Islam, Land & Property Research Series

PAPER 1: Islamic Land Theories and Their Application

UN-HABITAT

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Further Information:

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### SELECTED REFERENCES FOR PAPER 1
INTRODUCTION TO THE ISLAM, LAND & PROPERTY RESEARCH SERIES

The global mandate and activities of UN-HABITAT (United Nations Human Settlements Programme) in promoting access to land and protecting security of tenure are derived from a range of international human rights and development standards. While land, property and housing rights are generally cross-cultural and asserted within every socio-economic and political system, it is recognised that practice regarding their regulation and protection may take different forms. The Land and Tenure Section, Shelter Branch of UN-HABITAT has carried out systematic research into distinctive land, housing and property issues and approaches in various regions of the world including Africa, Latin America and the Balkans. It uses a ‘best practices’ approach to develop affordable, pro-poor and flexible tenure types and land tools, particularly for women. These tools are incorporated into UN-HABITAT’s global campaigns and programmes as well as made available to governments, civil society and all stakeholders for their advocacy work and for implementation of relevant laws and policies.

During its work in a range of 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. Too often global reviews of land tenure are undertaken without taking Islamic laws relating to land sufficiently into account. The Land and Tenure Section of UN-HABITAT therefore commissioned two experts Mr. M. Siraj Sait and Dr. Hilary Lim from University of East London, United Kingdom to carry out a year long in depth study of the Islamic and other dimensions of land and property rights in the Muslim world.

The objective of this research was to produce a body of material, through eight position papers, accompanied by a database, with proposed strategies which could enhance the knowledge and augment the capacity of UN-HABITAT and its partners to work more effectively in Muslim contexts. However, these papers have been written for a general audience without any assumption of knowledge regarding Islam, law or property rights and are therefore offer basic information as well as an opportunity to revisit first principles.

The general findings of the research are that there are distinctive Islamic conceptions of land and property rights which are varied in practice throughout the Muslim world. Though Islamic law and human rights are often an important factor in the conceptualisation and application, they intersect with State, customary and international norms in various ways. In doing so, they potentially offer opportunities for the development of ‘authentic’ Islamic land tools which can support the campaign for the realization of fuller land rights for various sections of Muslim societies, including women. However, in order to facilitate that role, the various stakeholders must constructively review the normative and methodological Islamic frameworks and their relationship with other systems of formal and informal land tenure.

Paper I on Islamic Land theories and Their Application contextualises and introduces Islamic property and land concepts as part of a sophisticated and alternate land framework running alongside international regimes. The Islamic property rights framework conceives of land as a sacred trust but promotes individual ownership with a re-distributive ethos. It argues that engagement with Islamic dimensions of land may
potentially support land rights initiatives in Muslim societies and has implications for programmes relating to land administration, land registration, urban planning and environmental sustainability. Position Paper II on *Islamic Land Tenure and Reforms* explores how land tenure concepts, categorisations and arrangements within the Islamic world are multi-faceted, generally distinctive and certainly varied. This paper explores the socio-historical context and development of Islamic land tenure regimes leading to the ‘web of tenure’ in contemporary Muslim societies. An appreciation of the historical context of land tenure in Muslim societies and the range of land tenure forms contributes towards development of authentic and innovative strategies for enhancing access to land and land rights.

Position Paper III on *Islamic Law, Land and Methodologies* finds Islamic law (*Shari’a*) an important factor influencing land rights and tenure systems in Muslim societies. Islamic law can be seen as an evolving, responsive and assimilating sphere of competing ideologies and interests, though it is a site of struggle between conservatives and liberals. An appreciation of the distinctive features and sources of Islamic law, its methodologies and diversity in application and its dispute resolution mechanisms would contribute towards strategies aimed at enhancing security of tenure. Position Paper IV *Islamic Human Rights and Land* sets out to examine the relationship between international human rights and Islamic conceptions of human rights in theory and practice. It argues that, with respect to land rights, the difference between these two sets of rights appears minimal and a sensitive and careful recognition of Islamic religious and political sensitivities can help deliver international human rights more effectively in Muslim societies, without offending Islamic principles.

Position Paper V *Muslim Women’s Rights to Property* explores the nature and scope of women’s rights to property and land under Islamic law (*Shari’a*) through a socio-historical background to women’s property rights, an appraisal of modern legal reforms and the avenues for enhancing their security of tenure. It argues that despite assumptions to the contrary, there are potential empowering strategies for women through Islamic law which can enhance women’s access to land and enforcement of their other property rights. Position Paper VI *Islamic Inheritance Laws and Systems* considers how Muslim societies are generally derived their inheritance rules from religious sources for the division of an individual’s property upon death, some of which are controversial. Yet, it argues that the application of these formal inheritance rules pertaining to designated shares must be understood in a broader socio-cultural and economic context and within wider inheritance systems of practice.

Position Paper VII *Islamic Endowments (Waqf) and Indigenous Philanthropy* outlines how the endowment (*waqf*, plural *awqaf*) is a key Islamic institution, which has incorporated within its legal sphere vast areas of land within the Muslim world, connected firmly with the religious precept of charity. Modern reforms in several Muslim countries have abolished, nationalised or highly regulated endowments but the endowment (*waqf*) remains influential and there are signs of its reinvigoration. The paper evaluates the role for the Islamic endowment (*waqf*) in strategies to improve security of tenure based on its legal foundations, history and socio-economic impacts. Position Paper VIII *Islamic Credit and Microfinance* considers the increasing demand from within Islamic communities for financial services that are compliant with Islamic law (*Shari’a*). This paper explores the Islamic context which stimulates such alternative credit systems, the key distinguishing features of the Islamic banking models, the development of Islamic microfinance models and the practical challenges to these
innovations. It considers how Islamic finance, banking principles and credit, particularly housing microfinance, can contribute to security of tenure and in transforming the lives of the poor.

The findings of this study were discussed at a workshop on ‘Land tenure and Land law tools in the Middle East and North Africa’ in Cairo, Egypt on December 17 2005. This preparatory meeting for World Urban Forum (WUF III) 2006 was part of a meeting hosted by the Government of Egypt and organised by United Nations Economic and Social Commission for Western Asia (ESCWA), UN-HABITAT, and the League of Arab States. This research was also presented at the Expert Group Meeting (EGM) at Bangkok, Thailand on ‘Secure Land Tenure: New legal frameworks and tools in Asia and Pacific’ December 7-9 2005 organised by UN-HABITAT, United Nations Economic and Social Commission for Asia and Pacific (UNESCAP), International Federation of Surveyors (FIG) and World Bank.

Through this preliminary study, UN-HABITAT and its partners seek to discuss and develop appropriate strategies through identification and development of innovative and pro-poor land tools in their particular context.
Paper 1: Islamic Land Theories and its Applications

The concept of dual ownership [human being-God] is one of the special features of the Islamic doctrine of economics. Islam protects and endorses the personal right to own what one may freely gain, through legitimate means...It is a sacred right. Yet, human ownership 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 from property.

(Abdul-Rauf 1984:19)

OVERVIEW

Security of tenure is an aspiration, if not a legal expectation, the world over including Muslim societies. While there may be cross-culturally valid international proposals promoting access to land and secure tenure, distinctive Islamic conceptions of land cannot be ignored as they continue to resonate in Muslim societies. The Islamic property rights framework conceives of land as a sacred trust but promotes individual ownership with a re-distributive ethos. Diverse Islamic land concepts and models potentially support the quest for security of tenure and offer a sophisticated and alternate land framework running alongside international regimes. This paper contextualises and introduces Islamic property and land concepts and their role in promoting access to land. It argues that engagement with Islamic dimensions of land may potentially support land rights initiatives in Muslim societies and has implications for programmes relating to land administration, land registration, urban planning and environmental sustainability.

Scope of this Position Paper: This position paper introduces the research relating to Islam and land discusses its implications in the context of international initiatives in Section 1. It outlines the distinctive conceptions of land tenure and rights in Islamic theory in Section 2. It explores the various factors impacting on the development and practice of Islamic land theories in Section 3. Section 4 examines the role of the Muslim State in ordering and implementing Islamic and internationally guaranteed land rights while Section 5 considers his application of Islamic perspectives on land registration, urban planning and environmental sustainability. Section 6 offers five strategies for empowerment through Islamic land theories are offered

* Advocate individual property rights through Islamic principles
* Promote Access to Land through Islamic arguments
* Recognise factors impacting on Islamic land Rights
* Promote proactive role of State
* Consider Islamic dimensions in contemporary land debates
1.1 CONTEXTUALISING THE ISLAM & LAND RIGHTS PROJECT

1.1.1 Is Islam relevant for land rights in the Muslim World?

Land, property and housing rights are asserted within every socio-economic and political system - including the Muslim world - though the rules and the practice regarding their regulation and protection may take different forms. The extent to which land rights are protected within Muslim countries is difficult to detail or even generalise because of the sheer range of Muslim countries as well as the lack of systematic and reliable data. By systematically addressing the distinctive features of the Islamic land framework, this project seeks to contribute to the quest for international land rights.

1.1.2 Muslims and Islam

Spread over 57 Muslim majority countries and as significant minorities in the West and from China to Russia, the estimated 1.2 billion Muslims comprise a fifth of the world’s population. The lived experiences of Muslims, their socio-economic conditions, political affiliations and religious practice cannot be essentialised or simplified. This project also underscores that Islam is only one of the factors impacting on Muslim societies alongside customary and cultural practices and modern secular influences.

1.1.3 Methodology

The research team, through a dialogic method of research, have adopted a general approach that Islam, like other religions and cultures, must be constructively analysed to discern its potential benefits as seen by Muslims as well as other communities. This research uses international, cross-cultural human rights and development standards as the framework for engaging with Islamic principles. At the root of this endeavour is a predisposition that land, property and housing rights are basic and universal aspirations though there may be different pathways to realising them.

1.2 PROPERTY AND LAND IN ISLAMIC THEORY

1.2.1 Property rights and religion

Rights to land, which are the primary concern of this project, are part of a broader set of property rights. In Islam, property relationships are considered social relations, which under Islamic law are called *mu'amalat* (as distinct from *ibadat*, matters relating to worship). The land rights framework in Islamic theory is circumscribed not only by external human rights and development strategies promoting a just and equitable society, but equally by internal dynamics. These religious and moral dimensions of land may be internalised and incorporated into property transactions of many societies in multiple ways. Islam potentially impacts on all stages of the property cycle from acquisition, to management and to transmission.
1.2.2 Islamic property rights and economic principles

There are scores of references to land in the Qur’an which provide for and respect property rights. Private property rights are well established but constructed as a sacred trust based on the doctrine of unity (tawhid), stewardship (khalifa) and trust (amana). Property and land vest in God, but are temporally enjoyed by men and women through responsibility or trust. However, for the most part it is not seriously contested that the rights to own (raqaba or full ownership), enjoy or alienate land exist in Islam. However, their legitimacy is derived from compliance with Islamic principles.

1.2.3 Access to Land

Unlike Western liberal private property rights which are largely unfettered, Islamic property rights are conditional on the requirement that property not be used wastefully or exploitatively nor in a way that will deprive others of their justly acquired property. The Qur’an mandates respect for property rights of all persons regardless of religious faith. Non-Muslims enjoy the similar property rights as non-Muslims. It has rules ranging from the guardianship of property of orphans, warnings against its misuse to the inheritance rights of women. The distinctive Islamic land tenure arrangements can facilitate access to land.

1.2.4 Security of tenure

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 is justiciable. Muslim scholars are unanimous that property rights are one of the five essential values of Islamic law which must be protected as a matter of priority. The Prophet emphasised the importance of property rights in his farewell pilgrimage by declaring to the assembled masses ‘Nothing shall be legitimate to a Muslim which belongs to a fellow Muslim unless it was given freely and willingly.’ Property and housing fall within the private domain in Islam and are therefore fully protected. 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) found in the Qur’an.

1.2.5 Islam and land reform/redistribution

Islamic theoretical insistence that ownership of everything belongs to God alone 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. The State assumes land ‘ownership’ on behalf of God but for the benefit of the community. Islamic property rights incorporate a redistributive element, which is evident in institutions such as the endowment (waqf) and charity (zakat). In Islam, the poor have rights against the State as well as the wealthy.
1.3 FACTORS IMPACTING ISLAMIC LAND DOCTRINES

1.3.1 Historical context to Islamic land rights

Despite the general principles relating to property rights, the Qur’an did not elaborate on land tenure, regulation and administration or the mechanics for its protection, leaving it to succeeding generations to develop the field. Though no generalisation can be made about the practice during different Muslim ruling dynasties, private land rights were always recognized as promoted by Islam. However, particular episodes – such as colonialism - and local histories have contributed to the evolution of contemporary land regimes.

1.3.2 Economics & poverty

Property rights across the Muslim countries cannot be generalised or too much attributed to religious influence or history alone. These are as much an outcome of contemporary economic conditions and choices. Some Muslim countries have been quicker to adapt to the calls for economic liberalisation or the challenges of globalisation.

1.3.3 Culture, custom, family/kinship

The convergence of customary and Islamic law has been a particular feature in the development of laws and practices with respect to land in Muslim countries. In Muslim societies too, land has multiple cultural meanings and implications. Historically, Arabs have seen land as not only the most valuable asset but part of their identities and fundamental to their personal esteem and honor. Other equally important factors such as family and kinship play an important role in determining the operation and effect of property rights.

1.4 LAND ADMINISTRATION IN THE MUSLIM CONTEXT

1.4.1 Good governance and land

The link between good governance and an efficient land policy is well established. The 2004 Arab Human Development report concludes that the situation of freedom and good governance in the Arab world ranges from deficient to seriously deficient, but there are positive aspects too. The assumption that there is an ‘Arab’ or ‘Muslim’ model of governance has been questioned. At the same time, much of the literature regarding Islam revolves around the Islamic State as a utopian past or idealised future. Concepts of consultation (shura) and justice (adl) are well embedded in Islamic consciousness and administration over centuries are influential.

1.4.2 Democracy and civil society

In contrast to those who find Islam and democracy incompatible, there is scholarship arguing the opposite, though it is clear that Western and Islamic democracy models vary. Literature on the traditional and modern Muslim civil society too show that traditional civil society institutions such as the endowment (waqf) are in contrast to Western inspired arrangements. Apart from State restrictions on the activities of civil society in
many Muslim States, there are theoretical dilemmas for non-governmental organizations. The extent to which they can adopt universal standards and methodologies and their relationship to Islam often affects their standing with the government and society. Civil society in the Middle East therefore can manifest itself in different ways, for example through religious and philanthropic organisations.

### 1.4.3 Ottoman land administration

A study of Ottoman land history is often offered as a way of understanding an Islamic land administration framework. Revenue and taxation drove Ottoman land administration with implications for social and land structures. With subsequent weakening State power, in the seventeenth century, tax farms (iltizams) for collection of land revenue were created and lasted until 1813. The Ottoman land administration experiences, which were partly derived from Islamic principles but equally conditioned by other socio-political considerations, have useful lessons for present day analysis.

### 1.4.4 Public interest (maslaha)

Though Land management principles are derived from Islamic law, they are equally amenable to Islamic public interest (maslaha) principles. Protection of property interests, as part of the essentials (daruriyyat) of Islamic order, is subject to a public interest consideration as a matter of priority. Traditional Islamic principles relating to land could not have foreseen the present day challenges of urbanisation, land conflicts, newer forms of land use, environmental problems as well as the difficulties in access to land and security of tenure. However, at a policy level, a State following Islamic principles has considerable leeway in orienting its land policy towards the benefit of the community though public interest (maslaha). In particular, the rights of the landless poor, slum-dwellers and squatters could be addressed through this policy tool.

### 1.5 ISLAM AND CONTEMPORARY LAND ISSUES

#### 1.5.1 Islam and land cadastre, registration and titling

One of the significant challenges for land administration is the development of appropriate cadastre systems which could provide necessary information and clarify legal rights. Far from a western invention, cadastre has been found in the histories of several Muslim countries. The earliest forms of cadastre in Islamic society were instituted in the seventh century by the Prophet. During the Ottoman period, a land registration system flourished with extensive land information records (Kuyud-u Hakani) containing all available land-related information. Despite its ambitious scope, the registration could not be completed for the entire Ottoman territories. Muslim countries attitudes towards cadastre or tiling vary but there is nothing in Islam that frustrates these attempts, indeed it is to the contrary.

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

Palestine, at the centre of the Arab-Israeli land dispute, underscores the complex and distinctive Islamic and Ottoman legacy. Palestine experienced most of the Ottoman land
surveys, taxation and administration including the Ottoman Land Law of 1858. However, Palestine had its own specific laws such as those relating to land registration and foreign land ownership. Like other parts of the Ottoman empire, significant proportions 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. Rather than outright confiscation, Israeli policy used selective interpretation of Ottoman and Islamic concepts of State (mirî) and dead lands (mewat), alongside extremely high evidentiary requirements for proof of ownership, to nationalise land. The Israeli land title registration office is still referred to as the ‘Tabu’ office and title registration certificates as ‘Tabu’ papers, a term Ottoman in origin, though central to the dispute is whether the Ottoman land records are reliable.

1.5.3 Islamic urban planning

Rapid urbanisation with its accompanying problems has led to the question ‘Are Cities in the Middle East Sustainable?’ These urban management problems are not unlike those faced by non-Islamic cities but the relevance of Islamic planning and rights has permeated the planning debate, underpinning socio-religious dimensions. However, others ask ‘Why would one expect Islamic cities to be similar and in what ways?’ The renewed interest in Islamic planning systems may or may not provide a wholesome alternative paradigm but needs to be studied.

1.5.4 Islam, environment and water

Environmental challenges, particularly those arising out of water shortages and disputes are critical in the Middle East and other parts of the Muslim world. The Qur’anic view holds that everything on the earth was created for humankind as God’s bounty (ni’amah) to be exercised with care as a trusteeship (amana). There are a large number of institutions and mechanisms to foster environmental protection. The question of individual ownership over water – in contrast to usufruct or access rights - is a matter of Islamic debate. In contrast to classical Islamic theory in which all land is held in trust for the benefit of the community, water rights over individual lands were bought and sold during the Ottoman period, and this continues to this day.

1.6 STRATEGIES FOR EMPOWERMENT THROUGH ISLAMIC LAND THEORIES

1.6.1 Advocate Individual Property Rights

International strategies for promotion of land rights could be strengthened by reliance on the explicit recognition of an extensive range of property rights in Islam. Property rights are not only well established under Islamic law, they are indisputably one of the five foundational principles of the Islamic society. Understanding the nature and scope of property rights in Islamic society could further secure tenure as the land rights framework emerges from divine edict and the sayings and examples of the Prophet.

1.6.2 Promote Islamic Access to Land through Islamic arguments
The concept of property rights in Islamic economics has implications far beyond the material domain as it lays stress on responsibility, poverty alleviation and redistribution. Islamic doctrines engage with entitlement to land rights for a broad range of beneficiaries including women, children, landless and minorities. 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.

1.6.3 Recognise factors impacting on Islamic land rights

The impact of Islamic land theories is best understood through an analysis of the particular national and local histories, dominant economic principles and the interplay of customary and cultural practices in each context. Disentangling the factors impacting on contemporary land discourse will help clarify the potential and the limits of an Islamic dimension to land rights.

1.6.4 Promote a pro-active role of the State

Under Islamic theory, the State in land management is seen as supervising land ultimately belonging to God. Thus, 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 the Ottoman land administration narrative is complex with its legacy often disputed. However, the doctrine of public interest (maslaha) within policy making clearly applies to the domain of land administration. Potentially, an Islamic framework gives States wide leeway in promoting security of tenure and access to land.

1.6.5 Consider the Islamic dimensions in contemporary land debates

Islam is considered by Muslims to be a complete way of life and property conceptions go far beyond theorisation and impact on the lived experiences of Muslims, albeit to varied extents. They also often inform the policies of the State and the land rights discourse. In several aspects, Islamic land principles and practices run parallel or are similar to contemporary international standards, in other ways they offer an alternative paradigm. Though traditional Islamic practice may not have foreseen the extent or nature of present day problems and purely Islamic solutions may be a utopian model, there are aspects of Islamic principles, mechanisms and processes that can provide legitimate and durable solutions through incorporating or at least considering authentic Islamic contributions.
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