a considerable source of pride because of their particularly close association with the Qur'an.

41 Santos, B. (1977), *The law of the oppressed: the construction and reproduction of legality in Pasargada*, *Law and Society Review*, Vol.28.no.1, 5-126

42 El-Ghonemy, M.R. 1992. *The Egyptian state and the agricultural land market, 1810 - 1986*. *J. Agric. Econ.*, 43(2): 175 - 190.

43 Radwan, S. & Lee, E. 1986. *Agrarian change in Egypt: an anatomy of rural poverty*. London, Croom Helm.

44 El-Ghonemy, M.R. 2001. *The political economy of market-based land reform*. In K. Ghimire, ed. *Land reform and peasant livelihood*. London, ITDG Publishing.

While modern reforms and changes have influenced several fields of Islamic law, the structure determining inheritance has been one of the enduring legacies of classical Islamic law. Esposito sets out the basic inheritance provisions within Islamic law (*Shari'a*) in the following extract. He also explains the opportunities for making testamentary bequests and the constraints upon the Islamic will (*wasiya*). Finally, Islamic endowment (*waqf*) is defined, providing an outline of its two basic forms: charitable (*waqf\_khairi*) and family endowment (*waqf\_abli/dhurri*).



# MODULE 5

## ISLAMIC INHERITANCE LAWS AND LAND SYSTEMS

# MODULE 5:

## Islamic inheritance laws and systems

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### Overview

This module engages with the complex dynamics of Islamic inheritance rules and practice towards practical strategies designed to enhance security of tenure. Islamic inheritance principles often represent a source of pride for Muslims because of their close association with the Qur'an. The rules are rigorously implemented by the family and community, and upheld by the State. A wider flexible system for property transmission takes place across the generations and within the family. This module looks at how application of these formal inheritance rules pertaining to designated shares must be understood in a broader socio-cultural and economic context and within wider inheritance practices.

Inheritance is often treated as peripheral to general debates and policy formation concerning security of tenure, land rights, land reform or regularisation. However, inheritance is a common way of acquiring land or access to land. In Muslim societies generally, irrespective of the nature of faith of the Muslims concerned, inheritance rules are derived from religious sources for dividing an individual's property upon death. Muslims can only bequeath or make a will (*wasaya*) of up to one-third of their estate. Islamic wills have an important role with respect to provision for particularly vulnerable children.

Inheritance of all land owned by Muslims are governed by compulsory inheritance rules, except State land rights. Inheritance rules apply to all size estates, residential or commercial, liquid assets or investments. According to the Islamic divine formula, specific fractional shares of a person's estate upon death are distributed to certain defined relatives or 'sharers'. Compulsory specified shares spread ownership of property, including land, amongst family members. Fragmentation into minute divisions through shares could be a concern. Land consolidation and readjustment, through collective rights can be facilitated.

Women have specific rights to fixed shares under the inheritance rules. But a woman will generally receive a half of a man in a similar situation. Changes to shares of 'adopted' children and orphaned grandchildren are justified on basis of the Qu'ranic bequest verse. Women's lesser shares are often regarded as gender discriminatory, but change meets resistance. Renunciation of shares (*tanazul*) – typically by women – is not an Islamic but a socio-cultural practices. One needs to take a closer look whether the renunciation is voluntary and legally sanctioned. 'Estate planning' and post-inheritance adjustment practices often create desired effects, without compromising Islamic law. For example, through a holistic approach, women are 'compensated' for their lesser inheritance shares.

This module explores how inheritance rules cannot be seen in isolation but must be considered as part of a dynamic inheritance system.

### Learning outcomes

At the end of this module, participants should be able to:

- ◆ appreciate some of the key features of the Islamic legal rules of inheritance, including the benefits and disadvantages of the fixed share system.
- ◆ explore the legal rules on inheritance as part of wider Islamic inheritance systems and their implications.
- ◆ examine post-inheritance adjustment practices including consolidation and renunciation of inheritance rights, with particular reference to the position of women.

## Reading materials

Esposito JL (1982) *Women in Muslim Family Law* (Syracuse NY: Syracuse University Press).

Feillard A (1997) *'Indonesia's Emerging Muslim Feminism: Women Leaders on Equality, Inheritance and Other Gender Studies*, 4 *Islamika* 83-112.

Moors A (1996) *Women, Property and Islam: Palestinian Experience, 1920-1990* (New York: Cambridge University Press).

## Additional reading

Carroll L (2001) 'Life Interests and Inter-Generational Transfer of Property Avoiding the Law of Succession' 8(2) *Islamic Law and Society* 245.

Layish A (1997) 'The Family Waqf and the *Shar'i* Law of Succession in Modern Times' 4(3) *Islamic Law and Society* 352-388.

Sait and Lim (2006) pp. 107-128.

## Facilitator's notes

Here participants are expected to gain an overview of the fixed Islamic inheritance rules and their importance to the wider Islamic framework. The facilitator will encourage engagement with some of the detail on the rules, but ensure that no one is put off by calculation of shares. The module should also be approached from a critical perspective, in which the inheritance rules are understood as part of wider inheritance systems. Participants are encouraged to reflect upon lifetime gifts, which are common in some Muslims societies as 'estate planning', where they may be regarded as socially and legally legitimate, as well as renunciation of inheritance shares.

The court judgment from Pakistan is an interesting document to look at from the perspective of women's rights. It also engages with the controversial issue of renunciation of Islamic shares that is often a gender issue. Beyond what the court says, this is also an opportunity to consider the role of various actors in protecting women's inheritance rights.

## Group work

### Renunciation of inheritance shares in Pakistan

The Constitution of Islamic Republic of Pakistan, 1973, provides the fundamental rights and principles of policy. Article 25(1) of the Constitution provides that "All Citizens are equal before law and are entitled to equal protection of law". Article 25(2) provides that "There shall be no discrimination on the basis of sex alone". Clause 3 of Article 25 provides that "Nothing in this article shall prevent the state from making any special provision for the protection of women and children". The purpose of clause 3 is the protection of women and children. It is a form of beneficial legislation and encourages the State to take up affirmative action policies to protect women and children.

In the case of Ghulam Ali vs. Ghulam Sarwar Naqvi, (PLD 1990 SC 1) a Muslim woman sought to claim under Islamic law her share of property left by her father to her and her three brothers. The brothers opposed her claim on the grounds that she had relinquished her claim because they had expended sums of money on her maintenance, her 2 marriages, and a murder case in which she was involved. The court upheld her claim, ruling that relinquishment of the kind argued by the brothers was against public policy and morality as well as Islamic law, which calls for brothers to protect the rights of their sisters.

The Supreme Court held in cases of inheritance that brothers cannot legally claim 'adverse possession' against their sister, and much less "oust" her. In the case of relinquishment of inheritance by a female co-sharer without consideration, such relinquishment having been declared void as being against public policy, the presumption would be that relinquishment was not on account of natural love but on account of social constraints. Brothers of a female co-sharer were required by law to protect the rights of their sister if ever they come into possession of their land in any capacity. One who is enjoined with the protection of the others property cannot lay a claim adverse to the interests and rights of that other who owns it. The scope of the rights of inheritance of females is so wide and their thrust so strong that it is the duty of the court to protect and enforce them.

The court concluded its decision by urging that women be better informed of their rights, particularly those women living in rural areas, and that Islamic law (*Hanafi* school), which protects women, be cleansed of alien customs and laws denigrating the status of women.

### Recommended reading for group work

Bina Agarwal (1998) *Gender and Command over Property: An Economic Analysis of South Asia* (Delhi: Kali for Women).

Sustainable Development Policy Institute (2008) *Land Rights for Muslim Women: Review of Law and Policy* (Islamabad: SDPI).

### Possible questions for group work

1. Relinquishment or renunciation of inheritance shares of women is common. Where does this practice come from, and is it legal?
2. The Court judgement was a landmark in favour of women's rights, but it still did not guarantee women 'equal' inheritance rights. Do you foresee Muslim women getting equal inheritance rights?
3. The Pakistan Constitution makes clear that gender discrimination is not permitted. What is the role of the State and the Court in guaranteeing 'equal rights' to women?
4. The Court referred to lack of awareness by women of their rights. What are the impediments to women's empowerment and how can civil society help overcome these obstacles.

## Background Q & A

“Islamic inheritance law is itself only a part of a much larger Islamic inheritance system that makes it possible for Muslim proprietors to accomplish many objectives (of Islam)”<sup>1</sup>

## Introduction

The Global Land Tool Network (GLTN) is a multi-sector and multi-stakeholder partnership seeking to translate aspirations, principles and policies into inclusive, pro-poor, affordable, gendered high quality and useful land tools, which can be replicated in a range of contexts. GLTN recognizes the demand for targeted tools, including culturally or religiously formatted tools, since there are many positions and approaches to conceptualising and delivering secure tenure and access to land. Most communities have deeply ingrained cultural traditions, many religions have firm rules on land and inheritance, and every government faces the challenge of land differently with its own array of laws and degrees of political will.

In most Muslim countries Islamic law, principles and practices make an important contribution to shaping access to land. GLTN has as one of its objectives, therefore, the identification and development of Islamic land tools through a cross-cultural, interdisciplinary and global process, owned by Muslims, but including civil society and development partners. Islamic approaches to land should not be seen as an internal matter, giving preference to religion over universal or secular approaches to land, but as part of GLTN’s inclusive, objective, systematic and transparent efforts.

### 1 What is inheritance?

Inheritance is the means of acquiring property, including land, upon the death of another person. In some societies a person has a free choice as to who should succeed to his or her property and by means of a will can set out a series of gifts, known usually as legacies, to chosen successors.

In other contexts a person may have no choice or only a limited choice as to who will enjoy his or her property after death, since the legal rules define either wholly or partly the person or persons who will succeed to a deceased person’s estate as well as the shares in the property each successor should receive.

### 2 How is Islam relevant to inheritance?

Inheritance is one of the most detailed fields of Islamic law, providing for the compulsory division of an individual’s property upon death. The inheritance rules are derived from religious sources – verses in the *Qur’an*.

### 3 Is inheritance an important means for accessing land in Muslim countries?

Yes, inheritance is one of the commonest ways of acquiring land or rights in land in the Muslim world.

### 4 What is the basis of Islamic inheritance rules?

According to the Islamic rules, by means of a divine formula, specific fractional shares of a person’s estate upon death are distributed to certain defined relatives – ‘sharers’ – sons, daughters, a father, a mother or a spouse and, in the absence of children, sisters and brothers, according to compulsory rules.

### 5 Do all Muslims use the same rules to define ‘sharers’?

Generally they do, but every case is not dealt with directly in the religious sources because of the many combinations of surviving relations of the deceased that can arise. It is where there is no direct *Qur’anic* instruction that *Sunni* and *Shi’a* Muslims, and their respective jurisprudential schools, have established different methods for the allocation of inheritance shares.

<sup>1</sup> Powers D (1998) *The Islamic Inheritance System 5:13 Islamic Law and Society*, pp. 285-290(6).

## 6 Is the inheritance of all land governed by these compulsory rules?

The same inheritance rules apply to big or small estates – residential or commercial property, liquid assets or investments. There is a distinction between two forms of landholding. Land held in full ownership, known as *mulk/milk*, is inherited according to Islamic rules of inheritance. Rights of possession in state land (*miri*) are traditionally regarded as outside Islamic inheritance rules, although such rights can be inherited.

## 7 Who inherits under Islamic law?

The heirs mentioned in the *Qur'an* (mother, father, husband, widow, daughter, uterine brother, full sister, uterine sister, consanguine sister) together with the three heirs added by juristic method of analogy (paternal grandfather, maternal grandmother and agnatic granddaughter) form a group of heirs called *Qur'anic* heirs or sharers. These heirs when entitled to inherit are given their fixed shares and the remaining estate is inherited by the residuaries.

### Examples of the application of the divine formula for specified shares

In a simple case an estate will be shared between the deceased's parents or parent, husband or wife, and children. A surviving parent will receive one-sixth of the estate, the surviving spouse one-eighth (a wife) or one quarter (a husband), with the balance shared between the surviving children and the sons receiving twice the share of the daughters.

Where the deceased has no children, a wife will receive one-quarter of her husband's estate, while a husband will have one-half of his wife's estate. Where the deceased dies with no descendants or siblings and the parents are the only heirs, the mother will receive one-third of the estate. The father will receive the remainder of the estate as the nearest *male* relative. However, the mother's share is reduced to one-sixth where the deceased has no children, but has siblings.

Indicative share calculations in particular cases can be made on the website of National Awqaf Foundation of South Africa: [http://www.awqafsa.org.za/share\\_calculation.htm](http://www.awqafsa.org.za/share_calculation.htm)



## 8 Can legitimate sharers be disinherited?

No, legitimate claimants cannot be disinherited, except in extreme circumstances such as causing the death of the deceased.

## 9 Is it possible, as in other legal systems, to make an Islamic will?

Islamic inheritance principles do not give the same apparent freedom to decide where property will devolve upon death as some other systems. However, it is possible for individuals to make a will (*wasaya*). Up to one-third of an individual's estate can be bequeathed in this manner. For a Sunni Muslim a bequest cannot be made to anyone who is entitled to a share under the compulsory inheritance rules, although *Shi'a* Muslims do permit bequests to those entitled to fixed shares in some circumstances.

## 10 Given the limits upon Islamic wills are they important?

Islamic wills have an important role with respect to provision for particularly vulnerable children. Orphaned grandchildren do not receive a defined share under the Islamic inheritance rules from their grandparents. Islamic law does not recognise formal adoption, but children are raised within families without sharing a blood relationship with the family members. The will is a useful means to benefit such 'children of the family' and orphaned grandchildren.

## 11 Are Muslims generally aware of these complex inheritance rules?

The Islamic inheritance principles represent a source of pride because of their close association with the *Qur'an*. So, Muslims, men and women, in all economic classes and of all educational standards, tend to have some knowledge of the basic inheritance rules. The rules are in the main rigorously implemented by families, communities, legal officials and state authorities.

## 12 What are the advantages of the Islamic system?

Compulsory specified shares have the benefit of spreading ownership of property, including land, amongst a range of family members, thereby reducing family strife.

## 13 What are the disadvantages of the Islamic system?

The Islamic system of compulsory shares can lead to fragmentation of property into minute divisions. A land parcel may, following application of inheritance rules, involve many partners with equal or unequal shares.

## 14 Is inheritance important to women?

Inheritance rules which provide women within the family of the deceased with their own specific shares, support women's more general rights in Islamic law to gain, retain and manage their own land and wealth. Where women own land it is frequently inherited land.

## 15 Do women enjoy the same shares as men?

Women have specific rights to fixed shares under the inheritance rules, but a woman could generally receive a half share to that which a man would receive in a similar situation. In some cases, a woman receives same as that of similarly positioned male.

## 16 Do the inheritance rules discriminate against women?

Women's lesser shares in inheritance are often regarded as a marker of their inferior status in Muslim societies and undoubtedly these rules violate the non-discriminatory provisions of the UN Convention for the Elimination of Discrimination against Women. However, despite barriers and constraints on women's access to inherited land and their lesser shares in comparison with men, inheritance remains an important source of access to land for women.

## 17 Are inheritance rules the source of discrimination against women?

It can be argued that within the Islamic framework women's property rights should be approached holistically and that women are 'compensated' for their lesser inheritance shares. A viewpoint, therefore, supported by many Muslim women, is that the system as a whole is fair, supportive of the family and that it fosters interdependence. It is the practices surrounding inheritance that lead to discrimination rather than the rules themselves.

## 18 How can women be compensated for their lesser inheritance shares?

There are other avenues for women to obtain property, such as gifts, payments from the husband to the wife upon marriage (*mahr*) and as a beneficiary under an endowment (*waqf*). It is stipulated also in the *Qur'an* that a husband is obliged to support and maintain a wife out of his property, providing shelter, clothing, food and medical care, but she has no equivalent obligation towards the husband.

## 19 Does the compensation system work in practice?

In practice, the system of so-called 'compensation' may be variable and uneven in its impacts depending upon the dynamics of custom, family, kinship and local interpretations of Islamic law. There is evidence from Yemen and Morocco that some women may be 'compensated' for their losses in gaining access to land, by periodic gifts of money or other personal property. Whether such support fully compensates for exclusion from rights in land will depend very much on the particular position of the woman in question.

## 20 Can inheritance rules be seen in isolation?

No, the rules on inheritance shares are part of a wider flexible system for the transmission of property across the generations and within the family, including tools such as lifetime gifts, which enable 'estate planning' and post-inheritance adjustment practices.

## 21 Is it possible then to avoid the inheritance rules?

There are legal techniques that a person contemplating death can use as a form of 'estate planning' when he or she is concerned about the distribution of property after death. This is particularly the case with regard to agricultural land, where fragmentation in ownership of the land is of great concern to individuals. The most obvious tool of estate planning is the lifetime gift or transfer. Land categorised as state land (*miri*) too is often subject to lifetime transfer, since it lies outside the compulsory inheritance rules.

## 22 Is estate planning socially acceptable?

Although such techniques are subject to debate and there may be tensions surrounding their deployment, they are commonly used in modern Islamic societies. A wide range of lifetime gifts have developed, with distinctions between the various schools of law. In some societies estate-planning techniques may be seen also as a socially acceptable means of mitigating the effects of the unequal legal status of women with respect to inheritance in some Muslim societies.

## 23 Does estate planning benefit women?

Lifetime gifts are often used by a father to transfer property, particularly agricultural land, to a chosen son or sons, to the detriment of women who may or may not be compensated for their consequent losses. But, in Indonesia, for instance it seems that estate planning as a means of recompensing some women and girls for their disadvantaged position under the compulsory Islamic inheritance rules is readily used and socially acceptable. Legal principles may be manipulated, therefore, both to the benefit and detriment of women in terms of their property rights and/or in order to concentrate ownership within the hands of one person, or a small select group, within the family.

## 24 Can legitimate sharers reject their specified shares?

The Islamic inheritance process does not conceive of a rejection by a beneficiary of their share, but there is a widespread practice whereby a person, typically a woman, voluntarily renounces her inheritance rights.

## 25 Is renunciation of shares an Islamic principle?

No, it is a customary practice or informal process that coexists alongside Islamic law in many countries.

## 26 How is renunciation implemented?

It has been incorporated into the legal process takes place after legal confirmation that the person renouncing is competent and fully aware of her actions. However, renunciation of inheritance rights across a range of Muslims societies has little to do with Islam and is a socio-cultural practice that requires close scrutiny.

## 27 What are the arguments for and against renunciation?

Women may be forced to renounce their limited inheritance rights, which is a justifiable concern for gender rights advocates. The picture 'on the ground' may be complex. Some women renounce their rights to land in order to preserve family relationships more powerful family members, particularly with their brothers. The benefits may include a continuing right of access to family homes.

## 28 Can a person sell or exchange their specified inheritance shares?

In a process known as consolidation the division of an estate into fractional shares may be followed by a series of sales or exchanges designed to reduce the number of co-owners. For instance, a daughter of the deceased may exchange her share in land for cash from her brother. The compensatory payment may be paid, thereby giving the transaction clear legal authority, or it may be a symbolic exchange or 'payment on paper'. Again this is a socio-cultural practice that requires close scrutiny and which can add to women's inequalities.

## 29 How has legal reforms impacted inheritance?

There has been extensive codification of inheritance rules, as part of Personal Status and Family Codes, in many Muslim countries. However, legal reform, change or addition to inheritance rules is relatively modest with little interference with the compulsory rules. Where change has arisen it has focused in the main on the position of 'adopted' children and orphaned grandchildren, justified on the basis of the *Qur'anic* verse of bequest. Even the limited adjustments remain the subject of juristic debate.

## 30 Are legal reforms of inheritance rules socially acceptable?

A number of NGOs and liberal personalities in Muslim countries have called for equal inheritance rights, but Islamic inheritance rules are a complex and sensitive issue. In 2000 Kenyan Muslim women protested against a proposed civil rights bill that gave equal shares in inheritance to sons and daughters, on the basis that such change was in breach of Islamic law.

# Module 5

## Powerpoint presentation


1

### ISLAMIC INHERITANCE MODULE 5

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### What are the key concepts?

4

- Inheritance of land owned by Muslims is governed by compulsory rules, except State land rights
- As per divine formula, specific fractional shares of estate distribution to define relatives or 'shares'
- Muslims can only bequeath or make a will (*wasaya*) of up to one-third of their estate.
- Women have specific (lesser) rights to fixed shares under the inheritance rules
- Inheritance rules cannot be seen in isolation but must be considered as part of a dynamic inheritance system





### Session Learning Outcomes

2

**At the end of this session participants should be able to:**

1. Appreciate some of the key features of the Islamic legal rules of inheritance, including the benefits and disadvantages of the fixed share system
2. Explore some of the legal rules on inheritance as part of wider Islamic inheritance systems and their implication
3. Examine post-inheritance adjustment practices including consolidation and renunciation of inheritance rights, with particular reference to the position of women





### Why are these concepts relevant?

5

- The inheritance rules are derived from religious sources – verse in the Qur'an.
- Inheritance remains an important source of access to land for women and others
- Changes to shares of 'adopted' children and orphaned grandchildren justified on basis of the Qu'ranic bequest verse
- A wider flexible system for property takes place across the generation and within the family.
- Estate planning debated; maybe seen as socially commendable to protect rights of women





### Your opening thoughts!

3

- What experience do you have of Islamic inheritance principles?
- Do you think Islamic inheritance principles are significant in the access to land?
- How can Islamic inheritance systems promote land, property and housing rights?





### How can the concepts be used?

6

- Inheritance rules apply to all size estates, residential or commercial, liquid assets or investments
- Islamic wills have an important role with respect to provision for particularly vulnerable children.
- Land consolidation and readjustment, through collective rights can be facilitated.
- Through a holistic approach, women are 'compensated' for their lesser inheritance shares.
- Need to take a closer whether the renunciation is voluntary and legally sanctioned.
- Islamic inheritance rules are complex and sensitive issue, cannot be avoided.





**What is inheritance?**

7

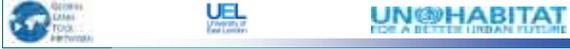
- Means of acquiring property/land upon death
- In some societies, free choice on who should succeed to property through series of gifts or legacies.
- In other contexts, no choice or only a limited choice as to who will enjoy his or her property after death
- Islam recognises freedom for one -third of property with rest being determined by legal rules which define who will succeed to a deceased persons estate as well as the shares in the property of each successor



**How is inheritance in Islam?**

11

- Same inheritance rules apply to big or small estates – residential or commercial property, liquid assets or investments.
- Distinction between two forms of landholding.
- Land held in full ownership, known as mulk/milk, is inherited according to Islamic rules of inheritance.
- Rights of possession in state land (miri) are traditionally regarded as outside Islamic inheritance rules, although such rights can be inherited.



**Why Islam deals with inheritance?**

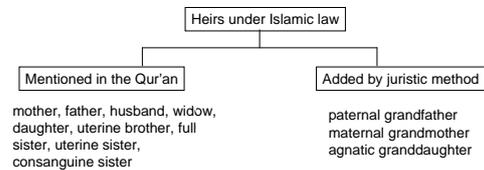
8

- Common way of acquiring land or rights in land in the Muslim world
- One of the most detailed fields of Islamic law
- Most Muslims are aware, many follow it
- Provides for the compulsory division of an individual's property upon death
- Derived from the Qur'an



**Who inherits under Islamic law?**

12



- After heirs inherit their fixed shares – the remaining estate is inherited by the residuaries
- Legitimate claimants can be disinherited, in extreme circumstances such as causing the death of the deceased



**What is the basis of Islamic rules?**

9

- Based on divine formula
- Specific fractional shares are distributed to certain defined relatives
- 'Shares' are sons, daughters, a father, a mother or a spouse.
- Absence of children, sisters and brothers, according to compulsory rules



**Is an Islam will possible?**

13

- Possible for Muslims to make a will (wasaya).
- But Islamic inheritance principles do not give the absolute freedom to decide where property will develop upon death as some other systems.
- Up to one-third of an individual's estate can be bequeathed through will.
- For a Sunni Muslim a bequest cannot be made to anyone who is entitled to a share under the compulsory inheritance rules
- Shi'a Muslim do permit bequests to those entitled to fixed shares in some circumstances.



**Does all use the same rules?**

10

- Where Qur'an is explicit, all Muslims use the same rules
- Where no direct Qur'anic instruction, *Sunni* and *Shi'a* Muslims, and their respective jurisprudential schools, established different methods for allocation of inheritance shares.
- Not every case dealt with directly in the religious sources; many combinations of surviving relations of the deceased that can arise



**Are Islamic wills important?**

14

- Importance in compensating those not in inheritance rules, such as vulnerable children
- Orphaned grandchildren do not receive a defined share.
- Not recognize formal adoption, but children are raised within families without sharing a blood relationship with the family members.
- The will is a useful means to benefit such 'children of the family' and orphaned grandchildren



### Are Muslims aware of these rules? 15

- The Islamic inheritance principles represent a source of pride because of their close association with the Qur'an
- Muslim men and women in all social classes and of all educational standards, tend to have some knowledge of the basic inheritance rules
- The rules are in the main rigorously implemented by families, communities, legal officials and state authorities

### Do women enjoy same shares as men? 19

- women**
  - Have specific fixed shares
  - Receive a half share
  - Receive same as of similarly positioned male
- men**
  - Receive whole share in a similar situation as women

### What advantages in the system? 16

- Compulsory specified shares have the benefit of spreading ownership of property, including land
- Creating rights amongst a range of family members, creating rights
- They reduce family strife and promote cohesion

### Do the rules discriminate? 20

- Women's lesser shares in inheritance are often regarded as marker of their inferior status
- These rules violate the non-discriminatory provisions of CEDAW
- View not shared by most Muslims, fixed shares a good starting point
- In practice, barriers and constraints on women's access to inherited land, irrespective of 'paper rights'.

### What are the disadvantages? 17

- A land parcel may follow application of inheritance rules, and involve many partners with equal or unequal shares.
- The Islamic system of compulsory shares can lead to fragmentation of property into minute divisions.

### How to interpret inheritance rules? 21

- Muslim women often argue that taken as a whole the inheritance system is fair, supportive of the family and that it fosters interdependence.
- Within Islamic framework, women's property rights should be approached holistically.
- Women are to be 'compensated' for their lesser inheritance shares
- Practices surrounding inheritance lead to discrimination rather than the rules themselves.

### Is Inheritance Important to Women? 18

- Where women own land, it is frequently inherited land
- Inheritance rules provide women within the family of the deceased with their own specific shares support

### How can women be compensated? 22

- Other avenues for women to obtain property exist
- Includes gifts, payments from the husband to the wife upon marriage (*mahr*) and as a beneficiary under an endowment (*waqf*)
- Qur'an requires that a husband support and maintain a wife out of his property, providing shelter, clothing, food and medical care, but she has no equivalent obligation towards the husband.

**Does compensation work?****23**

- In practice 'compensation' variable and uneven
- Impact depends on custom, family, kinship and local interpretations of Islamic law
- Some women may be 'compensated' for their losses in gaining access to land, by periodic gifts of money or other personal property.
- But this may not fully compensate the woman regarding exclusion from rights in land



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**Does estate planning benefit women?****27**

- Legal principles may be manipulated both to the benefit and detriment of women in terms of their property rights?
- In order to concentrate ownership within the hands of one person, or a small group, within the family.
- In Indonesia and other countries, it seems that estate planning as a means of re-compensating some women and girls for their disadvantage position under the compulsory Islamic inheritance rules is readily used and socially acceptable.



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**Are inheritance rules independent?****24**

- Rules on inheritance shares are part of a wider flexible system for the transmission of property
- Rules include tools such as lifetime gifts which enable 'estate planning' and post-inheritance adjustment practices.
- Rules cut across the generation and within the family



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**Can beneficiaries reject their shares?****28**

- Islamic inheritance process doesn't conceive of a rejection by a beneficiary of his or her share.
- But, there is a widespread practice of renunciation, post inheritance.
- A person typically a woman voluntarily renounces (tanazul) her inheritance rights in favor another family member.
- This is a customary practice or informal process which co-exist along side Islamic law in many countries.



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**Can inheritance rules be avoided?****25**

- Legal techniques for person in form of 'estate planning' when concerned about the distribution of property after death.
- Particularly the case with regard to agricultural land, where fragmentation in ownership of the land is great concern..
- Most obvious tool of estate planning is the lifetime gift or transfer.
- Land categorised as state land (miri) too is often subject to lifetime transfer, since it lies outside the compulsory inheritance rules.



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**How is renunciation implemented?****29**

- Renunciation is tolerated or has been incorporated into the legal process
- It takes place after legal confirmation that the person renouncing is competent and fully aware of her actions.
- Renunciation of inheritance rights across a range of Muslim societies has little to do with Islam and is a socio-cultural practice that requires close scrutiny.



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**Is estate planning acceptable?****26**

- There is debate and some tensions surrounding their use
- But commonly used in modern Islamic societies
- A wide range of different versions of lifetime gifts developed with distinctions between various schools of law
- 'Estate planning' techniques may be seen also as socially acceptable means of mitigating the effects of unequal legal status of women with respect to inheritance in some Muslim societies.



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**Is renunciation always bad?****30**

- Women may be forced to renounce their limited inheritance rights, which needs to be addressed
- Some women renounce their rights in order to preserve relationships with more powerful family members, particularly with their brothers.
- The benefit may include a continuing rights of access to family homes
- The reality 'on the ground' may be complex



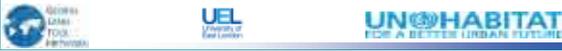
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**Can shares be sold or exchanged?**

**31**

- Consolidation: though this process a division of an estate into fractional shares may be followed by a series of sales or exchanges to reduce the number of co-owners
- Example: a daughter of the decease may exchange her share in land for cash from her brother.
- Compensatory payment: this may be paid, thereby giving the transaction clear authority, or it may be a symbolic exchange or 'payment on paper'



**Are legal reforms acceptable?**

**33**

- Number of NGOs and liberal personalities in Muslim countries have called for equal inheritance rights
- But, Islamic inheritance rights rules are complex and sensitive
- Change of inheritance is resisted the basis that it breaches Islamic law



**Have reforms impacted inheritance?**

**32**

- Exchange codification of inheritance rules, as part of Personal Status and Family Codes, in many Muslim countries
- Little change or addition to inheritance rules, relatively modest impact
- Focus on the position of 'adopted' children and orphaned grandchildren, justified on the basis of the Qu'ranic verse of bequest.
- Even limited adjustments remain in the subject of juristic debate



Thank you for your attention!

**34**

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Detail from Islamic architecture © Photos8.com

## Reference readings

In Muslim societies, the legal rules concerning the proper devolution of property upon death are deeply embedded in popular consciousness, being a considerable source of pride because of their particularly close association with the Qur'an. While modern reforms and changes have influenced several fields of Islamic law, the structure determining inheritance has been one of the enduring legacies of classical Islamic law. Esposito sets out the basic inheritance provisions within Islamic law (Shari'a) in the following extract. He also explains the opportunities for making testamentary bequests and the constraints upon the Islamic will (*wasiya*). Finally, Islamic endowment (*waqf*) is defined, providing an outline of its two basic forms: charitable (*waqf khairi*) and family endowment (*waqf ahli/dhurri*).

**R5.1** Esposito J. L. (1982) *Women in Muslim Family Law*, Syracuse NY: Syracuse University Press

### Why inheritance?

The customary laws dealing with inheritance in pre-Islamic Arabia were designed to keep property within the individual tribe in order to preserve its strength and power. Inheritance passed only to mature male (agnate) relatives who could also fight and defend their possessions. Male minors were totally excluded. Widows, who were regarded as part of the estate, and daughters, who would no longer belong to the family once they were married, were also barred from inheritance.

The inheritance provisions in the *Quran* modified this system in order to correct injustices. Islam brought a change in the social structure. Loyalty to the Islamic community (*ummah*) transcended tribal allegiance. In the Islamic community, more emphasis was placed upon family ties between husband, wife, and children. The consequent shift in allegiance from the individual tribe to the individual family unit significantly raised the status of women in the society. This Islamic reform is mirrored in the new Qur'an stipulated rules of inheritance that were superimposed upon certain unjust customary laws. The *Quran* granted rights of inheritance to the husband and the wife, to children, and to a number of close female relatives

who had previously had no rights of succession at all. These new "*Quranic* heirs" received fixed proportions from the deceased's estate before the inheritance Passed to the close male relatives. Generally speaking, female heirs were awarded a share equal to one-half that of their male counterparts, whose heavy maintenance responsibilities also cited in the *Quran* justified their larger share.

However, where the parents, and uterine brothers and sisters of the deceased are only entitled to a small share of inheritance, men and women share equally in the estate. In addition, no reference is made in the *Quran* to primogeniture. Thus, all sons, regardless of age, received an equal portion of inheritance.

The reforms introduced by the *Quran*, however, did not replace the existing legal scheme. Instead, the customary laws and *Quranic* reforms were fused into a comprehensive and coherent legal structure by the efforts of jurists and the force of events. The system of inheritance that resulted represents a feat of juristic achievement. The Prophet is reported to have said that the laws of inheritance comprise "half the sum of *ilm*" (true knowledge stemming from divine revelation).

### Definition of Inheritance

The system of inheritance is the science of duties or obligations (*ilm al-faraid*); specifically, religious obligations. The reform of customary law through its modification by Quranic verses (its Islamicization) will be seen in the explanation of classical laws of inheritance that follows. The outline arranging the structure of priority in inheritance demonstrates both the structure of the traditional extended family and the Islamic concept of social values. Furthermore, it illustrates the meticulous precision with which jurists formulated this elaborate legal system of succession.

### Classification of heirs

Hanafi jurists divide the heirs into seven categories. The first three are the principal classes.

#### *Quranic heirs*

The first class is made up of the Quranic heirs (*ahl al-faraid*) whose rights were established by Divine revelation. The Quranic heirs have been called "Sharers" because they receive a precise fractional share prescribed by the Quran (IV. 11-12, 176).

Although these relatives, who are mostly women, inherit first, they take only a portion of the estate. The strong influence of customary law can be seen by the fact that the residue, usually the bulk of the inheritance, reverts back to the male agnates (*asabah*).

A list of the twelve relations that make up this first class (Quranic heirs) follows. It includes a treatment of (1) the fraction of the estate which each class of heirs will receive, singly or collectively; (2) those relatives who exclude certain other heirs from inheritance; and (3) the other key circumstances affecting inheritance. The shares mentioned for each heir refer to the net estate, the amount remaining after funeral expenses and other debts have all been paid.

The first two *Quranic* heirs are heirs by "affinity," the *husband and wife*. These heirs always succeed. They do not exclude nor are they excluded by any other relative. If they exist, they reduce the residue that may be taken by the class two relatives (agnates). The husband takes one-fourth of his wife's estate. If his wife has no living children or children of a son (agnatic heirs), he takes one-half. The wife inherits one-eighth of her husband's estate if there are children or children of a son U.S., and one-fourth if there are no children. However, the wife's portion is a collective one. In the case of a polygamous union, the wives share the one-eighth or one-fourth equally. The remainder of the *Quranic* heirs (blood relations) is listed below:

The *father* receives one-sixth. However, when there are children of the deceased or of the deceased's son h.l.s., the father of the deceased is made an agnatic heir. The *mother* receives one-sixth. However, if there are no children of the deceased, no children of the deceased's son h.l.s., or only one brother or one sister of the deceased, her share is increased to one-third of the whole estate. If the husband or wife as well as the father of the deceased are alive, she will receive one-third of the residue after deducting the husband's or the wife's share.

One *daughter* of the deceased is entitled to one-half of the estate and two or more daughters receive two-thirds. However, if the deceased has a son, the daughter(s) are made agnatic heirs. The *paternal grandfather* is entirely excluded from inheritance by the father or nearer paternal grandfather of the deceased. However, if they are not living, he takes their place, receiving one-sixth of the estate, or if there are no children of the deceased or the deceased's son h.l.s., he becomes an agnatic heir.

The *maternal grandmother* is entirely excluded by the living mother of the deceased or nearer maternal or paternal grandmother. The *paternal grandmother* is excluded by the living mother or father of the deceased, a nearer maternal or paternal grandmother and a nearer paternal grandfather. However, when they are not excluded, they receive a share of one-sixth of the inheritance to be distributed to one or to two or more collectively.

The *son's daughter* receives a share of one-half for one and two-thirds for two or more collectively. However, she is excluded from inheritance by the existence of the son or more than one daughter, or a higher son's daughter. If only one daughter of the deceased exists or if only one higher son's daughter exists, her share is reduced to one-sixth. Finally, if an equal son's son exists, she is made an agnatic heir.

The *full sister* of the deceased is excluded from inheritance by the deceased's son or son h.l.s., father, and paternal grandfather. If these are not living, one sister receives one-half of the estate and two or more collectively receive two-thirds. However, if a full brother exists, the full sister is made an agnatic heir.

The consanguine sister is excluded from inheritance by a son h.l.s., father, paternal grandfather, full brother, or more than one full sister. Otherwise her share is one-half for one sister and two-thirds collectively for two or more. When only one full sister exists, the consanguine sister's share is reduced to one-sixth and if a consanguine brother exists, the consanguine sister is made an agnatic heir.

The *uterine brother* and *uterine sister* are excluded by the child, child of a son U.S., father, or paternal grandfather of the deceased. If these do not exist, the uterine brother and/or sister receive one-sixth singly and one-third for two or more collectively. Once the *Quranic* heirs have received their share, the estate passes on to the Class II agnatic heirs (*asabah*), or male relations on the male line. The inheritance rights of the agnates derive from pre-Islamic customary law.

Class II heirs have often been referred to as "residuaries" since the residue of the estate (often the bulk of the inheritance) goes to them. Class II contains all of the male agnates, and due to Quranic reforms, four specific female agnates.

Agnatic heirs are formally classified by the *Sirajiyah*<sup>2</sup> in the following way:

1. Males — The agnate in his own right (*asabah binafsihi*). This group, the largest and most important, includes a limitless number of blood relatives, all male agnates who were the tribal heirs of pre-Islamic law—the son, son’s son, father, brother, paternal uncle and his son, and so on.
2. Females —The agnate in the right of another (*asabah bi-ghayriha*). This section specifies four female agnates *when they co-exist with male relatives of the same degree*: daughter (with son), son’s daughter h.l.s. (with equal son’s son h.l.s.), full sister (with full brother) and consanguine sister (with consanguine brother).
3. Females —the agnate with another (*asabah maa ghayriha*). These consist of two irregular cases of full and consanguine sisters when they co-exist with daughters and there are no nearer heirs.

### Uterine heirs

Following distribution to the Quranic and agnatic heirs, the inheritance that remains is distributed among the uterine heirs (dhawu al-arham), often referred to as “distant kinsmen.” Uterine heirs include every relative who is neither a sharer nor a residuary. On close examination, one finds that the agnatic and the uterine together include all possible blood relatives of the deceased.

Following the first three principal categories of heirs described above, the following four subsidiary classes of heirs (successors unrelated by blood) inherit only as a rare exception:

### Successor by contract

In Hanafi law, in default of all blood relations and subject to the rights of husband or wife, the estate of the deceased goes to the “successor by contract.” Through a contract this person promises to pay a fine or ransom for which the deceased may become liable, and in exchange he receives this right of succession. Such an agreement is called a *mawalat*.

<sup>2</sup> *The Sirajiyah by Siraju al-din Md.b. Abdul al- Rashid al-Sajawandi is the highest authority on inheritance amongst the Hanafis.*

### Acknowledged kinsman

The next in succession is a person of unknown descent about whom the deceased has made an acknowledgement of kinship, not through himself but through another. The deceased could have acknowledged someone as his brother, the descendant of his father or his uncle, or the descendant of his grandfather, but not as his son.

### Universal Legatee

The universal legatee is the person to whom the deceased, through a will, has left all of his property. The deceased may leave the whole estate if he has no living heir.

### Escheat

In the default of all possible heirs mentioned above, the estate escheats to the government, the ultimate heir. In early Islamic history the inheritance would go to the Public Treasury (bayt al-mal).

As the Hanafi inheritance laws so fully reveal, a man is not free to bequeath his whole estate to whomever he chooses. He is obligated by law to give certain fixed amounts to specific heirs. These shares represent the inviolate right of such heirs to an inheritance. However, the verses of inheritance had been preceded by earlier verses permitting testamentary bequests to relatives. The law of testamentary bequests has its source in the Quran: “It is prescribed when death approaches any of you, if he leave any goods, that he make a bequest to parents and next of kin, according to reasonable usage; this is due from the God-fearing”<sup>3</sup> (II:180). This *Quranic* “Verse of Bequests” which was of a general and discretionary nature has generally been regarded by the majority of jurists as abrogated by the later *Quranic* verses of inheritance which, as has been noted above, stipulated fixed portions for specified heirs.

However, a minority of jurists continued to maintain that the “Verse of Bequests” was in force. Modern Egyptian reforms have been based on this position. Since the *Quranic* verses of inheritance only provided for a specific group of heirs and this only “after payment of legacies and debts,” some form of bequest was still presumed (IV:12). Because the *Quran* was silent as to the extent of this continued power of testamentary disposition, jurists turned to the *Sunnah* of the Prophet for regulations which

<sup>3</sup> *Some legal scholars, such as Ibn Taymiyya, condemned tahlil as an abuse of the spirit of the law and thus invalid.*

both enabled bequests and protected the rights of *Qurānic* heirs. The result is a system which recognizes the right of a Muslim to bequeath up to one-third of his net estate to parties of his own choice as long as they are not his own legal heirs. The bequest can be made for any person capable of owning property, regardless of his religion, or to an institution, or for a religious or charitable object.

The provision limiting the disposition of property to the "bequeathable third" is based on a report by the Companion of the Prophet, Saad b. Abi Waqqas: "*The Messenger of God visited me at Mecca... since I was near death. So I said to him: "My illness has become very serious. I have a good deal of property and my daughter is my only heir. Shall I give away all my property as alms?" He said: "No." I said: "Shall I bequeath two-thirds of my property as alms?" He said: "No." I asked: "Half" He answered again: "No." Then he said: "Make a will for one-third and one-third is a great deal. It is better to leave your heirs rich than poor and begging from other people.*"

The second restriction that a bequest may not be made in favor of a legal heir stems from the *hadith* reported by Ibn Abbas: "No legacy to an heir unless the other heirs agree. Sunni jurists, moreover, devised a further regulation to cover cases in which a testator went beyond the limits of his power and bequeathed in excess of the allowable one-third or bequeathed to an heir. In such cases, the permission of the testator's heirs is required before such provisions can take effect. In Hanafi law this consent must be obtained after the death of the testator.

### Waqf (Charitable Endowment)

The legal definition of *waqf*, or endowment, in the Hanafi schools is "the detention of a specific thing in the ownership of the *waqif* or appropriator and the devoting or appropriating of its profits or usufruct in charity on the poor or other good objects<sup>4</sup>. The formation of *waqfs* is consistent with the strong emphasis on charitable deeds that is stressed in Islam, but in comparison with other institutions, its support in traditions is weak. The legal scholars (*fuqaha*), in explaining *waqf*, put most emphasis on a tradition of Ibn Umar which says that Umar asked the Prophet what he should do with valuable lands he had just acquired after the partition of Khaibar.

The Prophet answered: "Retain the thing itself and devote its fruits to pious purposes." Umar followed these instructions, prohibiting the land from being sold, given away, or bequeathed and giving it as charity to the poor, needy relatives, slaves, wanderers, guests, and for the propagation of the faith. In addition, the property's maintainer could also obtain sustenance for the property as long as he did not accumulate wealth from it.

Certain conditions must be met for the completion of a *waqf*. First of all, the founder of a *waqf* (*waqif*) must have reached puberty, be of sound mind and be a free man. He must also possess unrestricted ownership and full right of disposal of his property. Secondly, the object of the endowment must be of a permanent nature and it must yield a usufruct (profit). A *waqf* is generally associated with real estate although movable property has also been awarded. Thirdly, the *waqf* must be made in perpetuity (*muabbad*) so that if it is established for individuals, the proceeds are allotted after their death to the poor. Fourthly, the purpose of the *waqf* must be pleasing to God. In addition, the ultimate purpose of a *waqf* must be *qurbah* (i. e., for the benefit of the poor).

Two kinds of *waqf* can be distinguished: a religious or charitable endowment (*waqf khairi*) involving mosques, hospitals, bridges, etc., or family endowments (*waqf ahli* or *dhurri*) for children or grandchildren as well as other relatives or other people. Only in Hanafi law can the *waqif* himself also benefit from the *waqf* after the dedication. For the remainder of his life or for a shorter period of time, he can take the whole of the usufruct from the *waqf*.

*Waqfs* can be made for the rich and the poor alike, or the rich and thereafter for the poor, or for the poor only. Thus, when a *waqf* is given in favor of the *waqifs* descendants, the trust is in their favor as long as a single descendant exists. When they cease to exist, the usufruct will go to the poor. Some limitation is placed on the amount of the *waqifs* estate dedicated in certain circumstances. If a *waqf* is made through a will or during death illness (*marad al-maut*), the testator cannot award more than one-third of his estate without the consent of his heirs.

4 Al-Ahram, December 27, 1971

In the next extract, Feillard argues that estate planning in Indonesia is viewed as socially and legally legitimate from an Islamic perspective. Further, the operation of a system of 'compensation' for women's lesser inheritance shares, within the distinctive Indonesian context of complex legal pluralism, is described. Addressing directly gender rights, Feillard uses concrete examples and interviews with individual women to support his arguments.

**R5.2** Feillard A. (1997) '*Indonesia's Emerging Muslim Feminism: Women Leaders on Equality, Inheritance and Other Gender Issues*', *Studia Islamika*, 83

The greater freedom of movement and the relatively high status enjoyed by Indonesian women have made their fate appear quite enviable compared to women in Middle Eastern and South Asian societies as India and Pakistan (Vreede-de Stuers 1960<sup>5</sup>; Ward 1963<sup>6</sup>). In Java for example, women deal with money, become traders and their contribution to the household gives them financial autonomy and power (Geertz 1961<sup>7</sup>; Stoler 1977<sup>8</sup>; Koentjaraningrat 1985<sup>9</sup>; Keeler 1990<sup>10</sup>, Brenner 1995<sup>11</sup>). Recently however, the Islamic revival, which has also reached Indonesia, has been accompanied by an increasingly conservative discourse on womanhood, vehiculed since the 1980s by some media and *dakwah* activities, partly as a reaction to modernity.<sup>7</sup>

This article proposes to examine the views of women leaders on major gender issues which have been a subject of disagreement between feminist activists and conservatives. What does Islamic revival imply for the modern Indonesian woman? How does she react to it? Evelyn Blackwood (1995<sup>12</sup>) has shown that women in Minangkabau were not marginalized despite the double effort of legitimating men's power by both the state and Islam. Earlier, Lucy Whalley (1993<sup>13</sup>) has also cleverly demonstrated that women adapt to pressures and "develop strategies for self-representation designed to preserve their own reputations and that of their families" (Whalley 1993: 26<sup>14</sup>). How do women leaders perceive recent societal changes and how do they face them? This was the theme of a one-month research project I did in Java in 1995. In 23 interviews which lasted from two to four hours each, I interviewed women on issues ranging from polygamy to veiling, from freedom to work to inheritance, from equality at home to female circumcision, etc.<sup>7</sup> Their discourse exposes the reality of a growing conservatism in their surroundings, what some call "fundamentalism", to which, ironically, strict Muslim milieus seem to be the most reactive. In general, interviews revealed a widening gap between the sense of justice prevailing among these women, and the conservative trends emerging in Indonesian society.

This conservatism has driven to a new consciousness among some Indonesian women (and some men sympathetic to their cause) about the need to make efforts to preserve their privileged status and improve remaining inequalities. An embryonic Muslim feminist awareness is emerging, though scattered, unstructured and little organized. It seems to be in search of an Indonesian model, neither middle-eastern nor western, but properly Muslim Indonesian.

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6 Ward B, (1963) "Men, Women and Change: An Essay in Undersatnding Social Roles in South and South -East Asia", in *Women in New Asia: The Changing Social Roles of Mena and Women in South and South- East Asia*, Ward ed, Paris, Unesco.

7 Geertz H, (1961) "The Javanese Family: A study of kinship and socialization, Free Press, Glencoe

8 Stoler A, (1977) "Class Structure and Female Autonomy in Rural Java", *Signs* 3 (1): 74-89

9 Koentjaraningrat, (1985), "Javanese Culture", Oxford University Press, Singapore

10 Keeler W, (1990), "Speaking of Gender in Java", in *Power and Difference: Gender in the Southeast Asia*, ed Atkinson and Errington, Stanford University Press, Stanford, California

11 Brenner S, (1995) " Why Women Rukle the Roost: Rethink Javanese Ideologies of Gender and Self Control", in *Bewitching Women and Pious Men: Gender and body politics in Southeast Asia*, eds. Aihwa Ong and Michael Peletz, University of California Press: 19-50.

12 Blackwood E, (1995) "Senior Women, Model Mothers, and Dutiful Wives: Managing Gender Contardictions in a Minangkabu Village", in *Bewitching Women and Pious Men: Gender and body politics in Southeast Asia*, eds. Aihwa Ong and Michael Peletz, University of California Press: 19-50.

13 Whalley L, (1993) "Veiling and the Politics of Women's Dress in West Sumatra, Indonesia" paper presented at the conference *Islam and the Social Construction of Identities: Comparative Perspectives on Southeast Asian Muslims*", Centre for the South East Asian Studies, University of Hawaii, Manoa, August 4-6, 1993

14 *ibid*

Between the women whose references are western (who dare, for example, defend the rights of lesbians) and those who look to the Middle East as a model (acceptance of polygamy as the very proof of true faith), there appears to be an intermediary category of Muslim feminists, modern moderates who believe in and fight for an egalitarian and liberating interpretation of Islam.

## Inheritance

In Java, descent and inheritance are reckoned bilaterally. Javanese adat prescribes that daughters inherit equal shares from all the property of their parents'. Married women keep the property inherited from their parents, and dispose of it as they like (Geertz 1961<sup>15</sup>). Upon divorce, a married woman may take with her this property and also the property she earned during marriage.

Customary law (*adat*) was applied until recently, in theory at least, for questions of inheritance in Java, Madura and South-Kalimantan. A 1937 Dutch regulation was applied which provided that, in these regions, religious courts could no longer rule on inheritance, but only on matters of marriage, divorce, reconciliation, interpretation of marriage contracts, dowry, and money allowances to a divorced wife. In fact, Daniel Lev has shown that Islamic law continued to be applied on inheritance in Java, due to the ruling that it could be used in regions where it had become an integral part of customary law (Lev 1972: 114-115<sup>16</sup>). Suzanne Brenner found in her 1988 research in Solo that more people preferred to follow the prescription of "Javanese custom" rather than Islamic law followed by some strict Muslims (Brenner 1995: 24<sup>17</sup>). In the early 1980s, Minister of Religious affairs Munawir Sjadzali and Supreme Court Vice-chairman Busthanul Arifin initiated a project called *Kompilasi Hukum Islam Indonesia* (Compilation of Indonesian Islamic Law). "Ulama" all over Indonesia were asked to help codify a specifically Indonesian Islamic code, creating a consensus on sensitive questions pertaining to family law.

It had the effect of homogenizing family law in the ethnically diverse archipelago. The new code was legalized in 1989 together with a law on Islamic courts, extending their jurisdiction over matters of inheritance for Java, Madura, and South-Kalimantan. Munawir and Busthanul, both Muslim intellectuals, had wanted to produce a code close to the indigenous sense of justice. However, the 'ulam'a' put their weight behind a code largely taken from the Sh'afi'i school of law (*madhhab*). The government succeeded in adding a clause stipulating that the judge should take into consideration the living sense of justice particular to the area where he lived. To my knowledge, there has been no study yet on the impact of the new code published in 1994-1995.<sup>18</sup> The impact of the law will be important in case of conflicts between parties disagreeing on whether *adat* or *Hukum Islam* should prevail.

Except for lawyer Nursyahbani, none of the 23 interviewees had heard of any conflictual case linked to the new code. In general, after stressing that they had not been raised to wait for inheritance and laid more importance on schooling as the way to social progress, the interviewees said they felt that inheritance should be distributed equally between brothers and sisters or should go to the poorest member of the family. For the majority of them, their families had opted for an equal sharing, or even for a larger share for women. Three groups of women leaders could be singled out: those whose family totally ignored Islamic law and pursued the family tradition of equal sharing between boys and girls or even giving preference to girls; a larger group who tried to pay lip-service to Islamic law but circumvented it by a will before death; and a minority who stuck to Islamic law.

## Equal sharing

The equal sharing rule was applied among the women leaders interviewed, in abangan circles, in mixed santri/abangan families, and in traditionalist santri circles. In the abangan family of Madurese Moersia Syaafri Ilyas, adat law giving preference to women has prevailed: "Among us, it is the girls who have inherited, not the boys, because they can earn their living.

15 Geertz H, (1961) "The Javanese Family: A study of kinship and socialization, Free Press, Glencoe

16 *ibid*

17 Brenner S, (1995) " Why Women Rukle the Roost: Rethink Javanese Ideologies of Gender and Self Control", in *Bewitching Women and Pious Men: Gender and body politics in Southeast Asia*, eds. Aihwa Ong and Michael Peletz, University of California Press: 19-50

18 *Pedoman Penyuluhan Hukum, Undang- undang Nomor 7 tahun 1989 tentang Peradilan Agama dan Kompilasi Hukum Islam, published by the Ministry of Religious Affairs, Direktorat Jenderal Pembinaan Kelembagaan Agama Islam*

Thus, the boys have given up their part of inheritance. This is so, this is our custom.” In the elite Javanese family of Saporinah Sadli, equal sharing was used.

In families where one parent is *abangan* and the other *santri*, equal sharing was the rule. This was the case for NGO activist Sita and for student leader Damayanti, both born from a Javanese father and a Minangkabau mother. For Damayanti, consultation on inherited wealth with her brothers seemed important, a trend also found in other leaders: “We will share equally, the Javanese way, and maybe we will manage the inherited wealth in common.”

In traditionalist *santri* elite circles, equal sharing also seems to be the prevailing sense of justice. Fatayat co-founder Chuzaimah says: “For me, inheritance should be shared equally between boys and girls, in order not to contradict religion. In our family, we were 2 boys and 5 girls, and there has been no problem with equal sharing.” It is interesting to see that Chuzaimah legitimates equal sharing citing religion, without precision, but failing to mention the 2:1 Qur’anic principle. For Huzaemah Tahido Yanggo, a lecturer at the State Institute for Islamic Studies in Sulawesi, the same values seemed to prevail: “When my parents died, inheritance was distributed equally among boys and girls, according to our tradition, although we know that religion recommends two parts for boys. The boys did not protest because they knew that, as the oldest daughter, I had paid medical expenses for my parents and school fees for my younger brothers, whom I had pushed to study further.” In the family of the founder of Nandlatul Ulama, Kyai Hasyim Asy’ari, there is the same trend.

The family of his son, Wahid Hasyim, has distributed wealth equally. According to his daughter, Aisyah Hamid, Muslimat chairwoman: “After the death of my father, my mother told her children that inheritance would be shared equally between my brothers and sisters. We all agreed because we had been treated equally since our early childhood”. The Muslimat chairwoman said that, although the 2:1 principle was applied by her grandfather, Kyai Hasyim Asy’ari, her grandmother still enjoyed great autonomy, as according to Javanese custom:

The wife of Kyai Hasyim, my father’s grandmother, was a woman of great character, and of great discipline. She had her own workers to build her *madrassah*, whereas her husband had his own workers for his *pesantren*. She earned her own money from a

small *warung* and from the *pesantren’s* canteen. She spent that money on the *madrassah* she wanted her son, Wahid Hasyim, to manage later.

Finally, adat sometimes converges with Islamic law in favor of men. Asmah Syahroni, from Timbuk Baru in South Kalimantan, says that both her mother and father left their belongings (rice-fields and house) to their poorer brothers in accordance with *adat*. She adds there were many conflicts in her time regarding inheritance that favored boys, and adds that now, in her surroundings, parents distribute their wealth equally through a will, resulting in less problems.

### *Hibah* or Will before death

Families eager to apply the sacred texts yet inclined to equal sharing have chosen to resolve the inheritance dilemma through several artifacts, using either a donation (*hibah*) before the death of their parents or a testament. Former Minister of Religious Affairs, Munawir Siadzall, had used the argument that such procedure was frequent among Indonesian Varna” to try and push in favor of a definite rule of equal sharing. He did not succeed.

Tutty Alawiyah, a preacher from an influential ‘ulama’ family in Jakarta, explains the reasoning: “Islam has ruled the question of inheritance in a complete way. (Question: Is it all right for the woman to receive less?) It depends whether the woman is wife, mother or daughter. And, anyway, there is the possibility of sharing the inheritance while the parents are still alive. Let people do it! But after death, God proposes the best solution.”

All four women leaders of the Muhammadiyah movement interviewed belong to families who have used some kind of compensation for girls. In Yogyakarta, Baroroh Baried, former ‘Aisyiyah chairwoman, says Islamic law is applied in her circles, “but a compensation is given to the girls, before the parents’ death, in the form of a donation (*hibah*), with the consent of the boys.” Trios Setiawati, the young Nasyiatul ‘Aisyiyah leader, had the 2:1 Islamic rule applied in her family, “but the children who were particularly appreciated, like my mother, were given a compensation before the death of my grandmother. My mother was very good to my grandmother, and so, she was given rice-fields. This did not create a problem to my brothers. They had all received a good education and did not expect much from inheritance.”

North-Sumatra born Elyda Djazman, the current 'Aisyiyah chairwoman said: "We follow religious law, but my father made a testament with witnesses and a tax stamp (*materai*), that the house should go to the girls. He explained that the girls would be the remaining pillars (*tumpuan*) and the boys would go to the girls. My mother now has made her own testament that our house should not be sold, and should be used by all of us." Despite this choice, Elyda defends the Islamic sharing system which is "not inferiorizing women. There are grounds for it." Finally, Malichah Mocharom father's will was written not in favor of daughters but of the wife. Her father called *'Ilim* just before he died, to give all his wealth to his wife. Later, when his wife died she gave everything according to the 2:1 Islamic sharing principle.

Accommodation through donation was applied in Lies Marcoes' family in West Java, which was close to the Muhammadiyah movement: "My mother tried to stick to Islamic principles, but she herself could not help but find a way out: she gave jewels to the girls for their marriage, and helped them build their houses." In the family of Wardah Hafidz — a Muslim traditionalist family which kept ties with the Masyumi party after the 1952 split between the NU and Masyumi —, her grandmother made a will, which was heavily contested by the descendants (nine boys and one girl). Finally, the 2:1 sharing was used and the will disregarded. Favoring of girls was also found in the case of Emmy Hafid's grandfather, a Malay, Datuk and *kepala suku* (tribe leader) from Sungai Karung, Deli Serdang in North-Sumatra. He gave a part of his wealth to his daughters, to the discontent of her father. Zakiah Daradjat's family gave her wealth to "the poorest daughter" (her sister), according to Minangkabau *adat* which gives preference to needy lineage members, mostly women. But she says that, traditionally, the *harta pusaka* went to the girls, whereas acquired wealth was distributed according to Islamic law. Lawyer Nursyahbani Katjasungkana, born of a Madurese father and a Betawi *santri* mother, says her Madurese grandfather wrote a will, in which he gave more to the girls than admitted by Islamic law, "something usual among intellectuals". The practice of circumventing unequal sharing in favor of sons through a donation (*hibah*) or through a will before death, thus legalizing the non-Islamic sharing system, seems to have been frequent at least in elite *santri* circles. The traditionalist elite seems to have had the least problematic relationship to *adat*.

## The 2:1 principle

Among the 23 women leaders, only two said that inheritance in their family is now totally ruled by Islamic law. For one of them, it was something new: Farida Riyanti, born of Minangkabau parents, says: "Before, the family house was for the girl, now it is one part for girls, two for boys." Fatayat chairwoman Sri Mulyati Asrori, born of Madurese parents, also says that her family's rice fields would be distributed later totally according to Islamic rule.

Lawyer Nursyahbani complained that the codification had created new problems: besides the long distance to go to Islamic courts (mostly present at the regency level only), problems have arisen with widows who had a right to receive half of the inheritance first, while the other half was shared between her and her children. Now Islamic law prescribes that the widow receives only a quarter of the wealth, if she has no children, and 1/8 otherwise. Nursyahbani had to deal with one case where a widow was ordered to leave the family house by a son who wanted his share immediately. Munawir Sjadzali and Busthanul Arifin, despite their good intentions, she says, "may have only reinforced the inferior position of women by asking the opinion of conservative *kyais* from Aceh, Padang etc. while they should have asked the people themselves." Thus, we seem to have the case here that any efforts to formalize inheritance rules can only occur in the conservative line despite a wide consensus in favor of equality. This question seems to show how difficult reform (*pembaruan*) remains and the still wide discrepancy between the theoretical debate and reality.

The extract below, from part of a book by Moors, provides an interesting companion for discussion and reflection to the previous extract. Moors explains the widespread practice called *tanazul*, whereby a person, typically a woman, may renounce her inheritance rights, after legal confirmation that she is competent and fully aware – specifically in the context of Nablus, Palestine. It is an interesting example of ‘God proposes, Man disposes’, where pragmatic or socio-cultural considerations alter the impact of Shari’a rules, even though they take effect after the Shari’a formula is implemented. Moors takes the view that such renunciation is generally an act to preserve a woman’s kinship relations, particularly with her brother/s.

**R5.3** Moors A. (1996) *Women, Property and Islam: Palestinian Experience, 1920-1990*, New York: Cambridge University Press.

One way for women to gain access to property is through inheritance. According to the prevalent laws of succession in the region a woman is entitled to inherit both from her kin and her husband. Many women I spoke with, in the city as well as in the rural areas, were aware of their inheritance rights. But at the same time they underlined that if urban women might take their share in the estate, rural women by and large refrained from doing so. Such an urban–rural dichotomy is also prevalent in the literature on the subject.

Even if the law is not always applied, it does provide a point of reference in debates on women and inheritance. In the Jabal Nablus region, as in other areas once part of the Ottoman empire, succession is regulated through two different legal systems, with the nature of the property involved determining which system is applied. Property held in full ownership (*mulk*), such as urban real estate, buildings, vineyards, orchards and movables, is inherited in accordance with the Islamic law of succession. Most agricultural land (but not the plantations) is not *mulk* but *miri*, land to which individuals could acquire rights of usufruct and possession, but with ultimate ownership vested in the state. This right of possession is also inheritable, but a secular law of succession is applied.

If *mulk* property is inherited according to Islamic law, a very different law of succession is applied to *miri* land: the Ottoman *intiqdl* (succession) system. While early forms of *intiqdl* severely restricted the number of heirs, only recognising the rights of sons, later legal reforms extended the number of heirs; by 1868 daughters were also able to inherit. Codified in 1913 as the Ottoman Law of Succession, its main principles are gender neutrality and the distribution of the estate on the basis of generations. The major heirs are the children of the deceased, and if there are none, then the parents, the surviving spouse receiving one-quarter of the estate if the deceased had children and one-half if there were none (Schölch 1982: 21<sup>19</sup>; Mundy 1988: 12<sup>20</sup>).

In the last seventy years, only limited changes have been made in the laws of succession (see Welchman 1988: 879<sup>21</sup>). The shari’a courts are still responsible for drawing up a list of heirs and calculating the percentage of the estate each heir is entitled to, also for *intiqdl* inheritance. The law itself remains silent about when the estate is to be divided and it is common practice for the estate to remain officially undivided for a considerable length of time, with heirs only asking the shari’a court to register their shares if they want to formally donate or sell their share.

In short, women’s inheritance rights are regulated according to two different systems. In regard to real estate and movables, Islamic law is in force. In that case, women’s rights are generally more limited than those of men, and while spouses and close matri-kin (such as mothers) hold rights, there is a distinct preference for agnates. *Intiqdl* law, on the other hand, applied to virtually all agricultural land (except that planted with trees), expresses gender neutrality, allocates a greater share of the estate to spouses and does not recognise the special position of agnates. Yet comparing these two systems out of context is problematic, as Islamic inheritance law ought to be seen within the framework of the total shari’a system.

19 Schölch A, (1982) “European penetration and the economic development of Palestine, 1846- 82, in Roger Owen (ed), *Studies in the economic and social history of Palestine in the nineteenth and twentieth centuries*, London: McMillan, pp. 10-87

20 Mundy M, (1988) “The Family, inheritance and Islam: a re-examination of the sociology of faraa’id law”, in Aziz al- Azmeh (ed), *Islamic Law: social and historical contexts*, London and New York: Routledge.

21 Welchmann L, (1988) “The development of Islamic family law in the legal system of Jordan”, *The International and Comparative Law Quarterly* 37: 868-86

In Islamic legal thought, women's lesser inheritance rights are seen as compensated for by women's rights to maintenance, and women are defined as protected dependents.

It is true that both Islamic and *intiqal* law entitle women to a share in their father's estate. Yet amongst small property owners the most striking commonality in women's life stories is that few daughters with brothers would ever take their share and even amongst the wealthy they often did not receive what they were entitled to. Women themselves point out that it not so much the nature of land tenure but rather that of kin relations which is at stake. When in the 1920s Granqvist asked in Artas, a village near Bethlehem, why a woman does not take her share of the inheritance, the answer was 'but then she would have no more rights to her father's house' (1935: 256<sup>22</sup>). Women in Al-Balad in the 1980s by and large expressed very similar sentiments; by leaving her share to her brothers, a daughter reaffirms and strengthens her ties with her closest male kinsmen. And such ties are of great importance to women, as they both identify with their father's house and lineage and are dependent on it. With women remaining lifelong members of their own patrilineage, also after marriage they continue to share in its status and feel a special closeness to their natal household. Leaving her share in the father's estate to her brothers, a woman at once enhances their status and by implication her own and accentuates their obligations towards her. Just as a woman could return to her father's house if she intended to leave her husband or if he had repudiated her, after his death she would then be able to turn to one of her brothers, who would be responsible for housing her and providing for her. The relation between giving up a claim to land and maintaining kinship ties is also embodied in the gifts a man is obliged to present to his sisters on a number of occasions, such as at the end of Ramadan (also Rosenfeld 1960<sup>23</sup>).

That renouncing her inheritance rights is central to the brother-sister relation is evident from what happens if a woman demands her share. Then her kinship ties with her brothers are usually disrupted at once and she is no longer able to invoke their help and support. As the position of a woman in her husband's house often depends on the support she can count on from her own kin, this would simultaneously undermine her position *vis-à-vis* her husband and in-laws (also Granqvist 1935: 144<sup>24</sup>).

Neither is this easily compensated for by her newly gained access to land. Although the gender division of labour in agriculture is not very marked, some tasks are gender specific; ploughing in particular is considered men's work. Men can always ask women— their wives, daughters or sisters – to work on the (male) 'household lands', but when a woman needs male labour for cultivating her land, she has no such automatic claims to men's labour. In particular, when a woman is no longer able to ask her brothers or other relatives to help her, she becomes increasingly dependent on her husband.

A daughter without brothers usually has good reasons to try to claim her land. She knows that her father's brothers will generally be less concerned about her well-being and less dependable in providing for her than brothers would have been. So, even if her husband is to profit most from the inheritance, it could still be a sensible strategy for a brotherless woman to take her share. The problematic situation of such a daughter is also socially recognised, as she is not condemned for claiming her share. On the contrary, a man attempting to disinherit his late brother's daughter is often censured. Still, it may be very difficult for her to gain *de facto* control over the property. If she is already married her father's brother, usually many years her senior, will try to ignore her claims and whether she receives anything may well depend on her husband's standing in the community. If she is still single her father's brother is not only her contending heir, but also her legal marriage guardian. To forestall further problems about the estate he may try to marry her to his own son, as in that way no land will be lost to strangers. As Granqvist noted in Artas, a daughter without brothers could inherit, but she had to marry within the lineage 'in order to prevent a stranger taking possession of the property and inheritance of the family' and a disproportionate number of brotherless girls had married their paternal cousin (*ibn 'amm*) (1931: 76, 78<sup>25</sup>). Elsewhere on the West Bank this type of cousin marriage is also one of the most common forms of forced marriages, both for women and for men. A man might have to marry a woman many years his senior only to hold on to the land. This in turn may induce him later to take a second wife. Even if brotherless women are not always successful in their attempts, compared to women with brothers they tend to take their inheritance share relatively often. But what is the meaning of inheriting property for the women involved? Historians, who by virtue of their sources often have more information about the property than about the women concerned and their motives, commonly consider property ownership as the embodiment of power. Anthropologists, on the

22 Granqvist H,(1931) " Marriage consitions in the Palestinian Village, 1. Helsingfors: Akademische Buchhandlung

23 Rosenfeld H, (1960) "On the determinents of the status of the Arab village women", *Man* 40: 66-74

24 Granqvist H,(1935) " Marriage consitions in the Palestinian Village, 2. Helsingfors: Akademische Buchhandlung

25 Granqvist H,(1931) " Marriage consitions in the Palestinian Village, 1. Helsingfors: Akademische Buchhandlung

other hand, have argued that refraining from claiming property rights does not necessarily imply giving up all rights to it. The material presented here points to the multiple meanings of inheriting property. In the Jabal Nablus region, women inherit under very diverse circumstances and with widely divergent implications, and acquiring inherited property does not necessarily tie in with gendered power. Some women may receive (part of) their share automatically because they are from an urban, wealthy family background and men can raise their own status by giving to their sisters. Yet the latter are not supposed to inquire about their rights, but ought to accept what they are given. In such cases, women's access to property is first and foremost an expression of their class position. Incidentally, it is this specific category to which people refer when they argue that urban women indeed inherit. Others inherit because their husbands put great pressure on them to claim their share. Rather than an indication of power, under such circumstances inheriting property points to a highly problematic situation. These women are not only likely to lose kin support, but, as a result, also find themselves in a weaker position in regard to their husband and his kin. Then there are women, in particular daughters without brothers, who claim their share because they find themselves in a highly vulnerable situation. Such as girl does not only stand a good chance that, after her father's death, his brother will take possession of the land but she may also be forced to marry her paternal cousin (*ibn 'amm*), whether he is suitable or not, to preempt the possibility that the land goes to strangers. In a similar vein, daughters in large landowning families, as potential heirs, previously had severely limited marriage options, having to choose between marrying their paternal cousin or remaining single.

While inheriting property is not always an indication of gendered power, neither is refraining from taking one's share necessarily an expression of total subordination. Daughters may renounce their rights to the estate as they both identify emotionally with their brothers, sharing in their prosperity, and in order to underline their brothers' obligations towards them. And when a widow leaves her share to her sons, rather than a sign of powerlessness, this tends to strengthen her position.



# MODULE 6

## MUSLIM WOMEN AND PROPERTY

# MODULE 6:

## Muslim women and property

### Overview

This module analyses the legal status of women with regard to property under Islamic law (*Shar'ia*), the socio-historical background to women's property rights and the possible avenues for enhancing their security of tenure. The perception that Muslim women do not have property rights is attributed to the Islamic legal system, as well as practical application of laws. This module explores how all the key Islamic legal materials generally support women's right to acquire, use, administer and dispose of property. It also considers strategies for converting these principles into practical tools for empowerment.

Under Islamic law, there are no restrictions on women's purchase, gifts, dower (*mahr*) or as the manager or beneficiary of an endowment (*waqf*). Women can hold title individually and jointly. Except in the case of inheritance shares, a Muslim woman is entitled to equal treatment with male members of the family. Unlike a husband's obligations to meet his family needs, there is no such obligation for wife, which is an explanation for her lesser inheritance rights. A Muslim woman retains control over her pre-marital property and finances through marriage, and beyond into divorce and widowhood.

Rather than see property transmission avenues in fragments, they need to be viewed in isolation. Despite reduced inheritance shares, Muslim women do not necessarily see themselves as victims or discriminated. Where inheritance rules are part of a wider flexible system, tools such as lifetime gifts enable women to be compensated. For example, *mahr* may consist of land or land use rights, as well as other property. The Islamic framework is able to yield contemporary strategies which are innovative in terms of securing and enhancing women's property rights.

Owing to oppressive family and social structures, there is often a gap between women's theoretical rights in Islamic law and their ability to advocate and realise those rights. Some governments do not commit themselves to gender equality and rights, undermining the quest for empowerment. Conservative interpretations of Islamic law and customary/traditional structures/practices often combine to diminish or altogether extinguish women's rights to property. This division between formal law and its implementation in specific cultural and social contexts is not exclusive to Islamic law or Muslim countries.

While Islamic procedures are available to women, there are obstacles, in practice, to accessing them. Women often encounter male bias in formal law mediums, from legislation or judicial redress. Activists (including Islamic feminists) are in the forefront of challenging patriarchal Islamic law application. This module considers how to demystify Islamic principles and find opportunities to address socio-economic, cultural and legal impediments to property rights women often face.

### Learning outcomes

At the end of this session, participants should be able to:

- ◆ critically assess the stereotypes regarding Muslim women and property.
- ◆ appreciate the property rights of women under Islamic law.
- ◆ examine women's property rights in relation to custom and family.
- ◆ evaluate the impact of modern legal reforms.
- ◆ suggest strategies for empowerment through gender rights.

## Reading materials

Charrad M (2001) *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria and Morocco* (Berkeley: University of California Press, 2001).

Katulis B (2004) *Women's Freedom in Focus: Morocco*, (Washington DC: Freedom House).

Sait S and Lim H (2006) *Land, Law and Islam*, (London: Zed Press/UN-HABITAT).

## Additional reading

Ali SS (1999) *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* (The Hague: Kluwer).

Barlas A (2002) *Unreading Patriarchal Interpretations of the Qur'an* (Austin: University of Texas Press).

Sonbol A (1996) (ed) *Women, the Family, and Divorce Laws in Islamic History* (Syracuse, N. Y.: Syracuse University Press).

Sait S and Lim H (2006) pp. 129-146.

## Facilitator's notes

At one level this module is concerned to dispel prevalent Western stereotypes of Muslim women and their property rights. At another level it is focused on the extent to which women's rights within the Islamic framework area is realised on the ground. Participants should be encouraged to reflect upon the barriers to full realisation of women's property rights, whether these barriers are distinctive to Muslim contexts and the extent to which the Islamic 'compensatory framework' (where women are compensated by other forms of property in lieu of their lesser inheritance shares) can be made to work. In particular, trainers may wish to consider the extent to which work at a grassroots level with the religious elite and the personnel in Shari'a courts may enable women to achieve the rights to which they are entitled on paper.

The Moroccan *Moudawana* is a good news story but one that raises the question of replicability. Participants will have their own familiar women's rights contexts in mind. This case study enables us to look closely at the substantive reforms and the struggle through which they have been achieved. The role of civil society, women's groups and feminist approaches, are likely to enliven this seminar.

## Group work

### *Moudawana* (family law) in Morocco

The *Moudawana*, or *Mudawanat al-Ahwal al-Shakhsiyya*, originally refers to six books issued in five *dahir* (decrees) issued in Morocco (independent 1956) in 1957 and 1958. It is a key text of Maliki law, although it follows French patterns of codification. The *Moudawana* is legislation inspired by Islamic law, some French law, as well as trends in comparative law and international human rights conventions. The *Moudawana* is the family law code that deals with complex cultural (as in other states of the Middle East and North Africa) dynamics relating to the family as the core of society, and women with particular gendered roles.

Beyond these written texts, women's status in Morocco is also regulated by unwritten sources such as traditions and inherited customs, not always supportive of women's rights. While there was a shift from the extended to the nuclear family in Morocco, and thus from collective to individual identities and rights, the *Moudawana* reinscribed conservative principles of Islamic law and posited a patriarchal family model.

Various Moroccan constitutions dating from 1962, establish the principle of equality between men and women: "All Moroccans are equal before the law" (Article 5); men and women enjoy equally their political and civil rights (Article 8) etc. These statements of equality for women contradicted the *Moudawana*, which constructed female citizens as minors unable to enter into marriage contracts on their own and needing to be represented by a *wali* (guardian or tutor) until their husbands take over. Women had no say in the event the husband decided to marry additional wives.

Lacking autonomy, women had little control over their own lives or those of their children. Since 1970s, efforts were underway to bring the *Moudawana* into harmony with other laws.

In 2004, a revitalised *Moudawana* was seen as a victory for Moroccan women's rights as it placed women on equal footing as men with regard to marriage and children. Major legal changes regarding the legal rights of women include raising minimum age of marriage raised to 18 for women, sharing of property between married couples, polygamy being controlled, repudiation and divorce initiated by women and are subject to judicial supervision, women can to retain custody of children, inheritance rights improved for women, recognition of children born out of wedlock and simplified proof of paternity procedure, removal of gender degrading language in the family code and children's rights in accordance with the international instruments ratified by Morocco.

### Recommended readings for group work

Wuerth-Hawwa (2005) *The Reform of the Moudawana: The Role of Women's Civil Society Organizations* (Leiden: Brill).

Maddy-Weitzman (2005) *Women, Islam, and the Moroccan State: The Struggle over the Personal Status Law*, 59:3 *Middle East Journal* 393-410.

### Possible group work questions

1. The reform of the *Moudawana* took nearly 50 years to accomplish but it is perhaps the most successful of family law reforms in any Muslim country. Can this experience be replicated in other Muslim countries?
2. The *Moudawana* was opposed by Islamic fundamentalists. Is the new *Moudawana* a victory for modernism/secularism over Islam?
3. Women activists, who spearheaded the *Moudawana* movement, say that the battle for gender equality is yet to be won. What are the obstacles faced by Moroccan women in their pursuit of equal property rights?
4. *Moudawana* is touted as a success story of reconciliation between Islamic law and international human rights. What does this experience tell us about Islamic feminists?



Dome of the Rock, Jerusalem © Photos8.com

## Background Q&A

### Muslim women and property

'Islam does not deprive [Muslim women] of their rights, but in fact demands those rights for them'<sup>1</sup>

## Introduction

The Global Land Tool Network (GLTN) is a multi-sector and multi-stakeholder partnership seeking to translate aspirations, principles and policies into inclusive, pro-poor, affordable, gendered high quality and useful land tools, which can be replicated in a range of contexts. GLTN recognizes the demand for targeted tools, including culturally or religiously formatted tools, since there are many positions and approaches to conceptualising and delivering secure tenure and access to land. Most communities have deeply ingrained cultural traditions, many religions have firm rules on land and inheritance, and every government faces the challenge of land differently with its own array of laws and degrees of political will.

In most Muslim countries Islamic law, principles and practices make an important contribution to shaping access to land. GLTN has as one of its objectives, therefore, the identification and development of Islamic land tools through a cross-cultural, interdisciplinary and global process, owned by Muslims, but including civil society and development partners. Yet, Islamic approaches to land should not be seen as an internal matter, giving preference to religion over universal or secular approaches to land, but as part of GLTN's inclusive, objective, systematic and transparent efforts.

### 1 Why do land rights matter to women?

Land rights are a gendered issue. Despite progress on women's rights on some fronts over the last few decades, it is recognized that women's access to land and security of tenure remains very low.

It is estimated that only 2% of women in developing countries own land. Development approaches to implement women's land rights are driven largely by a gender-neutral poverty-alleviation (pro-poor) agenda have largely been ineffective. Women are disproportionately affected by gender blind/neutral approaches and are unable to access 'paper rights'. Muslim women, like women elsewhere, also face significant obstacles in accessing land rights.

### 2 Is CEDAW relevant for Muslim societies?

Despite reservations (opt out clauses) by some Muslim governments, Convention on the Elimination of Discrimination Against Women (CEDAW) provides an agenda for national action to end gender discrimination. Reports by intergovernmental agencies such as United Nations Development Fund for Women (UNIFEM) and Economic and Social Commission for Western Asia (ESCWA) provide information, capacity building as well as recommendations for augmenting women's land, property and housing rights. However, it is civil society; including community groups- particularly those that are women-led- that use the CEDAW as the framework for advocacy, empowerment and change. Many groups work on the convergence approach, highlighting and consolidating the consensus, while negotiating the divergences.

### 3 Does a Muslim woman have independent rights to land?

A Muslim woman possesses, within the Islamic framework, an independent legal, economic and spiritual identity, supported by injunctions from the *Qur'an*, with respect to access to land. All the key Islamic legal materials generally support women's right to acquire, hold, use, administer and dispose of property including land. This may arise through purchase, inheritance and dower (*mahr*) transferred to a wife from her husband at marriage and other transactions.

<sup>1</sup> Al-Hibri, A, (1997), 'Islam, Law and Custom: Redefining Muslim Women's Rights', *American University Journal of International Law and Policy*, 12, 1, at page 16.

## 4 Does a Muslim woman lose her property rights when she marries?

No. A Muslim woman retains control, according to Islamic law, over her pre-marital property and finances through marriage, and where relevant beyond into divorce and widowhood. The Muslim woman has no restrictions on the property she can purchase out of her earnings, or the gifts she may receive from her natal family or her husband's family, or on what she may enjoy as a beneficiary of an endowment (*waqf*). In all these respects she is entitled to equal treatment with male members of the family.

## 5 Does the Qur'an say men are guardians over women?

In the *Qur'an* (9:71), it is stated that women and men are each other's guardians and mutual protectors. However verse 4:34 has been notoriously used to justify male superiority. It says "*Men are the protectors/maintainers [qawwamuna 'ala] of women, because God has given the one more preference/strength than the other, and because they support them from their means.*"

Scholar Amina Wadud-Muhsin writes about verse 4:34: "In this verse it means that men are *qawwamuna 'ala* women only if the following two conditions exist. The first condition is 'preference' given to men must be demonstrated and the other is that they support the women from their means. 'If either condition fails, then the man is not '*qawwam*' (authority) over that woman'. Another leading Muslim feminist in Aziza al- Hibri writes, "The word '*qawwamun*' is a difficult word to translate. Some writers translate it as 'protectors' and 'maintainers'. However, this is not quite accurate. The basic notion involved here is one of moral guidance and caring".

## 6 Is it difficult to talk about gender equality and Islam?

An increasing number of Muslim women, and men, openly talk about gender equality. The resistance to gender equality is based on conservative interpretations of the *Qur'an* and the fear that equality would mean identical rights for men and women thereby undermine family and social dynamics.

Several Muslims are more comfortable with the concept of gender equity which signifies is gender fairness process and whose outcome is equality.

Muslim governments have in past not committed themselves explicitly to gender equality on all fronts, as seen in CEDAW reservations. However, on the ground, there are major changes in the way women are able to assert their rights, autonomy and freedoms- without necessarily undermining Islamic or socio-cultural values.

### Joint titling in post-tsunami Indonesia

In Indonesia there is a widespread practice, termed *Peruma*, whereby at the time of a daughter's marriage she is given a house, in part as a means of recompensing some women for their disadvantaged position under the compulsory Islamic inheritance rules. Women rarely seek to have these land rights formalised. In the post-Tsunami and post-conflict context of Banda Aceh, some women have or will lose these rights, largely based upon trust and memory, when distant members of their family make claims upon the property.

However, international organizations and NGO's have made efforts to engender the law and there is evidence that gender training for judges in the Islamic (*Shari'a*) courts has enhanced the opportunities for women to advocate their rights. Joint ownership is also being in Tsunami affected and post-conflict areas. Reconstruction in Banda Aceh is taking place under a system known as RALAS – Reconstruction of Aceh Land and Administration System – run by the National Land Agency (Badan Pertanahan National, BPN) with support from UNDP. Under RALAS it is intended that up to 600,000 land parcels/titles will be granted.

The government is encouraging a joint land titling policy, benefiting women as well as men, which are being replicated by other agencies. The leaders of the BPN are supportive of joint titling but the officials involved in implementation are less aware of the policy and resistant to the paperwork involved.

## 7 Why is there a common perception that women do not enjoy these individual property rights within the Islamic framework?

There is a widespread presumption that Muslim women's property rights are limited in Islamic law. In particular a woman's lesser rights in inheritance, where her share is generally half that of her *male* counterpart, are seen as a marker of the inferior status of women in the Islamic framework. In addition, some Muslim states refuse to include words in international resolutions giving women equal land rights, preferring instead the language of equal access to land. Reservations are entered by some Muslim states to international Conventions with respect to equal rights between the sexes. These are seen as illustrating Muslim women's limited property rights.

## 8 Are there barriers outside the legal system that restrict or inhibit women's pursuit of their property rights?

Women in Muslim societies may be denied rights in the face of oppressive family and social structures and have an absence of conviction in pursuing their property rights. Their status is determined not just by religion but by race, ethnicity, class, literacy, age, marital status, and other classifications such as 'fairness', beauty, rural/urban background, displacement or sexuality.

### Legal reform in Morocco

In Morocco, a new *Moudawana* – Moroccan Code of Personal Status – was introduced in 2004. Its objective, in the words of King Mohammed VI was 'freeing women from the injustices they endure, protecting children's rights, and safeguarding men's dignity', within the tolerant spirit of Islam. The reforms in the *Moudawana* offer substantial changes to the *formal* status of women and are to a degree supportive of the nuclear married family. It completely excludes from its provisions the concepts of a woman's obedience towards her husband or disobedience (*nushuz*); joint decision-making between the marriage partners is envisaged; and the Code conceives of joint ownership of property within marriage.

A woman's access to land is often frustrated by stereotypes of biological roles, her construction as a temporary member of the family (through marriage), interests in the consolidation of family properties and kinship relations.

## 9 Is inheritance an important source of access to land for women?

Inheritance rules which provide women within the family of the deceased with their own specific shares, support women's more general rights in Islamic law to gain, retain and manage their own land and wealth. Despite women's lesser shares in comparison with men, where women own land it is frequently inherited land.

## 10 Are inheritance rules the source of discrimination against women?

Women's land rights appear discriminatory with respect to inheritance on the face of it, but that is not how it is seen by many Muslims who view it as a fair system. There is the potential within the Islamic framework for women to receive other property rights by way of recompense. Inheritance rules are seen as part of a wider flexible system for the transmission of property across the generations and within the family, including tools such as lifetime gifts that enable individuals to plan the devolution of their property and post-inheritance adjustment practices.

## 11 Is estate planning acceptable within the Islamic framework?

Estate planning techniques are subject to debate, with some tensions surrounding their deployment, where they are seen as undermining divine intent. But they are commonly used in modern Muslim societies, even preferred as giving effect to Islamic ethical principles. The most obvious tools of estate planning are the lifetime gift or transfer, and the *Waqf* (endowment) that has no gendered limits.

## 12 Does estate planning benefit women?

Lifetime gifts are often used by a father to transfer property, particularly agricultural land, to a chosen son or sons, to the detriment of women who may or may not be compensated for their consequent losses. However, they can equally well be a common socially accepted practice by which women are 'compensated' for their lesser shares in inheritance. Estate planning may operate both to the benefit and detriment of women.

## 13 Do women renounce their inheritance shares in favour of male relatives?

The Islamic inheritance process does not conceive of a rejection by a beneficiary of his or her share, but there is a widespread practice, now incorporated into the legal process under Islamic law, whereby a person, typically a woman, voluntarily renounces (*tanazul*) her inheritance rights. Other women may give up an inheritance right to land in 'exchange' for cash or other property that may or may not be paid.

## 14 What are the arguments for and against renunciation?

Renunciation of inheritance rights across a range of Muslims societies is a socio-cultural practice, but cannot undermine guaranteed Islamic rights for women. Women may be forced to renounce their limited inheritance rights, which is a justifiable concern for gender rights advocates. Thus, abuse of women's rights must be resisted. The picture 'on the ground' may be complex. Some women renounce their rights to land in order to preserve family relationships with more powerful family members, particularly with their brothers. The 'benefits' of renunciation may include a continuing right of access to a family home.

## Maintenance debate in India

The famous Shah Bano case in India involved a husband, a senior advocate by profession, who repudiated his elderly wife by *talaq*. He claimed that he no longer had any financial obligations towards his former wife since he had already paid the dower (*mahr*) to which she was entitled. The wife made a claim for maintenance under Indian legislation and was awarded a small monthly payment. On appeal from the husband, the Supreme Court in India held, on an analysis of Islamic law and other factors, that there was no obligation on the part of the husband to pay maintenance.

In the aftermath of the Supreme Court's decision, riots and demonstrations took place. The Shah Bano case acquired a political dimension, not least because all five of the judges in the Court were Hindu. The legal opinion appeared to raise a potential threat for the future in terms of Muslim law governing family matters. It led to the state passing the Muslim Women (Protection of Rights on Divorce) Act 1996, which shifted the maintenance responsibility to the extended family, endowment (*waqf*) institutions and the state. The Supreme Court has interpreted section 3 of this Act, which requires the husband to make 'a reasonable and fair provision and maintenance' as an obligation to secure the future of his former wife.

## 15 How can women be compensated for their lesser inheritance shares?

As discussed, women have lesser inheritance shares, but these rules are part of wider flexible property transmission system. A woman's access to property and land will come at various stages of life. There is a complex and uneven compensatory framework of gifts, maintenance, payments of dower (*mahr*), and as a beneficiary under an endowment (*waqf*), with varying impacts on individual women. But there is no integrated life course perspective and inter-generational approached used in implementing Islamic law.



New Delhi, India © Asa Jonsson /UN-HABITAT

## 16 Is a husband obliged to maintain his wife?

There is a legal expectation that a woman's fundamental daily requirements, including her immediate shelter, will be met by her husband. There is no equivalent obligation from the wife towards the husband, even if working. Her savings aid her ability to accumulate or preserve property. However, a woman may lose her right to maintenance, which is controversially justified by her lack of obedience to the husband (*nushuz*), for instance if she leaves the matrimonial home 'without good reason'.

## 17 What is dower (*mahr*)? How does it differ from dowry payments?

Dower (*mahr*) is an immediate or deferred payment by the husband, whether in cash or property, to his wife as a consequence of their marriage. It is quite distinct from the social phenomenon of dowry payments from the bride's side to the groom's side. Dowry is institutionalised in some South Asian societies but it is not required by, or part of, Islamic law. In contrast, dower (*mahr*) is a wife's entitlement under Islamic law, which is generally perceived to be an essential aspect of marriage. It may consist of land or land use rights, as well as other property.

## 18 Is dower (*mahr*) an important resource for women?

Historically dower (*mahr*) was an important part of women's wealth, including land. In contemporary Muslim societies it has declined in importance as a social institution and women may relinquish all or part of the payment or discharge a husband from his obligation. It may be significant in the event of a divorce, for any deferred dower (*mahr*) must be paid in full where the husband repudiates his wife (*talaq*). If a wife seeks a judicial divorce (*khula*), she is likely to lose any dower payment.

## 19 Is a woman entitled to any other payment or maintenance upon divorce?

Other than a right to specified dower (*mahr*), many jurists hold that a wife has no financial rights against her former husband, even in a case of repudiation (*talaq*). Husbands may be enjoined to provide compensation. In some jurisdictions, such as Egypt and Jordan, compensation may be required of a husband who has divorced his wife without good reason. Such compensatory payments are not generous, amounting at best to a few years' maintenance.

## 20 What role do gifts play in the compensatory framework?

The system of ‘compensation’ and its effects upon individuals is dependent upon the dynamics of custom, family, kinship and local interpretations of Islamic law. A woman can expect to receive gifts of cash, jewellery or clothing from men throughout her life, including her husband, father or brother. There is evidence from Yemen and Morocco that some women may be ‘compensated’ for their losses in gaining access to land, by periodic gifts of money or other personal property. But such support may not fully compensate for exclusion from rights in land.

## 21 Do women benefit as a consequence of endowments (*awqaf*)?

An endowment (*waqf*) is a legal mechanism in which an owner permanently settles property, usually although not exclusively land, its usufruct or income, to the use of beneficiaries for specific purposes. The beneficiaries may be exclusively family members (*waqf ahli*) of the founder or creator (*waqif*), or devoted to general welfare. In the past women were actively engaged in creating and managing endowments (*awqaf*) and the benefits they received under endowments (*awqaf*) were an important source of wealth. This institution is of much less contemporary importance, particularly since the family endowment (*waqf ahli*) was abolished in many Muslim countries in the 20<sup>th</sup> century.

## 22 Does the compensatory system benefit women in practice?

The compensatory framework may be promising, but in current practice, the system fails to deliver equitable access to land. There is no mechanism to ensure that a woman is compensated for her lesser inheritance share in other ways. Choices are made on the basis of current demands or needs, rather than a ‘life course’ perspective. Inheritance shares are often land rights, while others such as dower (*mahr*); maintenance and beneficial interests under endowments (*awqaf*) are limited to use rights or other property. Property tends to flow away from women, not towards them. Customary norms through kinship and family structures seem to trump Islamic principles.

## 23 Do women have effective access to courts to enforce their rights?

Traditionally, Muslim women’s rights were enforced through Islamic courts, according to evidence. Women in general have restricted access to formal law-generating mediums, whether legislation or judicial redress. If they have the opportunity, many Muslim women do access the legal system, whether customary, Islamic (*Shari`a*) or state courts. Family courts are being promoted in several Muslim countries, including Morocco and Egypt, which are designed to be less legalistic and to encourage a mediation approach.

## 24 What impact did land reform have on women’s property rights in Muslim countries?

The land reforms in the Middle East in the middle of the 20<sup>th</sup> Century bypassed most women and the shift from sharecropping to mechanized forms of production tended to consolidate land in the possession of men. In Egypt, for instance, the main beneficiaries were rural middle class men and the small number of women who gained access to land did so as guardians of young sons.

## 25 What effect has the codification of Muslim personal and family law had upon women’s property rights?

The experiences of codification of personal status law across diverse Muslim societies, from Morocco to Indonesia, are varied and cannot be generalised. For instance, the Algerian Family Code of 1984 is largely faithful to the *Shari`a* and fully reinforces the traditional bonds of kinship. The Tunisian Personal Status Code is regarded as much more radical introduced modifications, including that a wife should contribute to the family’s maintenance where she has the means. It can be argued that some of these reforms have created new institutions and practices, which support freedoms, while others reinforce earlier discriminations.

## 26 Can progress on women's rights in the Muslim world be measured?

The availability of rights for Muslim women varies from country to country, and even within specific countries depends on a variety of factors including race, class, age, disability, displacement etc. For example the United Nations Development Fund for Women (UNIFEM) in its September 2008

surveys the progress made towards the Millennium Development Goals (MDGs) to achieve gender equality and female empowerment. The CEDAW Committee periodically reviews country reports on women's rights. Several other inter-governmental organizations such as ESCWA document the status of women in Muslim countries (as with the 2004 report). Yet, it is grassroots, community based and women-led civil society organizations that are closely monitoring and fighting for greater rights in the Muslim world.



Mosque detail, Zanzibar © UN-HABITAT / Asa Jonsson

# Module 6

## Powerpoint presentation


1

### Muslim Women's Property Rights MODULE 6

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### What are the key concepts?

4

- All key Islamic materials generally support women's rights to acquire, hold, use administer and dispose of property including land
- Women can hold title individually and jointly
- Muslim woman retains control over her pre-marital property and finances through marriage, and beyond into divorce and widowhood.
- Muslim women, as do counterparts in other societies, face considerable obstacles on accessing land, property and shelter
- Muslim women's lack of rights not merely due to their religious context





### Session learning outcomes

2

**At the end of this session, participants should be able to:**

- Critically assess the stereotypes regarding Muslim women and property
- Appreciate the property rights of women under Islamic Law
- Examine women's property rights in relation to custom and family
- Evaluate the impact of modern legal reforms
- Suggest strategies for empowerment through gender rights





### Why are these concepts relevant?

5

- There is limited awareness of benefits about joint titling.
- There are no restrictions on women's purchase, gifts, dower (mahr) or as beneficiary of an endowment (waqf)
- Other than specified dower (mahr), she has no financial rights against former husband
- Unlike husband's obligations to meet his family needs, there is no such obligations for wife
- Women often encounter male bias in formal law-mediums, from legislation or judicial redress





### Your opening thoughts

3

- What experience do you have of Islamic principles in relation to women's rights?
- Why do you think Islamic principles are relevant in the context of Muslim women?
- How can Islamic principles empower women's land, property and housing rights?





### How can these concepts be used?

6

- Qur'an can be used to enhance women's access to land
- Except for inheritance shares, Muslim woman is entitled to equal treatment with male members of the family.
- Inheritance rules are part of a wider flexible system, tools such as lifetime gifts enable individuals to compensate.
- Deal with oppressive family and social structures undermine women's property rights.
- Activists (including Islamic feminists) are challenging patriarchal Islamic law application.





**Why land rights matter to women?**

7

- Land, property and housing rights are a gendered issue, in Muslim and non-Muslim countries
- Despite progress, women's access to land and security of tenure remains very low- 2% ownership
- Women disproportionately affected by gender blind/ neutral approaches.
- Poverty-alleviation agenda for land rights have largely been ineffective.
- Muslim women also face significant obstacles in accessing land rights.



**Are men 'guardians' over women?**

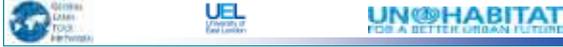
11

**Principles**

- As per Qur'an (9:71) women and men are 'each other's guardians and mutual protectors'.
- Qur'an 4:34 used to show male superiority. It says "*Men are the protector/maintainers [qawwamuna'ala] of women, because God has given the one more preference/ strength than the other, and because they support them from their means*".

**Facts**

- Scholars say conditions must exist, must be shown – preference and support.
- Basic notion involved is not superiority but one of 'moral guidance and caring'.



**Is CEDAW relevant to Muslim women?**

8

- Despite reservations to CEDAW, provides an agenda for national action to end gender discrimination.
- Reports by UNIFEM, ESCWA etc. provide information, capacity building as well as strategies for land rights.
- Civil society, including community and women-led groups use CEDAW for advocacy, empowerment and change.
- Many groups work on the convergence approach, highlighting and consolidating the consensus, while negotiating the divergence.



**Gender equality in Islam?**

12

- An increasing number of Muslim women, and men openly talk about gender equality.
- Resistance to gender equality due to conservative fear that equality would mean identical rights, thereby undermining family and social dynamics.
- Several Muslims more comfortable with gender equity in process, but outcome is equality.
- Muslim governments have in past not committed explicitly to gender equality on all fronts.
- On the ground, women asserting rights, autonomy and freedom- without undermining Islamic values.



**Do Muslim women have land rights?**

9

- Muslim women possess independent legal, economic and spiritual rights based on Qur'an
- All key Islamic legal materials generally support women's land rights
- Islamic rights to acquire, hold, use, administer and dispose of property including land
- Property transfer through purchase, inheritance and marriage and other modes



**Why perception of no rights for women?**

13

- Widespread presumption that Muslim women's property rights are limited in Islamic law.
- Woman's lesser rights in inheritance seen as marker of inferior status of women under Islamic framework.
- Some Muslim states refuse to recognise international resolutions giving women equal land rights.
- Reservations are entered to international Conventions with respect to equal rights between the sexes.
- These seen as illustrations of the Muslim woman's limited property rights



**Property rights lost by marriage?**

10

- Muslim women retain control over pre-marital property and finances through marriage, divorce and widowhood
- No restrictions on the property purchased out of her earnings, or gifts received from natal or her husband's family
- No limits as beneficiary of an endowment (*waqf*).
- In all these respects she is entitled to equal treatment with male members of the family.



**What restricts to women's rights?**

14

- Women in Muslim societies may lack rights in the face of oppressive family and social structures
- Absence of conviction in pursuing property rights
- Status not just by religion but by race, ethnicity, class, literacy, age, marital status, and other classifications such as 'fairness', beauty, rural/urban background, displacement or sexuality.
- Stereotypes of biological roles, construction as a temporary member of the family (through marriage), interests in consolidation of family properties and kinship relations



### Why is inheritance vital for women? 15

- Inheritance rules provide women within the family with specific shares
- Inheritance support women's more general rights in Islamic law to gain, retain and manage their own land and wealth
- Despite women's lesser shares in comparison with men, where women do own land it is frequently inherited land.



### Do women renounce shares? 19

- Islamic inheritance process do not conceive of rejection of share
- There is a widespread practice, whereby a person, typically a woman, voluntarily renounces (tanazul) her inheritance rights.
- Customary practice, now incorporated into the legal process under Islamic law
- Women may give up an inheritance right to land in 'exchange' for cash or other property- or nothing.

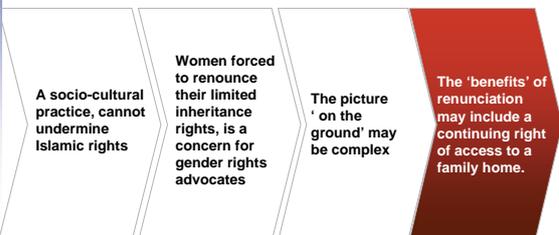


### Is inheritance discriminatory? 16

- Women's inheritance rights appear discriminatory, but not seen that way by many Muslims
- Potential within Islamic framework for women to receive other property rights by way of recompense.
- Inheritance rules part of a wider flexible system for the transmission of property across the generations and within the family.
- Tools such as lifetime gifts enable individuals to plan the devolution of their property and post-inheritance adjustment practice.



### What arguments over renunciation? 20



A socio-cultural practice, cannot undermine Islamic rights

Women forced to renounce their limited inheritance rights, is a concern for gender rights advocates

The picture 'on the ground' may be complex

The 'benefits' of renunciation may include a continuing right of access to a family home.



### Is estate planning acceptable? 17

- Estate planning techniques are subject to debate within Muslim societies, some tensions surrounding their deployment
- But commonly used in modern Muslim communities, sometimes to support Islamic ethical principles
- Most obvious tool of estate planning is the lifetime gift or transfer
- Waqf can also be used since no gender control



### How can women be compensated? 21

- Lesser inheritance shares, but rules are part of wider flexible system
- Compensatory framework of gifts, maintenance, payment of dowers (*mahr*), and as a beneficiary under an endowment (*waqf*)
- Access to property and land will come at various stages of life
- No integrated life course perspective and intergenerational approached used in implementing Islamic law



### Does estate planning benefit women? 18

- Estate planning may operate both to the benefit and detriment of women.
- Lifetime gifts are often used to transfer property, particularly agricultural land, to chosen child.
- Daughters may or may not be compensated for their consequent losses.
- Common and socially accepted practice where women are 'compensated' for lesser inheritance.



### Is husband obliged to maintain wife? 22

- A woman's fundamental daily requirements will be met by her husband.
- No equivalent obligation from the wife towards the husband, even if working.
- Savings, used for purchase of property.
- Technically, wife may lose maintenance, which is controversially justified by her lack of obedience to the husband (*nushuz*).



Is *Mahr* different from Dowery?

23

Dower (Mahr)

- immediate or deferred payment
- wife's entitlement under Islamic law
- may consist of land or land use rights, as well as other property

Dowery

- Quite distinct from the social phenomenon of dowry payments from the bride's side to the groom's side



Do women benefit from *waqf*?

27

- Through an endowment (*waqf*), an owner permanently settles property, including land, its usufruct or income, for use of beneficiaries for specific purposes.
- Beneficiaries may be family members (*waqf ahli*) – no restriction on women's shares; or devoted to general welfare
- In the past women actively engaged in creating and managing endowments; and benefits under endowments an important source of wealth
- Family endowment (*waqf ahli*) abolished in many Muslim countries, but *waqf* idea is being revived



Is *Mahr* important for women?

24

- Important part of women's wealth, including land
- Declined in importance as a social institution
- Women may relinquish all part of the payment or discharge a husband from his obligation
- Significant in the event of a divorce, for any deferred dower (*mahr*) must be paid in full where the husband repudiates his wife (*talaq*)
- If a wife seeks a judicial divorce (*khula*), she is likely to lose any dower payment



Does compensation work?

28

- Compensatory framework holistic, but in practice, fails to deliver equitable access to land.
- No mechanism to ensure that woman is compensated for her lesser inheritance share in other ways.
- Choices are made on the basis of current demands or needs, rather than a 'life course' perspective.
- Inheritance shares often land rights, while dower (*mahr*), endowments (*awqaf*) are limited to use rights.
- Property tends to flow away from women, not towards them.
- Customary norms through kinship and family structures seem to trump Islamic principles.



What will divorced women get?

25

- Apart from specified dower (*mahr*), a wife may have no financial rights against her former husband, even in a case of repudiation (*talaq*)
- Husbands may be enjoined to provide compensation, such as in Egypt and Jordan, where husband has divorced his wife without good reason
- Such compensatory payments are not generous, amounting at best to a few years' maintenance



Do courts enforce women's rights?

29

- Traditionally enforced through Islamic courts
- Women in general have restricted access formal law-generating mediums
- Where opportunity, Muslim women access legal system, whether customary, Islamic (*Shir'a*) or state courts
- Family courts are being promoted in several Muslim countries, which are designed to be less legalistic and to encourage



What role do gifts play?

26

- A woman can expect gifts of cash, jewellery or clothing from men throughout her life, including husband, father or brother.
- System of 'compensation' dependent upon dynamics of custom, family, kinship and interpretations of Islamic law.
- Evidence from Yemen and Morocco that some women 'compensated' for their losses in gaining access to land, by periodic gifts of money or other personal property.
- Such support may not fully compensate for exclusion from rights in land.



Land reform helped women's rights?

30

- Land reforms in Middle East in 20th Century bypassed most women
- Shift from sharecropping to mechanized forms of production consolidated land in hands of men
- In Egypt, main beneficiaries were rural middle class men and the small number of women who gained access to land did so as guardians of young sons



**Was family law reform good?**

31

- Codification of personal status law across Muslim societies, from Morocco to Indonesia, cannot be generalised
- Algerian Family Code of 1984 is largely faithful to the Shari'a reinforces traditional bonds of kinship
- Tunisian Personal Status Code more radical, eg. wife to contribute to family's maintenance where possible
- 2004 Moroccan Mouduwanna groundbreaking
- Some reforms create new institution and practices create new freedoms



**How to measure progress?**

32

- Rights for Muslim women varies from country to country, and even within specific countries depends on a variety of factors including race, class, age, disability, displacement etc.
- UNIFEM 2008 surveys progress based on MDGs to achieve gender equality and female empowerment
- The CEDAW committee periodically reviews country reports in women's rights
- ESCWA and others document practice
- Grassroot, women-led NGOs closely monitor and advocate greater women's rights



**Thank you for your attention!**

33

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## Reference readings

The following extracts emphasise that a Muslim woman possesses an independent legal, economic and spiritual identity, and therefore independence. And a woman's right to property is not just an abstract ideal, or merely a matter of legal principles, it is a crucial dimension to her identity, security and empowerment, although shaped by her social status, place in the life cycle and dynamics within her household and family. Sait and Lim address also the apparent disadvantage to women from the inheritance laws, but explain that Muslim women rarely challenge their unequal proportion of shares as they are fixed and compulsory by the Qur'an. Not only are inheritance rules presented as a complete and divinely ordained code, but many Muslim women view the inheritance distribution rules as one part of a 'property flow chart'. Some Muslim feminists argue that women are adequately compensated by other sources of support. Sait and Lim conclude that with respect to the compensatory framework there exists a difference between Islamic principles and socio-economic and cultural practices. However, they suggest that the means by which to materialise the embedded egalitarian and distributive aspects of Islamic law can provide a route to reform.

### R6.1 Sait S and Lim H. (2006) *Land, Law and Islam*, London: UN-HABITAT/Zed

As in other societies, a woman's access to land in the Muslim world is often frustrated by stereotypes of biological roles, her construction as temporary member of the family (through marriage), interests in the consolidation of family properties and kinship relations. Nevertheless, a review of women's individual property rights within the Islamic legal framework may help to counter any such damaging suppositions or residual images. Subverting stereotypes of Muslim women would seem to be a prerequisite for developing meaningful strategies for women's access to land.

The scope of Islamic law relating to female ownership of property emerges from its main textual sources. The key texts are the *Qur'an*, read alongside the *Sunna*, as well as the theoretical debates and evidence of policy and practice through land registers, court records, *fatawa* and laws. There is explicit recognition of women's acquisition, utilization and alienation of property in the

*Qur'an* through purchase, inheritance and *mahr* or *mahr* transferred to the wife from the husband at marriage and other transactions. The *Qur'an* notes that women 'shall be legally entitled to their share' (*Qur'an* 4: 7) and that 'to men is allotted what they earn, and to women what they earn' (*Qur'an* 4: 32). Only if women choose to transfer their property can men regard it as lawfully theirs (*Qur'an* 4: 4). The Islamic laws relating to property rights of women are drawn from a variety of fields such as family law (marriage/*mahr*, inheritance, and guardianship), property law (gifts, waqf, sale and hire) (Shatzmiller 1995<sup>2</sup>) and economic law (right to work, income) as well as public law.

All the key Islamic legal materials generally support women's right to acquire, hold, use, administer and dispose of property. To take an obvious example, the legal disabilities of married women, which were a feature in the past of Anglo-American law are not found in Islamic law. Until legislative changes towards the end of the nineteenth century in England, the common law did not recognize the legal existence of the married woman; both her identity and rights to property were merged or rather submerged into those of her husband. In contrast, Muslim women throughout history, whether married or not, have enjoyed an autonomous legal identity and separate property rights. The *Qur'an* addresses men and women as distinct persons, different but equal individuals. In some contexts — as in the rules concerning inheritance, which award women smaller shares in property than men — the differentiation between men and women may be regarded as contributing to the latter's social inequalities. However, from a legal perspective the recognition of a woman's distinct identity leads to equal treatment between men and women in some very fundamental ways in relation to their property rights. There is no doubt that the Muslim woman retains control, according to Islamic law, over her pre-marital property and finances through marriage, and where applicable beyond into divorce and widowhood (Shatzmiller 1995: 253). The Muslim woman has no restrictions on the property she can purchase out of her earnings, on the gifts she may receive from her natal family or her husband's family, or on the endowment she may enjoy as a beneficiary of a *waqf* in all these respects she is entitled to equal treatment with male members of the family.

<sup>2</sup> Shatzmiller, M. (1995) 'Women and Property Rights in Al-Andalus and the Maghrib: Social Patterns and Legal Discourse', *Islamic Law and Society*, 2, 3.

### Unequal shares in inheritance and the 'Compensation' argument

There could be a net material flow from men to women within the family. For instance, *mahr* is a payment or promise of such a payment that a husband makes to the wife as a consequence of the marriage. In addition, a husband is under a legal duty to support and maintain his wife. There are no corresponding obligations on the part of the woman to provide for her husband or family, even if she has property and her husband does not. However, when it comes to inheritance, the woman's share is generally half of that of the male members. Muslim women's lesser rights in inheritance, under Islamic compulsory succession, have for long been regarded as a marker of the inferior status of women under Islamic law. Undoubtedly, these rules violate the non-discriminatory provisions of CEDAW. However, there is a robust viewpoint within Muslim societies, supported by many Muslim women, which argues that the totality of arrangements within the Shari'a is realistic and equitable (Wadud 1999<sup>3</sup>; Hassan 1982<sup>4</sup>; and Barlas 2002<sup>5</sup>). Commentators who support the view that women's property rights in the Islamic framework should be approached holistically, point to the Qur'anic stipulation that 'men spend out of their property for the support of women'. The argument continues to the effect that women have no concomitant financial obligations. Other avenues of obtaining property such as gifts, dower, maintenance, and as a beneficiary under a *waqf* could be deemed compensatory. The argument is made by Al-Faruqi (2000: 81<sup>6</sup>), for instance, who regards the legal system taken as a whole to be fair. She argues that the whole scheme is supportive of the family and fosters its interdependence, while at the same time ensuring that women are properly taken care of by their male relatives.

There is potential in the integrated and cohesive property regime for women within Islamic jurisprudence. A question is raised: can the holistic approach to property rights for women in Islamic land law compensate women, through the life course, for their reduced inheritance rights through other means of wealth generation? These methods include a woman's equal access to purchase through earnings, *awqaf* gifts and special supplements such as savings (from lack of financial obligations within the family), *mahr* and maintenance. In current practice, the system fails to deliver equitable access to land for several reasons. First, there is no mechanism to ensure that the woman is compensated for her inheritance loss in other ways, as there are different interests and relationships in play at various stages of the woman's life. The legal ideology may be holistic, but choices are often made in a vacuum, in the sense that they are made on the basis of current demands or needs, rather than in a 'life course' perspective. Second, while inheritance shares are often land rights, the others — such as *mahr*, maintenance and beneficial interests under a *waqf ahli*, the last now largely abolished — are at best limited to usufruct rights or wealth. Property tends to flow away from women, not towards them. In any event under social or familial pressure women may give up that inheritance right to land, or 'exchange' it for cash or other property, which may or may not actually be paid. Third, customary norms through family and kinship structures seem to have trumped Islamic principles by making earnings and savings difficult, the *mahr* and maintenance rights nominal, conditional or non-enforceable, and inheritance rights often merely theoretical. However, Islamic principles and early practice demonstrate that it does not have to be this way and that a reappraisal of Islamic law could empower Muslim women and enhance security of tenure.

3 Wadud, A. (1999) *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective*, New York: Oxford University Press.

4 Hassan, R. (1982) 'On Human Rights and the Qur'anic Perspective', in L. Swindler (ed.) *Human Rights in Religious Traditions*, New York: Pilgrim Press.

5 Barlas, A. (2002) *Unreading Patriarchal Interpretations of the Qur'an*, Austin: University of Texas Press.

6 Al-Faruqi, M. (2000) 'Women's Self-identity in the Qur'an and Islamic Law', in G. Webb (ed.) *Windows of Faith: Muslim Women Scholar-Activists in North America*, Syracuse, NY: Syracuse University Press.

Codification of personal status law as a frame for women's rights or the lack of them, across diverse Muslim societies from Morocco to Indonesia, has been contested and remains a matter of vibrant public debate, even conflict. These debates are connected with wider concerns about the family, adherence to religious law, Western influences and arguments. Charrad in the following extract summarises different postcolonial approaches in the Maghreb, specifically Morocco, Algeria and Tunisia, showing how even countries with several shared historical and cultural features could have varied codification experiences. The Algerian Family Code of 1984 is largely faithful to the Shari'a, unlike its Tunisian equivalent. In the second extract, from a research report written by Katulis, the new Moudawana (2004) in Morocco is introduced. It contains thorough reforms, offering substantial changes to the formal status of women and is to a degree supportive of the nuclear, married family. Katulis also recounts some interesting responses to the Moudawana encountered amongst participants in the research project upon which he was reporting.

**R6.2** Charrad M. (2001) *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria and Morocco*, Berkeley: University of California Press; and a brief summary of the new Moudawana (2004) in Morocco

In Algeria, the nationalist struggle culminated with the formation of a national state characterized by extensive factionalism. Engaged in an eight-year guerrilla war and lacking channels of internal communication, the nationalist movement experienced serious division. Cleavages developed mainly on the basis of regional differences and different war experiences during the decentralized guerrilla war of national liberation. Cleavages refer here to sharp divisions or splits among political groups with different social bases of power and with a tendency to engage intermittently in open conflict. Kept in check during the anticolonial struggle, the factionalism within the nationalist leadership erupted into violent conflicts after the achievement of national sovereignty in 1962.

Kin-based forms of association, which had provided Algerians with a refuge from colonial domination, remained politically significant as networks for mobilization during the nationalist war.

After independence, kin-based forms of association served as a basis of support for some of the factions vying for power in the new national state. With respect to Algeria in this period, I use the term "kin-based forms of association" to indicate groupings more loosely structured than tribes. Multiple factions had ties to social groups within which they could mobilize kin-based solidarities to acquire more political leverage in the national state. Several segments of the leadership had vested interests in preserving these solidarities or at least in avoiding policies that might disrupt them.

Family law was held hostage to the political tensions generated by factionalism. The adoption of a family law in effect became one of the thorniest policy issues in the new state. The issue raised fundamental questions about the kind of society that newly independent Algeria would become. Like Morocco, Algeria adopted a highly conservative family law, but it did so through a different process. First, it took Algeria twenty-two years of hesitation and oscillation before it finally adopted its Family Code in 1984, whereas Morocco and Tunisia each adopted theirs a few months after independence. Second, shifting political alliances and factional conflicts that occurred after independence in Algeria continued to have a major influence on developments in family law, or on the lack thereof, since the result was a gridlock and a series of aborted plans for more than two decades. No faction was confident or powerful enough to institutionalize its vision of family law in a new code.

Third, by the time Algeria equipped itself with a family law, the wave of Islamic fundamentalism of the early 1980s created a political climate different from that of the 1950s when Morocco and Tunisia promulgated their family law. Fourth, in contrast to Morocco and Tunisia, conflicts directly centered on family law took place in Algeria when, in 1981, women actively opposed a government plan to codify the law in conservative terms. Women's resistance succeeded in stalling the plan for a while. But it failed to prevent the final adoption of a conservative family law, as embodied in the Algerian Family Code of 1984. The Algerian Family Code, like the Moroccan *Mudawwana* enacted in the mid-1950s, sanctioned a model of the family as an extended patrilineage in which male kin have privileges and men have power over women.

The period from 1962 to 1984 witnessed a gridlock on the issue of family law. Gridlock refers here to a blockage caused by intersecting lines of competing political forces. The issue of family law was a pressing one in the new state. It was evident that the country could not be left without a system of law. It had to be decided at the very least whether the laws in effect under the French colonial state would remain in effect. Furthermore, the different kinds of family law that applied to different populations within Algeria were a painful reminder of particularisms. Kabyle customary law was in effect in parts of Kabylia, and Ibadite family law applied in the southern region of the Mزاب. Maliki law applied to the majority of Algerians, but since it had not undergone general codification, it remained conducive to local and regional interpretations. For Algeria to achieve national unity, family law had to be unified and therefore codified. However, except for small and partial adjustments made mostly in 1962 and 1963, all attempts to codify the law aborted between 1963 and 1984.

The issue of family law became caught in the competition for power among different factions with different visions of Algerian society, different bases for power, and different roots in the heroic past of the anti colonial struggle. The structural context at the time of independence was conducive to gridlock. The factional conflicts dividing the leadership ran along several lines that intersected in different ways in a changing web of alliances. To reiterate briefly, the lines of division included among others: guerrilla forces anchored in the interior versus the army of the exterior (later made the national army), a political versus a military leadership, a Berber versus an Arab identity among the great politico-military leaders of the war, secularism versus Islam, and socialism versus liberalism. With a few exceptions, positions on family law often were shaped by politics, alliances, and conflicts. The same leader might shift positions or modify his position, depending on his allies and enemies at a particular time.

A codification attempt that occurred in 1981 took on a special character in that it precipitated women's resistance. This was a time when women organized themselves to block a government attempt to codify family law. In 1981, the government formed a commission again with the mandate to formulate a draft of a national family code. The commission included the Minister of Justice, a number of government figures and religious scholars. As earlier, secrecy surrounded the work of the commission. Rumors spread about the conservative tone of the

draft law and a number of women managed to obtain a copy of the text. A member of the government leaked a copy of the draft to some women at the university. An Algerian woman explained what the women did, and it is worth quoting her at length:

*"We had friends who were [government] ministers—they had two sessions to discuss this project. They told us that a copy of it was given to them when they entered the room, and taken back when they went out of the room ... We had to steal this proposal. Then we duplicated twenty five copies on an old alcohol machine.... One of these copies reached the target ... veteran women, women who fought in the Liberation struggle ... They understood the situation, and they called a demonstration ... The woman veterans also wrote to their Minister, the Minister of Veterans, saying that they hadn't fought for such a result. They also wrote to the Minister of Justice and to the President."<sup>7</sup>*

Several women organized a protest against the draft, which was in effect as conservative as the rumors had indicated. This was a grassroots protest that involved women teachers, academics, and lawyers who belonged to a minority of professional women in independent Algeria.<sup>8</sup> The core group had been meeting at the university to discuss family law. The protest also involved former *moudjahidates* such as Djamila Bouhired, Meriem Enmihoub, and Zohra Drif Bitat. The women dared to do what had not been done before—confront the state and its single party openly and publicly by organizing highly visible street demonstrations. Women organized demonstrations in Algiers, between October 1981 and January 1982.

The demonstrations gathered between one hundred and three hundred people, over-whelmingly women. The women also circulated a petition on which they collected ten thousand signatures and demanded primarily amendments of the family code proposed by the government.

7 In an interview in the March 1985 edition of the *American Newspaper, Off Our Backs*, quoted in Nadia Hajib, *Women Power: The Arab Debate on Women at Work* (Cambridge: Cambridge University Press, 1988), 27-28

8 Lazreq (*Eloquence of Silence*, 158) reports that, according to official statistics published in 1986, women represented 4.7 percent of the labor force and that 86 percent of those were in clerical white collar jobs. Saadi (*La femme et la loi*, 92) reports that a survey by the Algerian National Office of Statistics indicates that in 1989 women represented 4.7 percent of the paid work force.

The demands included monogamy, equality in inheritance rights between men and women, and identity of divorce conditions. The police broke up the demonstrations and some of the activists were arrested. Acting outside of government-controlled organizations, the women operated with no organizational support of any kind. Constituting what Knauss appropriately calls a “minimovement,” the women used informal networks of communication to organize their actions.<sup>9</sup>

Men in the government themselves were divided over the 1981 draft law. The government press included articles and even an editorial criticizing the draft, a fact that in itself was an indication of disagreements within the FLN and the state leadership.<sup>10</sup> Given the level of tension raised by the draft, the then Algerian president, Chadli Benjedid, withdrew the draft bill and decided to shelve it, pending further study. Nadia Hijab reports that it was the first time a bill had been withdrawn from the assembly in independent Algeria.<sup>11</sup> This and the other previously aborted plans confirm the extent to which family law was a disturbing issue in Algerian politics. Two years of silence on family law followed the 1981 attempt at codification.

### Conservative outcome: The Family Code of 1984

Then, in 1984, the government suddenly proposed a revised draft law to the National Assembly, which adopted it with barely any discussion. The Family Code became law on 9 June 1984. Although the 1984 code was very similar in content to the 1981 draft, general silence followed its promulgation. Lacking organizational support, the women who had constituted the core group of activists in 1981, some of whom had been arrested, did not respond immediately. The code passed essentially unopposed. About a year after the adoption of the code, reactions appeared, as small women’s associations developed, expressing opposition to the code.

Opposed on principle to any form of codification of family law, even if it remained faithful to the Shari’a some fundamentalists groups also voiced criticism of the code.<sup>12</sup>

The 1984 code nevertheless became the law of the land. Algeria had equipped itself with a national, unified, family law—one that was highly conservative. Like the Shari’a and the Moroccan Code, with only minor differences, the Algerian Family Code of 1984 included a conception of the family as an agnatic kinship structure in which the patrilineal male line had primacy and women were subordinate to both husbands and male kin. This was the model of kinship that the Algerian state presented to the people of Algeria. For example, the Algerian Family Code placed marriage within the framework of the larger kin group, instead of defining it as the choice of two individuals about to form a couple. For a marriage to be valid, a woman had to have a matrimonial guardian (father or a close agnatic relative). Only he could consent to the marriage, not the bride. The 1984 code set the minimum age of marriage at twenty-one for men and eighteen for women. As in Maliki law, polygamy remained legal, although the first wife (or second or third since four were allowed) and the new wife had to be informed of the husband’s decision.<sup>13</sup>

The husband retained the privilege of repudiation and thus of ending the marriage at will, although repudiation now had to be registered by a judge. The legality of repudiation meant that women could find themselves divorced and thrown out of their home, sometimes with no resources.

9 Knauss P., *The Persistence of Patriarchy: Class, Gender and Ideology in Twentieth-Century Algeria*, New York: Praeger, 1987.

10 Hijab, *Womenpower*, 28 on the withdrawal of the draft.

11 Nadia Hajib, *Women Power: The Arab Debate on Women at Work* (Cambridge: Cambridge University Press, 1988).

12 Saadi (*La femme et la loi*, 48) reports that some members of the Islamic Fundamentalist Movement were opposed to the very principle of codification of the law and proposed a return to an uncoded Islamic law, as in the Shari’a and as had been the case historically in Algeria.

13 Law no.84-11 of 9 June 1984, constitutes the Algerian Family Code of 1984. The text appeared in the *Journal Officiel de la République Algérienne Démocratique et Populaire*, no. 24 (12 June 1984) For a detailed analysis of the content of the code, Saadi, *La femme et la loi*; Leila Hamdan, “Les difficultés de codification du droit de la famille Algerian,” *Revue Internationale de Droit Compare* 38, no1 (1986): 133-39; and Ramdane Babadji and Mohamed N. Mahieddin, “Le Fiqh islamique, source non exclusive de droit de la famille en Algérie,” *Revue Internationale de Droit Compare* 39, no1 (1987):163-73. For an approach to the enactment of the 1984 Family Code different from the one as a legitimisation crisis for the official ideology of “specific socialism”, in Cheriet, “Islam and Feminism”.

As in Maliki law, women could request a divorce in a number of specified conditions, such as in case of sexual infirmity of the husband or in case of a prolonged absence on his part. In keeping repudiation and polygamy legal, the 1984 Algerian Family Code presented a conception of the marital bond as easily breakable and nonexclusive, the same conception as in Islamic law.

The code defined filiation as exclusively patrilineal and as occurring only in marriage, which meant that the child of an unmarried woman could not have a legally recognized father. Boys would be in the custody of their mothers until the age of ten and this could be extended until the age of sixteen. Daughters would be in the custody of their mothers until the daughters married. Involving day-to-day care, custody differs from guardianship, which refers to legal responsibility for the child and will be discussed below. The 1984 Algerian Code covered succession in minute detail and accorded to it the greatest number of articles. In this respect, too, it was faithful to the prescriptions of the Shari`a on almost every point. It maintained the prerogatives of extended kin with respect of inheritance.

The nationalist struggle in Tunisia culminated in the formation of a national state that was largely autonomous from the support of tribal areas. This was the decisive factor that distinguished Tunisia from Morocco and Algeria and permitted major reforms of family law with the resulting expansion in women's rights in the aftermath of independence. This chapter traces the balance of power between reformist and conservative forces in the Tunisian nationalist movement, their different political goals, and the course of state building reforms that the victorious liberal, reformist faction undertook after it gained power.

Once in power, the new leadership moved quickly to consolidate state institutions in the aftermath of independence. It sought to weaken, or preferably to eradicate, tribal solidarities and their manifestations. The targets attacked by the reforms included the collective tribal ownership of land, the autonomy of local areas, the inheritance rights of agnates within the lineage, the independent power of Islamic courts, religious property rights, and the privileges of extended kin in family matters.

The government also moved quickly to make two other unifying reforms of major importance. Both reforms consolidated the power of the national state by developing nationwide institutions and regulations, at the same time that they had weakened the religious establishment. The policy on family law in sovereign Tunisia followed from the kind of state that took shape toward the end of the nationalist period and at the time of independence. In the same way that the state engaged in other reforms meant to build institutions and unify the country, such as the reforms of administration, land ownership, and judicial system discussed above, the state promulgated a sweeping family law reform. In the same way as other reforms weakened what was left of tribal solidarities, so did family law reform. This stands in sharp contrast to the codification of family law in the *Mudawwana* of 1957-58 in Morocco and the 1984 Family Code of Algeria, where the model of the extended patrilineage was explicitly institutionalized and recognized in the new state. Tunisia in comparison equipped itself with a family law that sanctioned essentially a nuclear model of the family and expanded women's rights.

On 13 August 1956, less than five months after the proclamation of independence, a new Tunisian Code of Personal Status (CPS) was promulgated. The CPS altered regulations on marriage, divorce, alimony, custody, adoption, filiation, and to a lesser extent inheritance, leaving few, if any, aspects of family life untouched. The code dropped the vision of the family as an extended kinship group built on strong ties crisscrossing a community of male relatives. It replaced it with the vision of a conjugal unit in which ties between spouses and between parents and children occupy a prominent place. While it decreased the prerogatives of extended kin in family matters, the CPS also gave women greater rights by increasing the range of options available to them in their private lives. The code abolished polygamy, eliminated the husband's right to repudiate his wife, allowed women to file for divorce, and increased women's custody rights.

When the CPS was promulgated in 1956, the Ministry of Justice accompanied it with a communique that stated the Islamic character of the new laws. The communique indicated that "religious judges and scholars had participated in [its] preparation," that the CPS had met with their approval, and that it was based on Islamic sources.<sup>14</sup>

14 *L'Action Tunisienne*, 3 September 1956, Archives of the Central de Documentation Nationale, Tunis.

Members of the 1956 government presented the code as the outcome of a new phase in Islamic thinking, similar to earlier phases of interpretation (*ijtihad*) that have marked the evolution of Islamic legal thought throughout its history. They distinguished it from the reforms made under Kamal Atatürk in Turkey, where Islamic law was abandoned altogether and replaced by the Turkish Civil Code of 1926, which was almost identical to the civil code of Switzerland.

In Tunisia, the policy makers emphasized the continuing faithfulness of the law to the Islamic heritage. They described the CPS as a step necessary to free Islamic law from past misunderstandings and restore the true spirit of Islam. For example, Ahmed Mestiri, the then Minister of Justice, wrote: “The procedure of the Tunisian lawmakers has been fundamentally different from that of Kamal Atatürk. Except for the fact that they are both resolutely reformist, they differ on the key point, that is the source and content of the law.”<sup>15</sup> He went on, stating that the Tunisian lawmakers found inspiration in the *Shari’a* and used the principle of *ijtihad*. He indicated that they chose to open the doors of interpretation in order to rejuvenate the Islamic tradition. He expressed his and his collaborators’ belief that a renovated Islam could serve as a basis for a modern state. The extent to which the CPS is Islamic or secular in effect has led to debate since its promulgation. The important point is the fact that the CPS was innovative with respect to the interpretations of the *Shari’a* that had developed historically in the Maghrib, at the same time as it retained some elements of the *Shari’a*. The CPS can be interpreted either way, as an Islamic body of legislation inspired by secular norms, or a secular body of legislation inspired by Islam. Scholars alternatively have emphasized the Islamic or secular character of the CPS. Focusing on innovation within the Islamic tradition, scholars such as Abdesselem and Charfi state: “The Code of Personal Status of 1956 introduced a certain number of major innovations, inspired by the spirit of Moslem law, into the field of family law.”<sup>16</sup> Emphasizing secular norms, Olivier Carre writes: “The Tunisian code has the features of a secular civil code inspired by religion.”<sup>17</sup>

While the Islamic influence cannot be denied, it must be placed in perspective. Although the Tunisian Constitution states that Tunisia is a Muslim country, it does not say that the law has to be Islamic law, nor does the CPS suggest going back to the *Shari’a* to find the solution to questions not addressed in the CPS. The CPS is called the *Majalla* in Arabic, and I use both terms interchangeably.<sup>18</sup>

The initial statement on inheritance contained in the CPS was faithful to Maliki law. It maintained the same two basic categories of heirs, those who receive a well-defined part of the assets because of the nature of their kin relation to the deceased and those who are called to inherit on the basis of agnatism. The rule according to which the share of a man is twice as large as that of a woman was also preserved. In the light of the other regulations of the CPS, which gave more rights to women and favored the conjugal family over the extended patrilineal kinship system, the stipulations on inheritance were surprising. They did not seem in concord with the spirit of the *Majalla* as a whole. Reforms affecting inheritance appeared in the regulations on wills and in separate laws and decrees, promulgated after the *Majalla* itself. Although, at first sight, the changes in regard to inheritance were not as striking as in other areas of family law, they nevertheless were significant for kinship relations.

For example, the Decree of 1956 and the Law of 1957, which abolished the *habus* institution, also had implications for family relationships and for women.<sup>19</sup> By donating a piece of land as *habus* to a religious or charitable institution, one could escape the strict inheritance rules of the *Shari’a*. The *habus* were sometimes used to deprive women of their inheritance rights. They often served as a useful device for kinship units to keep their holding intact by excluding female heirs in favor of male relatives in the male line. In making the constitution of a *habus* illegal, the new legislation removed the availability of such a device. The CPS regulated the procedure for wills, which could no longer be made orally. A will now had to appear in writing and be dated and signed by its author in order to be valid. As previously, a will could not apply to more than one third of a person’s assets, the other two thirds going to specified heirs.

15 Ahmed Mestiri, letter to *Revolution Africaine*, 17 February 1966, Archives of the Central de Documentation Nationale, Tunis.

16 Mustapha Abdesselem and Mohamed Charfi, “Tunisia,” in *National Reports*, vol 1 of *International Encyclopedia of Comparative Law*, under the auspices of the International Association of Legal Science, ed. Victor Knapp (The Hague: Mouton, 1973), T 38.

17 Oliver Carre, *L’Islam Laïque ou retour à la grande tradition* (Paris: A. Collin, 1993), T-38.

18 *Code du Statut, Personnel*. For commentaries on the code by legal scholars, see Alya Che’erif Chamari, *La femme et la loi en Tunisie* (Casablanca: le Fennec, 1991), 35-78; and Naziha Ayyat Lakihal, *La femme tunisienne et sa place dans le droit positif* (Tunis: Editions Dar al- Amal, 1978).

19 Law of 31 May 1956 and Degree of 18 July 1957, in Bormans, *Statut personnel*, 346-347.

But an important change was introduced in regard to wills and the children of a predeceased daughter. Suppose that a man's daughter had died and left a child. Previously, the child of his predeceased daughter could not be the beneficiary of a man's will, whereas children of a predeceased son could be. This was concordant with the rule of agnatism prevalent in Islamic family law and with the inheritance privileges granted to relatives in the male line. In contrast, the new laws allowed a man to make the child of his predeceased daughter the beneficiary of his will, thus transmitting one third of his assets to the female line. In a society in which the male line had been overwhelmingly favored in inheritance, this constituted a substantial change. The same philosophy, striking a similar blow to agnatic privileges, appeared in two other regulations introduced in 1959.<sup>20</sup> The first gave the spouse greater access to inheritance. The second favored daughters and granddaughters over some agnatic relatives.

According to the Maliki School of law, in case there were no agnatic heirs, the remainder of the heritage after the specified heirs (the quota sharers) received their quota, went to the state or to some communal or public fund. In Hanafi law, one of the other Islamic schools of law, this issue was handled differently. Called "return," a Hanafi rule in effect returned the remainder of the inheritance to some of the heirs. If there were no agnatic heirs, the remainder was distributed among the first category of heirs, those who were identified in the Shari'a and whose share was specified. The spouse was excluded from this kind of inheritance, however. All the other heirs would receive part of the remainder in proportion with their initial part, only the spouse would not.

Abandoning Maliki principles, Tunisian law adopted the system of "return" of the Hanafi school. In addition, it changed the rule concerning the spouse, making him or her a recipient of the return in the same way as all the other quota sharers. The implication of this legal reform was far reaching. Under the same circumstances, namely in the absence of agnatic relatives, Maliki law gave the spouse only half of the patrimony, while the other half went to a public or communal fund. In contrast, under the new law, the spouse received the totality of the patrimony, the first half as her quota share and the second half on the basis of the "return" principle. The patrimony in its

entirety thus would now go to the spouse. And the rule held true whether the surviving spouse was male or female. This was another indication of the tendency of the Tunisian lawmakers to extend the inheritance rights of members of the conjugal family.

The second reform of inheritance rules went even further in shifting the direction of property transmission and in lessening the inheritance rights of extended kin. It allowed women to take precedence over or, to use the legal term, to exclude some agnatic heirs altogether. The Law of June 1959 stated: "The daughter and the granddaughter in the male line benefit from 'return' even in the presence of agnatic relatives in the category of brothers, paternal uncles and their descendants."<sup>21</sup> Suppose that a man died leaving a daughter and a brother or a paternal uncle. Under the new law, the daughter now received the whole patrimony, thereby excluding from inheritance the brother or the paternal uncle of the de-ceased. Under Maliki law, the daughter would have received only half of the patrimony and the other half would have gone to the brother or paternal uncles who would have inherited as agnates. In the same kinship configuration, a woman now received twice as much as she previously did. At the death of the daughter, the property that she had received to the detriment of her uncle or granduncle would then pass to her children, thus escaping the agnatic kin group altogether.

The Tunisian reforms as a whole have been interpreted as favoring women.<sup>22</sup> Like other laws in the CPS, the laws on inheritance certainly expanded women's rights. Inheritance laws also did something else, which was to sanction the nuclear family. For what was noteworthy about the new laws was not only that women excluded some men, but it was the particular category of male relatives that women excluded versus those that they did not. A careful reading of the law of 1959, for example, shows that daughters and granddaughters now excluded collateral male relatives of the deceased, namely brothers, paternal uncles, and their children. But they did not exclude the son, grandson, or father of the deceased.

<sup>20</sup> Law of 19 June 1959, in *Bormans, Statut personnel*, 333-35. The same principle – weakening the agnatic patrilineage – appears also in the Tunisian legislation on citizenship. See Mounira M. Charrad, "Becoming a citizen: lineage versus individual in Morocco and Tunisia" in *Citizenship and Gender in the Middle East*, ed. Suad Joseph (Syracuse: Syracuse University press, 2000).

<sup>21</sup> *Bormans, Statut personnel*, 346-47.

<sup>22</sup> This has been the case since the 1960's and among other observers writing from a variety of perspectives. See Arlie Hochschild, "Le travail des femmes une Tunisie en voie de développement," *Revue Tunisienne de Sciences Sociales*, no.9 (Mar. 1967)

There are two kinds of male relatives in the paternal line: descendants such as son and grandson and collateral kin such as brothers and uncles. In Maliki law, they were all called to inherit as agnates. Under the new law, sons and grandsons of the deceased retained their inheritance rights whereas his brothers and uncles were excluded by daughters.

The key to understanding the reforms of inheritance laws is that they favored descendants of both sexes over collateral relatives. They did not directly favor women as such. In the transmission of property, a child, whether male *or* female, now had priority over other kin, even if the other kin were males. The male relatives that were excluded, brothers, uncles, and cousins, constituted the center of the circle within which relations of solidarity and reciprocal obligations were historically emphasized in the Maghribi kin group. One of the Tunisian reforms favored the spouse and the other favored descendants over other kin. Taken together, the reforms represented a strengthening of the conjugal unit and its progeny, to the detriment of the extended agnatic group. In summary, the CPS made drastic innovations, even though it retained some aspects of Islamic family law, such as the rule according to which a woman inherits half as much as a man in the same kinship configuration.

As a whole, the CPS departed from Islamic law in its general conception of the family and in its specific regulations. Among the innovations, it abolished polygamy, repudiation, and the father's or guardian's right of matrimonial constraint. It required the bride to express her voluntary consent for the marriage to be valid. It gave men and women equal rights and responsibilities in regard to divorce. It made divorce less easy than it had been and required that it take place in court. It made the wife responsible for contributing to the expenses of the household and for support of her children. It gave custody to the mother if this was in the child's best interest. It reorganized civil status by making the registration of marriages and divorces mandatory. It made adoption legally valid. It required a patronymic name for all citizens. It abolished the institution of the *habus*. It modified the rules on inheritance so as to favor the spouse and female descendants over several agnatic relatives and, like the Moroccan and Algerian codes but with a fundamentally different content, it provided clearly formulated legal documents that facilitated the work of the judicial and administrative systems.

The promulgation of the CPS was followed by extensive efforts on the part of the government to explain the reforms to the Tunisian population and to enforce their application. Assigned a social responsibility, judges were called upon as social educators whose mission was not only to apply the new laws, but also to make the mutations required in family life more understandable to Tunisian citizens.<sup>101</sup> The code was presented to Tunisians as the expression of national goals and aspirations. Conferences and seminars were organized to provide explanations and clarifications of the code. August 13, the anniversary of the promulgation of the CPS, was made Women's Day. The party of the Neo-Destour and all national organizations were urged to share in the effort required to help make the social transition that the new laws entailed. The CPS became a matter of national pride. It also became a national project to which all parts of the government were asked to contribute and in which all Tunisians were invited to participate.<sup>23</sup>

**R6.3** Katulis B. (2004) *Women's Freedom in Focus: Morocco*, Freedom House Survey, Washington DC: Freedom House.

One issue that has emerged as a profoundly important topic in Moroccan political life is the *Moudawana*, a set of reforms aimed at improving the status of women in the country. Formally introduced by King Mohammed VI in late 2003 and passed into law in early February 2004 ... the new Family Status Code aims to give women and men equal authority in the family ...

Some of the specific provisions include giving women the right to get married without the consent of a male relative or authority figure; raising the minimum marriageable age for a woman from fifteen to eighteen; giving women the right to initiate a divorce and secure rights over property acquired during the marriage; requiring the consent of a man's first wife before he marries a second wife; and allowing grandchildren to inherit from their maternal grandfather ...

<sup>23</sup> Speech by President Habib Bourguiba, 25 July 1965, cited in Borrmans, *Statut personnel*, 379.

On the whole, the focus group participants [in the research project] have a generally positive outlook on the changes to the *Moudawana*. Unprompted, several participants say that the *Moudawana* represents one of the things going in the right direction for Morocco ... It will help address problems that exist in Moroccan families, and according to a few participants, the changes will help erase negative perceptions that other countries might have about Morocco.

Top of mind reactions to the overall changes to the *Moudawana* are not all positive. Some younger men dismiss its importance, with one younger urban man in Rabat saying that it is “just some silly stuff”. Though some participants say it will lead to fewer divorces, older Berber men from the towns of Ait Ourir and younger men in Rabat worry that the *Moudawana* will discourage people from getting married in the first place.

The most strident arguments opposing the general changes to the *Moudawana* are grounded in cultural and religious arguments. One younger man in Rabat blames international organizations such as the World Bank for the *Moudawana*, saying that they have “forced” Morocco to introduce this to “change our religion and change our culture.” Though it is not the dominant view, a handful of participants maintain that the changes to the *Moudawana* directly attack and seek to change Islam. A few participants – both men and women – say that according to Islam, women are necessarily subordinate to men and that attempts to equalize them in terms of rights contradict Islamic religious principles.

Again, these religiously and culturally based arguments against changes in the *Moudawana* do not seem to represent the dominant view of the focus group participants, and many of the comments above arguing that the *Moudawana* contradicts Islam are met with counterarguments from participants in the same groups. One younger man in Fez, a recent arrival to the city from the rural regions of Morocco, says, “*The Moudawana committee contains a lot of imams and religious scholars, so changes in the Moudawana have contributions from those scholars.*”

# **MODULE 7**

## **WAQF (ENDOWMENT) AND ISLAMIC PHILANTHROPY**

# MODULE 7:

## Waqf (Endowment) and Islamic philanthropy

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### Overview

This module examines *waqf* which is a highly significant legal mechanism and a key Islamic institution. At its heart the Islamic endowment is connected firmly with the religious precept of charity. *Waqf* as a welfare mechanism falls into the five basic welfare categories of food, housing, health, education and religion. The legal sources, structure and types of *awqaf* are addressed in this module, along with a brief consideration of its decline. It considers how the *waqf* served and continues to serve as an instrument of public policy and impacts on all aspects of Muslim life, including access to land.

The *waqf* (pl. *awqaf*) has been recognized and developed under the *Shari'a* (Islamic law) for more than a millennium. Under the *waqf*, an owner permanently settles property, its usufruct or income, to the use of beneficiaries for specific purposes. Ultimately, all *awqaf* must have a charitable purpose, although this need not be immediate. One of the key features of *waqf* is perpetuity or '*sadaqah jaariah*' – continuous charity. *Awqaf* consist of land, with property rights over the income or usufruct (not endowed land itself). Some moveable assets, such as furniture, books or farm animals, may be also settled in a *waqf*. There are two basic forms of *waqf*: public and family/private, depending on the beneficiaries. As per inheritance rules, only one-third of an estate can be made into a *waqf*.

There is evidence throughout Islamic history that women have both created, and been beneficiaries of *awqaf*. There is no requirement, as in inheritance rules, that women only benefit from half of *waqf*. A *waqf* could be dedicated entirely to women, to the exclusion of males. A valid *waqf* requires a founder/creator with a pious purpose, a declaration, a beneficiary and specific property. The *waqf* deed itself needs to be

legally authenticated and kept with a religious judge (*qadi*).

In several Muslim countries reforms have abolished, nationalized or highly regulated *awqaf*. Vast tracts of *waqf* land are now unaccounted, outside formal systems. The eclipse of the *waqf* has also left a vacuum in the arena of public services, which the State has been unable to fill easily in many Muslim countries. Yet, both the 'idea' of the *waqf* and the *waqf* doctrine itself remain influential and the *awqaf* are being invigorated.

As an indigenous philanthropic mechanism, it has taken hold in some Muslim societies. Through reform, *waqf* could become a transparent and responsive institution, with modern management structures. There is also an impetus to encourage new ones, with non-governmental organizations using the *waqf* model to solicit and manage funds. *Waqf* has potential for land development, providing homes for landless, subsidized rentals, and enhancing tenure security in informal settings. Cash endowments are an important source of credit, with the endowed capital lent to borrowers. This module evaluates how the revival of *waqf* offers the potential benefits of an inclusive, non-elitist and authentic economic institution.

### Learning outcomes

At the end of this module, participants should be able to:

- ♦ appreciate the significance of the Islamic endowment (*waqf*).
- ♦ understand the socio-economic impact of the *waqf*.
- ♦ consider initiatives for the contemporary revival of the *waqf*.
- ♦ assess innovative approaches to existing *waqf*

lands and the creation of new *awqaf* in order to facilitate security of tenure and access to land.

## Reading materials

Kuran T (2001) 'The Provision of Public Goods under Islamic Law: Origins, Impact and Limitations of the *Waqf* system' 35 *Law and Society Review* 4.

Sadeq AM (2002) '*Waqf, perpetual charity and poverty alleviation*', 29 1/2 *International Journal of Social Economics* 135-151.

## Additional reading

Gerber H (2002) 'The Public Sphere and Civil Society' in M. Hoexter, S. N. Eisenstadt and N. Levtzion (eds) *The Public Sphere in Muslim Societies* (Albany: State University of New York Press) 65-82.

Kahf M (1999) 'Towards the Revival of *Awqaf*: A Few *Fiqhi* Issues to Reconsider', Presented at the Harvard Forum on Islamic Finance and Economics, October 1, 1999.

Powers DS (1999) 'The Islamic Family Endowment' 32(4) *Vanderbilt Journal of Transnational Law*, pp. 1167-1190.

Sait and Lim (2006) pp. 147-173

## Facilitator's notes

It is likely that most participants working within Muslim societies will be aware of *waqf* land or at least of 'religious land'. The materials briefly cover the history, prevalence and decline of the *waqf*. However, the extracts within the reading pack and the discussion questions are intended to focus the participants upon the future potential of the Islamic endowment. In particular, how existing endowed lands may be regenerated and new Islamic endowments established, as opposed to just narrating the institution's past. Participants are also encouraged to reflect upon whether the endowment has a particular part to play in enhancing economic development and poverty alleviation in tandem with Islamic microfinance projects. Land information and management issues

with respect to *waqf* need to also be pursued.

The Malaysian example offers a variety of perspectives to revisit *waqf*. Inherent legal, economic and political frameworks are for discussion. Issues of maximising the potential of *waqf*, particularly through cash *waqf* will arise. The case also focuses on how land administration systems can deal with the *waqf* problems and considers dispute resolution.

## Group work

### *Waqf* development in Malaysia

Malaysia has significant tracts of endowed land *waqf* (or *wakaf*), which play an important social and economic role. However, there are calls for more efficient monitoring and use of *waqf* land towards poverty alleviation and sustainable development. In Malaysia, the State Islamic Religious Council is deemed the sole trustee of *waqf* under the State Islamic Enactments. The *waqf* was originally evolved as the 'third sector' or independent philanthropic process, through it was under the influence of *ulama*. As with other countries, there are several major issues facing *waqf* management in Malaysia – legal, economic and regulatory.

One criticism against classical *waqf* law has been its rigidity and inefficient management. The government is undertaking reforms to render *waqf* laws more flexible and responsive. In particular, there are disputes over *waqf* lands that are not easily or speedily resolved by the regular court system. At the same time, there is greater coordination towards ensuring *waqf* land development, particularly for the benefit of poorer sections of society, as prioritised by Islam. However, thousands of acres of *waqf* lands are vacant or underutilised, primarily because they are unregulated or detached from the reality of market forces. There are several cases of good practice where *waqf* land is leased to investors through current market (rental or lease) prices and through the income of the capital of *waqf*, access to land and development of needy groups is financed. There is also increasing attention being paid to monetary *waqf* and other forms of developmental financing.

Despite relative advances in the Malaysian land administration system to engage with *waqf* properties, *awqaf* need more attention and integration into the system, particularly in terms of land information. A full survey is a daunting task given the scale of the endeavour. There are also issues like the recognition, measurement and valuation of *waqf* assets. The limited monitoring and control, in addition to an absence of proper accounting standards, is being addressed by the State Islamic Religious Council to improve performance of *waqf*. An accountability and responsibility matrix is being proposed to ensure proper systems are in place.

### Further reading

Rashid SK (2003) 'Current *Waqf* Experience and the Future of *Waqf* Institution' 3 *Awqaf* (Kuwait)" 5-26.

Mohammad, MTS (2003) The *Waqf* Funds and Properties as a Source for Sustainable Development in Malaysia. In: ICUDM, 7-9 JULY 2003, LANGKAWI. (available online)

### Possible group work questions

1. One of the key features of *waqf* is perpetuity of '*sadaqah jaaria*' – continuous charity. Is this concept a strength or weakness of the *waqf* model in future land development endeavours?
2. Innovation in *waqf* mechanisms offer opportunities to fund poverty alleviation. How could the cash *waqf* offer flexibility as well as wider inclusion?
3. Details about *waqf* properties are often missing leading to their underperforming or misuse. What needs to be done for more efficient management of *waqf* properties?
4. *Waqf* properties are often mired in land disputes that clog the court system. Given that *waqf* properties are a distinct type of land, what dedicated *waqf* dispute resolution mechanism would you envisage?

## Background Q & A

### Waqf (endowment) and Islamic philanthropy

The revival of the waqf offers the potential of an inclusive, non-elitist and authentic institution that is capable of responding to contemporary challenges.

## Introduction

The Global Land Tool Network (GLTN) is a multi-sector and multi-stakeholder partnership seeking to translate aspirations, principles and policies into inclusive, pro-poor, affordable, gendered and useful land tools, which can be replicated in a range of contexts. GLTN recognizes the demand for targeted tools, including culturally or religiously adapted tools, since there are many positions and approaches to conceptualising and delivering secure tenure and access to land.

Communities have deeply ingrained cultural traditions, while many religions have firm rules on land and inheritance, and every government faces the challenge of land differently with its own array of laws and degrees of political will. In most Muslim countries Islamic law, principles and practices make an important contribution to shaping access to land. GLTN has as one of its objectives, therefore, the identification and development of Islamic land tools through a cross-cultural, interdisciplinary and global process, owned by Muslims, but including civil society and development partners. Yet, Islamic approaches to land should not be seen as an internal matter, giving preference to religion over universal or secular approaches to land, but as part of GLTN's inclusive, objective, systematic and transparent efforts.

### 1 What is the waqf?

The *waqf* (endowment) is a highly significant Islamic institution. Although there is no direct reference to the *waqf* in the *Qu'ran*, it is a legal mechanism that has been recognised and developed under Islamic law for more than a millennium. Under the *waqf*, an owner permanently settles property, its usufruct or income, to the use of beneficiaries for specific purposes.

This 'tying up' of property also signifies that it is protected from sale or seizure and its use or benefit given to others. At its heart the Islamic endowment is connected firmly with the religious precept of charity.

### 2 Why is the waqf a highly significant Islamic mechanism?

Existing *awqaf* involve vast tracts of land in many Muslim countries, although much of this land lies derelict today. The revitalisation and revival of the *waqf* in many Muslim countries has revealed opportunities for fulfilling its development potential. There is support for the idea of the *waqf* at local, national and international levels among Islamic communities. It offers the benefits of an inclusive, non-elitist and authentic economic institution. There is potential for endowed land to be better managed and used for enhancing security of tenure and for the urban poor. And, new *awqaf* could be created which could help in land redistribution, strengthening civil society and supporting effective housing microfinance.

### 3 How widespread is the waqf institution?

The investment over time of the Muslim community into the *waqf* institution is enormous. For instance, about one third of the land in the Islamic Ottoman Empire was held in the form of *awqaf*. Wherever there was an established Muslim community, one was likely to find a *waqf*. Under *Shi'a* practice, the *vaqf*, (Persian, *auqaf*, plural) were also numerous. *Awqaf* dot the Islamic landscape, from monuments such as the Indian Taj Mahal to the Bosnian Mostar bridge, from the Jerusalem Al-Aqsa mosque to the Egyptian Al-Azhar University, from Shishli Children's Hospital in Istanbul to Zubida's Waterway in Mecca. But, *awqaf* are also found in western countries, in Sicily, in Cyprus, in Andalusia, in Greece and in the Americas. Large areas of *waqf* land were nationalized in the 20<sup>th</sup> century and brought under the state administration so that often it became difficult to distinguish from state land. However, the *waqf* remains an important and widespread institution.

#### 4 What was the traditional purpose of establishing a waqf?

Ultimately, all *awqaf* must have a charitable purpose, although this need not be immediate. There are two basic forms of *waqf*: public and family/'private'. However, while the millions of *awqaf* spanning the world varied, the majority of foundations traditionally fell into the five basic welfare categories of food, housing, health, education and religion. The beneficiaries of *awqaf* could be exclusively family members, but a high proportion was devoted to general welfare. Traditionally, the *waqf* was intended to be a 'third sector' of philanthropy or civil society, which existed independently of both the State and the profit-making private sector.

#### 5 What is the purpose of establishing a waqf today?

The *waqf* retains its welfare role today, although nationalisation, abolition and reform of *waqf* endowments are the story of postcolonial states in many parts of the Muslim world. An increasing number of non-governmental organizations are using the *waqf* model to solicit and manage funds, cashing in on its appeal of authenticity. It is also attracting attention from economists and the corporate sector, appearing as an integral part of mechanisms whereby the wealthy can deposit funds and ensure that the profits from those funds are used for benevolent purposes.

#### 6 What is meant by a public waqf?

The public (*waqf khairi*) endowment, involves the 'permanent' dedication of the property for charitable purposes, such as an Islamic college. When created during the founder's lifetime, such an endowment takes effect immediately and may consist, should he or she desire, of all, or just part of, the founder's property. If a *waqf* is designed to take effect upon the death of the founder, it can be revoked or changed at any stage until death. However, such a *waqf* is subject to the established limits on Muslim wills and the endowment may not exceed one-third of a person's assets.

#### 7 What is meant by a family waqf?

It is possible in some Muslim countries to found a *waqf* in which the income or usufruct of the property is used for the benefit of the founder's family, until the extinction of his or her descendants, when it is diverted to charitable purposes. Sometimes it is misleadingly referred to as a private endowment. In Arab countries it is known as the *waqf ahli* or *waqf dhurri*, while in South Asia it is termed a *waqf al aulad*. It is a good mechanism for safeguarding family properties from the uncertain upheavals of economic and political life. The family *waqf* was abolished in some jurisdictions, but remains elsewhere, for instance India and Palestine.

#### 8 Are there other forms of waqf?

A third category is sometimes identified, the *waqf musharak*, which is best described as a quasi-public endowment. It provides for particular individuals or a class of individuals including the founder's family, but also serves certain outside public interests, such as a mosque that is convenient for, but not exclusive to, family members.

#### 9 Can the state endow property in a waqf?

Yes, a State endowment (*waqf gayri sahih*) can be created either because it was established from the State treasury (*bait al-mal*) or because the *waqf* has been taken into state control. This particular form of the *waqf* has considerable potential for future development, including providing homes for the landless and enhancing security of tenure for those whose existing rights arise only from possession or are informal.

#### 10 What are the essential components of the waqf?

All of the Islamic Schools of Law (*maddahib*) agree that a valid *waqf* requires a founder/creator with a pious purpose, a declaration, a beneficiary and specific property.

The *waqf* deed itself needs to be legally authenticated and kept with a religious judge (*qadi*). Some deeds are carved on the exterior or interior walls of the buildings. The *waqf* is more than a legal arrangement and some of the *waqf* properties have inscriptions warning of curses on anyone who alters any of its conditions. There are also traditions of some oral *waqf*, for instance in Oman and Bangladesh.

## 11 Can the creation of a waqf be challenged?

Yes, there are opportunities for outsiders to challenge a *waqf*, as illusory or abusive of others rights, as in a case where a dedication undermines the rights of creditors or causes a person's rights to be defeated or delayed.

## 12 What kinds of property can be endowed?

The majority of *awqaf* consist of land, where the security of the act of 'continuous charity' is easily evidenced. Property rights are exercised over the income or usufruct of the land, not the endowed land itself. Some moveable assets, such as furniture, books or farm animals, may be settled in a *waqf*.

## 13 Can money be endowed in the form of a waqf?

Though money lacks the enduring quality of land, there have been innovative cash *waqf*, despite some concerns over perpetuity of the *waqf*. However, in the 15<sup>th</sup> and 16<sup>th</sup> Centuries, a particular form of endowment or trust fund, the cash *waqf*, by which money was settled for social and pious purposes, was approved by the Islamic courts in the Ottoman world. Cash endowments were an important source of credit, with the endowed capital lent to borrowers. The returns were used for charitable purposes, after deductions for administrative expenses and any taxes. With the emergence of modern banks the cash endowment and this form of credit declined. There is a renewal of interest in the cash endowment, with new ones being created. The cash *waqf* has potential for enhancing microfinance mechanisms.

Some Islamic banks, for instance in Malaysia, are offering products which combine a cash *waqf* with a partnership (*mudaraba*) principle, whereby the wealthy may deposit funds as an endowment with the bank, which manages the fund and ensures that the depositor's share of the profits is used for benevolent purposes.

## 14 Who administers waqf property?

Traditionally, *awqaf* were managed by a *mutawalli* (or *nazir*) who was required to run it according to the terms within the founding deed, particularly its charitable purposes, and according to the general expected standards of behaviour and values within Islam. Postcolonial states drew *awqaf* under state administration, with ministries and departments of *waqf*, which monitor these lands and their management, either directly or indirectly.

## 15 Can poor administration of a waqf be challenged?

Traditionally, the accountability of the *waqf* lay largely with the religious teachers (*ulama*) who would sue the manager of a *waqf* where there was a failure to fulfill its purposes. More recently the records of the 20<sup>th</sup> century Islamic court in Jerusalem show cases brought against the administrators of *awqaf* for alleged neglect, mismanagement and embezzlement, sometime leading to the dismissal of the administrator. Ministries and boards monitor many *awqaf* in the modern world. This supervision raises questions about transparency, perceived corruption in state administration and concerns about the lack of integration of *waqf* lands into land registries.

## 16 Can women set up a waqf?

Yes, women can set up *awqaf*. There is evidence throughout Islamic history that women have created *awqaf*. There are famous endowments by women of high rank involving the sponsorship of monumental public works, such as mosques, religious colleges, soup kitchens, hospitals and schools.

However, the creation of *awqaf* is not confined to one economic class. Women from all sectors of society have and continue to endow property, although not so numerous or generally as large as those endowed by men.

## 17 Can women administer a waqf?

Yes, women can administer *awqaf*. Unlike their contemporaries in many other parts of the world, from early times in Islamic history, records show that women served as administrators of *waqf* property and, amongst other things, let property and supervised repairs to the school, college, mosque or other public works with which the *waqf* was concerned. Also, as the administration of *waqf* property has been drawn into the realm of the state, at least one woman has served as the head of a *waqf* board in India overseeing the management of many *awqaf*.

## 18 Can women benefit from a waqf?

Yes, women can be beneficiaries of *awqaf*. Under Islamic law there are compulsory rules setting out the shares that particular relatives are to receive from a deceased person's estate. In general, women's share is only half of that given to a man in an equivalent situation. One means for compensating women for their lesser inheritance shares is by means of the *waqf ahli* (family endowment). Prior to his or her death the founder settles up to a third of his or her property for the benefit of chosen relatives. However, there is evidence also of the *waqf ahli* being used to disinherit women and it has been abolished in many parts of the Muslim world.

## 19 Can non-Muslims benefit from a waqf?

Yes, the *waqf* is an Islamic institution, but the beneficiary, the administrator and the process can and did in the past involve non-Muslims. *Awqaf* supported many churches and synagogues and these were equally admissible in the Muslim courts of law.

### Muharraq and Manama, Kingdom of Bahrain

A team combining international and local representatives has worked to address widespread deterioration in the traditional urban environment of Muharraq and Manama. In Muharraq there exist many 'vacant' areas, where buildings are neglected or demolished. It was found that the *waqf* system was a major cause for this dereliction. Drawing upon Islamic traditions and values a generative process of urban planning, involving the local population was developed, to regenerate and preserve the integrity of these historic cities. A control and management structure for property was produced within a framework of locally authentic and acceptable ethical and legal stipulations. This has facilitated the production of innovative, open-ended, locally responsive solutions to urban environmental deterioration, including the unlocking of 'vacant lands'.

Islamic law insists only that the property be given into the ownership of God for the benefit of mankind. Several non-Islamic states with substantial Muslim communities have allowed for the *waqf*, and the 'secular' administration has not undermined this institution.

## 20 Are the legal rules governing the waqf similar across the Muslim world?

The basic principles on *awqaf* remain the same throughout the Islamic world. However, there are variations in Islamic jurisprudence between the different Sunni Schools of Law (*maddahib*) -- Hanafi, Maliki, Shafi and Hanbali -- regarding the theories of the *waqf*, as well as diversity in social practices, judicial attitudes and implementation by States. Rules can vary, therefore, according to geographical area and dominant jurisprudential school. And state intervention into *awqaf*, with the family *waqf* abolished in many countries, as well as nationalization of *awqaf* and other legal reforms, leads to further variation in approaches to this institution.

### The Kuwait *Awqaf* Public Foundation (KAPF)

The KAPF was set up in 1993 with the express aim of strategically developing *awqaf*. KAPF has used modern institution-building techniques and created a network of specialized bodies to enhance its management role and simplify its control system. Modern computerized information systems, including an integrated database for *awqaf* were introduced and KAPF is active in research and knowledge dissemination. Locally KAPF has focused on organizational relations with government bodies, charitable and investment institutions and private entities. It has built relationships outside Kuwait, exchanging good practice, locating and coordinating international support for promoting *awqaf* and collaborating with external partners and to develop *waqf* investment. Kuwait has seen considerable growth in newly established *awqaf* since 1993.

## 21 Who or what owns the waqf property?

In theory the *waqf* property is dedicated to God, but its temporality raises questions over ownership. And, legal opinion differs amongst Islamic schools of law on this issue. The *Shafis* argue that the property is simply owned by God, which in practice restricts human choices. *Hanbalis* say the ownership is transferred to the beneficiaries. However, the *Malikis* consider the ownership belongs to the *waqf* and is inherited from her/him by legal heirs. Thus, *Malikis* do not insist on the perpetuity and continuity of the endowment in the way the *Hanafis*, *Shafis* and *Hanbalis* require. Thus, when reformers sought to modify the *waqf* institution, in *Hanafi* or other jurisdictions, they favoured the *Maliki* position. Since the *Malikis* did not insist on perpetuity, the nature of the *waqf* could be altered or varied. There are variations also in the *Shi'a* legal position, for example, allowing the sale of family endowments *auqaf* (Persian) on the basis that the beneficiaries were owners, although not in the case of public endowments *auqaf* where the beneficiaries cannot be the owners.

## 22 Is the waqf only of historical significance?

No, the *waqf* is not merely of historical significance. It did flourish in the past and declined in the modern period, but it remains an important Islamic institution with considerable potential for future development.

## 23 Why did the waqf decline?

The decline of the *waqf* arose partly from the emphasis on its perpetuity. In particular, the perpetual nature of the family *waqf* meant that as generation succeeded generation the number of beneficiaries increased to a point where the benefits accruing to a particular individual were insignificant. The office of administrator of the *waqf* also passed down through the generations, with administrators over time becoming the principal beneficiaries in the property, drawing income from the endowed property for their management work. The effect was that *waqf* property was neglected, with a failure for instance to repair or renovate buildings, and land fell into disuse and ruin.

## 24 Why was the waqf subjected to abolition, nationalisation and reform in many countries?

The *waqf* was widely thought of as a rigid medieval institution unsuited to the modern world with its new structures of social services, including publicly funded schools and hospitals. Family endowments were seen, across much of the Middle East, as a block on economic development, leading to the abolition of existing ones and prohibition on the creation of new ones, as in Syria in 1949 and Egypt in 1952. Yet, the *waqf* retained a social importance and respect, particularly amongst religious leaders. Rather than abolition, the public *waqf* usually came under the control of the state, in the main a designated Ministry.

## 25 What were the effects of the 20<sup>th</sup> Century reforms to the waqf?

As a consequence of nationalisation of public endowments and abolition or restriction of family endowments, large tracts of land were brought under the control of the State. Sometimes in conjunction with land reform the outcome was redistribution of land, as in Tunisia where some four million acres of formerly endowed land was transferred to private owners. Elsewhere designated Ministries were given wide-ranging powers over public endowments, with their revenue spent according to a Minister's decision.

## 26 Why is the waqf now being revived and promoted?

The eclipse of the *waqf* has left a vacuum in the arena of public services, which the State has been unable to fill easily in many Muslim countries. A closer study of these 'religious lands', which are mostly in disuse, unaccountable or kept out of development plans, is required. Both the 'idea' of the *waqf* and the *waqf* doctrine itself remain influential and the reinvigoration of the *waqf*, as an indigenous philanthropic mechanism, has taken hold in some Muslim societies. Its future potential cannot be underestimated.

## 27 Who is interested in reviving the waqf and why?

Jurists, NGO's and social scientists are interested in reviving the *waqf*, as an 'authentic' instrument for sustainable development. Socio-political groups in a range of Muslim countries are also interested in the *waqf* as an element of Islamic identity, with its revival signifying a return to Islamic principles. Economists and bankers are interested also in the *waqf* as a vehicle for developing Islamic investment and asset management products.

## 28 What innovations can be made to the Waqf in order to revitalise it?

The *waqf* could become a transparent and responsive institution, with modern management structures, that can rival the western charitable institution and improve access to land. Efforts at capacity building with respect to administrators of endowments and enhancing accountability are important. The real challenges lie in improving and rendering more efficient the structures of *waqf* administration. International Islamic institutions such as the OIC, civil society in general and international agencies have a key role in providing the space for sharing of experiences and the development of efficient management norms. The example of Kuwait could be considered a best practice.

## 29 How can the *waqf* model improve access to land?

The state has the power to promote access to land through the Islamic public interest principle (*maslaha mursala*) and the *waqf* with its charitable ethos is an appropriate institutional vehicle for this, which can be adapted to particular localities. In Afghanistan, it has been suggested that a substantial endowment based on a village could be made to a religious institution, which could manage it separately from the civil authorities. The *waqf* can be used also to facilitate microfinance and other initiatives.

## 30 How can the *waqf* support effective and efficient housing microfinance projects?

Lack of guarantees and/or collateral for large loans has held back housing microfinance programmes. Housing microfinance, whether to build, purchase or repair homes, for land titling or for the provision of services, is relatively rare. It is possible to use the *waqf* to assist in overcoming these limitations. Some Islamic banks are offering products that combine a cash endowment (*waqf*) with the limited partnership (*mudaraba*) principle.

The wealthy deposit funds as an endowment with the bank, which manages the fund, while the depositor's share of the profit is used for benevolent purposes. This arrangement has potential for implementing housing microfinance projects, with the cash *waqf* supplying the guarantee element.

### 31 What special measures in relation to waqf development are needed?

As discussed, limited information about *waqf* exists within formal land systems. This is due to *waqf* land records being non-existent or lost. This had led to *waqf* land being usurped or underused, in effect being treated as private property by occupiers or neglected. Therefore, survey of all *waqf* land is a necessary precondition to its revival.

Also, since a large percentage of *waqf* land are trespassed or under dispute, a dedicated *waqf* dispute resolution mechanism is necessary. In many countries, *waqf* disputes are settled informally which need to be institutionalised. Since normal courts are overburdened with all types of land and property cases with little expertise for *waqf*. Some countries such as India (through the 1984 *Waqf* Amendment Act) have set up separate *waqf* tribunals for this purpose.

# Module 7

## Powerpoint presentation


1

### Islamic Endowment (WAQF) MODULE 7

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### What are the key concepts?

4

- The *waqf* (endowment), arising from Islamic concept of charity, comprised vast lands through history
- Five basic welfare categories of waqf- food, housing, health, education and religion
- A land owner permanently settles property, its usufruct or income, as 'continuing charity'
- Several forms of waqf: public and family/'private', depending on the beneficiaries
- Throughout Islamic history women have created, and were beneficiaries of awqaf (plural of waqf).
- The eclipse of the waqf has left a vacuum in the arena of public services in Muslim countries.





### Session learning outcomes

2

**At the end of this session, participants should be able to:**

1. Appreciate significance and role of *waqf*
2. Understand socio-economic impact of *waqf*
3. Consider contemporary revival of the *waqf*
4. Assess innovative approaches to existing and new *waqf* lands
5. Examine how *waqf* can facilitate security of tenure and access to land





### Why are these concepts relevant?

5

- As per inheritance rules, up to one-third of an estate can be made into a *waqf*, no limit on *waqf* for women.
- As 'third sector' or philanthropy/civil society, it was independent of State and private sector.
- Due to mismanagement by *Mutawalli/Nazir* (*waqf* administrators) and power of *ulema* (clergy) many States nationalised *awqaf*.
- Vast tracts of *waqf* land are unaccounted, outside formal systems – calls for reform.
- Waqf* includes cash endowments an important source of credit, with the endowed capital lent to borrowers.





### Your opening thought

3

- What are your experiences with the *waqf* (endowment)?
- Do you think the *waqf* is relevant in Muslim societies in dealing with land issue?
- How can the *waqf* facilitate land, property and housing issue?





### How can they be used?

6

- Waqf* are being invigorated, with potential for land development, subsidized rentals, and enhancing tenure security in informal settings.
- State, NGOs, commercial groups are increasingly using the *waqf* model to solicit and manage funds.
- The *waqf* is inclusive, can compensate women and can benefit minorities, non-Muslims, and landless.
- A *waqf* can be challenged as illusory or abusive of other gifts, or if mismanaged.
- Through modernization, *waqf* could become a transparent and responsive institution, with modern management structures.





**What is waqf?**

7

- Post-*Qur'anic* legal mechanism developed under Islamic law for more than a millennium.
- At its heart the Islamic endowment is connected firmly with the religious precept of charity.
- An owner permanently settles property, its usufruct or income, to the use of beneficiaries for specific purposes.
- 'Tying up' of property also signifies that is protected from sale or seizure and its use or benefit given to others.



**How has waqf changed?**

11

- Widespread nationalisation, abolition and reform of *waqf* endowments in many Muslim states.
- But the *waqf* retains its welfare role today, based on its appeal of authenticity.
- Many States, NGOs, business now using the *waqf* model to solicit and manage funds.
- Economists and corporate sector offering *waqf*, as integral part of mechanisms
- Used to mobilise deposit funds with profits used for benevolent purposes.



**Why is the waqf significant?**

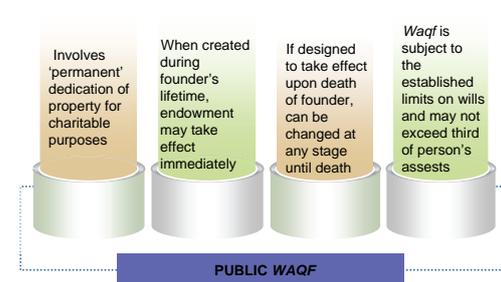
8

- Existing *awqaf* involve vast tracts of land in many Muslim countries, although much of this land lies derelict today.
- The revitalisation and revival of the *waqf* in many Muslim countries has revealed opportunities for fulfilling its development potential.
- There is support for the idea of the *waqf* at local, national and international levels among Islamic communities.
- Potential for better management and support for enhancing security of tenure and for the urban poor.
- New *awqaf* could support land redistribution, strengthening civil society and supporting effective housing microfinance.



**What is 'public' waqf?**

12



**How widespread is waqf?**

9

- At one time, about one third of Ottoman Empire was *awqaf*
- Wherever Muslim community, one likely to find a *waqf*, e.g., Habous in North Africa
- Under Shi'a practice too, the *vaqf*, (Persian, *auqaf*, plural) numerous)
- Large areas of *waqf* land nationalized in the 20th century, undistinguishable from state land.
- *Awqaf* are also found all over the world -from Taj Mahal to Mostar bridge; from Al-Aqsa mosque to Al-Azhar university



**What is 'family' waqf?**

13

- In Arab countries *waqf ahli* or *waqf dhurri*, while in South Asia, it is termed a *waqf al aulad*.
- *Waqf* where income or usufruct or property is used for the benefit of the founder's family
- On extinction of his or her descendants, it is diverted to general charitable purposes.
- Mechanism for safeguarding family properties from uncertain upheavals of economic and political life.
- Abolished in some jurisdictions, but remains elsewhere, for instance India and Palestine.



**What is the purpose of waqf**

10

- All *awqaf* have charitable purposes, some immediate
- Majority fell into the five basic welfare categories of food, housing, health, education and religion
- As 'third sector' of philanthropy or civil society, existed independent of both the State and the profit-making private sector
- Beneficiaries could be exclusively family members, high proportion for general welfare
- Two basic forms of *waqf*- public and family/'private'.



**Are there other forms of waqf?**

14

- Waqf mushtarak**
- Described as a quasi-public endowment
  - Provides for particular individuals or a class of individuals including outside founder's/ creator's family
  - Serves certain outside public interest
  - Example mosque which is convenient for, but not exclusive to, family member
- Istibdal Waqf**
- where the endower can change/substitute *waqf* property for better one (money)



### Can state endow property? 15

- State endowment (*waqf gayri sahih*) can be created Either from the State treasury (bait al-mal) or because the *waqf* has been taken into state control
- This particular form of the *waqf* has considerable potential for future development including providing homes for the landless and enhancing security of tenure for those whose existing rights arise only from possession or are informal.

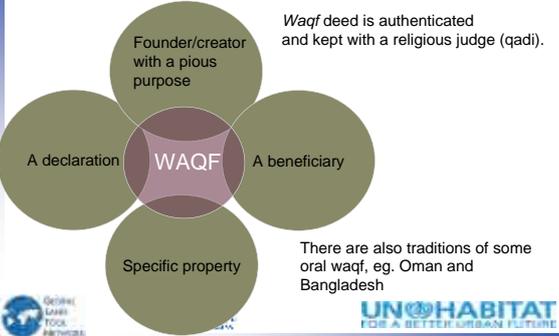


### Can money be endowed? 19

- In 15-16th Centuries, cash *waqf* approved by Ottoman Courts.
- With modern banks the cash endowment declined.
- But there is a renewal of interest in the cash endowment, with new ones being created.
- The cash *waqf* has potential for enhancing microfinance mechanisms.
- Islamic bands, e.g. Malaysia, offering products which combine a cash *waqf* with a partnership (*mudaraba*).
- Deposited funds are endowment and depositor's share of the profits is used for benevolent



### What are components of *waqf*? 16



Waqf deed is authenticated and kept with a religious judge (qadi).

There are also traditions of some oral waqf, eg. Oman and Bangladesh



### Who administers *waqf* property? 20

- Mutawalli (or nazir) Awqaf managed by mutawalli (or nazir) under terms within the founding deed
- Government either directly or indirectly
- Modern management systems: new waqf have modern management systems
- Charities: as per its charitable purposes, according to Islamic principles
- State administration: Postcolonial states drew *awqaf* under state administration



### Can a *waqf* be challenged? 17

- Yes, outsiders can challenge a *waqf*, if illusory or abusive of other rights, e.g., where a dedicated undermines the rights of creditors or causes a person's rights to be defeated or delayed.
- Traditionally, the accountability of waqf with the religious teachers (ulama) for failures.
- Administrators of awqaf can be used for alleged neglect, mismanagement and embezzlement, or for dismissal of the administrator.



### Can women set up a *waqf*? 21

- Yes, women can set up *awqaf*
- Historic evidence that women have created *awqaf*
- Women from all sector of society have and continue to endow property, although not so numerous or generally as large as those endowed by men
- Famous endowment by women of high rank involving the sponsorship of monumental public works, such as mosques, religious colleges, soup kitchens, hospitals and schools.



### What property can be endowed? 18

- The majority of *awqaf* consist of land, where the security of the act of 'contiguous charity'.
- Property rights are exercised over the income or usufruct of the land, not the endowed land itself.
- Some moveable assets, such as furniture, books or farm animals, may be settled in a waqf.
- Since money lacks the enduring quality of land, some concerns over perpetuity of the cash waqf.
- Cash endowments used as credit, capital lent to borrowers, returns used for charitable purposes.



### Can women administer *waqf*? 22

- Historically women served as administrators of waqf property
- Let property, supervised repairs to the school, college, mosque or other public works
- Women involved under state administration of waqf property, e.g. head of a waqf board on Tamil Nadu, India



**Can women benefit from *waqf*?**

23

- Prior to death, the founder settles up to a third of his or her property for the benefits of chosen relatives.
- Under Islamic law no compulsory rules on beneficiaries, can be entirely women
- Women's inheritance share being generally half of male, *waqf ahli* (family endowment) for women is compensatory.
- But *waqf ahli* can also disinherit women; and it has been abolished in many parts of the Muslim world.



**Why did the *waqf* decline?**

27

- Decline arose partly from perpetuity
- As generation succeeded generation number of beneficiaries increased and benefit fractioned
- *Waqf* administrator also passed down, becoming beneficiaries, leading to neglect, disuse, ruin
- Political reasons such as influence of ulema (clergy)
- Secularisation and land reform



**Can *waqf* benefit non-Muslims?**

24

- Yes, the beneficiary, the administrator and the process can and did in the past involve non-Muslim.
- *Awqaf* supported many churches and synagogues, acceptable under Islamic law.
- Islamic law insist on dedication for the benefit of mankind.
- Several non-Islamic states with substantial Muslim communities have allowed for the *waqf*, and the 'secular' administration has not undermined this institution.



**Why was *waqf* nationalised?**

28

- Thought of as a rigid medieval institution unsuited to the modern world
- Replaced by modern structures of social services, including publicly funded schools and hospitals
- Family endowments were seen, across much of the Middle East, as a block on economic development
- Abolition of existing ones and prohibition on the creation of new ones, as in Syria in 1949 and Egypt in 1952



**Are *waqf* rules same all over?**

25

- Basic principles on *awqaf* remain the same throughout the Islamic world.
- Variations in Islamic jurisprudence between the *Sunni* Schools of Law on *waqf* theories of *waqf*.
- Diversity in social practices, judicial attitudes and implementation by States
- State intervention into *awqaf*, nationalization of *awqaf* and legal reforms varies.



**What were effects of *waqf* reforms?**

29

- Large tracts of land were brought under the control of the State.
- Land reform and redistribution if land, formerly endowed land was transferred to private owners, e.g. Tunisia
- Ministries were wide ranging powers over public endowments, with their revenue spent according to a Minister's decision



**Who 'owns' *waqf* property?**

26

- In theory, the *waqf* property is dedicated to God, but its practical ownership debate.
- *Shafis* argue that property is simply owned by God, which in practice restricts human choices
- *Hanbalis* say the ownership is transferred to the beneficiaries
- However, the *Malikis* consider the ownership belongs to the *waqf* and inheritance by legal heirs.
- *Malikis* most flexible, do not insist on perpetuity and continuity of the endowment
- Variations among *Shi'a* legal position too.



**Why is *waqf* being revived?**

30

- Eclipse of *waqf* has left vacuum in public services, which State unable to fill easily
- *Waqf* mostly in disuse, unaccountable or kept out of development plans
- Both the 'idea' of the *waqf* and the *waqf* doctrine itself remain influential
- Reinvigoration of *waqf*, as an indigenous philanthropic mechanism, popular



### Who is interested in the waqf? 31

**Jurists, NGOs and social scientists** interested in reviving the waqf, as an 'authentic' instrument for sustainable development

**Economists and bankers** are interested also in the waqf as a vehicle for developing Islamic investment and asset management product.

**Socio-political groups** promoting waqf as an element of Islamic identity, with its revival signifying a return to Islamic principles

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### How can waqf support housing? 34

- Housing microfinance, whether to build, purchase or repair homes, is relatively rare.
- Lack of guarantees and/or collateral for large loans has held back housing microfinance programmes.
- It is possible to use the *waqf* to assist in overcoming these limitations
- Profits from cash *waqf* deposit can act as guarantee or loan
- Some Islamic banks combine a cash endowment (*waqf*) with limited partnership (*mudaraba*) principle
- Housing microfinance projects, can use cash *waqf* as the guarantee element.

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### How can waqf innovate? 32

- *Waqf* could become a transparent and responsive institution, with modern management structure
- Capacity building with respect to administrators of endowments and enhancing accountability.
- Improving and streamline structures of *waqf* administration
- International Islamic institutions, e.g. OIC, civil society and international agencies have a key role
- Sharing of experience and the development of efficient management norms, e.g. Kuwait Leadership

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### What are waqf priorities? 35

- Limited *waqf* information exists within formal land systems, with records limited, non-existent or lost
- Many *waqf* land usurped or under-utilised
- Survey of all *waqf* land is necessary
- *Waqf* land often trespassed or under dispute, but conventional courts unable to resolve
- Dedicated *waqf* dispute resolution mechanism needed
- Some countries such as India have set up separate *waqf* tribunals

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### How can waqf improve land access? 33

- State has the power to promote access to land through Islamic public interest principle (*masalah marsala*)
- *Waqf* with its charitable ethos an appropriate institutional vehicle for this, which can be adapted to particular localities, eg. Afghanistan
- *Waqf* land can provide access to land for squatters, slum upgrading etc
- The *waqf* can be used to facilitate microfinance and other initiatives

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### Thank you for your attention! 36

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## Reference readings

The waqf (Islamic endowment) is a highly significant legal mechanism and a key Islamic institution. No reference is made to the waqf in the Qur'an, but it has been recognised and developed under Islamic law for more than a millennium. The extract below explains the nature of the waqf and its widespread presence throughout the Muslim world. There is vigorous debate as to the effectiveness of the waqf and the modern period has seen its economic decline. Kuran outlines the most prominent explanation for its economic decline, but he suggests also that the waqf is now a more flexible institution.

**R7.1** T. Kuran T. (2001) *"The Provision of Public Goods under Islamic Law: Origins, Impact and Limitations of the Waqf system"*, 35 *Law and Society Review* 4

Whatever its level of development, every society must grapple with the challenge of providing "public goods—goods that are nonexcludable (not easily denied to unauthorized consumers) as well as non-rival (capable of being enjoyed by many consumers at once). The private provision of such goods is not impossible; language conventions and measurement standards offer examples of pure public goods that have emerged without the guidance or interference of a governing authority. Yet, if only because competitive markets do not always supply such goods efficiently, various forms of state intervention have been ubiquitous. The public good of national defense tends to be supplied directly by governments. Other public goods are provided by government-enforced private monopolies. For example, technological innovations are promoted through patents that give inventors exclusive rights to exploit their inventions commercially.

In the premodern Middle East, from 750 C.E., perhaps even earlier, an increasingly popular vehicle for the provision of public goods was the *waqf* known in English also as an "Islamic trust" or a "pious foundation." A waqf is an unincorporated trust established under Islamic law by a living man or woman for the provision of a designated social service in perpetuity. Its activities are financed by revenue-bearing assets that have been rendered forever inalienable.

Originally the assets had to be immovable, although in some places this requirement was eventually relaxed to legitimize what came to be known as a "cash waqf." The reason the waqf is considered an expression of piety is that it is governed by a law considered sacred, not that its activities are inherently religious or that its benefits must be confined to Muslims.

Traditionally, various public goods that are now generally provided by government agencies were provided through private initiatives. Not until the second half of the 19th century did the giant cities of the Middle East begin to establish municipalities to deliver urban services in a centralized and coordinated manner. Even a lighthouse on the Romanian coast was established under the waqf system,<sup>1</sup> which is particularly noteworthy in view of the modern intellectual tradition that treats the lighthouse as the quintessential example of a pure public good that must be provided by the government out of tax revenues.

Precisely because the waqf system played an important role in the premodern economy of the Middle East, it may well have contributed to turning the region into an underdeveloped part of the world.<sup>2</sup> Several claims are made here. Because Islamic law required the manager of a *waqf*, its mutawalli, to obey the founder's stipulations to the letter, the system lacked the flexibility to keep up with rapidly changing economic conditions. Reasonably well-suited to the slow-changing medieval economy into which it was born, it thus proved unsuitable to the relatively dynamic economy of the industrial age.

By the 19th century the system's rigidities made it appear as a grossly inadequate instrument for the provision of public goods; and this perception allowed the modernizing states of the Middle East to nationalize vast properties belonging to *waqfs*. The historical pattern might have been different had the regulations governing the *waqf* evolved into an enterprise enjoying corporate status. But no such transformation took place through indigenous means. Because of the very pecuniary motives that made the *waqf* system economically so significant, major reforms had to await the economic Westernization drive that began in the 19th century.

<sup>1</sup> *The lighthouse was built in 1745 near the port of Sunne, now known as Sulina (Yediyildiz 1990:44-45)*

<sup>2</sup> *For a critical survey of the major explanations for the Middle East's economic decline see Kuran 1997*

Today, in the early 21st century, the *waqf* institution is equipped with adaptation facilities it traditionally lacked. Most significantly, it now enjoys juristic personality, which means that it can sue and be sued as a legal entity. Traditionally, it was the manager who had been standing before the courts as an individual plaintiff or defendant. Another major reform is that a modern *waqf* is overseen by a board of *mutawallis* endowed with powers similar to those of a corporate board of trustees.

### Economic significance

Available aggregate statistics on the assets controlled by *waqfs* come from recent centuries. At the founding of the Republic of Turkey in 1923, three quarters of the country's arable land belonged to *waqfs*. Around the same time, one-eighth of all cultivated soil in Egypt and one-seventh of that in Iran stood immobilized as *waqf* property. In the middle of the 19th century, one half of the agricultural land in Algeria, and in 1883 one-third of that in Tunisia, was owned by *waqfs* (Heffening<sup>3</sup> 1936:1100; Gibb & Kramers<sup>4</sup> 1961:627; Barkan<sup>5</sup> 1939:237; Baer 1968b:79-80). In 1829, soon after Greece broke away from the Ottoman Empire, its new government expropriated *waqf* land that composed about a third of the country's total area (Fratcher<sup>6</sup> 1973:114).

Figures that stretch back the farthest pertain to the total annual income of the *waqf* system. At the end of the 18th century, it has been estimated, the combined income of the roughly 20,000 Ottoman *waqfs* in operation equalled one-third of Ottoman state's total revenue, including the yield from tax farms in the Balkans, Turkey, and the Arab world (Yediyildiz<sup>7</sup> 1984:26). Under the assumption that individuals cultivating *waqf* land were taxed equally with those working land belonging to state-owned tax farms, this last figure suggests that roughly one-third of all economically productive land in the Ottoman Empire was controlled by *waqfs*. Although these estimates rest on debatable assumptions, there is no disagreement over the orders of magnitude. They all testify to the massive economic significance of the *waqf* system.

Comparable estimates are unavailable for assets other than land, but it is known that the *waqf* system came to control a vast array of urban assets, including residences, shops, and production facilities. There is abundant evidence that even a single *waqf* could carry great economic importance.

In the 18th century, a *waqf* established in Aleppo by Hajj Musa Arniri, a member of the local elite, included 10 houses, 67 shops, 4 inns, 2 storerooms, several dyeing plants and baths, 3 bakeries, 8 orchards, and 3 gardens, among various other assets, including agricultural land (Meriwether 1999: 182-83). Further evidence pointing to the immense economic significance of the *waqf* system lies in the range of services supported by the *waqfs*. The preponderance of the Middle Eastern mosques that date from the Middle Ages, including many of the architectural masterpieces that symbolize the region's great cities, were financed through the *waqf* system. So were practically all the soup kitchens in operation throughout the region. By the end of the 18th century, in Istanbul, whose estimated population of 700,000 made it the largest city in Europe, up to 30,000 people a day were being fed by charitable complexes (imarets) established under the *waqf* system (Huart 1927:475). Another category of *waqfs* supported hospitals, orphanages, and shelters.

By the 19th century, irregularities and inefficiencies in administration had tarnished the *waqf* system's legitimacy. Although the pecuniary motives of the founders and *mutawallis* had never lacked salience, the sheer enormity of the prevailing legally questionable rents made these incentives loom larger than before. Throughout the Middle East, these transformations set the stage for massive confiscations of *waqf* properties.

Chronically short of funds, governments of the region already saw the *waqf* system as a potential source of new revenue even in principle. Several groups contributed to this radical transformation. It drew support from an assortment of Westernizers to whom the *waqf* system seemed retrogressive simply because of its identification with Islam (Kprili 1942:24-25; Baer 1968 p. 83-88). Other reformers, though convinced that a reformed *waqf* system could contribute to economic development, pursued nationalization in order to deny clerics an economic base for resisting the broader agenda of modernization. Ottoman reformers aimed to reduce the *waqf* system's share of the empire's wealth as part of a deliberate strategy to weaken conservatives affiliated with mosques and religious schools.

3 Heffening, W. (1936) "Wakf" *Encyclopedia of Islam*, 1st edition, vol.7 pp.1096-103. Leiden, Netherlands: E.J.Brill

4 Gibb, H.A.R., Harold Bowen (1950) *Islamic Society and the West: A Study of the Impact of Western Civilisation on Moslem Culture in the Near east*, vol. 1, 2 parts. London: Oxford Univ. Press

5 Barkan, Omer L. (1939) "Les Problemes Fonciers dans L'Empire Ottoman au temsde sa Fondation", 1 *Annales d'Historie Sociale* 233-37

6 Frather, William F. (1973) "Trust", *International Encyclopedia of Comparative law*, vol.4, pp. 1-120. Tubingen, Germany: J.C.B Mohr

7 Yediyildiz, Bahaeddin, (1982) "Vakif", *Islam Ansiklopedisi*

As intended, each centralization wave diminished the influence of the clerics, whose stipends and political support depended largely on the *waqfs* they served or supervised. Accordingly, the centralization of the Ottoman waqf system facilitated Westernization in a broad range of social, educational, political, and economic domains (Lewis 1961:92-94; Davison (1973:257-58). European policy makers fanned the reforms for reasons of their own. They hoped to transform the world in the image of their own societies. They thought that stronger states would find it easier to pursue Westernization.

As discussed in the context of municipalities, they wanted to facilitate foreign investment in the Islamic world. They sought to curb the losses that their subjects incurred in trying to have property seized for repayment of debt, only to learn that it was inalienable. Finally, European leaders wished to enable central governments to repay their Western creditors (Davison [1963] 1973:258; K6priilii 1942:24; Oztiirk 1994b:25). Whether interested in reforming the *waqf* system or in destroying it, all these groups exaggerated its inefficiencies. They also overlooked various inadequacies of the emerging centralized waqf administrations. The funds collected on behalf of the new *waqf* administrations went only partly into official coffers; embezzlement was common at all levels, and the governments that resorted to wholesale confiscations were themselves hardly paragons of economic efficiency (Barnes 1987:ch. 8; Cizaka 2000:85-86). In view of these patterns, one might wonder whether the Middle Eastern regimes of the time might have been able to restructure the *waqf* system as part of a reinvigorated private sector.

The reforms that might have been undertaken in the nineteenth century would be launched in the 20th century, often at the behest of coalitions that included pragmatic Islamists as well as secularists who sought to reinvigorate the *waqf* system as a means to strengthen civil society. The details of the *waqf* laws now in place in Egypt, Morocco, Iran, and Turkey, among other countries, speak volumes about the limitations of the traditional system.

*Waqfs* are now treated as juristic persons. They may be formed by pooling the resources of thousands of small contributors. Their founders may include governments and firms. The assets that support their activities may consist partly or even entirely of movables such as cash and stocks. Their operations may be overseen by *mutawalli* boards rather than by *mutawallis* exercising responsibilities on their own, as individual. *Mutawallis* have broader powers than in the past to alter investment and spending.

While Islamic endowments (*awqaf*) are in disarray – having been abolished, nationalised or mismanaged, as suggested in the previous extract there is a resurgence of interest, promotion and rethinking on the subject. The waqf concept did not lose its appeal, despite its official eclipse. In the following extract Sadeq addresses, in the context of Bangladesh, the contemporary revival of the waqf and specific opportunities for using the waqf as a means of contributing to the alleviation of poverty.

**R7.2** AbulHasan M. Sadeq. (2002) 'Waqf, perpetual charity and poverty alleviation', 29 1/2 *International Journal of Social Economics* 135-151

It is important to take a comprehensive approach to poverty and poverty alleviation. Islam provides a comprehensive framework to eradicate poverty from society.<sup>8</sup> It does not agree to have a section of population who will depend on charity or others' favors. But if there happens to emerge poverty despite such a poverty-averting framework, it suggests ways and means to handle it. It prescribes a crash program to alleviate hardcore poverty and a systematic approach to alleviate even general poverty. The poverty-alleviation strategies of the Islamic system may be classified so as to relate to our classifications of poverty phenomena, mentioned earlier. These will involve the following measures:

<sup>8</sup> For a comprehensive analysis of the Islamic concept of poverty and its alleviation. See Sadeq A.M.(1989), " Distribution of wealth through transfer payments", *Hamdard Islamicus*, Vol XIII No. 1, pp 33 – 45. See Sadeq A.M.(1996), "Ethico economic institution of Zakah: an instrument of self reliance and sustainable grassroots developments" *Humanomics*, Vol. 12 No2, pp 47-69

- Income-enhancement strategies.
- Improving on non-income aspects such as health and education.
- Increasing access to physical facilities, resources and employment.

In this system, the poverty-alleviation strategies and policies are multi-dimensional; one of them is charity (see Sadeq, 1997). Again, charity is of several kinds:

- Compulsory charity: *zakah* and *fitrah*.
- Optional charity: *sadaqah* (see Sadeq and Abul Hasan, 1980<sup>9</sup>).
- Perpetual charity: *waqf*.

The compulsory and optional charities deal with the poverty problem by adopting basically a re-distributive approach, while *waqf* can be used to enhance the capabilities of the poor to take care of themselves by providing access to education, health, physical facilities and so on. Thus, out of the three measures of poverty alleviation, the institution of *waqf* has direct relevance to the second and the third measures, mentioned above, namely: improving on non-income aspects such as health, education and so on, and increasing access to physical facilities, resources and employment. That is, the institution of *waqf* can effectively address the issue of poverty in its new and comprehensive approach.

Waqf is a voluntary charity characterized by perpetuity. It is voluntary in nature and hence it falls under the voluntary sector. However, this paper proposes to make it an organized matter with a deliberate effort. The institution of *waqf* may be usefully utilized, in an organized and deliberate manner, to provide education, health care and physical facilities to the target groups of people in a poverty-alleviation program.

In many Muslim countries and societies, a good number of the following activities are based on, or financed by, *waqf*:

- Educational institutions including universities[, colleges, schools, and most of the religious-oriented educational institutions; for instance, in Bangladesh, more than 8,000 educational institutions are based on waqf (Islam, n.d., p. 3).

- Orphanages that shelter poor orphans, provide their livelihood and education.<sup>10</sup>
- Almost all mosques which provide centers of socio-cultural activities in Muslim societies<sup>11</sup> especially in rural Bangladesh where about 90 per cent of the population live. In Bangladesh, more than 123,000 mosques are based on waqf; most of them have educational facilities, especially in imparting religious education. Mosques are also used as maktabas (educational institutions for rural children) and as centers of adult education and moral training (da'wah).
- Charitable clinics, medical centers and medical establishments. For example Hamdard Foundation (a large establishment of herbal medicine based on *waqf*) finances a University in Karachi, a large research institution and many other social welfare-oriented organizations in Pakistan, India and Bangladesh.
- Shrines<sup>12</sup> and Eid prayer grounds (big fields endowed for biannual Eid prayers) which are used for many other social occasions and meetings.
- Shopping complexes and commercial centers to earn income for financing target projects. For example, Baitul Mukarram shopping complex in the Dhaka city provides employment to a large number of people and finances a publication house, a large auditorium for many sorts of activities and the national mosque.

Some of these waqf-financed establishments are meant for the poor alone, while others are for general welfare. These activities directly help the poor by financing their expenses (for example, *waqf* for orphans), education, health, and also some physical facilities, which are important in the poverty-alleviation programs. Owing to waqf's potential role in poverty alleviation and socio-economic development, many countries have established departments for public administration of waqf estates. Some countries have even started ministries to deal with waqf properties.<sup>13</sup>

9 Sadeq, A.M., (1980) "Distribution of wealth in Islam", in Hossain, K.t. et al (Eds), *Islamic Economics Research Bureau, Dhaka*, pp. 44-91

10 For example, *Salimullah Muslim Yatimkhana (Salimullah Muslim Orphanage) of Dhaka, which takes care of thousands of orphans, is based on waqf property*

11 Almost all Mosques of the Muslim world are based on waqf, including Baitul Mukarram national mosque in Dhaka

12 For the holy shrines of Jordan, see Al Shoumil, M. (1998), "Case study of waqf: Jordan", paper presented at the International Conference on Awaqf and Economic Development, Kuala Lumpur, 2-4 March

13 For example, the Ministry of Awaqf in Jordan, see Al Shoumil, M. (1998), "Case study of waqf: Jordan", paper presented at the International Conference on Awaqf and Economic Development, Kuala Lumpur, 2-4 March

With this about contemporary aspects of waqf, let us look at a specific country, namely Bangladesh. According to an official survey of waqf estates conducted in 1986 (Bangladesh Bureau of Statistics, 1998, pp. 10-49), the total number of waqf estates in the country is 150,593, out of which 97,0461 estates have registered deeds; 45,607 estates are based on oral waqf, and the rest are waqfs by use (like mosques)<sup>14</sup>. A good number of institutions have been developed on these waqf estates. The waqf estates house 123,006 mosques; 55,584 Eidgah (fields designated for Eid prayers); 21,163 graveyards; 8,317 madrasahs (Islamic educational institutions); 1,400 dargah, and 3,859 other institutions (Islam, n.d., p. 3).

This is a list of waqf estates existing from before, which are in real estates. In fact, most of the waqf endowments are in real estates even in other cases.<sup>15</sup> Interestingly enough, there is a new sign of revival of the institution of waqf in the recent past in Bangladesh with its new forms and purposes. These are cash waqf, and waqf in intellectual property. The cash waqf, which created some endowment funds, has recently been instrumental in establishing some institutions of higher learning, especially some private universities.

Another very interesting development in the area of waqf in Bangladesh is waqf in intellectual property. Waqf in this category is waqf of the copyrights of books. The present author could identify at least two *waqfs* in this category in the country, one of which has a distinctive characteristic that 10 percent of its revenue will be spent to help the poor and for ideological causes.

This brief exposition of waqf in the contemporary world, and in particular in Bangladesh, provides some indications as to what potentials the institution of *waqf* does possess in making contributions to poverty alleviation and the socio-economic development agenda of a country.

The institution of waqf involves activities in two dimensions:

1. (1) making endowment of waqf; and
2. (2) administration of waqf.

The former is purely voluntary in nature. Normally, a well-off person makes an endowment of waqf as an act of benevolence that is encouraged in his/her belief system. The latter, the administration of waqf, depends on the terms of waqf. Sometimes a provision is made for a voluntary nazer or mutawalli (supervisor or administrator) or a trust to take care of the waqf property. It is also left sometimes to the management of the activity to which the waqf is dedicated. Besides, there is normally a department of waqf under a relevant ministry, or an independent ministry, to play an overall supervisory role in the administration of waqf for the entire country concerned.

Thus, the establishment of a *waqf* entity is purely voluntary in nature. It depends on the perceived intuition of the donor(s) as to its importance in the act of benevolence and social service, and not necessarily on the need of the society. Thus, it is obvious that, although it has been playing an important role, the institution of waqf will not be able to do much in its present voluntary nature in the implementation of a planned program of poverty alleviation and socio-economic development. This is because a planned program will have some specific planned projects in the agenda. There is no guarantee that any waqf will be voluntarily endowed to finance these planned projects. Besides, such planned projects may require huge sums of investment which individual *waqifs* (endowers) may not be able to endow.

We would like to propose a mechanism to make *waqf* an effective institution of poverty alleviation in a deliberate and planned manner to establish and support such planned projects by making it an organized voluntary activity.<sup>16</sup> The mechanism is as follows.

<sup>14</sup> *Waqf by use* are those which do not have formal deeds of waqf, but the owners of the estates or properties have given them away for some religious or charitable purposes, and hence they are known to be waqf properties. For a detailed list of waqf estates, see Government of Bangladesh (1998)

<sup>15</sup> For example, real estate represents most of the waqf properties in Egypt, Syria, Palestine and Turkey. See Roded, R, "Quantitative analysis of waqf endowment deeds", *The Journal of Ottoman Studies*, Vol 1, pp 51-56

<sup>16</sup> Some authors have suggested ways to make existing voluntary waqf entities more effective (see for example, Kahf, M, (1998) "Contemporary issues in the management of investment *Awaqf* in Muslim countries and communities" paper presented at the International Conference on *Awaqf* and Economic Development, Kuala Lumpur. Kuwait *Awaqf* Public Foundation (1998) "A strategic vision to promote the waqf development role" paper presented at the International Conference on *Awaqf* and Economic Development, Kuala Lumpur. To the present author this is not enough, but rather there is a need to have deliberate and organised waqf promotion.

The relevant authorities will plan some high-priority projects for poverty alleviation and socio-economic development. These projects will be directed to the *waqf* administration body (WAB) of the country concerned. The WAB will then prepare project profiles and invite voluntary cash waqf to finance the planned projects.

The cash waqf may be raised by issuing waqf certificates of different denominations against the planned projects, so that a number of individuals or institutions may buy them and thus join together to finance the planned projects. Separate cash waqf will be raised for each individual waqf activity. This will have a resource-pooling effect to implement a large waqf-based project, which would otherwise be impossible by a single effort. The planned projects will then be financed from waqf proceeds.

The initiative of such *waqf* originates from the WAB (Department or Ministry of Waqf) in an organized manner. Thus it has the characteristics of being an organized activity. On the other hand, the waqf certificates are bought voluntarily by individuals or institutions and thus the cash waqf is made by them purely voluntarily. This makes the activity a voluntary one. It is thus an “organized voluntary *waqf*” entity.

In this way, important and large poverty-alleviation projects may be financed by raising cash waqf in a planned way. Such projects may include income/employment-generating projects, medical facilities and infrastructure. As indicated earlier, such projects are important for poverty alleviation in a sustainable way. Let us elaborate a bit on some of these projects.

- Employment/income-generating projects. The poor countries experience high rates of unemployment of their labor force. Area-specific micro-projects such as cottage and handicraft industries may generate both employment and income for the target groups of people in the target areas.
- Educational facilities. Educational facilities can provide the badly needed education to the vast majority of illiterate population of a poor country,<sup>17</sup> which is expected to contribute to poverty alleviation, and social, moral and human resource development.

- Medical facilities. There is a crying need for medical facilities in a resource-poor country<sup>18</sup>. Unavailability of medical services for the vast majority of the population results in poor health, low productivity, low income, poverty, and so on. The facilities provided by the public sector are concentrated in the urban and sub-urban areas, and are also negligible. The vast majority of the population lives in the rural areas, which are deprived of proper medical facilities.
- Physical infrastructure and utilities. Poverty alleviation and economic development require necessary physical facilities and basic utilities. Access roads, irrigation dams, flood control devices, and utilities are essential for implementing any poverty alleviation and development plan in many developing and low-income countries such as Bangladesh.

These are high-priority poverty-alleviation and development needs of a typical poor country. It is neither possible for the public sector to provide these goods and services adequately, nor viable for the private sector to deliver them. The institution of waqf may be appropriately applied to finance such projects.

<sup>17</sup> For example, in Bangladesh, the official literacy rate is 32 percent (1991) which means that 68 percent of the people are illiterate (see Government of Bangladesh (1998), *Statistical Pocketbook Bangladesh 1997*, Bangladesh Bureau of Statistics, Dhaka)

<sup>18</sup> We may have to take an example of Bangladesh. According to the official statistics, the number of persons per physician is about 5,000 in Bangladesh. Obviously most medical facilities are concentrated in the urban areas and the vast majority of the 120 million people of the country based in rural areas (see Government of Bangladesh, 1998, p. 345)

# MODULE 8

## ISLAMIC MICROFINANCE

# MODULE 8:

## Islamic microfinance

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### Overview

This module explores the Islamic alternative credit systems, the key distinguishing features and development of the Islamic finance and microfinance models. The significant and increasing demand from within Islamic communities that financial services be compliant with Islamic law (*Shari'ah*) has led to diversification and innovation of banking activities from both Islamic and Western commercial banking institutions. An exploration of these existing developments should enable a consideration of the extent to which Islamic finance, banking principles and credit, particularly housing microfinance, may contribute to transforming the lives of the poor.

Islamic jurisprudence, with its emphasis upon partnership and a concern for community welfare, together with the expansion in Islamic banking and microfinance, has the ability to respond creatively to the needs of the urban poor. Microfinance, including land and housing micro-credit, is a growing industry. Islamic microfinance has not been sufficiently developed systematically yet, but it is expanding. Islamic financing principles emerge from a broader economic ideology that is concerned with achieving a just and equitable society.

The condemnation of usury as money lending for interest is well established within the Islamic framework. Islamic finance institutions, in their ideal form, do more than merely avoid interest payments. Financial instruments developed by Islamic institutions are rooted in profit and loss sharing principle. The location of risk entirely on the borrower is not permitted. Thus, persons providing capital do not receive rewards without exposure to the risks of the venture.

Equal opportunity, entrepreneurship, risk sharing and participation of poor facilitate Islamic microfinance models. Unlike conventional microfinance schemes which target 0 on loans to the 'entrepreneurial poor', there is a need for the full range of financial services that the poor need. Islamic banks not only aim to facilitate commercial success, but also consciously work towards poverty alleviation. For instance, several Islamic banks eligible customers with interest free benevolent loans, with no expectation of making a profit.

Women comprise of more than half of Islamic microfinance clients in Muslim countries generally researched. Micro-credit stimulates participation in labour market, improves status, and decision making. Gender empowerment and access to land are evident through Islamic microfinance.

There are a number of Islamic finance products, for example *murabaha* which is a two-stage process of financing purchase of goods by a financier, as per Islamic principles. Other products include *musharaka*, *ijara* and *mudaraba*. The combination of the *mudaraba* and *waqf* mechanisms may be a useful innovation for housing loans. In considering these products, the module evaluates the practical challenges these innovations face in easing access to land, property and housing.

## Learning outcomes

At the end of this module participants should be able to:

- ◆ appreciate some of the distinguishing features of Islamic finance, particularly the prohibition against *riba* (usury).
- ◆ analyse the application of Islamic principles to microfinance.
- ◆ discuss some Islamic financial objectives and products.
- ◆ consider some strategies for empowerment through Islamic microfinance.

## Reading materials

Loqman M (1999) 'A Brief Note on the Islamic Financial System', 25: 5 Managerial Finance 52.

Mirakhor A (2002) 'Hopes for the future of Islamic Finance', lecture at the Institute of Islamic Banking, London.

Sait S and Lim H (2006) Chapter 8.

Sait S and Lim H (2008) 'Islamic Microfinance in Crisis Countries: The Unofficial Developmental Discourse'.

## Additional reading

Brandsma, Judith and Hart, Laurence (2004) *Making microfinance work better in the Middle East and North Africa*, (Washington DC: World Bank).

CHF International (2005) *Practical Guide for Housing Microfinance in Morocco* (CHF International).

Sundararajan, Vasudevan and Errico, Luca (2002) Islamic Financial Institutions and Products in Global Financial System: Key Issues in Risk Management and Challenges Ahead (IMF Working Papers 02/192, International Monetary Fund).

Sait S and Lim H (2006) pp. 174-201.

## Facilitator's notes

This is a straightforward session, intended to familiarise participants with Islamic financial principles and encourage them to consider whether and in what contexts it is important that microfinance products (and projects) are Shari'a compliant. However, this will require listing each finance product and contrasting them. Like the earlier module on Muslim women and property, discussion should be directed towards the potential for grassroots work with religious elites in terms of legitimising microfinance projects. Among the questions likely to surface is the advantage of Islamic microfinance over conventional types. In this regard, trainers may wish to emphasise the different experiences of Islamic microfinance in Indonesia and Afghanistan, as discussed in the extract in the reading from Sait and Lim.

The Yemeni case has been chosen because it is a well documented one, and a positive example. At the same time, it raises questions over why this particular mode has been chosen and how it could be better. Some participants may find the identification of products difficult. Others may be more interested in the application and future prospects. Encourage comparative approaches.

## Group work

### Islamic Microfinance in Hodeidah, Yemen

Launched in 1997, Hodeidah is currently the third largest microfinance program in Yemen. It serves very poor clients along the Red Sea coast in the Hodeidah governorate of Yemen. About 80% of its clients are women who participate in group lending with an outstanding average loan balance of US\$25. Average outstanding loan balance for the MFI is US\$50. Hodeidah's outstanding loan portfolio is \$200,000, with a total outreach of 3,900 clients as of March 2008. Hodeidah Micro Credit Program uses Islamic financial services (IFS) which expands Hodeidah's potential clientele, because many Yemenis feel reluctant to accept normal loans due to religious reasons.

However, despite significant progress, microfinance in Yemen remains small scale. The low level of loans, especially at entry level, is overwhelmingly the main point of dissatisfaction among clients. Women repeatedly stated that they needed larger loans if they are to grow their businesses faster. It is estimated on average that in Indonesia, the Islamic product loan size is 45 percent higher than the average conventional micro-loan. Unlike Grameen in Bangladesh, it has not expanded into land and housing.

*Murabaha* is a common Islamic banking instrument used for short-term financing based on the conventional concept of purchase finance or cost plus mark up sales. As it has been applied in the microfinance sector in Yemen, MFI staff accompany the client to the suppliers to buy the goods and then charges a mark up fee for its services. In the case of group lending, the MFIs take all of the clients together for buying days, which can be very tiring and time consuming, particularly for women merchants who buy and sell their goods door to door. In some cases MFIs use sale centres to purchase certain goods facilitating the process. Repayments are made in monthly instalments, the same as conventional loans. Some argue that use of *murabaha* "eliminates the need for written records, often unavailable at the micro enterprise level or if available, the client may be unwilling to share them." *Murabaha* has other advantages such as clarity (contract pre-defined amounts), certainty (limited opportunity for cheating), simplicity (fixed contact) and economy (lower implementation costs).

### Recommended reading for group work

Faussone, LG (2008) *Development According to the Shari'ah: The Case of Islamic Microfinance* (Milan: ISPI).

Wilson, R (2007) Making Development Assistance Sustainable through Islamic Microfinance 15:2 *IJUM Journal of Economics and Management* 197-217.

### Possible group work questions

1. Islamic microfinance, though a latecomer to microfinance, is demonstrating rapid progress. What are the advantages of Islamic microfinance over other conventional micro-credit programmes?

2. According to one estimate, about 70% of the Islamic microfinance products offered are based on *murabaha*. Women repeatedly stated that they needed larger loans if they are to grow their businesses faster. What could be the strategies to enhance product diversity?
3. Two key features of Islamic finance are profit/loss sharing and prohibition of interest. How do these principles impact on Islamic microfinance?
4. The number of Muslim women accessing microfinance products is increasing. What are the impediments to even greater participation and how can these be removed?

### Islamic microfinance in Afghanistan

Microfinance was prioritised by the international community – the Afghanistan Reconstruction Trust Fund (ARTF) – as one of the core 'reconstruction' projects. Since its initiation in 2003, the Microfinance Investment and Support Facility Afghanistan (MISFA) grew to approximately USD 75 million with ambition for 200,000 clients. Despite the Islamic Republic of Afghanistan's traditional profile, no conscious engagement with Islamic principles was intended and the modernization of post-Taliban Afghanistan was conceptualised through secularist approaches. Islamic microfinance was not part of the official development discourse or general microfinance planning. End-user scepticism about the compatibility of microfinance loans with Islam forced a rethink. Until recently the Afghan MFIs showed little interest in Islamic microfinance. Ariana Financial Services Group (AFSG) admits working hard to convince people that its services were not un-Islamic. A number of MFIs in Afghanistan have now packaged themselves as Islamic.

The Danish MADRAC (Microfinance Agency for Development and Rehabilitation of Afghan Communities) in November 2006 launched new Islamic credit services for needy people in rural areas. The US-based FINCA International also announced that as of September 2006 all FINCA Afghanistan credit products were *Shari'a* compliant. Likewise, the French-based Oxus Development Network (ODN) began providing loans following the principles of Islamic banking.

There is an assortment in what is offered sporting the Islamic label. One MFI, PARWAZ, has argued that interest is not impermissible under the complex Islamic finance laws, while others use alternative descriptions of interest or strive to distinguish interest from usury. Some use colour-coded forms for different types of loans which indicate the tariffs for services. The lending arrangement where loan fees are charged on the basis of profit-sharing or 'cost plus mark-up' instead of a fixed interest rate invariably also includes overheads and running costs (including staff salaries, operating expenses, taxes, borrowing costs).

## Background Q & A Islamic Microfinance

[An] important function of Islamic finance that is seldom noted ... is the ability of Islamic finance to provide the vehicle for financial and economic empowerment ... to convert dead capital into income-generating assets to financially and economically empower the poor ...'<sup>1</sup>

### Introduction

The Global Land Tool Network (GLTN) is a multi-sector and multi-stakeholder partnership seeking to translate aspirations, principles and policies into inclusive, pro-poor, affordable, gendered high quality and useful land tools, which can be replicated in a range of contexts. GLTN recognizes the demand for targeted tools, including culturally or religiously formatted tools, since there are many positions and approaches to conceptualising and delivering secure tenure and access to land. Most communities have deeply ingrained cultural traditions, many religions have firm rules on land and inheritance, and every government faces the challenge of land differently with its own array of laws and degrees of political will.

In most Muslim countries Islamic law, principles and practices make an important contribution to shaping access to land. GLTN has as one of its objectives, therefore, the identification and development of Islamic land tools through a cross-cultural, interdisciplinary and global process, owned by Muslims, but including civil society and development partners. Yet, Islamic approaches to land should not be seen as an internal matter, giving preference to religion over universal or secular approaches to land, but as part of GLTN's inclusive, objective, systematic and transparent efforts.

### 1 Why is financing important for access to land and security of tenure?

The majority of the world's urban poor do not have access to the conventional institutions responsible for providing secure land rights and affordable finance. Rather, conventional institutions have been designed to meet the needs of the middle- and upper-income clients on terms that are not accessible, appropriate or affordable for the poor.

<sup>1</sup> \*Mirakhor, A. (2002) 'Hopes for the Future of Islamic Finance', Lecture at the Institute of Islamic Banking, London.

The failure of conventional systems is one of the reasons why the poor are faced with a choice between housing that is either affordable, but inadequate or housing that is adequate but unaffordable.

### 2 What is microfinance?

Microfinance institutions (MFIs) provide financial services including credit, savings, cash transfers and insurance to individuals excluded from or ignored by the traditional banking sector. One well-known and very successful example is the Grameen Bank in Bangladesh, established in 1976 to provide small collateral-free loans to the rural poor for productive enterprise purposes. Such schemes rely upon solidarity group lending in villages with self-selected members who evaluate each other's creditworthiness. Members make weekly repayments on loans, including interest.

### 3 What is Islamic microfinance?

Islamic microfinance is generally understood as lending by MFIs which is in compliance with Islamic law and Islamic economic principles, particularly the prohibition on usury (*riba*). Some MFIs are carefully constructed cooperative ventures between financial experts and Islamic law experts (or committees) that decide on the Islamic validity of a particular scheme. In other contexts, the interest portion of the repayments made by the members of the microfinance initiative is reformulated as an administrative or management cost. Doubts about the Islamic credentials of some schemes can arise because there is no consistency in the application of the label.

### 4 Why is Islamic microfinance important?

Islamic microfinance, on the heels of Islamic finance is a fast growing industry. There are examples such as the Hodeidah Microfinance programme in Yemen, Bank Simpanan Nasional in Malaysia, the Aceh relief aid schemes in Indonesia, and the UNDP microfinance initiatives at Jabal Al Hoss in Syria, Akuwat in Pakistan, Afghanistan, and Mali-North Program.

### The *Hodeidah* microfinance programme, Yemen

The *Hodeidah* Microfinance Programme was established in Yemen in 1997. It lends to the poor for entrepreneurial activities using a two-stage purchase and resale mechanism, with a fixed service charge and repayment schedule determined in advance. The charge is paid at the end of the whole transaction to avoid any appearance of interest. From the outset, it was recognised that the religious beliefs of the people in *Hodeidah* were such that credit in accordance with Islamic principles would be preferred.

The project management team made efforts to discuss the details of the transactions to be offered to clients with the local religious elite, who retracted their original opposition to the loans as un-Islamic. Despite administrative challenges and fairly high costs, the strength of this Programme is in the ability to reach out to potential clients who would be excluded from conventional microcredit schemes.

## 5 How can Islamic finance support Slum upgrading?

Slum Upgrading processes operate under the premise that slums can be upgraded successfully when slum dwellers are involved in the planning and design of upgrading projects and able to work in collaboration with a range of other key stakeholders. The Slum Upgrading Facility (SUF) at UN-HABITAT works with local actors to make slum upgrading projects “bankable” – that is, attractive to retail banks, property developers, housing finance institutions, service providers, micro-finance institutions, and utility companies. Islamic finance could be both participative and inclusive; and extend access to finance to marginalized groups.

Islamic microfinance could benefit the poorest of the urban poor, including squatters on remote or unutilised land and those living in rental arrangements in overcrowded inner-city slum tenements that tend to fall outside the net of the general finance industry. Islamic principles, values and institutions support effective housing microfinance programmes for the purchase, construction and improvement of homes, for installing basic services or to fund land-titling

processes. Since they involve larger loans requiring guarantees and/or collateral, these are often difficult to implement in the context of informal settlements. And, Islamic microfinance may draw in people who are generally left out of credit markets but wish to avoid *riba* (usury).

## 6 Do Islamic finance principles involve more than avoiding interest?

Islamic finance institutions, in their ideal form, should do more than merely avoid interest payments. Islamic financing principles emerge from a broader economic ideology and distinctive values that are concerned with achieving a just and equitable society. And, Islamic principles of equal opportunity, entrepreneurship, risk sharing and participation by the poor are supportive of microfinance.

## 7 How do Islamic principles support entrepreneurship?

Islam is not an ascetic religion, but encourages people to enjoy earthly gifts. Commercial activities conducted in order to provide for an individual, family and loved ones are permissible and often commendable. There are sayings of the Prophet (*hadith*) that support trade. However, the quest for possession and profit is a means of providing for human sustenance, rather than a goal in itself.

## 8 What about people who are unable to trade or engage in commercial activity?

The *Qur'an* celebrates good trading practices but is also conscious of those who are unable to trade. It praises charitable acts towards the poor and destitute, demanding compassionate treatment of poor borrowers.

## 9 Does the charitable obligation extend to Islamic institutions?

Yes, this charitable obligation extends to Islamic banks, which aim to facilitate commercial, investment and legitimate socio-economic activity, but also consciously work towards alleviation of poverty and the extension of economic opportunities. For instance, several Islamic banks provide a proportion of customers with interest free benevolent loans, with no expectation of making a profit.

## 10 How important is 'risk sharing' to Islamic financial principles?

The concept of risk sharing is a key feature of Islamic finance and banking. The relationship of creditor and debtor which identifies interest as the price of credit and the location of pressure/risk entirely on the borrower (as in Western models of commercial banking) is not permitted. In the Islamic framework, persons or institutions, in providing capital, should not receive a reward from financing any venture without exposure to its risks. Financial instruments developed by Islamic institutions to finance individuals' commercial activities are rooted in the profit and loss sharing principle.

## 11 Is interest completely prohibited in Islam?

The condemnation of usury as money lending for interest is well established within the Islamic framework. It is a general standpoint amongst Islamic scholars, although not without some dissenters, that all forms of interest are prohibited. Money has no value in itself, but is just a medium of exchange. It is not, therefore, an earning asset and cannot give rise to more money unless it is invested. The Islamic concept of *Riba* is often translated as simply a prohibition on interest, but some argue that it covers all transactions that give one party more than a fair exchange or which produce a payment that is like interest. Any transaction between lender and borrower such that the lender receives gains on capital through an additional excess payment, small or large, in money or another commodity, is considered *riba*.

### Women led initiative - local Market Women's Association in Kojokrom, Ghana.

The Association is negotiating with the Metropolitan Assembly to manage the construction of new market facilities that the women would finance with a commercial loan and then run on a Build Operate and Transfer basis. In this case, the women involved will finance the development with a bank loan, and, as a consequence, be relieved from paying standards taxes and fees during a period to be negotiated and specified within the contractual agreement between the women and the local Assembly. However, for this arrangement to be sufficiently robust to attract bank finance, the women have recognised that they will need a special development and management company which will enter into a series of contractual agreements that specify clearly the responsibilities and entitlements of the banks, the women who own the company, the Metropolitan Assembly and other relevant parties such as building contractors.

UN-HABITAT (2009) *Slum Upgrading Facility: Land and Slum Upgrading*, Paper 10 (Nairobi, SUF: GLTN)

## 12 Are other forms of commercial activity prohibited in Islamic principles?

The prohibition on money lending for usury is linked also to the Islamic prohibition against hoarding or an excess accumulation of personal riches. Trade and financial gain may be lawful, but beyond a certain point gain becomes excessive and immoral profiteering. Savings, beyond what is needed for sustenance and charitable giving, should be put to good use. Gambling, one form of the Islamic concept of *gharar*, which means anything that implies hazard, deceit or excess, is also to be avoided. Speculation is a feature of conventional banking and finance, but such uncertainty is not consistent with Islamic financial principles. Business dealings with alcohol, gaming and immoral activities are also prohibited.

## 13 What is the mainstream thinking on interest/usury?

Recently Sheikh Dr Tantawi, head of the influential traditional Islamic university Al Azhar in Egypt, joined others in arguing that conventional banking interest is a share in the profits of growth-inducing investments, and not the forbidden *riba*. This follows a line of thinkers, such as Sir Sayyed in the nineteenth century, who have argued that there is a difference between usury, which is prohibited, and interest when it is for commercial lending, which is not prohibited. By comparison, in a significant decision, the Supreme Court of Pakistan declared in 1999 that all types of interest fall within the purview of the *Qur'anic* prohibition on *riba* (Dr Mohammad Aslam Khaki v. Syed Mohammad Hashim, PLD 2000 SC 225)

## 14 Do Islamic financial principles support microfinance?

Yes, there is a strong correlation between Islamic principles and the values underpinning microfinance, including the emphasis upon partnership, mutual guarantees and a concern for the welfare of the community of Muslims. Mutual cooperation, for instance, lies at the heart of modern models of Islamic home financing in the developed world and these models share much in common with the microfinance institution.

## 15 Do Islamic financial principles translate themselves into the kinds of financial products offered by Islamic institutions?

Yes, freedom of contract in Islamic law has helped to develop financial instruments that are in accordance with legal principles and free of interest. There are deposit and lending products that comply with Islamic principles and are at the same time competitive. Instruments have been found that allow people to purchase homes with mortgages, buy goods, such as cars, as well as start/expand businesses, for which a conventional bank would offer an interest-bearing loan, secured or unsecured.

## 16 How can Islamic microfinance specifically promote women's empowerment?

There are considerable benefits to be accrued from Islamic microfinance in terms of providing access to financial products with religious, social and cultural legitimacy to those sections of society, particularly women, who are traditionally excluded from credit. Its goal is to empower women as income earners and decision makers in their homes and communities, leading to improvement in the economic status of women's families.

Micro financing has been referred to as 'barefoot banking' because of its ability to deliver financial services to rural women, and is of particular relevance in largely gender-segregated societies. Experience shows that providing financial services directly to women can aid empowerment. Women clients – with their generally high repayment and savings rates – are also seen as beneficial to the institution.

## 17 Are Muslim women able to access microfinance?

The Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) states that State Parties should ensure that women have equal access to "the right to bank loans, mortgages, and other forms of financial credit" (Article 13(b)) while in the area of rural development, Article 14(g) establishes that State Parties must take steps to ensure that women have access to "agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reforms as well as in land resettlement schemes."

A 2004 report on microfinance in the Arab world finds that the region has seen a significant improvement in terms of outreach to women borrowers. Up from approximately 36 per cent of borrowers in 1997, women currently make up 60 per cent of all clients in the region. Grameen in Bangladesh, Micro Fund for Women, Jordan and Hodeidah are few success stories of innovative schemes run by women for women – though not always based on Islamic principles.

Another influential survey carried out by the CGAP (Consultative Group to Assist the Poor) on Islamic microfinance accounts covering 126 institutions operating in 14 countries, found that Islamic micro-loans target women in proportions comparable to conventional micro-loans.

## 18 How do sadaqa and zakat influence microfinance?

As discussed, Islamic philanthropy is at the heart of the innovative pro-poor land policies. While *zakat* is one of the five pillars and obligations of Islam (which many countries have institutionalized), *sadaqa* by contrast, refers to voluntary, meritorious giving that goes beyond what was required.

Microfinance could use *zakat* funds or voluntary contributions (such as cash *waqf*), but it has to be a sustainable programme. It cannot be run on charity, as clients demand transparency and assert rights while also agreeing to pay back.

## 19 What sorts of financial products have been created?

A great variety of financial instruments have been developed by Islamic banks to be compliant with Islamic law, but only a small number of these instruments are used regularly. Four in particular are fairly common in practice: *murabaha* (mark-up/cost-plus); *mudaraba* (trust financing); *musharaka* (joint venture); and *ijara* (lease).

## 20 What is murabaha?

*Murabaha* involves a two-stage process of financing purchase of goods by a financier (such as a bank) and the sale of those goods to clients at mark-up prices, on a deferred payment basis. Each stage is kept separate. In the first stage, the financier purchases goods, such as machinery, raw materials, equipment or a house, from a third party on behalf of, and at the request of, a client. At the second stage, at a later date, the client purchases the goods on a mark-up or cost-plus basis, thereby giving the financier the agreed profits on the transaction. The deferred payment may be made in installments rather than a single lump sum.

## 21 What is murabaha used for?

*Murabaha* is the most widely used financing technique by modern Islamic banks, particularly to help customers to purchase consumer durables such as cars, but also to provide finance to purchase a house. It is a prevalent form of Islamic mortgage in the Gulf States.

## 22 What is musharaka?

*Musharaka* is a form of partnership in which all the partners agree to invest and have control rights proportional to their capital contributions. All partners have a financial stake in the venture and the right to a pre-determined percentage of profits. Partners share also in any losses of the partnership according to their contributions.

## 23 What is musharaka used for?

It is not a common financing mode for Islamic banks, but *Musharaka* can facilitate both short-term and long-term business financing, including farming. It is used in Singapore and elsewhere for commercial real estate investment, for the development of offices and modern apartments for rental. Currently there is little evidence that it can enable the provision of housing for low-income families or those living in informal settlements.

## 24 What is ijara?

An *ijara* is a lease, which is fashioned into a financial product whereby a financier purchases an asset and then leases it to the client for a fixed rental fee. The duration of the lease and the fee will be fixed and agreed in advance. A product is used for a specified period for a specified amount, determined at the outset, without the user taking ownership of the product. The transaction is really the sale of the product's specified use, thereby avoiding a prohibited speculative contract. Sometimes the client will be committed to buying the leased product at the end of the lease, as a lease-purchase agreement.



Old town, Zanzibar © UN-HABITAT / Asa Jonsson

## 25 What is *ijara* used for?

*Ijara* can be used in a range of contexts, but in the lease-purchase form it is particularly useful to enable the purchase of a home, instead of a prohibited mortgage on which interest is paid. However, this is often an expensive transaction and may be less appropriate outside a legal environment of secure titling with a formal land registration system.

## 26 What is *mudaraba*?

*Mudaraba* involves an investor (usually a bank) exclusively contributing capital to a project and an entrepreneur providing management expertise. Both parties split the profits according to a contractual formula and each carries a risk, the investor of loss of capital funds and the entrepreneur of deprivation of reward for her time.

## 27 What is *mudaraba* used for?

*Mudaraba* is used for individual business ventures and in a complex version for some Islamic investment funds. In accordance with core Islamic values, banks are also offering products that combine a cash endowment (*waqf*) with the *mudaraba* principle. The wealthy deposit funds as an endowment with the bank, which manages the fund, while the depositor's share of the profit is used for benevolent purposes. This arrangement has potential for implementing microfinance projects, especially housing microfinance, with the cash *waqf* supplying the guarantee element. Lack of guarantees and/or collateral for large loans has held back housing microfinance in informal settlements. The combination of the *mudaraba* and *waqf* mechanisms may be a useful innovation.

## 28 How can housing microfinance be strengthened?

Housing micro-finance is only a fraction of the core business for micro-finance institutions, even though loans for various purposes (such as small business start-ups) are used for housing. The obstacles to housing microfinance include limited land or housing supply, systemic or structural failures for affordable land delivery, as well infrastructure and basic service needs. Thus both capital investment and maintenance requirements are required as part a broader, more holistic approach to slum upgrading finance. Thus it is not merely the availability of Islamic microfinance but the policies and framework of land delivery processes that are important.

## 29 Is there an example of Islamic housing finance?

There exist a range of models. A model of cooperative Islamic home financing used over a considerable period in Canada, the diminishing partnership, may address the needs of Muslims outside the system of formalized property rights. It is a system based on mutual cooperation, whereby a person buys shares in an organization to which he or she can later apply for a mortgage. The mortgage itself takes the form of a partnership vehicle between the individual and the organization, based upon the relative size of their contributions and which is the nominal owner of the house. The individual pays rent to the partnership vehicle that is distributed to its shareholders. Over time, the individual buys all the shares in the partnership vehicle and eventually title in the house is passed to him or her.

## 30 Are there other Islamic finance products that are being discussed?

There are dozens of Islamic products that are being discussed- for example, *tawwaruq* that works as a reverse *murabaha*. As used in personal financing, a customer with a genuine need buys something on credit from the bank on a deferred payment basis and then immediately resells it for cash to a third party. In this way, the customer can obtain cash without taking an interest-based loan. Also, there are asset-based products. A *sukuk* has similar characteristics to that of a conventional bond with the difference being that they are asset backed. A *sukuk* represents proportionate beneficial ownership in the underlying asset. The asset will be leased to the client to yield the return on the *sukuk*.

## 31 What are the challenges facing Islamic microfinance?

Despite some successes, most commentators note that Islamic finance has not yet developed a cohesive model and is yet to fill its potential. At the Harvard Islamic Finance project consultations, two general views are canvassed. One view is that Islamic microfinance emerged from existing Islamic finance models, while the other view is that the challenges of microfinance mandate rethinking. For example, Islamic finance principles are difficult to implement on a profit and loss sharing basis in rural settings. They require long-term involvement by the microfinance institutions (MFI) in the form of technical/business assistance that raises the cost of implementation. Also, the question is how Islamic finance can meet the demand and work at scale. Therefore, more diversity, innovation, regulation and socially responsible models are expected to emerge in the new future. Hopefully, they will squarely address land, property and housing rights.

# Module 8

## Powerpoint presentation



GLOBAL  
LAND  
TOOL  
NETWORK

1

### Islamic Microfinance MODULE 8

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### What are the key concepts?

4

- Islamic microfinance based on Islamic economic principles, aimed at just and equitable society.
- In addition to prohibition or usury (*riba*), other principles such as profit and loss sharing apply.
- Women generally comprise of more than half of Islamic microfinance actors in Muslim countries.
- Four common in practice: murabaha (mark-up/cost-plus) mudaraba (trust financing); musharaka (joint venture); and ijara (lease).





### Session learning outcomes

2

**At the end of this session, participants should be able to:**

- Appreciate some features of Islamic microfinance
- Analyze application of Islamic principles
- Discuss some Islamic financial products
- Consider strategies for empowerment through Islamic microfinance





### Why are they relevant?

5

- Micro-credit stimulate pro-poor participation in housing market
- Equal opportunity, entrepreneurship, risk sharing and participation of poor
- Women participation high, leading to rights, empowerment and improving access to land
- *Qur'an* praises charitable acts towards poor, compassionate treatment of poor borrowers





### Your opening thought

3

- What experience do you have of Islamic finance?
- Do you think Islamic finance is preferable to conventional finance? Why?
- How can Islamic microfinance empower the poor, and provide access to land?





### How can they be used?

6

- Islamic microfinance more than avoiding interest payments, focus on poverty alleviation.
- Despite advantages, Islamic microfinance not been systematically developed, faces challenges.
- Scope for housing/land microfinance programmes for purchase, services or titling.
- Islamic banks can expand products such as interest free (non-profit) benevolent loans.
- Gender empowerment and access to land.
- Islamic microfinance (and cash *waqf*) can aid land access, housing finance and slum upgrading.





**How could this help landless poor?**

7

- Reach urban poor, squatters, slum dwellers
- Targets those outside general finance net
- Housing microfinance can purchase, improve homes, add basic services or help land titling process
- Not common as target loans require collateral, but group lending effective
- Islamic products

**Why Islam for microfinance?**

11

- Strong correlation between Islamic principles and microfinance values
- Emphasis upon partnership, mutual guarantees and welfare
- Mutual cooperation at the heart of Islamic home financing
- Interdependence of doctrines, institutionalisation of principles

**What is microfinance?**

8

- Micro-financial services including credit, savings, cash transfers and insurance
- To individuals exclude from or ignored by the traditional banking sector
- 'Barefoot banking' offers innovative and sustainable approach
- Solidarity group (sustainable) lending in villages, e.g. Grameen

**Does Islam encourage business?**

12

- Islam is not ascetic, encourages humans to enjoy earthly gifts
- Commercial activities are permissible and often commendable
- Savings of the Prophet (hadith) support trade, good practice
- Quest for possession and profit not a goal in itself

**What is Islamic microfinance?**

9

- Microfinance compliant Islamic principles
- More than avoiding interest payments
- Based on broader economic ideology and values
- For achieving a just and equitable society
- Equal opportunity, entrepreneurship, risk sharing and participating by the poor

**Why is charity important?**

13

- *Zakat* (purification) obligations on Muslim for poor and needy, *sadaqa* is voluntary
- *Qur'an* praises charitable acts towards the poor and destitute
- Demands compassionate treatment of poor borrowers
- Charitable obligation: one of the five pillars of Islam

**Is Islamic microfinance a success?**

10

- A fast growing industry, but not established
- Hodeidah in Yemen
  - Bank Simpanan Nasional in Malaysia
  - Aceh Indonesia, Afghanistan
  - UNDP at Jabal Al Hoss in Syria
  - Akuwat in Parkistan, Mali-North Program

**How does Zakat work?**

14

- Calculated percentage of annual profits
- Paid to mosques, needy, charitable institutions or the state
- Pakistan, Sudan, Libya and Saudi Arabia obligatory tax is levied
- The state organises and legally regulates collection of Zakat in Jordan, Bahrain, Kuwait, Lebanon, Malaysia and Bangladesh



**Do banks only make money?**

15

- Islam banks do aim to facilitate commercial, investment activity
- Focus on extension of economic opportunities
- But also consciously work towards alleviation of poverty
- Some interest free benevolent loans, with no expectation of making a profit



**Is interest prohibited in Islam?**

19

- Usury- money lending for interest – condemned
- Debate whether all forms of interest are prohibited. See al-Azhar, Pakistan etc.
- Money has no value in itself, but is just a medium of exchange
- Riba prohibition on usury, but includes charges beyond 'fair exchange'



**How is this relevant to women?**

16

- Access to financial products to women, who are traditionally excluded from credit
- And with those with religious, social and cultural concerns
- Empowers women as income earners and decision makers in their homes and communities
- Improvement in economic status of women's families



**What are prohibited activities?**

20

- Islam prohibition against hoarding excess, put savings to use
- Trade and financial gain may be lawful, not to be immoral profiteering
- Speculation, uncertainty (gharat) not consistent with Islamic financial principles
- Business dealings with alcohol, gaming and immoral activities are also prohibited



**Do Muslim women get microfinance?**

17

- Majority of clients are Muslim women
- 2004 Arab report says significant increase in women borrowers
- Grameen women-centered microfinance
- Jordan, Hodeidah, Aceh, Afghanistan – all point to innovative schemes by women



**Why so many Islamic products?**

21

- Range of targets –mortgages, car loans, start/expand business, deposits, insurance
- Freedom of contract, different modes develop diverse financial instruments
- But in accordance with legal principles and free of interest
- Products which are both Islamic and competitive



**How important is risk sharing?**

18

- Interest as price of credit not permitted
- Location of pressure/risk entirely on the borrower (or lender) not permitted
- Islamic persons or institutions must participate in risks
- Financial instruments rooted in the profits and loss sharing principles



**What financial products exist?**

22

Many products developed, few used widely:

- murabaha (mark-up/cost-plus);
- mudaraba (trust financing);
- musharaka (joint venture);
- ijara (lease)



**What is Murabaha?** 23

- Two-stage process of financing and sale, each stage is kept separate
  - Financer purchase goods from a third party for client
  - Later sells goods on a mark-up or cost-plus basis
- Financier has agreed profits on the transaction, deferred payment



**What is Ijara?** 27

- An ijara is a lease, fashioned into a financial product
- Financier purchases an asset to lease it for a fixed rental fee
- Duration of the lease and the fee fixed and agreed in advance
- May be a lease-purchase agreement



**How is Murabaha used?** 24

- Murabaha* is the most widely used
- Bank loans to purchase consumer durables such as cars
- To provide finance to purchase a house
- Prevalent form of Islamic mortgage in the Gulf States



**How is Ijara used?** 28

- Ijara can be used in a range of contexts
- Purchase of a home, instead of mortgage with interest
- Could be an expensive transaction
- Works equally for secure titling with a formal land registration



**What is Musharaka?** 25

- Partnership, all partners agree to invest
- Control rights proportional to capital contribution
- All partners have financial stake in venture
- Rights to pre-determined percentage of profits
- Partners share any losses according to their contribution



**What is Mudaraba?** 29

- Investor (bank) exclusively contributes capital to project
- Entrepreneur provides management expertise
- Both parties split the profits according to a contractual formula
- Both take risks – investor of capital loss, entrepreneur of labour



**How is Musharaka used?** 26

- Not common Islamic banking product
- Can facilitate both short and long-term business financing, including farming
- In Singapore, for commercial real estate investment, rentals
- Not yet used for low-income families or those living in informal settlements



**How can cash waqf contribute?** 30

- Raising money through the *waqf* model, or releasing money from cash *waqf* with *mudaraba* principles for benevolent loans
- Cash *waqf* with *mudaraba* principles for benevolent loans
- Cash *waqf* can serve as guarantee element
- In housing micro-finance, as collateral



**What is diminishing partnership?**

31

- A partnership between individual and an organisation. Person buys shares in organisation which later provides mortgage.
- Mortgage is a partnership vehicle between the individual and organisation.
- Individual pays rent to shareholders of organisation (nominal owner of house).
- Over time individual buys all shares from organisation and house title passes to him/her.



**What future for Islamic microfinance?**

33

- Despite some successes, no cohesive model to fill potential
- Whether to extend existing Islamic finance models or have new innovative models?
- Interest free and profit/loss sharing basis can raise the cost of implementation
- Can Islamic microfinance meet the demand and work at scale?
- How to cope with diversity. Innovation regulation and be socially responsible?



**What new focus in Islamic finance?**

32

- Many Islamic products being discussed
  - For example, Tawwaruq works as reverse murabaha
  - Tawwaruq is where product purchased on credit deferred payment is sold immediately for cash to third party, thus no interest-based loan needed
- A *sukuk* (Islamic bond) represents proportionate beneficial ownership in the underlying asset, the asset will be leased to the client to yield the return on the *sukuk* (Islamic bond) represents proportionate beneficial ownership in the underlying asset, the asset will be leased to the client to yield the return on the *sukuk*



**Thank you for your attention!**

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## Reference readings

Acquisition of land and the access to, improvement and enjoyment of property are often predicated on the ability of individuals to access financial services and secure easy and affordable credit. The significant and increasing demand from within Muslim communities for financial services complying with Islamic law has stimulated a diversification of banking activities by both Islamic and Western commercial banking institutions. Islamic banks are seen as having several interrelated benefits, including being able to mobilise funds and savings amongst those unable to use conventional banks because they do not conform to Islamic values. Loqman explains in the next extract the nature and objectives of the Islamic financial system and identifies some of the principal Islamic financial products.

**R8.1** Loqman M. (1999) 'A Brief Note on the Islamic Financial System', Vol 25, No. 5 *Managerial Finance* 52.

The Islamic Financial System is ideologically characterized by the absence of interest-based financial in situations /transactions, doubtful transactions, stocks of companies dealing in un lawful activities, un ethical or immoral trans actions such as market manipulations, insider trading, short- selling, etc.

The objectives of the Islamic financial sys tem are based on Islamic Law, Shari'ah, which is to be treated as an important vehicle to transfer funds from the surplus to the deficit units. This is done to en sure the equitable al location of capital to sectors which would yield the best re turns to the owners of capital, thereby contributing to wards the over all growth and expansion of an economy.

The Islamic financial sys tem is a product of Islamic principles and philosophy and is based on Shari'ah functions. Since this sys tem is an important part and parcel of Islam, IFS recognises man as the vice gerent of God on earth. Any wealth earned by a man is seen to be merely en trusted upon him. He holds the wealth as a trust from God, and does not have absolute ownership of the wealth. As such, in an IFS, freedom of enterprise as well as financial decisions made either by individuals or corporations, should be on the basis of guide lines given by Islam. These do not prohibit profit making as the target, as long as

the interest of society and the nation as a whole are protected and pre served; the profitable undertaking is permissible under Shari'ah.

The [Conventional Financial System] is based purely on Riba (interest).Whereas interest is strictly prohibited in Islam. Yet IFS is purely based on re ward/ loss/compensation and charity in stead of Riba. It is increasingly found that the financial sys tem based on Riba results in concentration of income and economic power in few hands, while the financial sys tem based on profit and loss sharing principle will result in more equitable distribution of economic opportunities and productive social charge in the long- run.

In the case of debt financing, Islam permits the con tract of ex change which involves deferred payments and there are three important con tracts in this category viz., firstly, Bai Muajjal or sale on deferred payment, under which an entrepreneur of a project can buy the required goods and pay in installments later on. Secondly, Ijarah or leasing under which the entrepreneur can lease the goods required for his project. Thirdly, Murabahah or sale with price mark-up is commonly used in trade financing wherein the entrepreneur can purchase raw materials but settle the payments in cash at a later date. All these three types of con tract provide profit mar gin to the financier through the cost plus pricing of sale and rental on leasing as agreed upon.

With the elimination of Riba or interest, appropriate mechanisms should be developed to make feasible the workings of the Islamic financial system. The role of an Islamic financial system is to mobilize savings on a large scale, pooling money from the savers to be mobilised to the investors for different periods and with different risk levels through various products mechanisms that con form with Shari'ah. Some of the Islamic financial products whose conformity with Shariah has been established are as follows:

### 1) Generation of deposit on profit and loss sharing

All deposits generated on profit and loss sharing basis should be in vested in non- interest based instruments while profit earned and loss incurred should be shared between the involving par ties. For this purpose, the interest- based in come should be separated from noninterest based in come (if any) and the basis of sharing of profit and loss between the parties should be pre determined. Different modules have been developed for the distribution of profits.

## 2) *Mudarabah*

*Mudarabah* is defined as a business in which a person participates with his money and another with his efforts. Their proportionate shares in profit are determined by mutual agreement. The loss, if any, is borne by the owner of money only.

## 3) Unit trusts

Unlike *Mudarabah* certificates, which can not be repurchased by the company issuing those certificates, the Unit Trust Certificates can be sold and repurchased by the company issuing them. This product can be used by the Islamic Banks and financial institutions in situations both for generation of deposits and investment of bank funds.

## 4) Participation term certificates

A participation term certificate (PTC) is a method whereby fund can be generated for a specified period on profit and loss sharing basis. An Islamic Bank may issue registered fixed denominations for a fixed period on the basis of payment of a share of the bank's profits to the PTC holders. A provisional rate of profit may be applied subject to a final determination at the time of declaration of annual profits by the bank.

## 5) Modes of financing

The modes of financing as permissible under Islamic financing system are:

- a) Loans on a service charge which is the percentage of annual administrative expenditure to the average annual assets of the banks.
- b) Loans without a service charge (*Quarz- Hasana*), i.e. some portion of Islamic bank's fund can be used for realizing such social assistance as making interest-free loans to deserving persons from education, medical treatment or other noble objectives.
- c) Bai-e-Muajjal or *Murabaha* is financing to purchase goods by banks and their sale to clients at mark-up prices on deferred payment basis.
- d) Leasing and hire purchase (*Ijara*) is a contract allowing use of land, building, equipment or other fixed assets for a specified period in exchange for payment in the form of rent.
- e) *Musharakah* is a partnership between the bank and its clients under which bank provides capital finance as per terms agreed, with profits and losses shared in agreed ratios.

- f) Rent sharing is practiced in real estate and equipment rental.

In its ideal form an Islamic bank is much more than just an institution guided by Islamic principles and avoiding interest payments; it seeks to achieve a just and equitable society. As Mirakhor suggests in the following brief extract, with their distinctive values Islamic financial schemes can reach out to groups excluded by conventional banks.

**R8.2** Mirakhor, A. (2002) '*Hopes for the future of Islamic Finance*', Lecture at the Institute of Islamic Banking, London

Let me conclude by mentioning a very important function of Islamic finance that is seldom noted: that is the ability of Islamic finance to provide the vehicle for financial and economic empowerment. Before I do so, let me recommend the works of the Peruvian economist Hernando de Soto. De Soto's long-time research has been summarized in a recent book titled: "The Mystery of Capital". His basic thesis is that much of the poor in developing countries are in possession of what he calls dead capital. He estimates that the developing and former communist countries possess US\$9.3 trillion worth of dead capital. These are physical resources and capital that are not used for any purpose other than to provide physical service to their owners. He suggests that the ability of documenting and using this capital as a productive asset is what distinguishes the rich from the poor. How can Islamic finance help to empower financially those who are in possession of dead capital? Let me give some rudimentary examples:

Agricultural Development Bank of Iran through *Mazarah* partnerships with farmers helps them to convert their physical possession into assets that can generate additional capital. Also through the Islamic law of *Arz Amwat* dead capital is converted into productive asset. A second example is that of the Housing Bank of Iran which through *Musharakah* and lease purchase agreements helps people without homes to own one. These homes can then be used to generate additional capital for the owners to undertake other productive activities. Similarly, Islamic finance can be used in other Muslim and developing countries to convert dead capital into income generating assets to financially and economically empower the poor.

The urban poor, including squatters living on remote or unused land, as well as those living in rental arrangements in overcrowded inner-city slum tenements, tend to fall outside the net of the general finance industry. The development of appropriate financial instruments to meet the shelter needs of this latter population group is one of the greatest challenges facing housing microfinance. Initiatives for the purchase, construction or improvement of homes, for installing basic services or even to fund land-titling processes can also fit into the Islamic framework which supports private ownership. Lack of guarantees and/or collateral for large loans has held back housing microfinance, but as suggested in the next extract, the combination of the Islamic endowment (*waqf*) and an Islamic financial product, the *mudaraba*, may have the potential to overcome this difficulty.

**R8.3** Sait S and Lim H. (2006) *Land, Law and Islam*, Zed Press, London

The *mudaraba* product is one in which the investor bank contributes capital and the entrepreneur provides management, with the entrepreneur and investors splitting profits according to a contractual formula. Thus, the *rabal-maal* (the financier, such as a bank) exclusively provides the capital monies for a project, while the *mudarib* (client) provides know-how, labour or management expertise, and they agree together in advance how to divide the profits. The provider of the capital (the bank) carries all the risk of the loss of capital funds, although the other party risks the deprivation of a reward for time, effort and so on.

In *mudaraba* the provider of the capital has no control over the project management, which makes this a preferred mode for banks. In addition to being used for individual business ventures a more complex version of the *mudaraba* is used for some Islamic investment funds. Some banks are also offering products which combine a cash *waqf* with the *mudaraba* principle, whereby the wealthy may deposit funds as an endowment with the bank, which manages the fund, while the depositor's share of the profit is used for benevolent purposes.

Islamic microfinance has emerged from the same principles of Islamic financing that have been applied to trading, business and investing within Muslim communities. The Islamic principles of equal opportunity, entrepreneurship, risk sharing, charitable obligation and participation by the poor are supportive of microfinance principles. Doubts have been raised about the Islamic credentials of mainstream Islamic financial institutions and products. Similar questions have been raised as to whether Islamic Microfinance Institutions truly deserve the label. Microfinance clients should have access to Shari'a-compliant services, where such compliance is important to them. However, some institutions make what can only be termed cosmetic changes to their operations and products, such as changing the term 'interest' to 'service charge'. This can be problematic, since the success or failure of a scheme is often dependent upon local resistance, which may be possibly laid to rest by ensuring that the products offered are in accordance with Islamic law. These issues are explored in the extract which follows, in which Sait and Lim contrast the differing recent experiences of microfinance in Afghanistan and Indonesia.

**R8.4** Sait S and Lim H. (2008) *'Islamic Microfinance in Crisis Countries: The Unofficial Developmental Discourse'*

### The Afghanistan context

Afghanistan's socio-political and economic profile is intriguing. In a country where an estimated 56% of the approximately 23 million Afghans live under the poverty line,<sup>2</sup> the post-conflict economy is still largely opium driven,<sup>3</sup> contingent on the security situation and based significantly on informal money transfers or *hawala*.<sup>4</sup> Microfinance was prioritised at the outset by the international community – the Afghanistan Reconstruction Trust Fund (ARTF) – as one of the core 'reconstruction' projects. Since its initiation in 2003, the Microfinance Investment and Support Facility Afghanistan (MISFA) grew to approximately USD 75 million with ambition for 200,000 clients.<sup>5</sup>

2 IMF, *Islamic Republic of Afghanistan: Statistical Appendix No. 6/114* (Washington, D.C.: IMF, 2006).

3 See Goeldner, Karri A., *Roles and Opportunities for Rural Credit Initiatives in Afghanistan's Opium Economy* (London: DfID, 2004).

4 Munzele Maimbo, S., *The Money Exchange Dealers of Kabul: A Study of the Hawala System in Afghanistan* (Washington, D.C.: World Bank, 2003).

5 Scanteam, *Assessment, Afghanistan Reconstruction Trust Fund (ARTF) Final Report* (Oslo: ARTF, 2005).

MISFA has several objectives which are common to microfinance sectors elsewhere, such as providing affordable financial services to poor people and integrating the financial sector. In addition, there are other objectives considered vital by the international community for Afghanistan. These include weaning away unemployed persons from participation in the conflict by providing opportunities<sup>6</sup>, increasing women's participation in the economy and creating alternative livelihoods in poppy-growing provinces.<sup>7</sup> Consider the gender focus of MISFA - 74% of the microfinance clients are women and over two thirds of those employed by sector are women. Thus, Afghanistan's microfinance project is not merely about general poverty alleviation or sustainability, but also a targeted political and developmental endeavour.

Though the microfinance services in Afghanistan were to be "flexible and tailored to local priorities," despite the Islamic Republic of Afghanistan's overwhelmingly traditional and conservative Muslim profile, no conscious engagement with Islamic principles was intended. Of the four countries that contributed to the 24 member ARTF, only Saudi Arabia was a significant Muslim donor. Islamic transplantation could have materialised when the management committee of ARTF<sup>8</sup> (administered by the World Bank) included the Islamic Development Bank, which promotes and contributes to economic and social development in accordance with the principles of Islamic Law, but it does not appear to have done so; rather, the modernization of post-Taliban Afghanistan was conceptualised through secularist approaches. Until recently, there was little evidence of interest in Islamic microfinance by the dozen odd Afghan MFIs. For example, the 2006 mid-term review of the microfinance sector and MISFA in Afghanistan only tangentially addresses Islamic microfinance.<sup>9</sup>

## Islamic microfinance in Afghanistan

While Islamic Microfinance was not part of the official development discourse or general microfinance planning, realities on the ground forced a rethink. The potential high demand for small loans was accompanied by end-user skepticism over their compatibility with Islam. For example, Ariana Financial Services Group (AFSG), established by Mercy Corps, narrated its hard work to convince people that its services were not un-Islamic. Making a virtue out of necessity, a number of MFIs in Afghanistan have since packaged themselves as Islamic. The Danish MADRAC (Microfinance Agency for Development and Rehabilitation of Afghan Communities) in November 2006 launched new Islamic credit services for needy people in rural areas. The US-based FINCA International also announced that as of September, 2006 all FINCA Afghanistan credit products are *Shari'a* compliant. Likewise, the French-based OXUS Development Network (ODN) now provides loans following the principles of Islamic banking.

While several MFIs such as MADRAC and FINCA explicitly identify the use of the Islamic *Murabaha* model, in general there is an assortment in what is offered as Islamic. One MFI, PARWAZ, has argued that interest is not impermissible under the complex Islamic finance laws, while others use alternative descriptions of interest or strive to distinguish interest from usury. Some use colour-coded forms for different types of loans which indicate the tariffs for services. The lending arrangement where loan fees are charged on the basis of profit-sharing or 'cost plus mark-up' instead of a fixed interest rate invariably also includes overheads and running costs (including staff salaries, operating expenses, taxes, borrowing costs). This requires effective risk management and sustainable approaches.<sup>10</sup> However, Grace and Al-ZamZami,<sup>11</sup> in their report on microfinance in Yemen, are forthright in their assessment that the extent to which a microfinance product is altered to be Islamic depends on "how strongly these beliefs regarding interest are held."

6 See Malika Anand and Samer Badawi (2007) *Can microfinance heal wounds of war?* <http://www.middle-east-online.com/english/opinion/?id=18774>

7 Gender was identified as one of the three cross-cutting themes in the 2002 National Development Framework (NDF) 2002. The others are Governance, Financial Management and Administrative Reform and Human Rights, Security and Rule of Law.

8 Others members of the ARTF Management Committee are Asian Development Bank (ADB), UNDP and the World Bank.

9 Nagarajan, G., Knight, H., and Chandani, T., *Mid-Term Review of the Microfinance Sector and MISFA in Afghanistan* (Kabul: Govt of Afghanistan and MISFA, 2006).

10 Some analysts argue that fee for services based on profit-sharing calculations would be higher than the interest rate, particularly in unstable or conflict societies.

11 Grace, L. and A. Al-ZamZami, *Islamic Banking Principles Applied to Microfinance Case Study: Hodeidah Microfinance Program, Yemen* (Geneva: UNCDF, 2002).

Therefore, where these beliefs are not as pervasive, institutions may make cosmetic changes to their operations and products, such as changing the term 'interest' to 'service charge.' In other cases where these beliefs are fundamental and widespread, more extensive adaptations have had to take place, which affect the core of an institution's systems, operations and beliefs.

The expansion of microfinance in Afghanistan, Islamic microfinance in particular, is remarkable since it neither possesses a systematic Islamic banking infrastructure nor an established civil society. What is worrying though is that, given the post-Taliban environment, the religious sector has been largely excluded at the same time as there is *ad hoc* growth of microfinance sporting the Islamic label raising questions over the integrity, transparency and accuracy of the information for a largely illiterate population - as well as its long-term sustainability. Neither MISFA nor the Central Bank of Afghanistan has addressed the need for concrete guidelines in a sector avoiding self-regulation. Islamic microfinance models in Afghanistan are being largely developed by its nascent civil society with individual MFIs - overtly or discreetly - in consultation with international donors, who are invariably Western partners. Therefore, the MFIs face the challenge of systematically developing innovative, pro-poor and gendered Islamic tools that could assist the implementation of development policies in Afghanistan almost on their own, with a little help from their international 'secular' partners rather than a coordinated indigenous expert support.

### Afghanistan and Indonesia

The development of Islamic microfinance in Afghanistan can be usefully explored further by drawing a contrast with Indonesia after the tsunami of December 2004.<sup>12</sup> First, there was no single coordinating microfinance agency in Indonesia like the MISFA in Afghanistan and microfinance initiatives were slower to start following the emergency relief efforts. Second, within Indonesia debates over the nature of Islamic financial services were already underway as, for example, between the influential Indonesian *Nahdlatul Ulama* (NU) and *Muhammadiyah* over the permissibility of interest.

Yet, in the case of Afghanistan, microfinance was to a larger extent 'introduced,' and despite the relative autonomy of MFI had to be, curiously, ratified in its particular manifestations by the external partners. Third, the existence of credit institutions, including Islamic ones - *Baitul Qiradh* (*Bank Perkreditan Rakyat Shariyah*) - meant that the focus was not on initiation but rather consolidation (or rectification), regulation and capacity building. The State and the Central Bank as well as the MFIs being better established entities<sup>13</sup> were able to negotiate more effectively with international players and draw in the support of the Asian Development Bank in a relatively more systematic way, focused on sustainability, capacity building, and lobby for a viable and workable framework.<sup>14</sup>

In devising the appropriate Islamic microfinance models for Aceh, the various stakeholders have been aware of the region's distinctive concepts and terminologies. It was agreed that the principles of *shari'a* would govern Islamic microfinance in their legal and social framework.<sup>15</sup> Moreover, Indonesian legal pluralism<sup>16</sup> and autonomy for local determination of Islamic legal principles generated prospects for innovative and sustainable approaches.<sup>17</sup> Therefore, particularly with respect to Islamic cooperatives, the changes have come from within - with the external actors being arrayed as supporters.<sup>18</sup> This participative process of determining Islamic principles as applicable to microfinance in their particular context is in contrast to the Afghanistan experience where the designing have been largely externally mediated, though the MFIs have been localised in operations. Another vital difference is the direct role of commercial banking in Indonesia, unlike the Afghan experience. This could be critical for sustainability of microfinance institutions when international support runs out.

12 Seibel, Hans Dieter, *Reconstruction and Development of the Microfinance System in Nanggroe Aceh Darussalam (NAD), Indonesia* (Cologne: GTZ, 2005).

13 See Lapenu, Cécile, *The Role Of The State In Promoting Microfinance Institutions Paper No. 89* (Washington, D.C.: International Food Policy Research Institute, 2000).

14 The German Agency GTZ exceptionally undertook the laborious process of establishing partnerships between the Bank of Indonesia, reconstruction agencies, Islamic institutions and civil society while identifying pilots, strengthening structures and elaborating methodologies.

15 Seibel, Hans Dieter, *Reconstruction and Development of the Microfinance System in Nanggroe Aceh Darussalam (NAD), Indonesia* (Cologne: GTZ, 2005).

16 See Sait & Lim, *supra* note 6.

17 See Bowen, John, *Islam, Law and Equality in Indonesia* (Cambridge: Cambridge University Press, 2003).

18 Utama, Iman Budi, *Baitul Qiradh: Reconstructing Islamic Cooperatives in Aceh, Indonesia* (Jakarta: GTZ, 2005).

Both Afghanistan and Indonesia face opportunities for strengthening Islamic microfinance protocols - where the roles of stakeholders are generally fluid, negotiable and overlapping. The dynamics of creating an inclusive microfinance industry in post-conflict or post-disaster societies present particular challenges but they also offer stark choices not unlike in other 'normal' situations.<sup>19</sup> The alternatives include pragmatic responses which are *shari'a* conversant or justifiable,<sup>20</sup> on the one hand, and those rigorously conjured through Islamic jurisprudential enquiry as being *shari'a*-compatible.<sup>21</sup> Equally, there are attempts at adaptation and fusion of conventional and Islamic microfinance. Whether Islamic microfinance is being designed by the believer, agnostic or secular for faith, development or empowerment, legal methodologies matter as much as politics and economics. How can Islamic microfinance be gendered, made affordable and upscaled while upholding the fundamental Islamic principles? It appears that the approaches adopted in Afghanistan have not fully and holistically addressed this challenge.

19 Manalo, Marilyn S., *Microfinance Institutions' Response in Conflict Environments - Africa Region Working Paper Series No. 54* (Washington, D.C.: World Bank, 2003); Nagarajan, G., *Microfinance in Post-Conflict Situations: Towards Guiding Principles for Action* (Geneva: ILO, 1999).

20 Anwar, Muhammed, *Islamicity of Banking and Modes of Islamic Banking, 2003 arab law quarterly* at 62-80.

21 See Alirani, Kais, *Islamic Micro-finance - Yemen Experience (First Annual Conference of SANABEL, Micro-finance Network of Arab Countries, 2003)*.



# ANNEXES

## ANNEX 1.

# Glossary of Islamic and Arabic terms

A quick reference guide to Islamic and Arabic terms used in the Islamic training package. For a fuller list and discussion on Islamic terminology, see Sait & Lim, *Land, Law & Islam* (London: Zed/UN-HABITAT)

Term	Variations	Meaning
<i>Adl</i>	<i>`adālah</i>	justice, one of the fundamental concepts in the Qur'an
<i>akhira</i>	<i>akhirat</i>	the eternal life after death with God
<i>amana</i>		Qur'anic principle of trust, land and resources are owned by God and human beings exercise in trust
<i>ard</i>		land
<i>asaba</i>		deceased's closest surviving male agnate, the deceased's father, brothers, uncles, cousins or more distant male relative
<i>bashari</i>		human, for example human endeavour or interpretation, as well as State preferences that determine how contemporary society actualises the Shari'a
<i>bay</i>		sale (see different types of sale)
<i>bayt-al-mal</i>		the State treasury for welfare, also the means for managing zakat funds
<i>darura</i>		necessity and need, supplementary principle in the methodology of Islamic law ( <i>usul al fiqh</i> )
<i>dhimmi</i>		'protected' or 'covenanted' people, non-Muslim subjects, specifically Christians and Jews.
<i>duniya</i>		worldly life in the here and now on earth
<i>Emir land</i>		Sultanic land, often used synonymously with State land ( <i>miri</i> )
<i>falah</i>		Felicity and equitable success, in the way of God.
<i>fard</i>	plural <i>faraid</i>	an act considered to be obligatory under Islamic law, also the duty to act
<i>fasad</i>		injustice
<i>fatwa</i>	plural <i>fatawa</i>	Formal advice from a competent authority ( <i>mufti</i> ) on a point of Islamic law or dogma. It is given in response to a question.
<i>fiqh</i>		Islamic jurisprudence, practical rules of Shari'a derived from the detailed evidence in the textual sources. <i>Fiqh</i> is thus the end product of <i>usul al-fiqh</i> .
<i>fuqaha</i>		jurists or those well versed in <i>fiqh</i>
<i>gharar</i>		uncertainty, risk or speculation
<i>ghasb</i>		wrongful appropriation of property by force
<i>hadith</i>	plural <i>ahadith</i>	Narratives, the sacred tradition, recorded actions and sayings of the Prophet
<i>hajj</i>		annual Muslim pilgrimage to Makkah and Medina, one of the five pillars of Islam, incumbent on every Muslim once in a lifetime to those who can make it
<i>halal</i>		permitted, lawful
<i>Hanafi</i>		name of a Sunni school of law, associated with the early religious leader (Imam) Abu Hanifa (d. 767)
<i>Hanbali</i>		name of a Sunni school of law, associated with the early religious leader (Imam) Ahmad ibn Hanbal (d. 855)
<i>haqq</i>		truth or rights, used in the Qur'an 227 times, sometimes referred to as rights of God, thereby creating obligations for human beings
<i>haram</i>		forbidden, unlawful under Islamic law or religion

<i>hawala</i>		informal system of banking and debt transfer
<i>hiba</i>		lifetime transfer or gift, in Islamic law a contract without consideration
<i>hijab</i>		Muslim veil worn by women
<i>hikrs</i>		long leases with advance lump sums
<i>hima</i>		special reserves, for example, those established by the state for use as conservation zones
<i>hisbah</i>		an Islamic institution or ombudsman for enforcement of public interests or vigilance powers.
<i>hujja</i>		document recording the contract of sale and the deed of ownership (DIFFERENT HUJJAS)
<i>ibadat</i>		matters of worship and practice of religion
<i>ihya' al-Mawat</i>		reclamation or the revival of dead (mawat/mawat) land, creates a right of ownership with the claimant being given a tapu (grant or document)
<i>ijara</i>		lease in commercial or financing context, land may also be leased for its usufruct by the State for its reclamation and development
<i>ijma</i>		consensus of opinion, one of the four main sources of Islamic law (Shari'a) but supplementary to the Qur'an and Sunna
<i>ijtihad</i>		personal reasoning or interpretation, a tool of Islamic jurisprudence; opposite of taqlid (following traditions scrupulously)
<i>Imaan</i>		faith in God
<i>Imam</i>		religious leader Imama/imamate Islamic ideal theory of the caliphate or leadership, particularly Shi'a, where the Imam has extensive powers and the final word on religion
<i>iqta</i>	<i>iqta tamlik</i>	grants of land by the State, historically land given to Ottoman soldiers in lieu of regular wage, which by itself did not create juridical or hereditary rights. Could also be a grant for other purposes, for example land reclamation or development
<i>Islah</i>		Reform
<i>Islam</i>		from Arabic word s-l-m, which refers to peace and submission, the religion of 1.2 billion Muslims worldwide
<i>istihsan</i>		juristic preference to achieve equity and avoid a harsh result, a legal method particularly associated with the Hanafi school of law
<i>jizya</i>		a poll tax paid by non-Muslims in classical times, originates from the Arabic word 'compensate' in the context of higher taxes being paid by non-Muslims in lieu of their exemption from other obligations, used synonymously with kharaj
<i>kadi</i>	<i>khadi, qadi</i>	judge in an Islamic court
<i>kanun</i>	<i>qanun</i>	decree to supplement Islamic law (Shari'a)
<i>Khalifa</i>	Caliph	successor, vicegerent; caliph Stewardship, an Islamic political concept indicating leadership on behalf of the Muslim community (Umma)
<i>kharaj</i>		land under state control upon which a tax is paid by those in possession, it describes both the land itself and the tax
<i>khoms</i>		general obligation for a charitable payment on all gains from trade or other economic activities for Shi'a Muslims
<i>khula</i>		a judicial divorce, granted through a decree
<i>'ma</i>		water, water rights are widely discussed in the Qur'an and the documented sayings of the Prophet
<i>maddhab</i>		(plural maddahib), a school of legal thought with distinctive elements to its methodology, associated with a particular religious leader (Imam) of the classical period
<i>mal</i>		Wealth, money, property; any valuable thing which can be possessed.
<i>Maliki</i>		name of a Sunni school of law

<i>maqaside sharia</i>	<i>Maqasidal Sharia</i>	hierarchy of legal aims or objectives of Islamic law, also the title of an influential book by Al-Ghazzali (1058-1111)
<i>maruf</i>		good or acceptable behaviour that is to be encouraged by other Muslims
<i>Maslaha</i>	<i>maslaha marsala</i>	Islamic public interest principle, literally means benefit or interest in Islamic jurisprudence and is often perceived as overriding public interest,
<i>matruk</i>	<i>metruke</i>	public land for general use such as pastures for the use of particular towns and villages, markets, parks and places to pray
<i>mehlul</i>	<i>mahlul</i>	land left uncultivated, State land (miri) under the Ottoman Land Code 1858 if left uncultivated for three years could be taken back by the State, depriving the owner of possession
<i>mahr</i>	<i>mehr</i>	the payment of money from the husband to the wife at the time of marriage, known as dower
<i>mewat</i>	<i>mawat</i>	dead or empty land, which can be reclaimed or revived (ihya'al mawat)
<i>microtakaful</i>		Islamic micro-insurance, based on mutual responsibility and mutual guarantee
<i>mirath</i>		the Islamic law of succession
<i>mu'amalat</i>		sphere of Islamic law governing human or social relationships such as most property rights, as distinct from ibadat, matters relating to worship
<i>mudaraba</i>		limited partnership, trust financing
<i>mufti</i>		theologian who is competent to issue an advisory Islamic legal opinion (fatwa) in response to a specific question
<i>muhtasib</i>		one who is appointed to implement hisbah, must be experienced, honest, knowledgeable in his profession, pious in his dealings, and of good standing in the community
<i>mujtahid,</i>	plural <i>mujtahidun</i>	a person who practises independent reasoning (ijtihad)
<i>mujtahidat</i>		woman practising Islamic reasoning (ijtihad)
<i>mulk</i>	<i>milk</i>	land in full ownership
<i>munkar</i>		unacceptable behaviour or wrongful, that which other Muslims have a duty to stop, in contrast to maruf, good conduct to be encouraged
<i>murabaha</i>		purchase and resale agreement, mark-up/cost plus sale
<i>musha'</i>		communal land, also a term deployed by colonial officials during Mandate rule in the Middle East to describe a system by which most of a village's arable land was held in common and in shares which were periodically redistributed
<i>musharaka</i>		partnership, joint venture
<i>mutawalli</i>		the administrator, manager or superintendent of endowment (waqf) property, equivalent to nazir in South Asia
<i>muzara'a</i>		agricultural contract, a form of sharecropping in which the landowner provides both land and seed for the crop, the worker provides the labour
<i>nushuz</i>		disobedience in marriage
<i>qard hasana</i>		Interest free loan
<i>qiwama</i>		the concept of male guardianship, in respect of Qura'an 4:34: 'men are qawwamuna 'ala women.'
<i>qiyas</i>		reasoning, deduction by analogy, a source of Islamic law (Shari'a)
<i>(Holy) Qur'an</i>	Koran	the Holy Qu'ran, the revelation of God, the sourcebook of Islamic values and the primary source of Islamic law (Shari'a)
<i>raqaba</i>		full property ownership, often in the context of private individual land (milk/mulk)

<i>riba</i>		usury, the Islamic prohibition of interest
<i>sadaqa</i>		religiously inspired voluntary alms giving or discretionary charitable donation, not necessarily monetary in nature
<i>sadaqa jaaria</i>		continuous charity, as in an endowment
<i>salah</i>	<i>Salat, namaaz</i>	prayer or worship performed five times a day by Muslims
Shafi		name of a Sunni school of law, associated with the early religious leader Muhammed al-Shafii (d. 820)
<i>Shari'a</i>	<i>Syariah, Shariat</i>	Islamic law
<i>Shi'a</i>		minority branch of the Muslim community which claims that the Prophet named Ali, his nephew and son-in law, as his successor
<i>shura</i>		concept of consultation discussed in the Qur'an, relevant in the context of democracy in Islam
<i>shuf'a</i>		preemption, a barrier upon the free disposal of land and the means by which a co-inheritor, or in some cases a neighbor, may use a privileged option to purchase land when it is for sale
<i>sukuk</i>		Similar characteristics to that of a conventional bond with the difference being that they are asset backed, a sukuk represents proportionate beneficial ownership in the underlying asset. The asset will be leased to the client to yield the return on the sukuk.
<i>sulah</i>		conciliation, an Islamic dispute resolution technique which requires compromise between two parties.
<i>Sunni</i>		the largest group within the Muslim community, who believe that the Prophet died in 632 AD without choosing any successor
<i>Sunna</i>		tradition, deeds, utterances and tacit approvals of the Prophet, the second source of Islamic law (Shari'a)
<i>tahkim</i>		arbitration, an Islamic dispute resolution technique which involves a mutually acceptable arbitrator
<i>takaful</i>		mutual responsibility, mutual guarantee, Islamic insurance
<i>takhayyur</i>		Islamic legal method of selection amongst competing legal principles
<i>talaq</i>		husband's unlimited right to divorce his wife
<i>talfiq</i>		the legal method of 'patchwork', combining approaches or principles from different Islamic schools of law
<i>tanazul</i>		a customary practice by which a person, typically a woman, renounces her inheritance rights
<i>tapu</i>	<i>Tabu, tabo</i>	an Ottoman land title registration office or document, still referred to as such for example in Palestinian territories and Israel. Also a title deed granting usufruct rights in State land (miri)
<i>tawhid</i>		Islamic doctrine of unity in God
<i>tawarruq</i>		Reverse murabahah. As used in personal financing, a customer with a genuine need buys something on credit from the bank on a deferred payment basis and then immediately resells it for cash to a third party. In this way, the customer can obtain cash without taking an interest-based loan
<i>ulama</i>	<i>Ulema, ilmiye (singular alim). Slang. mulla</i>	religious sector in Turkey, corresponds to ulema
<i>umma</i>		universal Muslim community, which defies national boundaries
<i>'urf</i>	<i>'urf wa adah</i>	custom and usage, a general or local model of behaviour, social understanding, or mode of expression, that is generally accepted by the population and does not contract a definitive rule of Islamic law (Shari'a)

<i>ushr</i>		land on which a tithe is paid, belonging to a Muslim at the time of his conversion or distributed to a Muslim soldier as his share of the spoils of war, describes both the land itself and the tithe. It is an obligatory charge on farm produce ranging from one-tenth to one-twentieth of the produce. A lower rate than kharaj paid by non-Muslims.
<i>usul al-Fiqh</i>		methodology applied to the Qur'an and Sunna to deduce the rules of fiqh, or substantive law
<i>wali</i>		guardian, also a local governor in Ottoman times
<i>waqf,</i>	plural <i>wqaf; waqf,</i> Persian, plural <i>auqaf; wakf,</i> <i>wakaf, habus,</i> <i>habous</i>	general term for charitable endowment
<i>waqf ahli</i>	<i>waqf al aulad,</i> <i>waqf dhurri</i>	a family endowment
<i>waqf gayri sahih</i>		State endowment, created either because it was established from the State treasury (bait al-mal) or because the endowment was taken into state control
<i>waqf khairi</i>	<i>Waqf Ikhayri</i>	a charitable endowment, which involves the 'permanent' dedication of the property for charitable purposes
<i>waqf mushtarak</i>		a quasi-public endowment which primarily provides for particular individuals or a class of individuals including the founder's family, but also serves certain outside public interests, such as a mosque which is convenient for, but not exclusive to, family members
<i>waqif</i>		the founder of an endowment
<i>wasta</i>		mediation, an Islamic dispute resolution technique whereby one or more persons intervene in a dispute either of their own initiative or at the request of one of the parties
<i>wasaya</i>	<i>wasiyya</i>	an Islamic will
<i>zakat</i>		general charitable payment, levied on property such as gold, silver, merchandise and income producing animals, as well as land, required of all Muslims to purify both themselves and their wealth
<i>zulm</i>		oppression

## ANNEX 2.

# Islamic historical timeline

### Some key political, social and economic dates

610-632	Age of Prophet Muhammad (PBUH). The Qur'an is revealed, the practice of the Prophet.
632-666	Age of the Rightly-Guided Caliphs – Abu Bakr, Umar, Uthman and Ali
661-935	Ummayyad Caliphate
750-935	Abbasid Caliphate, including Harun al-Rashid
	Bayt al-Hikma (House of Wisdom) is established in Baghdad.
800s	Written collections of Hadith (sayings of the Prophet) are compiled. Sicily comes under Muslim rule.
910	Establishment of the Shi'a Fatimid caliphate in North Africa
900s	Islam comes to West Africa
940	Muhammad al-Mahdi, the twelfth imam, disappears. Twelvers still await the future return of the "Hidden Imam."
984-1289	Seljuks and Fatimids rule
929	The rise of the Hamdanids in Syria and Iraq. Great patrons of scholars, poets, philosophers, and historians. Emir of al-Andalus, Abd al-Rahman III, proclaims himself Khalifa, breaking ties with Syrian and Egyptian Caliphates.
983	Al-Azhar University, a center for religious and academic learning, is established in Cairo. It is also known as the oldest university in the world.
1058-1111	Al-Ghazzali, who wrote the treatise Maqasid e Sharia, hierarchy of legal aims or objectives of Islamic law
1100s-1200s	Sufi orders (turuq) are founded.
1126-98	Life of Averroës, Muslim philosopher from Cordoba who sought to integrate Islam with Greek thought.
1171- 1250	Ayyubids dynasty. Salah ad-Din unifies Egypt and Syria and establishes the Abbuid Dynasty.
1221	Genghis Khan and the Mongols enter Persia
1228	The Almohad rulers of Tunisia establish the Hafsid dynasty.
1281-1918	Ottoman or Uthmani, Muslim dynasty
1250-1517	The Mamluks, slave-soldiers, rise to power in Egypt
1332-1395	Muslim writer Ibn Khaldun, who wrote Muqaddimah
1369	The Turkic-Mongol, Tamburlaine, becomes the ruler of the Changatai Khanate. He conquers parts of the Middle East and Central Asia.
1382	Kitab al-Kharaj (The Book of Land Tax), Abu Yusuf's wide ranging treatise on the Islamic theory of taxation (Cairo, 1382)
1453	Mehmet Fatih (rules 1451-81) conquers Constantinople. The two halves of the Ottoman Empire are united and the sultan becomes Byzantine emperor.
1492	The last Muslim kingdom in Spain, the Kingdom of Granada, is conquered by Ferdinand and Isabella.
1501-1722	Safavid dynasty
1520-66	Reign of Suleyman the Magnificent; Ottoman Empire reaches its zenith. Hungary and coastlands of Algeria and Tunisia come under Ottoman rule.
1534-1634	Kuyud-u Hakani Ottoman period land information records (particularly between) containing all land-related information
1600-1700	Venetians, Habsburgs, and Russians divide European Ottoman lands between them.
1670:	Futawa Alumgeeree legal compilation during the reign of Mughal Indian emperor Aurangzeb by eminent lawyers of the time (about 1670) and was translated by Neil Baillie (1850)

1634 -1847	Temessuk Belgeleri, Title Deed Records, the name for the Kuyud-u Hakani registration books
1779	Afghans ousted by Qajar dynasty, which rules Persia until 1925.
1700s	Muhammad Abd al-Wahhab rejects Sufism and all innovation (bid'a). Founds what becomes the Saudi Arabian kingdom.
1807-76	Tanzimat period. Ottoman Empire undergoes extensive program of modernization in government, law, and medicine.
1813	Ottoman Itizam feudal land system abolished
1858	Last Mughal in India is deposed and India comes under British rule.
1858	Ottoman Land Code 1858
1882-1952	British Occupation of Egypt
1876	Majalla, the Ottoman Civil Code based on Islamic law (Shari'a), which dealt specifically with mulk land.
1878	Congress of Berlin recognizes independence of Balkan states previously under Muslim rule.
1870.	Hedaya, the classical compendium of Hanafi law translated into English.
1912	Founding of Islamic Union (Sareket Islam), a modernizing movement in SE Asia.
1914	Minhaj source of Shafi law translated into English
1918	Fall of Ottoman Empire. League of Nations grants Britain mandatory status over Palestine and Iraq, and France over Lebanon and Syria.
1920-21	In Palestine, Muhlul Lands Ordinance of 1920, under which anyone in possession of uncultivated land was obliged to inform the state; and Mewat Lands Ordinance in Palestine of 1921,
1923	Republic of Turkey established. Mustafa Kemal (Ataturk) is first president
1928	Ikhwan al-Muslimun (Muslim Brothers) founded in Egypt.
1930	Lebanese Land Law
1941	Jamaat-i Islami in Lahore, India.
1945	Indonesia becomes independent republic.
1945	Arab League formed
1945-2009	Islam spreads to the West with mass migrations from Asia, Africa, and India.
1947	Pakistan founded as an Islamic nation. Islam becomes a minority religion in India.
1949	Egyptian Civil Code Syrian Civil Code
1950s, 1960s.	Egyptian Nasser's agrarian reforms
1953	Iraqi Civil Code
1957	Independent Malayan state established with Islam as the official religion but guaranteed tolerance.
1958	Syrian land reforms
1962-71	The land reforms of the White Revolution. Bureaucratic control extends into villages and discontent with the shah rises among Iranians.
1967	mujadad pioneering land registration document created by the Jordanians in the West Bank as part of its land reform abandoned
1969	Organisation of Islamic Conference formed at Rabat
1971	Bangladesh achieves independence
1974	Bangladesh Muslim Marriages and Divorces Act
1976	Jordanian Civil Code
1979	Iran becomes Islamic Republic
1981	UIDHR adopted by the Islamic Council of Europe
1984	Algerian Family Code
1990	Cairo Declaration on Human Rights in Islam adopted by the OIC
1990	Kenya recognises Islamic succession
1992	Egyptian land laws overturn Nasser's reforms
2000	Egypt Personal Status (Amendment) Law
2004	Amended Arab Charter on Human Rights

## ANNEX 3.

# Selected Hadith on land, property, and housing

**Translation of Sahih Bukhari by M. Muhsin Khan (undated)**

Sahih Bukhari is a collection of sayings and deeds of Prophet Muhammad (PBUH), also known as the *sunna*. The reports of the Prophet's sayings and deeds are called *ahadith*. Bukhari lived a couple of centuries after the Prophet's death and worked hard to collect his *ahadith*. Each report in his collection was checked for compatibility with the Qur'an, and the veracity of the chain of reporters had to be painstakingly established. Bukhari's collection is not complete, there are other scholars who worked as Bukhari did and collected other authentic reports. This is only a limited list of *hadith* which number thousands.

### Property rights

Ibn 'Umar (May Allah be pleased with them) reported: We were talking about the Farewell Pilgrimage without knowing what was it when Messenger of Allah (PBUH) was also present. He (PBUH) said.....Listen, Allah has made your blood, and your properties as inviolable as of this day of yours (i.e., the Day of Sacrifice), in this city of yours (i.e., Makkah), in this month of yours (i.e., Dhul-Hijjah). Listen, have I conveyed Allah's Message to you?" The people replied in affirmative. There upon he said, "O Allah, bear witness." And he repeated it thrice. (Bukhari). Abū Hurairah said When the Messenger of Allāh, peace and blessings of Allāh be on him, died and Abū Bakr became (his successor), and those of the Arabs who would disbelieve disbelieved, 'Umar said, How dost thou fight people (who profess Islām), and the Messenger of Allāh, peace and blessings of Allāh be on him, said "I have been commanded to continue fighting against people until they say, There is no god but Allāh; whoever says this will have his property and his life safe unless there is a due against him and his reckoning is with Allāh." (Abū Bakr) said, By Allāh! I shall fight those who make a difference between prayer and zakāt, for zakāt is a tax on property; By Allāh! if they withhold from me even a she-kid which they used to make over to the Messenger of Allāh, peace and blessings of Allāh be on him, shall fight against them for their withholding it. 'Umar said, By Allāh! Allāh opened the heart of Abū Bakr (to receive the truth), so I knew that it was true. (Bukhari 24:1.) Ibn 'Umar

reported, 'Umar ibn al-Khattāb got land in Khaibar; so he came to the Prophet, peace and blessings of Allāh be on him, to consult him about it. He said, O Messenger of Allāh! I have got land in Khaibar than which I have never obtained more valuable property; what dost thou advise about it? He said: "If thou likest, make the property itself to remain inalienable, and give (the profit from) it in charity." So 'Umar made it a charity on the condition that it shall not be sold, nor given away as a gift, nor inherited, and made it a charity among the needy and the relatives and to set free slaves and in the way of Allāh and for the travellers and to entertain guests, there being no blame on him who managed it if he ate out of it and made (others) eat, not accumulating wealth thereby. (Bukhari 54:19.)

### Land

'Ā'ishah reported, The Prophet, peace and blessings of Allāh be on him, said: "Whoever cultivates land which is not the property of any one has a better title to it." (Bukari 41:15.) Abū Ja'far said, There was not in Madīnah any house of the emigrants but they cultivated (land) on one-third and one-fourth (of the produce) .... And 'Umar employed people (for cultivation) on condition that if 'Umar supplied the seed from his pocket, he should have one-half (of the produce), and if they supplied the seed, they should have such and such a portion. (Bukari 41:8.)

Ibn 'Umar reported, The Messenger of Allāh, peace and blessings of Allāh be on him, granted (the lands of) Khaibar to the Jews on condition that they worked thereon and cultivated them and they should have half of the produce. (Bukhari 41:11)

Ibn 'Umar said, The Prophet, peace and blessings of Allāh be on him, said: Whoever takes any part of land without having a right to it, he shall be, as a punishment for it, sunk down into earth on the day of resurrection to the depth of seven earths." (Bukhari 46:13.)

## Contracts, debt

Hakīm ibn Hizām said, The Messenger of Allāh, peace and blessings of Allāh be on him, said: “The buyer and the seller have the option (of canceling the contract) as long as they have not separated, then if they both speak the truth and make manifest, their transaction shall be blessed, and if they conceal and tell lies, the blessing of their transaction shall be obliterated.” (Bukhari 34:19.)

Sa’id ibn al-Musayyib said, ‘Uthmān decided that whoever takes his due before a man becomes insolvent, it is his, and whoever recognises his property itself with an insolvent has a greater right to it. (Bukhari 43:14.)

Abū Hurairah said, The Messenger of Allāh, peace and blessings of Allāh be on him, said: “Delaying the payment of debt by a well-to-do person is injustice.” (Bukhari 43:12.)

The Prophet, peace and blessings of Allāh be on him, is reported to have said: “Deferring payment by one who has the means to pay legalizes his punishment and his honour.” (Bukhari 43:11)

Narrated Jabir bin ‘Abdullah: Allah’s Apostle said, “May Allah’s mercy be on him who is lenient in his buying, selling, and in demanding back his money.” (Bukhari 34:290)

## Stealing, breach of trust – a crime

‘Abdullah bin ‘Amr bin Al-‘as (May Allah be pleased with them) reported: A man named Kirkirah, who was in charge of the personal effects of Messenger of Allah (PBUH) passed away and the Prophet (PBUH) said, “He is in the (Hell) Fire.” Some people went to his house looking for its cause and found there a cloak that he had stolen. [Bukhari] Khaulah bint ‘Thamir (May Allah be pleased with her) reported: Messenger of Allah (PBUH) said, “Many people misappropriate (acquire wrongfully) Allah’s Property. These people will be cast in Hell on the Day of Resurrection.” (Bukhari).

## WILLS AND

### Inheritance

Ibn ‘Umar reported, The Messenger of Allāh, peace and blessings of Allāh be on him, said: “It is not right for a Muslim who has property regarding which he must make a will that he should sleep for two nights (consecutively) but that his will should be written down with him. (Bukhari 55:1.)

Sa’d ibn Abī Waqqās said, The Messenger of Allāh, peace and blessings of Allāh be on him, used to visit me at Makkah, in the year of the Farewell pilgrimage, on account of (my) illness which had become very severe. So I said, My illness has become very severe and I have much property and there is none to inherit from me but a daughter, shall I then bequeath two-thirds of my property as a charity? He said, “No”. I said, Half? He said, “No”. Then he said: “Bequeath one-third and one-third is much, for if thou leavest thy heirs free from want, it is better than that thou leavest them in want, begging of (other) people; and thou dost not spend anything seeking thereby the pleasure of Allāh but thou art rewarded for it, even for that which thou puttest into the mouth of thy wife.” (Bukari 23:36.)

Anas reported, The Messenger of Allāh, peace and blessings of Allāh be on him, said to Abū Talhah: “Give it to the needy from among thy near relatives.” So he gave it to Hassān and Ubaiyy ibn Ka’b, . ...and they were nearer to him than my self. (Bukhari 55:10.)

It is mentioned that the Prophet, peace and blessings of Allāh be on him, ordered the debt to be paid before the execution of the will (Bukhari 55:9.)

Ibn ‘Abbās reported, The Prophet, peace and blessings of Allāh be on him, said: “Give the appointed portions to those entitled to them. Then whatever remains is for the nearest male.” (Bukhari 85:4.)

Zaid said, The children of a son take the place of a son, when there is no son besides them; their males are like their males and their females like their females; they inherit as they inherit and they preclude (other relatives) as they preclude; and the son of a son does not inherit with the son. (Bukhari 85:6.)

## Charity (*sadaqa, zakat*)

Abū Mūsā reported, The Prophet, peace and blessings of Allāh be on him, said: “Sadaqah is incumbent on every Muslim.” They (his companions) said, O Prophet of Allāh! And (what about him) who has not got (anything to give)? He said: “He should work with his hand and profit himself and give in charity.” They said, If he has nothing (in spite of this). He said: “He should help the distressed one who is in need.” They said, If he is unable to do this. He said: “He should do good deeds and refrain from doing evil--this is charity on his part “ (Bukhari 24:31.)

Abū Hurairah reported, The Prophet, peace and blessings of Allāh be on him, said: “Removal from the way of that which is harmful is charity.” (Bukhari 46:24.)

Abū Hurairah said, The Prophet, peace and blessings of Allāh be on him, said: “The man who exerts himself on behalf of the widow and the poor one is like the one who struggles in the way of Allāh, or the one who keeps awake in the night (for prayers) and fasts during the day.” (Bukhari 69:1.)

Abū Hurairah said on the authority of the Prophet, peace and blessings of Allāh be on him, (who said): “There is a man who gives a charity and he conceals it so much so that his left hand does not know what his right hand spends.” (Bukhari 24:11)

Ibn ‘Abbās reported, The Prophet, peace and blessings of Allāh be on him, sent Mu’ādh to Yaman and said: “Invite them to bear witness that there is no god but Allāh and that I am the Messenger of Allāh; if they accept this, tell them that Allāh has made obligatory on them five prayers in every day and night; if they accept this, tell them that Allāh has made obligatory in their wealth a charity which is taken from the wealthy among them and given to the poor among them.” (Bukhari 24:1)

Abū Sa’id said, The Prophet, peace and blessings of Allāh be on him, said: “There is no zakāt in what is less than five auqiyah (of silver), nor is there any zakāt in the case of less than five camels, nor is there any zakāt in what is less than five wasaq.” (Bukhari 24:4.)

## Women

Anas said, The Prophet, peace and blessings of Allāh be on him, saw women and children coming from a wedding, so the Prophet, peace and blessings of Allāh be on him, stood up erect and said: “O Allāh! You are the most loved of all people to me.” He said this three times.

Abū Hurairah reported, The Prophet, peace and blessings of Allāh be on him, said: “A woman is married on account of four things; on account of her wealth, and on account of (the nobility of) her family, and her beauty, and on account of her character, so attain success with the one possessing nobility of character.” (Bukhari 67: 16.)

Ibrāhīm said, The giving of a gift by a man to his wife and by the wife to her husband is lawful. And ‘Umar ibn ‘Abd al ‘Azīz said, They cannot take back (the gifts). (Bukhari 51:14.)

Zaid said, When a man or a woman leaves behind a daughter, she gets one-half; and if there are two (daughters) or more, they get two-thirds; and if there is a male with them, beginning is made with him who inherits with them and he is given his appointed portion. and what remains (is divided among the children), the male having the portion of two females. (Bukhari 85:4.)

## Orphans

Sahl bin Sa’d (May Allah be pleased with him) reported: Messenger of Allah (PBUH) said, “I will be like this in Jannah with the person who takes care of an orphan”. Messenger of Allah (PBUH) raised his forefinger and middle finger by way of illustration. (Bukhari).

## ANNEX 4.

# Select verses from the Holy Qur'an on land related issues

Translation by Yusuf Ali, The Holy Qur'an: translation and commentary 1694 (Beirut:Holy Qur'an Publishing House, 1934)

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## 1. Guidance from God, Land ownership by God

- 2:2 This is the Book; in it is guidance sure, without doubt, to those who fear Allah;  
Thalika alkitab larayba feehi hudan lilmuttaqeen

ذَٰلِكَ الْكِتَابُ لَا رَيْبَ فِيهِ هُدًى لِّلْمُتَّقِينَ ﴿٢﴾

- 2:5 They are on (true) guidance, from their Lord, and it is these who will prosper.  
Ola-ika AAala hudan minrabbihim waola-ika humu almuflihoona

أُولَٰئِكَ عَلَىٰ هُدًى مِّن رَّبِّهِمْ وَأُولَٰئِكَ هُمُ الْمُفْلِحُونَ ﴿٥﴾

- 2:108 Would ye question your Apostle as Moses was questioned of old? but whoever changeth from Faith to Unbelief, Hath strayed without doubt from the even way.  
Am tureedoona an tas-aloo rasoolakum kamasu-ila moosa min qablu waman yatabaddali alkufra bial-eemanifaqad dalla sawaa alssabeeli

أَمْ تُرِيدُونَ أَن تَسْأَلُوا رَسُولَكُمْ كَمَا سُئِلَ مُوسَىٰ مِن قَبْلُ وَمَن يَتَّبِعِ  
الْكُفْرَ بِالْإِيمَانِ فَقَدْ ضَلَّ سَوَاءَ السَّبِيلِ ﴿١٠٨﴾

- 3:190 Behold! in the creation of the heavens and the earth, and the alternation of night and day,- there are indeed Signs for men of understanding,-  
Inna fee khalqi alssamawatiwaal-ardi waikhtilafi allayli waalnnaharilaayatin li-olee al-albabi

إِنَّ فِي خَلْقِ السَّمَوَاتِ وَالْأَرْضِ وَأَخْتِلَافِ اللَّيْلِ وَالنَّهَارِ  
لَآيَاتٍ لِّأُولِي الْأَلْبَابِ ﴿١٩٠﴾

- 7:128 Said Moses to his people: "Pray for help from Allah, and (wait) in patience and constancy: for the earth is Allah's, to give as a heritage to such of His servants as He pleaseth; and the end is (best) for the righteous.  
Qala moosa liqawmihiistaAAeenoo biAllahi waisbiroo innaal-arda lillahi yoorithuha man yashaomin AAibadihi waalAAaqibatu lilmuttaqeen

قَالَ مُوسَىٰ لِقَوْمِهِ اسْتَعِينُوا بِاللَّهِ وَاصْبِرُوا إِنَّ الْأَرْضَ لِلَّهِ يُورِثُهَا مَنْ يَشَاءُ مِنْ عِبَادِهِ ۗ وَالْعَاقِبَةُ لِلْمُتَّقِينَ ﴿١٢٨﴾

5:105 O ye who believe! Guard your own souls: If ye follow (right) guidance, no hurt can come to you from those who stray. the goal of you all is to Allah. it is He that will show you the truth of all that ye do.  
 Ya ayyuha allatheena amanooAAalaykum anfusakum la yadurrukum man dallaitha ihtadaytum ila Allahi marjiAAukumjameeAAan fayunabbi-okum bima kuntum taAAamaloona

يَتَأْتِيهَا الَّذِينَ ءَامَنُوا عَلَيْكُمْ أَنفُسَكُمْ ۗ لَا يَضُرُّكُمْ مَن ضَلَّ إِذَا أَهْتَدَيْتُمْ ۗ إِلَى اللَّهِ مَرْجِعُكُمْ جَمِيعًا ۖ فَيُنَبِّئُكُم بِمَا كُنتُمْ تَعْمَلُونَ ﴿١٠٥﴾



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## 2. Property rights

**2:220** (Their bearings) on this life and the Hereafter. They ask thee concerning orphans. Say: "The best thing to do is what is for their good; if ye mix their affairs with yours, they are your brethren; but Allah knows the man who means mischief from the man who means good. And if Allah had wished, He could have put you into difficulties; He is indeed Exalted in Power, Wise."

Fee alddunya waal-akhiratiwayas-aloonaka AAani alyatama qul islahunlahum khayrun wa-in tukhalitoohum fa-ikhwanukumwaAllahu yaAAalamu almufsida mina almuslihiwalaw shaa Allahu laaAAanatakum inna AllahaAAazezun hakeemun

فِي الدُّنْيَا وَالْآخِرَةِ وَيَسْأَلُونَكَ عَنِ الْيَتَامَىٰ قُلْ إِصْلَاحٌ لَّهُمْ خَيْرٌ وَإِنْ تُخَالِطُوهُمْ فَإِخْوَانُكُمْ وَاللَّهُ يَعْلَمُ الْمُئْسِدَ مِنَ الْمُصْلِحِ وَلَوْ شَاءَ اللَّهُ لَأَعْنَتَكُمْ إِنَّ اللَّهَ عَزِيزٌ حَكِيمٌ ﴿٢٢٠﴾

**4:2** To orphans restore their property (When they reach their age), nor substitute (your) worthless things for (their) good ones; and devour not their substance (by mixing it up) with your won. For this is indeed a great sin.

Waatoo alyatama amwalahumwala tatabaddaloo alkhabeetha bialttayyibiwala ta/kuloo amwalahum ila amwalikuminnahu kana hooban kabeeran

وَعَاثُوا الْيَتَامَىٰ أَمْوَالَهُمْ وَلَا تَتَبَدَّلُوا الْخَبِيثَ بِالطَّيِّبِ وَلَا تَأْكُلُوا أَمْوَالَهُمْ إِلَىٰ أَمْوَالِكُمْ إِنَّهُ كَانَ حُوبًا كَبِيرًا ﴿٢﴾

**4:5** To those weak of understanding Make not over your property, which Allah hath made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice.

Wala tu/too alsufahaamwalakumu allatee jaAAala Allahu lakum qiyamanwaorzuqoohum feeha waoksoohum waqooloo lahumqawlan maAAroofan

وَلَا تُؤْتُوا السُّفَهَاءَ أَمْوَالَكُمُ الَّتِي جَعَلَ اللَّهُ لَكُمْ قِيَامًا وَارْزُقُوهُمْ فِيهَا وَاكْسُوهُمْ وَقُولُوا لَهُمْ قَوْلًا مَعْرُوفًا ﴿٥﴾

**4:6** Make trial of orphans until they reach the age of marriage; if then ye find sound judgment in them, release their property to them; but consume it not wastefully, nor in haste against their growing up. If the guardian is well-off, Let him claim no remuneration, but if he is poor, let him have for himself what is just and reasonable. When ye release their property to them, take witnesses in their presence: But all-sufficient is Allah in taking account.

Waibtaloo alyatama hattaitha balaghoo alnnikaha fa-in anastumminhum rushdan faidfaAAoo ilayhim amwalahum walata/kulooha israfan wabidaran an yakbaroowaman kana ghaniyyan falyastaAAfif waman kanafaqeeran falya/kul bialmaAAroofi fa-itha dafaAAatumilayhim amwalahum faashhidoo AAalayhim wakafa biAllahihaseeban

وَأَبْتَلُوا أَلْيَتَمَىٰ حَتَّىٰ إِذَا بَلَغُوا النِّكَاحَ فَإِنْ آنَسْتُمْ مِنْهُمْ رُشْدًا  
فَادْفَعُوا إِلَيْهِمْ أَمْوَالَهُمْ وَلَا تَأْكُلُوهَا إِسْرَافًا وَبِدَارًا أَن يَكْبَرُوا وَمَنْ  
كَانَ غَنِيًّا فَلْيَسْتَعْفِفْ وَمَنْ كَانَ فَقِيرًا فَلْيَأْكُلْ بِالْمَعْرُوفِ فَإِذَا  
دَفَعْتُمْ إِلَيْهِمْ أَمْوَالَهُمْ فَأَشْهَدُوا عَلَيْهِمْ وَكَفَىٰ بِاللَّهِ حَسِيبًا ﴿١﴾

- 4:29 O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you Traffic and trade by mutual good-will: Nor kill (or destroy) yourselves: for verily Allah hath been to you Most Merciful!  
Ya ayyuha allatheena amanoola ta/kuloo amwalakum baynakum bialbatiliilla an takoona tijaratan AAan taradinminkum wala taqtuloo anfusakum inna Allaha kanabikum raheeman

يَتَأْتِيهَا الَّذِينَ ءَامَنُوا لَا تَأْكُلُوا أَمْوَالَكُم بَيْنَكُم بِالْبَاطِلِ إِلَّا أَن  
تَكُونَ تِجَارَةً عَن تَرَاضٍ مِّنكُمْ وَلَا تَقْتُلُوا أَنفُسَكُمْ إِنَّ اللَّهَ كَانَ بِكُمْ  
رَحِيمًا ﴿٢٩﴾

- 24:27 O ye who believe! enter not houses other than your own, until ye have asked permission and saluted those in them: that is best for you, in order that ye may heed (what is seemly).  
Ya ayyuha allatheena amanoola tadkhuloo buyootan ghayra buyootikum hattatasta/nisoo watusallimoo AAala ahliha thalikumkhayrun lakum laAAallakum tathakkaroon

يَتَأْتِيهَا الَّذِينَ ءَامَنُوا لَا تَدْخُلُوا بُيُوتًا غَيْرَ بُيُوتِكُمْ  
حَتَّىٰ تَسْتَأْذِنُوا وَتُسَلِّمُوا عَلَىٰ أَهْلِهَا ذَٰلِكُمْ خَيْرٌ لَّكُمْ لَعَلَّكُمْ  
تَذَكَّرُونَ ﴿٢٧﴾

### 3. Child rights; orphans

- 2:188** And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people's property.  
 Walā ta/kuloo amwalakumbaynakum bialbatili watudloo biha ilaalhukkami lita/kuloo fareeqan min amwali alnnasibial-ithmi waantum taAAlamoona

وَلَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ وَتُدْلُوا بِهَآ إِلَى  
 الْحُكَمِ لِتَأْكُلُوا فَرِيقًا مِّنْ أَمْوَالِ النَّاسِ بِالْإِثْمِ وَأَنْتُمْ تَعْلَمُونَ



- 4:10** Those who unjustly eat up the property of orphans, eat up a Fire into their own bodies: They will soon be enduring a Blazing Fire!  
 Inna allatheena ya/kuloona amwalaalyatama thulman innamaya/kuloona fee buṭoonihim naran wasayaṣlawnasaaAeeran

إِنَّ الَّذِينَ يَأْكُلُونَ أَمْوَالَ الْيَتَامَىٰ ظُلْمًا إِنَّمَا يَأْكُلُونَ فِي بُطُونِهِمْ  
 نَارًا وَسَيَصْلُونَ سَعِيرًا

- 6:152** And come not nigh to the orphan's property, except to improve it, until he attain the age of full strength; give measure and weight with (full) justice;- no burden do We place on any soul, but that which it can bear;- whenever ye speak, speak justly, even if a near relative is concerned; and fulfil the covenant of Allah: thus doth He command you, that ye may remember.  
 Walā taqraboo mala alyateemiilla biallatee hiya ahsanu hattayablughā ashuddahu waawfoo alkayla waalmeezana bialqistila nukallifu nafsān illa wusAAaha wa-ithaqultum faiAAadiloo walaw kana tha qurbawabiAAahdi Allahi awfoo thalikum wassakumbihi laAAaallakum tathakkaroonā

وَلَا تَقْرَبُوا مَالَ الْيَتِيمِ إِلَّا بِالَّتِي هِيَ أَحْسَنُ حَتَّىٰ يَبْلُغَ أَشُدَّهُ<sup>ط</sup> وَأَوْفُوا  
 الْكَيْلَ وَالْمِيزَانَ بِالْقِسْطِ<sup>ط</sup> لَا نُكَلِّفُ نَفْسًا إِلَّا وُسْعَهَا وَإِذَا قُلْتُمْ فَاعْدُوا  
 وَلَوْ كَانَ ذَا قُرْبَىٰ<sup>ط</sup> وَبِعَهْدِ اللَّهِ أَوْفُوا ذَٰلِكُمْ وَصَدِّكُمْ بِهِ لَعَلَّكُمْ

تَذَكَّرُونَ

- 17:34 Come not nigh to the orphan's property except to improve it, until he attains the age of full strength; and fulfil (every) engagement, for (every) engagement will be enquired into (on the Day of Reckoning).  
 Wala taqraboo mala alyateemiilla bi allatee hiya ahsanu hattayablugha ashuddahu waawfoo bialAAahdi inna alAAahda kanamas-oolan

وَلَا تَقْرَبُوا مَالَ الْيَتِيمِ إِلَّا بِالَّتِي هِيَ أَحْسَنُ حَتَّىٰ يَبْلُغَ أَشُدَّهُ وَأَوْفُوا  
 بِالْعَهْدِ ۗ إِنَّ الْعَهْدَ كَانَ مَسْئُولًا ﴿٣٤﴾

## 4. Women's rights

2:240 Those of you who die and leave widows should bequeath for their widows a year's maintenance and residence; but if they leave (the residence), there is no blame on you for what they do with themselves, provided it is reasonable. And Allah is Exalted in Power, Wise.

Waallatheena yutawaffawnaminkum wayatharoon azwajan wasiyyatanli-azwajihim mataAAan ila alhawlighayra ikhrajin fa-in kharajna fala junahaAAalaykum fee ma faAAalna fee anfusihinna min maAAaroofinwaAllahu AAazeezun hakeemun

وَالَّذِينَ يَتُوفُّونَ مِنْكُمْ وَيَذَرُونَ أَزْوَاجًا وَصِيَّةً لِأَزْوَاجِهِمْ مَتَاعًا إِلَى  
الْحَوْلِ غَيْرِ إِخْرَاجٍ فَإِنْ خَرَجْنَ فَلَا جُنَاحَ عَلَيْكُمْ فِي مَا فَعَلْنَ  
فِي أَنْفُسِهِنَّ مِنْ مَّعْرُوفٍ وَاللَّهُ عَزِيزٌ حَكِيمٌ ﴿٢٤٠﴾

4:4 And give the women (on marriage) their dower as a free gift; but if they, of their own good pleasure, remit any part of it to you, Take it and enjoy it with right good cheer.

Waato alInnisaa saduqatihinnanihlatan fa-in tibna lakum AAan shay-in minhunafsan fakuloohu hanee-an maree-an

وَعَاتُوا النِّسَاءَ صَدُقَاتِهِنَّ نِحْلَةً فَإِنْ طِبْنَ لَكُمْ عَنْ شَيْءٍ مِنْهُ نَفْسًا فَكُلُوهُ  
هَنِيئًا مَرِيئًا ﴿٤﴾

4:19 O ye who believe! Ye are forbidden to inherit women against their will. Nor should ye treat them with harshness, that ye may Take away part of the dower ye have given them,-except where they have been guilty of open lewdness; on the contrary live with them on a footing of kindness and equity. If ye take a dislike to them it may be that ye dislike a thing, and Allah brings about through it a great deal of good.

Ya ayyuha allatheena amanoola yahillu lakum an tarithoo alInnisakarhan wala taAAaduloohunna litathhaboobibaAAadi ma ataytumoohunna illa anya/teena bifahishatin mubayyinat  
waAAashiroohunnabialmaAAarofi fa-in karihtumoohunna faAAasa antakrahoo shay-an wayajAAala Allahu feehi khayran katheeran

يَتَّيِّهَاتِ الَّذِينَ ءَامَنُوا لَا يَحِلُّ لَكُمْ أَنْ تَرِثُوا النِّسَاءَ  
كُرْهًا وَلَا تَعْضُلُوهُنَّ لِتَذْهَبُوا بِبَعْضِ مَا ءَاتَيْتُمُوهُنَّ إِلَّا أَنْ يَأْتِيَنَّ  
بِفَحِشَةٍ مُبَيِّنَةٍ وَعَاشِرُوهُنَّ بِالْمَعْرُوفِ فَإِنْ كَرِهْتُمُوهُنَّ فَعَسَى  
أَنْ تَكْرَهُنَّ وَأَنْ تَكْرَهُنَّ وَبِجَعَلِ اللَّهُ فِيهِ خَيْرًا كَثِيرًا

4:34 Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard in (the husband's) absence what Allah would have them guard. As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (Next), refuse to share their beds, (And last) beat them (lightly); but if they return to obedience, seek not against them Means (of annoyance): For Allah is Most High, great (above you all).

Alrijalu qawwamoonaAAala alnisa-i bima faddalaAllahu baAAadahum AAala baAAadin wabimaanfaqoo min amwalihim faalssalihatu qanitatunhafithatun lilghaybi bima hafithaAllahu waallatee takhafoonanushoozahunna faAAai o |hunna waohjuroohunnafee almadajiAAi waidriboohunna fa-in ataAAanakumfalā tabghoo AAalayhinna sabeelan inna Allaha kanaAAaliyyan kabeeran

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ  
وَبِمَا آذَقْتُمُوهُنَّ مِنْ أَمْوَالِهِمْ فَالصَّالِحَاتُ قَانِتَاتٌ حَافِظَاتٌ لِّلْغَيْبِ بِمَا  
حَفِظَ اللَّهُ وَاللَّتِي تَخَافُونَ نُشُوزَهُنَّ فَعِظُوهُنَّ وَأَهْجُرُوهُنَّ فِي  
الْمَضَاجِيعِ وَأَصْرِبُوهُنَّ فَإِنِ اطَّعْنَكُمْ فَلَا تَبْغُوا عَلَيْهِنَّ سَبِيلًا إِنَّ  
اللَّهَ كَانَ عَلِيمًا كَبِيرًا ﴿٣٤﴾

9:71 The Believers, men and women, are protectors one of another: they enjoin what is just, and forbid what is evil: they observe regular prayers, practise regular charity, and obey Allah and His Apostle. On them will Allah pour His mercy: for Allah is Exalted in power, Wise.

Waalmu/minoona waalmu/minatubaAAaduhumawliyaobaAAadinya/muroona bialmaAAroofiwayanhawna AAani almunkari wayuqeemoona alssalatawayu/toona alzzakata wayuteeAAaona Allahawarasoolahu ola-ika sayarhamuhumu Allahuinna Allaha AAazeezun hakeemun

وَالْمُؤْمِنُونَ وَالْمُؤْمِنَاتُ بَعْضُهُمْ أَوْلِيَاءُ بَعْضٍ يَأْمُرُونَ بِالْمَعْرُوفِ  
وَيَنْهَوْنَ عَنِ الْمُنْكَرِ وَيُقِيمُونَ الصَّلَاةَ وَيُؤْتُونَ الزَّكَاةَ وَيُطِيعُونَ اللَّهَ  
وَرَسُولَهُ أُولَئِكَ سَيَرْحَمُهُمُ اللَّهُ إِنَّ اللَّهَ عَزِيزٌ حَكِيمٌ ﴿٧١﴾

## 5. Minority rights, respect diversity

**2:256** Let there be no compulsion in religion: Truth stands out clear from Error: whoever rejects evil and believes in Allah hath grasped the most trustworthy hand-hold, that never breaks. And Allah heareth and knoweth all things.

La ikrahā fee alddeeniqaḍ tabayyana alrrushdu mina alghayyi faman yakfur biattaghootiwayu/min biAllāhi faqadi istamsaka biAAurwatalwuthqa la infisama laha waAllāhusameeAAun AAaleemun

لَا إِكْرَاهَ فِي الدِّينِ قَدْ تَبَيَّنَ الرُّشْدُ مِنَ الْغَيِّ فَمَنْ يَكْفُرْ بِالطَّاغُوتِ  
وَيُؤْمِنْ بِاللَّهِ فَقَدِ اسْتَمْسَكَ بِالْعُرْوَةِ الْوُثْقَىٰ لَا انْفِصَامَ لَهَا وَاللَّهُ سَمِيعٌ

عَلِيمٌ ﴿٢٥٦﴾

**4:1** O mankind! reverence your Guardian-Lord, who created you from a single person, created, of like nature, His mate, and from them twain scattered (like seeds) countless men and women;- reverence Allah, through whom ye demand your mutual (rights), and (reverence) the wombs (That bore you): for Allah ever watches over you.

Ya ayyuha alnnasuittaqoo rabbakumu allathee khalaqakum min nafsin wahidatinwakhalaqa minhā zawjahā wabaththa minhumarijalan katheeran wanisaan waittaqoo Allāhaallathee tasaloona bihi waal-arhamainna Allāha kana AAalaykum raqeeban

يَتَّيِّهَا النَّاسُ أَنْتُمْ أَلَّذِي خَلَقَكُمْ مِنْ نَفْسٍ  
وَاحِدَةٍ وَخَلَقَ مِنْهَا زَوْجَهَا وَبَثَّ مِنْهُمَا رِجَالًا كَثِيرًا وَنِسَاءً  
وَأَنْتُمْ أَلَّذِي تَسَاءَلُونَ بِهِ وَالْأَرْحَامَ إِنَّ اللَّهَ كَانَ عَلِيمٌ

رَقِيبًا ﴿١﴾

**5:48** To thee We sent the Scripture in truth, confirming the scripture that came before it, and guarding it in safety: so judge between them by what Allah hath revealed, and follow not their vain desires, diverging from the Truth that hath come to thee. To each among you have we prescribed a law and an open way. If Allah had so willed, He would have made you a single people, but (His plan is) to test you in what He hath given you: so strive as in a race in all virtues. The goal of you all is to Allah. it is He that will show you the truth of the matters in which ye dispute;

Wanzalna ilayka alkitaba bialhaqqimusaddiqan lima bayna yadayhi mina alkitabiwamuhayminan AAalayhi faohkum baynahum bimaanzala Allahu wala tattabiAA ahwaahum AAammajaaka mina alhaqqi likullin jaAAalna minkumshirAAatan waminhajan walaw shaa AllahulajaAAalakum ommatan wahidatan walakin liyabluwakumfeema atakum faistabiqoo alkhayratiila Allāhi marjiAAukum jameeAAan fayunabbi-okum bimakuntum feehi takhtalifoona

وَأَنْزَلْنَا إِلَيْكَ الْكِتَابَ بِالْحَقِّ مُصَدِّقًا لِمَا بَيْنَ يَدَيْهِ مِنَ الْكِتَابِ وَمُهَيِّمًا  
 عَلَيْهِ فَاحْكُم بَيْنَهُم بِمَا أَنْزَلَ اللَّهُ وَلَا تَتَّبِعْ أَهْوَاءَهُمْ عَمَّا جَاءَكَ  
 مِنَ الْحَقِّ لِكُلِّ جَعَلْنَا مِنْكُمْ شِرْعَةً وَمِنْهَاجًا وَلَوْ شَاءَ اللَّهُ لَجَعَلَكُمْ  
 أُمَّةً وَاحِدَةً وَلَكِنْ لِيَبْلُوَكُمْ فِي مَا آتَاكُمْ فَاسْتَبِقُوا الْخَيْرَاتِ  
 إِلَى اللَّهِ مَرْجِعُكُمْ جَمِيعًا فَيُنَبِّئُكُمْ بِمَا كُنْتُمْ فِيهِ تَخْتَلِفُونَ ﴿٤٨﴾

- 30:22** And among His Signs is the creation of the heavens and the earth, and the variations in your languages and your colours: verily in that are Signs for those who know.  
 Wamin ayatihi khalqu alssamawatiwaal-ardi waikhtilafu alsinatikumwaalwanikum inna fee thalika laayatinililAAalimeena

وَمِنْ آيَاتِهِ خَلْقُ السَّمَوَاتِ وَالْأَرْضِ وَأَخْتِلَافُ أَلْسِنَتِكُمْ وَأَلْوَانِكُمْ  
 إِنَّ فِي ذَلِكَ لَآيَاتٍ لِّلْعَالَمِينَ ﴿٢٢﴾

- 49:13** O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise (each other)). Verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you. And Allah has full knowledge and is well acquainted (with all things).  
 Ya ayyuha alnnasuinna khalaqnakum min thakarini waonthawajaAAalnakum shuAAooban waqaba-ila litaAAarafooina akramakum AAinda Allahi atqakum inna AllahaAAaleemun khabeerun

يَتَأَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِنْ ذَكَرٍ وَأُنْثَىٰ وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ  
 لِتَعَارَفُوا إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتَقْوَاهُ إِنَّ اللَّهَ عَلِيمٌ خَبِيرٌ ﴿١٣﴾

- 59:8** (Some part is due) to the indigent Muhajirs, those who were expelled from their homes and their property, while seeking Grace from Allah and (His) Good Pleasure, and aiding Allah and His Apostle: such are indeed the sincere ones:-  
 Lilfuqara-i almuhajireena allatheenaokhrijoo min diyarihim waamwalihim yabtaghoona fadlanmina Allahi waridwanan wayansuroonaAllaha warasoolahu ola-ika humu alssadiqoona

لِلْفُقَرَاءِ الْمُهَاجِرِينَ الَّذِينَ أُخْرِجُوا مِنْ دِيَارِهِمْ وَأَمْوَالِهِمْ يَبْتَغُونَ  
 فَضْلًا مِنَ اللَّهِ وَرِضْوَانًا وَيَنْصُرُونَ اللَّهَ وَرَسُولَهُ أُولَئِكَ هُمُ  
 الصَّادِقُونَ ﴿٨﴾

## 6. Inheritance, wills

- 2:180** It is prescribed, when death approaches any of you, if he leave any goods that he make a bequest to parents and next of kin, according to reasonable usage; this is due from the Allah-fearing. Kutiba AAalaykum itha hadaraahhadakumu almawtu in taraka khayran alwasiiyyatulilwalidayni waal-aqrabeena bialmaAAroofi haqqanAAala almuttaqeeana

كُتِبَ عَلَيْكُمْ إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ إِنْ تَرَكَ خَيْرًا الْوَصِيَّةُ لِلْوَالِدَيْنِ  
وَالْأَقْرَبِينَ بِالْمَعْرُوفِ ۗ حَقًّا عَلَى الْمُتَّقِينَ ﴿١٨٠﴾

- 4:7** From what is left by parents and those nearest related there is a share for men and a share for women, whether the property be small or large,-a determinate share. Lilrrijali naseebun mimmataraka alwalidani waal-aqraboona walilInnisa-inaseebun mimma taraka alwalidani waal-aqraboonamimma qalla minhu aw kathura naseeban mafroodan

لِلرِّجَالِ نَصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانِ وَالْأَقْرَبُونَ وَلِلنِّسَاءِ نَصِيبٌ مِّمَّا  
تَرَكَ الْوَالِدَانِ وَالْأَقْرَبُونَ مِمَّا قَلَّ مِنْهُ أَوْ كَثُرَ ۗ نَصِيبًا مَّفْرُوضًا ﴿٧﴾

- 4:8** But if at the time of division other relatives, or orphans or poor, are present, feed them out of the (property), and speak to them words of kindness and justice. Wa-itha hadara alqismataoloo alqurba waalyatama waalmasakeenufaorzuqoohum minhu waqooloo lahum qawlan maAAroofan

وَإِذَا حَضَرَ الْقِسْمَةَ أُولُو الْقُرْبَىٰ وَالْيَتَامَىٰ وَالْمَسْكِينُ فَأَرزُقُوهُمْ مِنْهُ  
وَقُولُوا لَهُمْ قَوْلًا مَعْرُوفًا ﴿٨﴾

- 4:9** Let those (disposing of an estate) have the same fear in their minds as they would have for their own if they had left a helpless family behind: Let them fear Allah, and speak words of appropriate (comfort). Walyakhsha allatheena law tarakoo minkhalfihim thurriyyatan diAAafan khafooAAalayhim falyattaqoo Allaha walyaqooloo qawlan sadeedan

وَلْيَخْشَ الَّذِينَ لَوْ تَرَكَوْا مِنْ خَلْفِهِمْ ذُرِّيَّةً ضِعَافًا  
خَافُوا عَلَيْهِمْ فَلْيَتَّقُوا اللَّهَ وَلْيَقُولُوا قَوْلًا سَدِيدًا ﴿٩﴾



﴿ وَلَكُمْ بِصَفِّ مَا تَرَكَ أَرْوَاجُكُمْ إِنْ لَمْ يَكُنْ لَهُنَّ وَلَدٌ  
فَإِنْ كَانَ لَهُنَّ وَلَدٌ فَلَكُمْ الرَّبْعُ مِمَّا تَرَكَنَّ مِنْ بَعْدِ وَصِيَّةٍ يُوصِينَ بِهَا  
أَوْ دَيْنٍ وَلَهُنَّ الرَّبْعُ مِمَّا تَرَكَتُمْ إِنْ لَمْ يَكُنْ لَكُمْ وَلَدٌ فَإِنْ كَانَ  
لَكُمْ وَلَدٌ فَلَهُنَّ الثُّمُنُ مِمَّا تَرَكَتُمْ مِنْ بَعْدِ وَصِيَّةٍ تُوصُونَ بِهَا أَوْ دَيْنٍ  
وَإِنْ كَانَ رَجُلٌ يُورَثُ كَلِيلَةً أَوْ أَمْرَأَةً وَلَهُ إِخٌ أَوْ أُخْتٌ فَلِكُلِّ  
وَاحِدٍ مِنْهُمَا السُّدُسُ فَإِنْ كَانُوا أَكْثَرَ مِنْ ذَلِكَ فَهُمْ شُرَكَاءُ فِي الثُّلُثِ

مِنْ بَعْدِ وَصِيَّةٍ يُوصَى بِهَا أَوْ دَيْنٍ غَيْرِ مُضَارٍ وَصِيَّةً مِنَ اللَّهِ

وَاللَّهُ عَلِيمٌ حَلِيمٌ ﴿١٧٦﴾

4:176 They ask thee for a legal decision. Say: Allah directs (thus) about those who leave no descendants or ascendants as heirs. If it is a man that dies, leaving a sister but no child, she shall have half the inheritance: If (such a deceased was) a woman, who left no child, Her brother takes her inheritance: If there are two sisters, they shall have two-thirds of the inheritance (between them): if there are brothers and sisters, (they share), the male having twice the share of the female. Thus doth Allah make clear to you (His law), lest ye err. And Allah hath knowledge of all things.

Yastaftoonaka quli Allahu yufteekumfee alkalalati ini imruon halaka laysa lahu waladun walahuokhtun falaha nisfu ma taraka wahuwayarithuha in lam yakun laha waladun fa-in kanataithnatayni falahuma alththuluthani mimmataraka wa-in kanoo ikhwatan rijalan wanisaanfaliththakari mithlu haththialonthayayni yubayyinu Allahu lakum an tadilloo waAllahubikulli shay-in AAaleemun

يَسْتَفْتُونَكَ قُلِ اللَّهُ يُفْتِيكُمْ فِي الْكَلِيلَةِ إِنْ أَمْرُؤٌ هَلَكَ لَيْسَ لَهُ وَلَدٌ  
وَلَهُ إِخْتٌ فَلَهَا نِصْفُ مَا تَرَكَ وَهُوَ يَرِثُهَا إِنْ لَمْ يَكُنْ لَهَا وَلَدٌ فَإِنْ كَانَتَا  
أُخْتَيْنِ فَلَهُمَا الثُّلُثَانِ مِمَّا تَرَكَ وَإِنْ كَانُوا إِخْوَةً رِجَالًا وَنِسَاءً فَلِلذَّكَرِ  
مِثْلُ حَظِّ الْأُنثِيَيْنِ يُبَيِّنُ اللَّهُ لَكُمْ أَنْ تَضِلُّوا وَاللَّهُ بِكُلِّ شَيْءٍ عَلِيمٌ ﴿١٧٦﴾

**5:106** O ye who believe! When death approaches any of you, (take) witnesses among yourselves when making bequests, - two just men of your own (brotherhood) or others from outside if ye are journeying through the earth, and the chance of death befalls you (thus). If ye doubt (their truth), detain them both after prayer, and let them both swear by Allah. "We wish not in this for any worldly gain, even though the (beneficiary) be our near relation: we shall hide not the evidence before Allah. if we do, then behold! the sin be upon us!"

Ya ayyuha allatheena amanooshahadatu baynikum itha hadara ahadakumulmawtu heena alwasiiyyati ithnani thawaAAadlin minkum aw akharani min ghayrikum in antum darabtumfee al-ardi faasabatkum museebatu almawti tahbisoonaHumamin baAAadi alssalati fayuqsimani biAllahiini irtabtum la nashtaree bihi thamanan walaw kana thaqurba walā naktumu shahadata Allahiinna ithan lamina al-athimeena

يَتَأْتِيهَا الَّذِينَ ءَامَنُوا شَهَادَةٌ بَيْنَكُمْ إِذَا حَضَرَ أَحَدَكُمْ  
 الْمَوْتُ حِينَ الْوَصِيَّةِ اثْنَانِ ذَوَا عَدْلٍ مِّنْكُمْ أَوْ آخَرَانِ مِّنْ غَيْرِكُمْ إِنْ  
 أَنْتُمْ ضَرَبْتُمْ فِي الْأَرْضِ فَأَصَبْتَكُمْ مُصِيبَةُ الْمَوْتِ تَحْبِسُونَهُمَا  
 مِنْ بَعْدِ الصَّلَاةِ فَيُقْسِمَانِ بِاللَّهِ إِنْ أَرْتَبْتُمْ لَا نَشْتَرِي بِهِ  
 ثَمَنًا وَلَوْ كَانَ ذَا قُرْبَىٰ وَلَا نَكْتُمُ شَهَادَةَ اللَّهِ إِنَّا إِذًا لَّمِنَ الْآثِمِينَ ﴿١٠٦﴾

## 7. Charity, Philanthropy

**2:177** It is not righteousness that ye turn your faces towards east or west; but it is righteousness to believe in Allah and the Last Day, and the Angels, and the Book, and the Messengers; to spend of your substance, out of love for Him, for your kin, for orphans, for the needy, for the wayfarer, for those who ask, and for the ransom of slaves; to be steadfast in prayer, and practice regular charity; to fulfil the contracts which ye have made; and to be firm and patient, in pain (or suffering) and adversity, and throughout all periods of panic. Such are the people of truth, the Allah-fearing.

Laysa albirraan tuwalloo wujoohakum qibalaalmashriqi waalmaghribi walakinna albirra man amanabiAllahi waalyawmi al-akhiri waalmala-ikatiwaalkitabi waalnnabiyyeena waatqalmala AAala hubbihi thawee alqurbawaalyatama waalmasakeena waibnaalssabeeli waalssa-ileena wafee alrriqabiwaaqama alssalata waataalzzakata waalmofoona biAAahdihim ithaAAahadoo waalssabireena fee alba/sa-iwaalddarra-i waheena alba/si ola-ikaallatheena sadaqoo waola-ika humualmuttaqoona

❖ لَيْسَ الْبِرَّ أَنْ تُوَلُّوا وُجُوهَكُمْ قِبَلَ الْمَشْرِقِ وَالْمَغْرِبِ  
 وَلَكِنَّ الْبِرَّ مَنْ ءَامَنَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَالْمَلَائِكَةِ وَالْكِتَابِ  
 وَالنَّبِيِّينَ وَءَاتَى الْمَالَ عَلَى حُبِّهِ ذَوِي الْقُرْبَىٰ وَالْيَتَامَىٰ وَالْمَسْكِينِ  
 وَابْنَ السَّبِيلِ وَالسَّائِلِينَ وَفِي الرِّقَابِ وَأَقَامَ الصَّلَاةَ وَءَاتَى الزَّكَاةَ  
 وَالْمُوفُونَ بِعَهْدِهِمْ إِذَا عَاهَدُوا وَالصَّابِرِينَ فِي الْبَأْسَاءِ وَالضَّرَّاءِ  
 وَحِينَ الْبَأْسِ أُولَئِكَ الَّذِينَ صَدَقُوا وَأُولَئِكَ هُمُ الْمُتَّقُونَ ﴿١٧٧﴾

- 2:215** They ask thee what they should spend (in charity). Say: Whatever ye spend that is good, is for parents and kindred and orphans and those in want and for wayfarers. And whatever ye do that is good, Allah knoweth it well.

Yas-aloonaka matha yunfiqoona qul maanfaqtum min khayrin falilwalidayni waal-aqrabeenawaalyatama waalmasakeeni waibnialssabeeli wama tafAAaloo min khayrin fa-inna Allahabihi AAaleemun

يَسْأَلُونَكَ مَاذَا يُنْفِقُونَ قُلْ مَا أَنْفَقْتُمْ  
 مِنْ خَيْرٍ فَلِلْوَالِدَيْنِ وَالْأَقْرَبِينَ وَالْيَتَامَىٰ وَالْمَسْكِينِ وَابْنِ السَّبِيلِ  
 وَمَا تَفَعَّلُوا مِنْ خَيْرٍ فَإِنَّ اللَّهَ بِهِ عَلِيمٌ ﴿٢١٥﴾

- 3:92** By no means shall ye attain righteousness unless ye give (freely) of that which ye love; and whatever ye give, of a truth Allah knoweth it well.

Lan tanaloo albirra hattatunfiqoo mimma tuhibboona wama tunfiqoo minshay-in fa-inna Allaha bihi AAaleemun

لَنْ تَنَالُوا الْبِرَّ حَتَّى تُنْفِقُوا مِمَّا تُحِبُّونَ وَمَا تُنْفِقُوا مِنْ شَيْءٍ  
 فَإِنَّ اللَّهَ بِهِ عَلِيمٌ ﴿٩٢﴾

- 9:18** The mosques of Allah shall be visited and maintained by such as believe in Allah and the Last Day, establish regular prayers, and practise regular charity, and fear none (at all) except Allah. It is they who are expected to be on true guidance.

Innama yaAAamuru masajida Allahiman amana biAllahi waalyawmi al-akhiriwaaqama alssalata waataalzzakata walam yakhsa illa AllahafaAAasa ola-ika an yakoonoo mina almuhtadeena

إِنَّمَا يَعْمُرُ مَسْجِدَ اللَّهِ مَن ءَامَنَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَأَقَامَ الصَّلَاةَ وَءَاتَى  
 الزَّكَاةَ وَلَمْ يَحْشَ إِلَّا اللَّهَ فَعَسَىٰ أُولَٰئِكَ أَن يَكُونُوا مِنَ الْمُهْتَدِينَ ﴿١٨﴾

- 9:60** Alms are for the poor and the needy, and those employed to administer the (funds); for those whose hearts have been (recently) reconciled (to Truth); for those in bondage and in debt; in the cause of Allah; and for the wayfarer: (thus is it) ordained by Allah, and Allah is full of knowledge and wisdom.  
 Innama alssadaqtulilfuqara-i waalmasakeeni waalAAamileenaAAalayha waalmu-allafati quloobuhum wafee alrriqabiwaalgharimeena wafee sabeeli Allahi waibniaalssabeeli fareedatan mina Allahi waAllahuAAaleemun hakeemun

﴿ إِنَّمَا الصَّدَقَتُ لِلْفُقَرَاءِ وَالْمَسْكِينِ وَالْعَمِلِينَ عَلَيْهَا وَالْمَوْلَاةِ  
 قُلُوبُهُمْ وَفِي الرِّقَابِ وَالْغُرَمِينَ وَفِي سَبِيلِ اللَّهِ وَأَبْنِ السَّبِيلِ فَرِيضَةً  
 مِّنَ اللَّهِ وَاللَّهُ عَلِيمٌ حَكِيمٌ ﴾ ﴿١٠﴾

- 30:39** That which ye lay out for increase through the property of (other) people, will have no increase with Allah: but that which ye lay out for charity, seeking the Countenance of Allah, (will increase): it is these who will get a recompense multiplied.  
 Wama ataytum min ribanliyarbuwa fee amwali alnnasi falayarboo AAinda Allahi wama ataytum min zakatintureedoona wajha Allahi faola-ika humu almudAAifoona

وَمَا ءَاتَيْتُم مِّن رَّبٍّ لَّيْرَبُوءَٰ فِي أَمْوَالِ النَّاسِ فَلَا يَرْبُوءَٰ عِنْدَ اللَّهِ  
 وَمَا ءَاتَيْتُم مِّن زَكَاةٍ تُرِيدُونَ وَجْهَ اللَّهِ فَأُولَٰئِكَ هُمُ الْمُضْعِفُونَ ﴿٣٩﴾

- 51:19** And in their wealth and possessions (was remembered) the right of the (needy,) him who asked, and him who (for some reason) was prevented (from asking).  
 Wafee amwalihim haqqun lilssa-iliwaalmahroomi

﴿ وَفِي أَمْوَالِهِمْ حَقٌّ لِّلسَّائِلِ وَالْمَحْرُومِ ﴾ ﴿١٩﴾

**73:20** Thy Lord doth know that thou standest forth (to prayer) nigh two-thirds of the night, or half the night, or a third of the night, and so doth a party of those with thee. But Allah doth appoint night and day in due measure He knoweth that ye are unable to keep count thereof. So He hath turned to you (in mercy): read ye, therefore, of the Qur'an as much as may be easy for you. He knoweth that there may be (some) among you in ill-health; others travelling through the land, seeking of Allah's bounty; yet others fighting in Allah's Cause, read ye, therefore, as much of the Qur'an as may be easy (for you); and establish regular Prayer and give regular Charity; and loan to Allah a Beautiful Loan. And whatever good ye send forth for your souls ye shall find it in Allah's Presence, - yea, better and greater, in Reward and seek ye the Grace of Allah: for Allah is Oft-Forgiving, Most Merciful.

Inna rabbaka yaAAalamu annaka taqoomu adnamin thuluthayi allayli waniṣfahu wathuluthahu wata-ifatunmina allatheena maAAaka waAllahu yuqaddiruallayla waalInnahara AAalima an lan tuhsoohufataba AAalaykum faiqraoo ma tayassara minalqur-ani AAalima an sayakoonu minkum marda waakharoonayadriboona fee al-ardi yabtaghoona min fadliAllahi waakharoona yuqatiloona fee sabeeliAllahi faiqraoo ma tayassara minhu waaqeemooalssalata waatoo alzzakatawaaqidoo Allaha qardan hasanan wamatuqaddimoo li-anfusikum min khayrin tajidoohu AAinda Allahihuwa khayran waaAAathama ajran waistaghfirooAllaha inna Allaha ghafoorun raheemun

﴿ إِنَّ رَبَّكَ يَعْلَمُ أَنَّكَ تَقُومُ أَدْنَىٰ مِنْ ثُلُثِي اللَّيْلِ وَنِصْفَهُ وَثُلُثَهُ وَطَائِفَةٌ مِّنَ الَّذِينَ مَعَكَ وَاللَّهُ يُقَدِّرُ اللَّيْلَ وَالنَّهَارَ عَلِمَ أَن لَّنْ نُحِصُوهُ فَتَابَ عَلَيْكُمْ فَاقْرَءُوا مَا تَيَسَّرَ مِنَ الْقُرْآنِ عَلِمَ أَن سَيَكُونُ مِنكُم مَّرْضَىٰ وَآخَرُونَ يَضْرِبُونَ فِي الْأَرْضِ يَبْتَغُونَ مِن فَضْلِ اللَّهِ وَآخَرُونَ يُقْتَتِلُونَ فِي سَبِيلِ اللَّهِ فَاَقْرَءُوا مَا تَيَسَّرَ مِنْهُ وَأَقِيمُوا الصَّلَاةَ وَآتُوا الزَّكَاةَ وَأَقْرِضُوا اللَّهَ قَرْضًا حَسَنًا وَمَا تُقَدِّمُوا لِأَنفُسِكُمْ مِن خَيْرٍ تَجِدُوهُ عِنْدَ اللَّهِ هُوَ خَيْرٌ وَأَعْظَمَ أَجْرًا وَاسْتَغْفِرُوا لِلَّهِ إِنَّ اللَّهَ غَفُورٌ رَّحِيمٌ ﴿٢٠﴾

## 8. Trade, Interest, Prohibition of Greed

- 2:245 Who is he that will loan to Allah a beautiful loan, which Allah will double unto his credit and multiply many times? It is Allah that giveth (you) want or plenty, and to Him shall be your return.  
 Man tha allathee yuqriduAllaha qardan hasanan fayudaAAifahulahu adAAafan katheeratan waAllahuyaqbidu wayabsutu wa-ilayhi turjaAAoona

مَنْ ذَا الَّذِي يُقْرِضُ اللَّهَ قَرْضًا حَسَنًا فَيُضْعِفُهُ لَهُ أَضْعَافًا كَثِيرَةً وَاللَّهُ  
 يَقْبِضُ وَيَبْضُ وَإِلَيْهِ تُرْجَعُونَ ﴿٢٤٥﴾

- 2:275 Those who devour usury will not stand except as stand one whom the Evil one by his touch Hath driven to madness. That is because they say: "Trade is like usury," but Allah hath permitted trade and forbidden usury. Those who after receiving direction from their Lord, desist, shall be pardoned for the past; their case is for Allah (to judge); but those who repeat (The offence) are companions of the Fire: They will abide therein (for ever).  
 Allatheena ya/kuloona alrribala yaqoomoona illa kama yaqoomu allatheeyatakhabbatuhu alshshaytanu mina almassi thalikabi-annahum qaloo innama albayAAu mithlu alrribawahaAllahu albayAAa waharrama alrribafaman jaahu mawAAithatun min rabbihi faintahafalahu ma salafa waamruhu ila Allahi wamanAAada faola-ika as-habu alnnarihum feeha khaldooona

الَّذِينَ يَأْكُلُونَ الرِّبَا لَا يَقُومُونَ إِلَّا كَمَا يَقُومُ الَّذِي يَتَخَبَّطُهُ الشَّيْطَانُ  
 مِنَ الْمَسِّ ذَلِكَ بِأَنَّهُمْ قَالُوا إِنَّمَا الْبَيْعُ مِثْلُ الرِّبَا وَأَحَلَّ اللَّهُ الْبَيْعَ  
 وَحَرَّمَ الرِّبَا فَمَنْ جَاءَهُ مَوْعِظَةٌ مِنْ رَبِّهِ فَانْتَهَى فَلَهُ مَا سَلَفَ وَأَمْرُهُ  
 إِلَى اللَّهِ وَمَنْ عَادَ فَأُولَئِكَ أَصْحَابُ النَّارِ هُمْ فِيهَا خَالِدُونَ ﴿٢٧٥﴾

- 2:280 If the debtor is in a difficulty, grant him time Till it is easy for him to repay. But if ye remit it by way of charity, that is best for you if ye only knew.  
 Wa-in kana thoo AAusratinfanathiratun ila maysaratin waan tasaddaqookhayrun lakum in kuntum taAalamoona

وَإِنْ كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَىٰ مَيْسَرَةٍ وَأَنْ تَصَدَّقُوا خَيْرٌ  
 لَّكُمْ إِنْ كُنْتُمْ تَعْلَمُونَ ﴿٢٨٠﴾

- 3:130 O ye who believe! Devour not usury, doubled and multiplied; but fear Allah; that ye may (really) prosper.  
 Ya ayyuha allatheena amanoola ta/kuloo alrriba adAAafanmudaAAafatan waittaqoo Allaha laAAallakumtuflihooona

يَأْتِيهَا الَّذِينَ ءَامَنُوا لَا تَأْكُلُوا أَمْوَالَهُمْ مَضْغَفَةً  
وَأَنْتُمْ قَائِلُونَ ﴿١٣٠﴾

- 89:15 Now, as for man, when his Lord trieth him, giving him honour and gifts, then saith he, (puffed up), "My Lord hath honoured me."  
Faamma al-insanu itha majbtalahu rabbuhu faakramahu wanaAAAAamahu fayaqoolu rabbeeakramani

فَأَمَّا الْإِنْسَانُ إِذَا مَا ابْتَلَاهُ رَبُّهُ فَأَكْرَمَهُ وَنَعَّمَهُ فَيَقُولُ رَبِّي أَكْرَمَنِ

﴿١٣١﴾

- 89:16 But when He trieth him, restricting his subsistence for him, then saith he (in despair), "My Lord hath humiliated me!"  
Waamma itha ma ibtalahufaquadara AAalayhi rizqahu fayaqoolu rabbee ahanani

وَأَمَّا إِذَا مَا ابْتَلَاهُ فَقَدَرَ عَلَيْهِ رِزْقَهُ فَيَقُولُ رَبِّي أَهْنَنِ ﴿١٣١﴾

- 89:17 Nay, nay! but ye honour not the orphans!  
Kalla bal la tukrimoonaalyateema

كَلَّا بَلْ لَا تُكْرِمُونَ الْيَتِيمَ ﴿١٣٢﴾

- 89:18 Nor do ye encourage one another to feed the poor!-  
Wala tahaddoona AAala taAAamialmiskeeni

وَلَا تَحْتَضُونَهُ عَلَىٰ طَعَامِ الْمَسْكِينِ ﴿١٣٢﴾

- 89:19 And ye devour inheritance - all with greed,  
Wata/kuloona altturatha aklanlamman

وَتَأْكُلُونَ التُّرَاثَ أَكْلًا لَّمًّا ﴿١٣٣﴾

- 89:20 And ye love wealth with inordinate love!  
Watuhibboona almala hubbanjamman

وَتُحِبُّونَ الْمَالَ حُبًّا جَمًّا ﴿١٣٤﴾

- 89:21 Nay! When the earth is pounded to powder,  
Kalla itha dukkati al-ardudakkan dakkan

كَلَّا إِذَا دُكَّتِ الْأَرْضُ دَكًّا دَكًّا ﴿١٣٥﴾

- 89:22 And thy Lord cometh, and His angels, rank upon rank,  
Wajaa rabbuka waalmalaku saffansaffan

وَجَاءَ رَبُّكَ وَالْمَلَكُ صَفًّا صَفًّا ﴿٢٢﴾

- 89:23 And Hell, that Day, is brought (face to face),- on that Day will man remember, but how will that remembrance profit him?  
Wajee-a yawma-ithin bijahannamayawma-ithin yatathakkaru al-insanu waannalahu alththikra

وَجَاءَتْ يَوْمَئِذٍ بِجَهَنَّمَ يَوْمَئِذٍ يَتَذَكَّرُ الْإِنْسَانُ وَأَنَّى لَهُ الذِّكْرَىٰ ﴿٢٣﴾

- 89:24 He will say: "Ah! Would that I had sent forth (good deeds) for (this) my (Future) Life!"  
Yaqoolu ya laytanee qaddamtu lihayatee

يَقُولُ يَلَيْتَنِي قَدَّمْتُ لِحَيَاتِي ﴿٢٤﴾

- 92:1 By the Night as it conceals (the light);  
Waallayli itha yaghsha

وَاللَّيْلِ إِذَا يَغْشَىٰ ﴿١﴾

- 92:10 We will indeed make smooth for him the path to Misery;  
Fasanuyassiruhu lilAAusra

فَسَنُيَسِّرُهُ لِلْعُسْرَىٰ ﴿١٠﴾

- 100:1 By the (Steeds) that run, with panting (breath),  
WaalAAadiyati dabhan

وَالْعَادِيَاتِ ضَبْحًا ﴿١﴾

- 102:1 The mutual rivalry for piling up (the good things of this world) diverts you (from the more serious things),  
Alhakumu alttakathuru

أَلْهَكُمُ التَّكَاثُرُ ﴿١﴾

- 104:1 Woe to every (kind of) scandal-monger and-backbiter,  
Waylun likulli humazatin lumazatin

وَيْلٌ لِّكُلِّ هُمَزَةٍ لُّمَزَةٍ ﴿١﴾

## 9. JUSTICE, TRUTH, RIGHTS, DISPUTE RESOLUTION

**2:10** In their hearts is a disease; and Allah has increased their disease: And grievous is the penalty they (incur), because they are false (to themselves).

Fee quloobihim maradun fazadahumuAllahu maradan walahum AAathabun aleemun bimakanoo yakthiboona

فِي قُلُوبِهِمْ مَّرَضٌ فَزَادَهُمُ اللَّهُ مَرَضًا وَلَهُمْ عَذَابٌ أَلِيمٌ بِمَا كَانُوا

يَكْذِبُونَ ﴿١٠﴾

**2:205** When he turns his back, his aim everywhere is to spread mischief through the earth and destroy crops and cattle; but Allah loveth not mischief.

Wa-itha tawalla saAAafee al-ardi liyuftsida feeha wayuhlika alharthawaalInnasla waAllahu la yuhibbualfasada

وَإِذَا تَوَلَّى سَعَى فِي الْأَرْضِ لِيُفْسِدَ فِيهَا وَيُهْلِكَ الْحَرْثَ وَالنَّسْلَ وَاللَّهُ لَا

يُحِبُّ الْفَسَادَ ﴿٢٠٥﴾

**4:35** If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation: For Allah hath full knowledge, and is acquainted with all things.

Wa-in khiftum shiqqa baynihimafaibAAathoo hakaman min ahlihi wahakaman minahliha in yureeda islahan yuwaffiqiAllahu baynahuma inna Allaha kanaAAaleeman khabeeran

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِّنْ أَهْلِهِ

وَحَكَمًا مِّنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنْ

اللَّهُ كَانَ عَلِيمًا خَبِيرًا ﴿٣٥﴾

**4:58** Allah doth command you to render back your Trusts to those to whom they are due; And when ye judge between man and man, that ye judge with justice: Verily how excellent is the teaching which He giveth you! For Allah is He Who heareth and seeth all things.

Inna Allaha ya/murukum an tu-addoal-amanati ila ahliha wa-itha hakamtumbayna alInnasi an tahkumoo bialAAadliinna Allaha niAAaimma yaAAithukum bihiinna Allaha kana sameeAAan baseeran

﴿ إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ  
النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ ۗ إِنَّ اللَّهَ كَانَ سَمِيعًا

بَصِيرًا ﴿٥٨﴾

4:135 O ye who believe! stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for Allah can best protect both. Follow not the lusts (of your hearts), lest ye swerve, and if ye distort (justice) or decline to do justice, verily Allah is well-acquainted with all that ye do.

Ya ayyuha allatheena amanookoonoo qawwameena bialqisti shuhadaalillah walaw AAala anfusikum awi alwalidayniwaal-aqrabeena in yakun ghaniyyan aw faqeeran faAllahuawla bihima fala tattabiAAoo alhawaan taAADiloo wa-in talwoo aw tuAAaridoo fa-inna Allahakana bima taAAamaloona khabeeran

﴿ يَتَأْتِيهَا الَّذِينَ ءَامَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ شُهَدَاءَ لِلَّهِ وَلَوْ عَلَىٰ  
أَنْفُسِكُمْ أَوِ الْوَالِدِينَ وَالْأَقْرَبِينَ ۚ إِن يَكُنْ غَنِيًّا أَوْ فَقِيرًا فَاللَّهُ أَوْلَىٰ بِهِمَا  
فَلَا تَتَّبِعُوا الْهَوَىٰ أَنْ تَعْدِلُوا وَإِن تَلَوْتُمْ أَوْ نَعَرَضُوا فَلِإِنَّ اللَّهَ كَانَ بِمَا

تَعْمَلُونَ خَبِيرًا ﴿١٣٥﴾

5:42 (They are fond of) listening to falsehood, of devouring anything forbidden. If they do come to thee, either judge between them, or decline to interfere. If thou decline, they cannot hurt thee in the least. If thou judge, judge in equity between them. For Allah loveth those who judge in equity.

SammaAAoona lil kathibi akkaloona lissuhti fa-in jaooka faohkumbaynahum aw aArid AAanhum wa-in tuArid AAanhumfalan ya durrooka shay-an wa-in hakamta faohkumbaynahum bialqisti inna Allaha yuhibbualmuqsiteena

﴿ سَمِعُونَ لِلْكَذِبِ أَكْثَرُونَ لِلسَّحْتِ ۚ فَإِن جَاءُوكَ فَاحْكُم بَيْنَهُمْ أَوْ أَعْرِضْ  
عَنْهُمْ ۖ وَإِن تُعْرِضْ عَنْهُمْ فَلَن يَضُرُّوكَ شَيْئًا ۖ وَإِن حَكَمْتَ فَاحْكُم  
بَيْنَهُم بِالْقِسْطِ ۚ إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ ﴿٤٢﴾

- 5:43 But why do they come to thee for decision, when they have (their own) law before them?- therein is the (plain) command of Allah. yet even after that, they would turn away. For they are not (really) People of Faith.

Wakayfa yuhakkimoonaka waAAindahumu alttawratufeeha hukmu Allahi thumma yatawallawna minbaAAadi thalika wama ola-ika bialmu/mineena

وَكَيْفَ يُحْكِمُونَكَ وَعِنْدَهُمُ التَّورَةُ فِيهَا حُكْمُ اللَّهِ ثُمَّ  
يَتَوَلَّوْنَ مِنْ بَعْدِ ذَلِكَ وَمَا أُولَئِكَ بِالْمُؤْمِنِينَ ﴿٤٣﴾

- 5:47 Let the people of the Gospel judge by what Allah hath revealed therein. If any do fail to judge by (the light of) what Allah hath revealed, they are (no better than) those who rebel.

Walyahukum ahlu al-injeeli bimaanzala Allahu feehi waman lam yahkum bimaanzala Allahu faola-ika humu alfasiqoona

وَلْيَحْكُمْ أَهْلُ الْإِنجِيلِ بِمَا أَنْزَلَ اللَّهُ فِيهِ وَمَنْ لَمْ يَحْكَمْ بِمَا  
أَنْزَلَ اللَّهُ فَأُولَئِكَ هُمُ الْفَاسِقُونَ ﴿٤٧﴾

- 5:107 But if it gets known that these two were guilty of the sin (of perjury), let two others stand forth in their places,- nearest in kin from among those who claim a lawful right: let them swear by Allah. "We affirm that our witness is truer than that of those two, and that we have not trespassed (beyond the truth): if we did, behold! the wrong be upon us!"

Fa-in AAuthira AAala annahumaistahaqqa ithman faakharani yaqoomanimaqamahuma mina allatheena istahaqqaAAalayhimu al-awlayani fayuqsimani biAllahilashahadatuna ahaqqu min shahadatihimawama iAAtadayna inna ithan lamina alththalimeena

فَإِنْ عُرِّرَ عَلَىٰ أَنَّهُمَا اسْتَحَقَّا إِثْمًا فَآخَرَانِ يَقُومَانِ مَقَامَهُمَا مِنَ الَّذِينَ  
اسْتَحَقَّ عَلَيْهِمُ الْأَوْلَئِينَ فَيُقْسِمَانِ بِاللَّهِ لَشَهِدْتُنَا أَحَقُّ مِنْ شَهِدَتِيهِمَا  
وَمَا أَعْتَدْتُنَا إِذَا لَمِنَ الظَّالِمِينَ ﴿١٠٧﴾

- 5:108 That is most suitable: that they may give the evidence in its true nature and shape, or else they would fear that other oaths would be taken after their oaths. But fear Allah, and listen (to His counsel): for Allah guideth not a rebellious people:

Thalika adna an ya/too bialshshahadatiAAala wajhiha aw yakhafoo an turadda aymannunbaAAda aymanihim waittaqoo Allaha waismaAAoowaAllahu la yahdee alqawma alfasiqeena

ذَٰلِكَ أَدْنَىٰٓ أَن يَأْتُوا بِالشَّهَادَةِ عَلَىٰ وَجْهِهَا أَوْ يَخَافُوا أَن تُرَدَّ أَيْمَانُهُمْ  
بَعْدَ أَيْمَانِهِمْ ۗ وَاتَّقُوا اللَّهَ ۗ وَاللَّهُ لَا يَهْدِي الْقَوْمَ الْفَاسِقِينَ



- 16:71** Allah has bestowed His gifts of sustenance more freely on some of you than on others: those more favoured are not going to throw back their gifts to those whom their right hands possess, so as to be equal in that respect. Will they then deny the favours of Allah?  
WaAllahu faddala baAAadukumAAala baAAadin fee alrrizqi fama allatheenafuddiloo biraddee rizqihim AAala mamalakat aymānūhum fahum feehi sawaon afabiniAAamatiAllahi yajhadooona

وَاللَّهُ فَضَّلَ بَعْضَكُمْ عَلَىٰ بَعْضٍ فِي الرِّزْقِ ۖ فَمَا الَّذِينَ فُضِّلُوا بِرَأْدِي  
رِزْقِهِمْ عَلَىٰ مَا مَلَكَتْ أَيْمَانُهُمْ فَهُمْ فِيهِ سَوَاءٌ ۗ أَفَبِنِعْمَةِ اللَّهِ يَجْحَدُونَ



- 16:90** Allah commands justice, the doing of good, and liberality to kith and kin, and He forbids all shameful deeds, and injustice and rebellion: He instructs you, that ye may receive admonition.  
Inna Allaha ya/muru bialAAadliwaal-ihsani wa-eeta-i theealqurba wayanha AAani alfahsha-i waalmunkariwaalbaghyi yaAAait hukum laAAallakum tathakkaroono

﴿ إِنَّ اللَّهَ يَأْمُرُ بِالْعَدْلِ وَالْإِحْسَانِ وَإِيتَايَ ذِي الْقُرْبَىٰ  
وَيَنْهَىٰ عَنِ الْفَحْشَاءِ وَالْمُنْكَرِ وَالْبَغْيِ ۗ يَعِظُكُمْ لَعَلَّكُمْ تَذَكَّرُونَ ﴾

- 22:78** And strive in His cause as ye ought to strive, (with sincerity and under discipline). He has chosen you, and has imposed no difficulties on you in religion; it is the cult of your father Abraham. It is He Who has named you Muslims, both before and in this (Revelation); that the Apostle may be a witness for you, and ye be witnesses for mankind! So establish regular Prayer, give regular Charity, and hold fast to Allah! He is your Protector - the Best to protect and the Best to help!  
Wajahidoo fee Allahi haqqajihadihi huwa ijtabakum wama jaAAalaAAalaykum fee alddeeni min harajin millata abeekumibraheema huwa sammakumu almuslimeena min qabluwafee hatha liyakoono alrrasoolu shaheedanAAalaykum watakoono shuhadaa AAala alInnasifaaqeemoo alssalata waatoo alzzakatawaiAatašimoo biAllahi huwa mawlakumfaniAama almawla waniAama alInnaşeeru

وَجَاهِدُوا فِي اللَّهِ حَقَّ جِهَادِهِ هُوَ اجْتَبَاكُمْ وَمَا جَعَلَ عَلَيْكُمْ فِي الدِّينِ  
 مِنْ حَرَجٍ مِّلَّةَ أَبِيكُمْ إِبْرَاهِيمَ هُوَ سَمَّاكُمُ الْمُسْلِمِينَ مِنْ قَبْلُ وَفِي هَذَا  
 لِيَكُونَ الرَّسُولُ شَهِيدًا عَلَيْكُمْ وَتَكُونُوا شُهَدَاءَ عَلَى النَّاسِ فَأَقِيمُوا  
 الصَّلَاةَ وَآتُوا الزَّكَاةَ وَاعْتَصِمُوا بِاللَّهِ هُوَ مَوْلَاكُمْ فَنِعْمَ الْمَوْلَى وَنِعْمَ

التَّصِيرُ ﴿٧٨﴾

38:24 (David) said: "He has undoubtedly wronged thee in demanding thy (single) ewe to be added to his (flock of) ewes: truly many are the partners (in business) who wrong each other: Not so do those who believe and work deeds of righteousness, and how few are they?"...and David gathered that We had tried him: he asked forgiveness of his Lord, fell down, bowing (in prostration), and turned (to Allah in repentance).

Qala laqad thalamakabisu-ali naAAajatika ila niAAajihi wa-innakatheeran mina alkhulata-i layabghee baAAaduhum AAalabaAAadin illa allatheena amanoowaAAamiloo alssalihati waqaleelun mahum wathanna dawoodu annama fatannahufaistaghfara rabbahu wakharra rakiAAan waanaba

قَالَ لَقَدْ ظَلَمَكَ بِسُؤَالِ نَعَجَتِكَ إِلَىٰ نِعَاجِهِ ۗ وَإِنَّ كَثِيرًا  
 مِّنَ الْخُلَطَاءِ لَيَبْغِي بَعْضُهُمْ عَلَىٰ بَعْضٍ إِلَّا الَّذِينَ آمَنُوا  
 وَعَمِلُوا الصَّالِحَاتِ وَقَلِيلٌ مَّا هُمْ ۗ وَظَنَّ دَاوُدُ أَنَّمَا فَتَنَّاهُ فَاسْتَغْفَرَ

رَبَّهُ ۗ وَخَرَّ رَاكِعًا وَأَنَابَ ﴿٢٤﴾

## THE GLOBAL LAND TOOL NETWORK

The main objective of the Global Land Tool Network (GLTN) is to contribute to poverty alleviation and the Millennium Development Goals through land reform, improved land management and security of tenure.

The Network has developed a global land partnership. Its members include international civil society organizations, international finance institutions, international research and training institutions, donors and professional bodies. It aims to take a more holistic approach to land issues and improve global land coordination in various ways. These include the establishment of a continuum of land rights, rather than a narrow focus on individual land titling, the improvement and development of pro-poor land management, as well as land tenure tools. The new approach also entails unblocking existing initiatives, helping strengthen existing land networks, assisting in the development of affordable gendered land tools useful to poverty-stricken communities, and spreading knowledge on how to implement security of tenure.

The GLTN partners, in their quest to attain the goals of poverty alleviation, better land management and security of tenure through land reform, have identified and agreed on 18 key land tools to deal with poverty and land issues at the country level across all regions. The Network partners argue that the existing lack of these tools, as well as land governance problems, are the main cause of failed implementation at scale of land policies world wide.

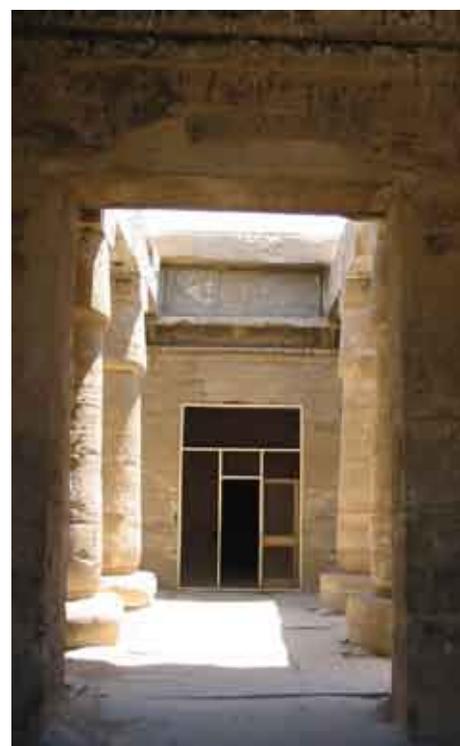
The GLTN is a demand driven network where many individuals and groups have come together to address this global problem. For further information, and registration, visit the GLTN web site at [www.glttn.net](http://www.glttn.net).

## About this training course

This training course from the Global Land Tool Network is part of the Network's activities on Islamic dimensions of land. In most Muslim countries Islamic law, principles and practices make an important contribution to shaping access to land. GLTN therefore has as one of its objectives the identification and development of Islamic land tools and case studies through a cross-cultural, interdisciplinary and global process, owned by Muslims, but also including other civil society and development partners. More information on work in this area is available on GLTN's website ([www.glttn.net](http://www.glttn.net))

The training course, designed as an introduction to the field, is divided into eight stand-alone Modules, intended for use across Muslim societies. It is generic in nature, encouraging local adaptations where applicable. In addition to the Modules, the package includes a Guide for Facilitators and a set of annexes to draw from during the training course.

The target groups for the course are policy makers or an audience at beginners or undergraduate level without prerequisite knowledge of Islamic land law but having basic experience with land issues in the Muslim world. The course builds on the baseline study by Sait S and Lim H (2006) *Land Law and Islam: Property and Human Rights in the Muslim World* (London: Zed Press/UN-HABITAT).



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GLTN contributes to the implementation of pro-poor land and policies to achieve secure land rights for all  
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