



# LAND PROPERTY AND HOUSING RIGHTS IN THE MUSLIM WORLD

<h2>BRIEFING PAPERS</h2>
--------------------------

UN-HABITAT 2008



Copyright (C) United Nations Human Settlements Programme (UN-HABITAT), 2008

**All Rights reserved**

United Nations Human Settlements Programme (UN-HABITAT)  
P.O. Box 30030, Nairobi, Kenya  
Tel: +254 20 621 234  
Fax: +254 20 624 266  
Web: [www.unhabitat.org](http://www.unhabitat.org)

**Disclaimer**

The designations employed and the presentation of the material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area, or of its authorities, or concerning delimitation of its frontiers or boundaries, or regarding its economic system or degree of development. The analysis, conclusions and recommendations of this publication do not necessarily reflect the views of the United Nations Human Settlements Programme, the Governing Council of the United Nations Human Settlements Programme, or its Member States.

**Further Information:**

These Briefing Papers are part of the Global Land Tool Network's (GLTN) ongoing work on the Islamic Land Tool Initiative (ILTI). It was commissioned by the Land Tenure and Property Administration Section, Shelter Branch, UN-HABITAT and was devised and written by Hilary Lim and Siraj Sait of the University of East London, United Kingdom. It arises out of an earlier piece of research for UN-HABITAT which is reproduced in Sait S and Lim H, *Land Law and Islam: Property and Human Rights in the Muslim World* (London: Zed Press/UN-HABITAT, 2006). For further information regarding the UN-HABITAT research and activities in this field contact

Clarissa Augustinus, Chief  
Land Tenure and Property Administration Section,  
Shelter Branch,  
United Nations Human Settlements Programme (UN-HABITAT)  
P.O. Box 30030  
Nairobi 00100, Kenya  
E-mail: [clarissa.augustinus@unhabitat.org](mailto:clarissa.augustinus@unhabitat.org)  
Web site: [www.unhabitat.org](http://www.unhabitat.org)

## CONTENTS

Briefing Paper No 1 .....	4
ISLAMIC FRAMEWORK FOR LAND.....	5
Briefing Paper No. 2.....	11
ISLAMIC LAW AND LAND .....	12
Briefing Paper No. 3.....	18
ISLAMIC HUMAN RIGHTS AND LAND .....	18
Briefing Paper No. 4 .....	24
ISLAMIC LAND TENURES .....	24
Briefing Paper No. 5.....	29
INHERITANCE OF LAND IN THE MUSLIM WORLD.....	29
Briefing Paper No. 6 .....	33
MUSLIM WOMEN'S RIGHTS IN LAND.....	33
Briefing Paper No.7.....	38
THE WAQF (ENDOWMENT).....	38
Briefing Paper No.8 .....	44
ISLAMIC MICROFINANCE.....	44



## INTRODUCTION

During its work in a range of Muslim countries from Afghanistan to Indonesia, UN-HABITAT has been increasingly aware of the importance of Islamic land tenure conceptions and land rights. Over 20 percent of the world's population is Muslim but there has been little research on the complex and distinctive forms of land tenure and land rights. The Land Tenure and Property Administration Section of UN-HABITAT therefore commissioned a year long in depth study of the Islamic and other dimensions of land and property rights in the Muslim world which is reproduced in Sait S and Lim H (2006) *Land Law and Islam: Property and Human Rights in the Muslim World* (London: Zed Press/UN-HABITAT). This series of briefing papers is intended to provide policy makers and others working on land issues in Muslim contexts an easy reference to Islamic dimensions through a question and answer format. This output is part of the Global Land Tool Network (GLTN) Islamic Land Tools Initiative which explores different land rights conceptions and practice as well as tenure forms towards development of authentic and innovative strategies for enhancing access to land rights.

The eight papers cover some of the main themes relating to land issues in Muslim countries, despite the diversity of the experiences in these countries. Briefing Paper 1 on *Islamic Framework for Land* introduces Islamic property and land concepts as part of a sophisticated and alternate land framework running alongside international regimes. Briefing Paper 2 on *Islamic Law and Land* explains why and how Islamic law (*Shari'a*) could be an important factor influencing land rights and tenure systems in Muslim societies. Briefing Paper 3 *Islamic Human Rights and Land* examines the relationship between international human rights and Islamic conceptions of human rights in theory and practice with respect to land, property and housing. Briefing Paper 4 on *Islamic Land Tenure and Reforms* explores distinctive land tenure concepts, categorisations and arrangements within the Islamic world.

Briefing Paper 5 *Inheritance of Land in the Muslim World* outlines the application of formal Islamic inheritance rules as well as the wider inheritance systems of practice. Briefing Paper 6 on *Muslim Women's Rights in Land* explores the nature and scope of women's rights to property and land under Islamic law (*Shari'a*) which can enhance their women's access to land and enforcement of their other property rights. Briefing Paper 7 *Islamic Endowments (Waqf)* considers why endowment (*waqf*) remains influential in strategies to improve security of tenure. Briefing Paper 8 *Islamic Microfinance* notes the key distinguishing features of the Islamic banking models, the development of Islamic microfinance models.

The UN-HABITAT research on Islamic land, as a baseline study, has been part of GLTN partner consultations and has been recognized through the Cairo Initiative on Islamic Land Tools (2005) and the East London Guiding Principles on Islamic Land Tools (2007). Through these papers, UN-HABITAT endeavours to contribute to efforts to demystify the theory and practice of Islamic land law, policies and practices in the Muslim world.



## Briefing Paper No 1

# ISLAMIC FRAMEWORK FOR LAND

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.\*

### 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 GLTN interested in Islamic conceptions of land?

Security of tenure implies that the right of access to and use of land and property is underwritten by a known set of rules, and that this right will be legally protected. The tenure can be realised in a variety of ways, depending on constitutional and legal frameworks, social norms, cultural values and, to some extent, individual preference. GLTN is interested in Islamic conceptions of land because understanding the nature and scope of property rights in Islamic society 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 system recognize land and property rights?

The Islamic system promotes private property rights but assumes 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.

Given the variety and diversity of land systems in the Muslim world, no generalizations can be made about land management and administration. While a religious input can be found in many Muslim countries, the Islamic discourse is not always dominant, nor does it necessarily shape the land administration challenges in



individual states. Those challenges are often similar to those faced in non-Muslim countries, but an awareness of the customary, Islamic and informal sources can help to develop more effective tools and strategies.

### **3. 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.

### **4. 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 cannot be owned. Thus, Islamic principles have potentially important implications for access to land and secure tenure.

### **5. Can Islamic approaches and arguments facilitate access to land for people who are excluded?**

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.

### **6. 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 (*Hadd*) (*Qur'an* 5:41.).

### **7. 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.

#### **8. 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.

#### **9. 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, but 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.

#### **10. Do Muslim countries suffer from poor land governance?**

It is difficult to generalise 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.

#### **11. Is Islam a barrier to good land governance in Muslim countries?**

There is no 'Muslim' or 'Arab' model of 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.

#### **12. 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.

### 13. 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.

#### Box 1

**Ottoman Legacy over Land: A Palestinian Case Study** See attached notes for explanation

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 of property to confiscate these.

The Israeli land title registration office is still referred to as 'Tabu' office and title registration certificates as 'Tabu' papers, a term Ottoman 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'. \*\*

14. 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*).

### **15. 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 (*baytul-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.

### **16. 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 *maslahah* into three categories each of which must be protected: the *daruriyyat* (essentials), the *hajiyyat* (complements), and the *tahsiniyyat* (embellishment).

The *daruriyyat* consist of five essential interests: 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 are 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).

### **17. 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. 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.

### **18. 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 have 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.

### BOX 2

#### 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.\*\*\*

### 19. 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 (*ni'mah*) 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-harim*), 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 (*awqaf*) may be established with specific environmental or conservation purposes.

### 20. 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 (*wudu*) 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 (*shafa*) 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.

\* 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)

\*\*Bunton, M. (2000) 'Demarcating the British Colonial State: Land Settlement in the Palestinian *Jiftlik* villages of Sajad and Qazaza, in R. Owen (ed.) *New Perspectives on Property and Middle East*, Cambridge M.A: Harvard University Press

\*\*\*Khubaisy, F (Government of Bahrain), 'How can Islamic property doctrines, such as the *waqf*, support pro-poor land empowerment and financing?', Speaker at UN-HABITAT, Expert Group Meeting on the Cross-Fertilisation of Universal and Islamic Land Approaches, 17 and 18 May 2007, University of East London, London, UK.

# 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'.\*

## 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.

## 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. 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*.

## 8. 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.

## 9. 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.

## 10. 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 weed out spurious gender deprecating customary norms projected as Islamic truisms, with reference to the gender empowering *Qur'anic* stipulations.

## 11. Are there other sources of Islamic law?

Reasoning by analogy (*qiyas*) and consensus (*ijma*) 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*.

## 12. 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*).

**13. 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 (*fard kifaya*) of every competent individual.

**14. 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.

**15. Do Islamic legal systems differ across the Muslim world?**

There are two major sects of Islam, *Sunni* and *Shi'a*, which means that pluralism is inherent in Islam and Islamic law. 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.

**Box 1**

**Prevalence of the *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.\*\*

**16. 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.

**17. 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.

#### BOX 2

##### **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. \*\*\*

#### **18. Does Islamic law apply to non-Muslims in Muslim countries?**

Islam law within Muslim countries is 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 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 such is also controversial. In India there have been calls for the abolition of the Islamic personal status laws which are presently applicable to Muslims.

#### **19. 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.

#### **20. 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.

### **21. 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.

### **22. 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.

### **23. 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.

### **24. 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 lay person, 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.

## **25. 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 (*solh*), 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.

## **26. 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.

## **27. 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 agency of *hisba*, created to promote both a just society and an efficient market economy. This agency from the earliest times 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.

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

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

\*\*\*Charrad, M (2001) *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria and Morocco*, (Berkeley: University of California Press).



## Briefing Paper No. 3

# 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\****

## 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 (UDHR). 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.

### **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. For instance, article 17 of the UDHR enshrines the right to own property alone as well as in association with others and article 11 of the 1966 International Covenant on Economic, Social and Cultural Rights, provides key support for secure tenure and access to land.

### **6. 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 which are relevant.

#### **BOX 1**

#### **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 (MENA) 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 body 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”. \*\*

### **7. 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).

## **8. 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. This goes far beyond the filing of reports, extending to ‘constructive dialogue’. The participation of Muslim States, who are members of the treaty, has produced a rich record of their progress in implementing human rights norms with respect to land.

## **9. Have Muslim Countries signed up to International Human Rights?**

A number of Muslim countries (member States of the 57 member Organisation 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.

## **10. Do reservations to human rights treaties affect the obligations of Muslim States?**

Yes, a number of Muslim countries ratifying international human rights treaties have also entered into 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 universalist 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.

## **11. 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. There is considered to be little conflict between Islamic and International human rights regimes 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.

## **12. Is there a human rights enforcement mechanism particularly for Muslims?**

No, there is no global Muslim human rights treaty mechanism. The 1981 Universal Islamic Declaration of Human Rights (UIDHR), adopted by the Islamic Council of Europe, bears a resemblance to the UDHR, but identifies property and other rights through Islamic religious sources. The 1990 Cairo Declaration on Human Rights in Islam adopted by the Organisation of Islamic Conference, proclaims the right to property in article 15, a right to a decent living in article 17 and the right to privacy in enjoying one’s home in article 18. However, neither the UIDHR, nor the Cairo Declaration have an implementation or monitoring body. There is also 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.

### **13. 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 a 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.

### **14. 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.

#### **BOX 2**

#### **Diverse approaches to human rights within Muslim contexts**

Bielefeldt 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*.\*\*\*

### **15. 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), 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.

### **16. 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.



### 17. Where are Islamic human rights found?

Islamic human rights are derived from the main sources of Islamic law and practice (see the FAQ 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.

### 18. 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 which cannot substitute the binding international norms, they could support the arguments for fuller Islamic property, housing and land rights conceptions.

### 19. 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 which 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*).

### 20. 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. However, in practice there are some complexities relating to 'adopted' or illegitimate children.

### 21. 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.

#### BOX 3

#### Minority rights in the Universal Islamic Declaration of Human Rights

The Universal Islamic Declaration of Human Rights relies on several *Qur'anic* principles such as verses 2:256; 5:42-43 and 5:47 to declare in Article 10, in relation to minority rights.

a) The *Qur'anic* principle "There is no compulsion in religion" shall govern the religious rights of non-Muslim minorities.

b) In a Muslim country religious minorities shall have the choice to be governed in respect of their civil and personal matters by Islamic Law, or by their own laws.

### 22. 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 Organisation 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'.

### 23. 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 which impose the duties to provide and fulfill, which require State intervention.

#### **24. How can we deal with the debate on 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.

#### **25. 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 human rights principles are widely regarded in Muslim societies and communities as offering a more legitimate and authoritative 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.

#### **26. 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.

#### **27. What can be done to improve land rights in Muslim countries?**

Muslim countries who 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 fulfilment. 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.

\*Weeramantry, C. G. (1988) 'Islam and Human Rights', in *Islamic Jurisprudence* (London: Macmillan), at p 116-117

\*\*Office of the High Commissioner for Human Rights, Human Rights Programme for the Middle East and North Africa 2008/2009, <http://www.ohchr.org/EN/Countries/MenaRegion/Pages/MenaRegionProgramme0809.aspx>

\*\*\*Bielefeldt, H (1995) 'Muslim Voices in the Human Rights Debate', *Human Rights Quarterly*, 17, 4.

## Briefing Paper No. 4

# 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 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.\**

## 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 tenure?

Modern land regulation laws in most parts of the Muslim world are derived, at least in part, from land classifications in classical Islamic law and Ottoman land law. The term 'Islamic land tenure' encapsulates the recognition that these systems ultimately, if indirectly, have religious foundations. Islamic principles contribute to a distinctive tradition of land tenure categories and use of land. Traditional categories have remained important in many countries, despite variations in the histories of individual Muslim countries, doctrine and land tenure practice. However, 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.

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

Rights in land depend upon Islamic principles emphasising that land is a sacred trust for human beings and the idea that it should be put to continuous productive use. Property rights should not be used exploitatively, wastefully, to deprive others of their rights or lead to the hoarding of land. Similar to the well-known Islamic prohibition on interest (*riba*), which



stipulates that money by itself should not create money, unproductive land should not create wealth.

These principles are part of a broader framework which 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.

### **5. 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, whether 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 which 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.

### **6. 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. There are other classifications such as unused state land liable to be confiscated

(*mehlul*) and unused or dead land (*mewat*) which 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.

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

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.

### **8. 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 *mulk* land are similar to freehold rights in the Western legal system. Unlike freehold, one barrier upon the free disposal of *mulk* land is pre-emption (*shufa*), 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.

### **9. 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 such as roads (*matruk mahmiyya*) or into property for use by a particular community such as marketplaces and cemeteries (*matruk murfaqa*).

#### 10. 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*).

#### 11. 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*).

#### 12. 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 legitimize land reform programmes.

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

Empty or dead land (*mewat*) is unused or uncultivated land which 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 which, 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.

#### 14. 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 may 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.

#### Box 1

##### '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. This was viewed by the occupiers 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.\*

### 15. 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 *Qur'an*. It has been developed by jurists 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.

### 16. 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 which saw the endowed property as a vast resource of 'non-private' land.

### 17. 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.

### 18. Can land be leased by its owner to another within the Islamic framework?

Some Islamic economists argue that land rent is unlawful, relying on the tradition of the Prophet (*hadith*) to the effect that ownership beyond what one can cultivate is surplus and should be distributed free to other Muslims or surrendered to the state. A larger group of Islamic scholars hold that the tradition prohibits only the payment of rent on land which has not been improved in some way. In this case rent is a rightful return for the inputs into the land in terms of labour and capital. Leases are now widely accepted within the Muslim world.

### 19. Can the state intervene to control rents?

Islam recognizes contractual rights and commands followers to fulfill 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 which would be affordable for the tenant while also permitting the landlord a reasonable profit.

### 20. 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. It seems there is a distinction between sharecropping where the owner provides only the land (*mukhabara*) 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.

the formal legal system, sometimes rooted in religious norms and ethics.

\* S. M. Bukhari, (1982) 'Squatting and the Use of Islamic Law', 6 (5/6) Habitat International 555-563, at page 555

## **21. Does the Islamic framework facilitate co-ownership and collective forms of tenure?**

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.

## **22. 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'

## Briefing Paper No. 5

# Inheritance of land in the Muslim world

**'Bought land is men's land, women's land is inherited'.\***

## 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.

### Box 1

#### 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: IRTH: The Islamic Inheritance Program <http://members.aol.com/IslamicSoftware/irthie.html> and National Awqaf Foundation of South Africa: [http://www.awqafsa.org.za/share\\_calculation.htm](http://www.awqafsa.org.za/share_calculation.htm)

##### **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 have established different methods for the allocation of inheritance shares.

##### **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. Can legitimate sharers be disinherited?**

No, legitimate claimants cannot be disinherited, except in extreme circumstances such as causing the death of the deceased.

##### **8. 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.

##### **9. 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.

##### **10. Are Muslims aware of these 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.

##### **11. 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.

##### **12. 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.



### **13. 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.

### **14. Do women enjoy the same shares as men?**

Women have specific rights to fixed shares under the inheritance rules, but a woman will generally receive a half share to that which a man would receive in a similar situation.

### **15. 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.

### **16. 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. There is a robust viewpoint, therefore, supported by many Muslim women, that taken as a whole the system 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.

### **17. 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/mehr*) 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.

### **18. 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.

### **19. 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.

### **20. 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.

### **21. 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 different versions of lifetime gifts have developed, with distinctions between the various schools of law. Social attitudes to such practices as lifetime gifts vary, sometimes being regarded as legal but not within the spirit of Islam. In some societies, including Indonesia, estate planning techniques are a well-established and socially acceptable means of mitigating the effects of the women's lesser inheritance shares.

## **22. 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.

## **23. Can legitimate sharers reject their specified shares?**

The Islamic inheritance process does not conceive of a rejection by a beneficiary of his or her share, but there is a widespread practice whereby a person, typically a woman, voluntarily renounces (*tanazul*) her inheritance rights.

## **24. How is renunciation implemented?**

It has been incorporated into the legal process under Islamic law and will take 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.

## **25. 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 with more powerful family members, particularly with their brothers. The benefits may include a continuing right of access to family homes.

## **26. 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 which requires close scrutiny and which can add to women's inequalities.

## **27. What about legal reforms?**

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 *Qu'ranic* verse of bequest. Even the limited adjustments remain the subject of juristic debate.

## **28. 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 giving equal shares in inheritance to sons and daughters, on the basis that such change was in breach of Islamic law.



\*Stauth, G. (1990) 'Women, Properties, and Migration: Access to Land and Local Conflicts in Rural Egypt', Zeitschrift Der Deutschen Morgenlandischen Gesellschaft, 140, 1, at page 40.

Briefing Paper No. 6

## MUSLIM WOMEN'S RIGHTS IN LAND

*'Islam not only does not deprive [Muslim women] of their rights, but in fact demands those rights for them'*<sup>\*\*</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. 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 (*mehr/mahr*) transferred to a wife from her husband at marriage and other transactions.

#### **2. Does a Muslim woman lose her property rights when she marries?**

There is no doubt that 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.

#### **3. 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 additions, 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 also as illustrations of the Muslim woman's limited property rights.

#### **4. Are there barriers outside the legal system which restrict or inhibit women's pursuit of their property rights?**

Women in Muslim societies may lack agency 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. 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.

#### **5. 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.

#### **6. Are inheritance rules the source of discrimination against women?**

Women's land rights may appear discriminatory with respect to inheritance, but there is the potential within the



Islamic framework for women to receive other property rights by way of recompense. Inheritance rules 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 individuals to plan the devolution of their property and post-inheritance adjustment practices.

### 7. Is estate planning acceptable within the Islamic framework?

Estate planning techniques are subject to debate, with some tensions surrounding their deployment, but they are commonly used in modern Islamic societies. The most obvious tool of estate planning is the lifetime gift or transfer.

### 8. 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.

#### BOX 1

#### 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 lost or will lose these rights, largely based upon trust and memory, when distant members of their family make claims upon the property.

However, international organisations 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 Nasional, 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 is 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\*\*.

### 9. 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 which may or may not be paid.

### 10. What are the arguments for and against renunciation?

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. 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 with more powerful family members, particularly with their brothers. The 'benefits' of renunciation may include a continuing right of access to a family home.



### 11. How can women be compensated for their lesser inheritance shares?

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/mehr*), and as a beneficiary under an endowment (*waqf*), with varying impacts on individual women.

### 12. Is a husband obliged to maintain his wife?

There is a legal expectation that a woman's fundamental daily requirements will be met by her husband, which is relevant to her immediate shelter but not her ability to accumulate or preserve property. There is no equivalent obligation from the wife towards the husband. However, a woman may lose her right to maintenance, which is controversially justified by her lack of obedience to the husband (*nushuq*), for instance if she leaves the matrimonial home 'without good reason'.

#### Box 2

##### 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 (*ta'a*) or disobedience (*nushuq*); joint decision making between the marriage partners is envisaged; and the Code conceives of joint ownership of property within marriage\*\*\*.

### 13. What is dower (*mahr/mehr*)? How does it differ from dowry payments?

Dower (*mahr/mehr*) 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/mehr*) 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.

### 14. Is dower (*mahr/mehr*) an important resource for women?

Historically dower (*mahr/mehr*) 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/mehr*) 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.

### 15. Is a woman entitled to any other payment or maintenance upon divorce?

Other than a right to specified dower (*mahr/mehr*), 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 (*mutat*). 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.

#### Box 3

##### 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/mehr*) 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.\*\*\*

#### **16. 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. Whether such support fully compensates for exclusion from rights in land is related to the specific position of the woman concerned.

#### **17. 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.

#### **18. Does the compensatory system benefit women in practice?**

The legal ideology may be holistic, 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/mehr*), 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 have trumped Islamic principles.

#### **19. Do women have effective access to courts to enforce their rights?**

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.

#### **20. 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.



## 21. 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 and 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 the effect of creating new institutions and practices which deny previous freedoms, while reinforcing earlier discriminations.

\*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.

\*\*Sri Sofjan (UNIFEM), 'How do Islamic Islamic Customary and universal land approaches intersect', Speaker at UN-HABITAT, Expert Group Meeting on the Cross-Fertilisation of Universal and Islamic Land Approaches, 17 and 18 May 2007, University of East London, London, UK.

\*\*\*Katulis, B (2004) *Women's Freedom in Focus: Morocco*, Washington DC: Freedom House

\*\*\*\*Akhtar, S (1994) *Shah Bano Judgement in Islamic Perspective, a Socio-Legal Study*, New Delhi: Kitab Bhavan.

## Briefing Paper No.7

# THE WAQF (ENDOWMENT)

***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 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. What is the *Waqf*?

The *waqf* (plural *awqaf*) (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 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 would GLTN partners be interested in the *Waqf*?

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 a *waqf*. 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 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 is 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 (*waqif*'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 find a *waqf* in which the income or usufruct of the property is used for the benefit of the founder's/creator'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 SouthAsia 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 mushtarak*, which is best described as a quasi-public endowment. It provides for particular individuals or a class of individuals including the founder's/creator's family, but also serves certain outside public interests, such as a mosque which 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*?

Money lacks the enduring quality of land and may represent a challenge to the 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.

#### **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 fulfil 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. 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*, *Shafii* 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.

## 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 *Shafii*s 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 *waqif* 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*, *Shafii*s 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.

### Box 1

#### 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'. \*

## 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 challenge lies 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.

### Box 2

#### 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\*\*.

## 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 (*masalah marsala*) 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 which combine a cash endowment (*waqf*) with the limited partnership (*nudaraba*) 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.

\* Khubaisy, F (Government of Bahrain), 'How can Islamic property doctrines, such as the *waqf*, support pro-poor land empowerment and financing?', Speaker at UN-HABITAT, Expert Group Meeting on the Cross-Fertilisation of Universal and Islamic Land Approaches, 17 and 18 May 2007, University of East London, London, UK.

\*\*Salih, S. A (1999) *The Challenges of Poverty Allevation in IDB Member Countries*, Jeddah: Islamic Development Bank

***'[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 ...' \****

## 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. 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

Briefing Paper No.8

# ISLAMIC CREDIT AND MICROFINANCE



with self-selected members who evaluate each other's creditworthiness. Members make weekly repayments on loans, including interest.

## 2. 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 interest (*riba*). Some MFIs are carefully constructed cooperative ventures between financial experts and Islamic law experts (or committees) which 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.

### Box 1

#### 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 skepticism 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).\*\*

## 3. Why GLTN partners are interested in Islamic microfinance?

GLTN is interested in Islamic microfinance because 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 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* (interest).

## 4. 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 which 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.

### **5. How do Islamic principles support entrepreneurship?**

Islam is not an ascetic religion, but encourages man to enjoy earthly gifts. Commercial activities conducted in order to provide for an individual, family and loved ones is permissible and often commendable. There are sayings of the Prophet (*hadith*) which support trade. However, the quest for possession and profit is a means of providing for human sustenance, rather than a goal in itself.

### **6. 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.

### **7. 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*.

### **8. 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.

### **9. 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.

### **10. 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 it also covers all transactions that give one party more than a fair exchange or which produce a payment which 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*.

### **11. Are other forms of commercial activity prohibited in Islamic principles?**

The prohibition on money lending for interest 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 which 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.

## 12. 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.

### Box 2

#### 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.\*\*\*

## 13. 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 which both comply with Islamic principles and are 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.

## 14. 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).

## 15. 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 instalments rather than a single lump sum.

## 16. 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.

### 17. 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.

### 18. 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.

### 19. 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; a lease-purchase agreement.

### 20. 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.

### 21. 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.

### 22. 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 which 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.

### 23. What other possibilities are there for using Islamic financial products for housing microfinance?

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 organisation 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 organisation, 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 which 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.

\*Mirakhor, A. (2002) 'Hopes for the Future of Islamic Finance', Lecture at the Institute of Islamic Banking, London.

\*\*Sait, S and Lim, H (2007) 'Islamic Microfinance in Crisis Countries: The Unofficial Developmental Discourse, Harvard Law School Paper, April 17, 2007.

\*\*\*Grace, L and Al-ZamZami, A. (2002) *Islamic Banking Principles Applied to Microfinance Case Study: Hodeidah Microfinance Program, Yemen*, Geneva: UNCDF.