Islam, Land & Property
Research Series

PAPER 3: Islamic Law, Land
and Methodologies

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*Global Coordinator and Substantive Editor:* Clarissa Augustinus, Chief, Land & Tenure Section, Shelter Branch, UN-HABITAT with the assistance of Florian Bruyas, UN-HABITAT

*Researchers:* M. Siraj Sait and Dr. Hilary Lim, University of East London, UK

*Editing:* Roman Rollnick and Tom Osanjo, UN-HABITAT

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**Partner Details**

M. Siraj Sait  
Dr. Hilary Lim  
School of Law  
University of East London  
Duncan House  
High Street  
Stratford  
London E15 2JB  
UNITED KINGDOM

Telephone: +44 208 223 2113/2836  
Emails: s.sait@uel.ac.uk  
h.lim@uel.ac.uk

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**Paper 3: Islamic Law, Land and Methodologies**

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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 Applications 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 redistributive 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 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 clear 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 that financial services be 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 an experts’ 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.
Islamic Law is the epitome of the Islamic spirit, the most typical manifestation of the Islamic way of life, the kernel of Islam itself. For the majority of Muslims, the law has always been and still is of much greater practical importance than the dogma. Even today the law remains a decisive element in the struggle which is being fought in Islam between traditionalism and modernism under the impact of Western ideas. 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.

(Khadduri and Lienbesny 1955:28)

OVERVIEW

A striking feature of Islamic societies is the high degree of reliance on legal cultures, arising in part because of the sophistication and breathtaking scope of Islamic law (Shari’a). Islamic law is an important factor influencing land rights and tenure systems in Muslim societies. Rather than assume that Islamic law (Shari’a) is a monolithic, static or immutable corpus of medieval laws, it 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. The primary sources of the Shari’a may be divine (the Qur’an) but it is the human (bashari) endeavour or interpretation as well as State preferences that determine how contemporary society actualises the Shari’a. An appreciation of the distinctive features and sources of Islamic law, its diversity in application, its dispute resolution mechanisms would contribute towards strategies aimed at enhancing security of tenure.

Scope of this Position Paper: This position paper introduces the significance of Islamic law in Muslim consciousness in Section 1. Section 2 outlines the sources of Islamic law relating to land and property right. Section 3 explores the pluralism inherent in the articulation of Islamic legal theories and their practice. Section 4 examines the role of various legal institutions in implementing Islamic law. Section 5 offers five strategies for empowerment through Islamic law

* Recognize the importance of Islamic legal discourses
* Engage with Islamic sources and legal methodologies
* Appreciate the dynamics of Islamic legal pluralism
* Support capacity building of legal institutions in Muslim countries
* Facilitate alternative dispute resolution mechanisms in the Muslim World.
3.1 CENTRALITY OF ISLAMIC LAW IN THE MUSLIM WORLD

3.1.1 Role of Law in Land Policy

Law generally constitutes a significant medium in the development, articulation and implementation of land policies. It defines property rights, informs land tenure systems and regulates land administration. Throughout the world there are variations in how property rights are established, the types of property rights recognized, the regulation of different types of use and users and in the enforcement mechanisms. This position paper outlines how notions of law, in the Islamic legal contexts, are distinctive in their normative outlines, structure and methodology.

3.1.2 The relevance of Islamic Law

Whatever the extent and form of Islamic law ‘officially’ sanctioned in Muslim socities, in the consciousness of much of the Muslim world land tenure regimes and concepts are generally constructed or realised, to a noticeable degree, through reference to the Islamic law (Shari‘a). Therefore there is no field of ‘Islamic land law’ but rather a set of overlapping themes or domains which practitioners will recognize as such. Land rights in Islam therefore do not exist in isolation but rather are best understood with reference to other parts of Islamic law. Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself.

3.1.3 Reasoning in Islamic Law

Much of Islamic law relating to land, property and housing would fall within the domain of ‘social transactions’ (muamalat) and therefore be open to a greater degree of interpretation than matters of religious observances. Islamic law does not make sense without the ethical dimension of the divine revelation. There are certain basic Islamic concepts or ‘golden threads’ that embody the spirit of the Islamic law (Shari‘a) such as rights (haqq), justice (adl) and equity (qist) which are reiterated in the Qur’an. Islamic law has to be appreciated from a socio-historical context and debates even though it may have outgrown classical formulations.

3.1.4 Methodology in Islamic Law (Usul al fiqh)

Usul al-fiqh is a science which deals with the methods of reasoning and the rules of interpretation which are derived from the Qur’an and Sunna (practice of the Prophet’s generation). It is the methodology (usul) which determines the substantive rules of, or practical jurisprudence (fiqh). The foundational principles of Islamic law (Maqasid al-Sharia) recognise property rights as a priority so no law can violate this essential (daruriyyat) and also that State policy through public interest or welfare (masala) 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.
3.2 SOURCES OF ISLAMIC LAW RELATING TO LAND

3.2.1 Evolution of Islamic Laws relating to Land and Property

There exists no amalgamated or systematic field of Islamic land law or property law, even though it is an important Islamic legal branch of learning. During formative classical period of seventh to the ninth centuries, institutions and doctrines relating to Islamic property law emerged, and were adapted to their specific socio-economic and political contexts. The classical law relating to property and land rights underwent several periods of influence –Ottoman, colonial and post-colonial/modern periods. In 1858 the Ottoman government consolidated various existing laws into a Land Code and it is from this that most States in the modern Muslim world derive their land tenure categories. Study of contemporary Islamic Property law today in the Western world its structure adopts much of the Western legal structure.

3.2.2 The Qur’an and Sunna in relation to Land and Property Law

In Islamic law, there is a formal hierarchy of sources of law. The two foundational and primary sources of Islamic Law (Shari’a), are the Qur’an and the Sunna. The Qur’anic stipulations on general aspects of property and land rights are significant for example on the nature of property and women’s rights. Where an Islamic property regime, such as the compulsory inheritance rules, are dealt with explicitly by the Qur’an, most Muslims would consider the matter not subject to independent reasoning (ijtihad) but that it has to be interpreted as a whole. A further important source of law lies in the records of the words and deeds of the Prophet (Sunna), peace be on him, in the form of a diverse collection of narratives (hadith). Here the challenge is to weed out spurious gender deprecating customary norms projected as Islamic truisms with reference to the gender empowering Qur’anic stipulations. Modern day land, property and housing rights within the Islamic framework are still heavily reliant on the Qur’an and the Sunna.

3.2.3 Deduction by analogy (Qiyas) & consensus (Ijma)

Reasoning by analogy (qiyas) and consensus (ijma) are two secondary sources of Islamic understanding or law (Shari’a), first. Consensus (ijma) is commonly taken to mean the unanimous agreement amongst those who are learned in the religion at a particular time on a specific issue, though this is a matter of debate. It is ijma which allowed guardianship over the property of minors; this allowance has been extended by qiyas to apply to the guardianship of minors in marriage. Reasoning by analogy is form of deduction in comparable cases which links the reasoning back to the original sources of the Qur’an and the tradition of the Prophet (Sunna). Through Ijma and Qiyas, there are further possibilities for developing land and property rights.

3.2.4 Supplemental Sources

There are also other supplemental law-generating mediums such as juristic preference (istishan) which enhance the flexibility and responsiveness of Islamic law (Shari’a) and which demonstrate the plurality of method in Islamic law since some of these tools are only closely associated with particular Sunni schools. The concept of juristic preference (istishan) where discretion (not contrary to Qur’an and Sunna) can be exercised in cases
of miscarriage of justice. Similarly, general principle found in some Islamic schools of law is that of “necessity and need,” or Darura. A second supplementary principle of law is based on public interest and human welfare (maslaha). It is a method associated with the Maliki school and permits the jurist to find a solution using discretion that is based on determining and promoting man’s best interest in a case (Istislah), provided again that it is not a matter covered by any Shari’a textual source.

3.2.5 Personal Reasoning (Ijtihad)

Independent personal reasoning (ijtihad) is an established wing of Islamic jurisprudence. It is strictly not a source but an interpretative methodology which is not confined to jurists but is the sacred duty (fard kifaya) of every competent individual. The idea that the ‘gates of ijtihad’ were shut in the year 1258 by a juristic consensus has been discredited. It is the post-facto validation of ijtihad through ijma (consensus of opinion) that converts the fruits of personal reasoning into a discovery or finding for the benefit of society. This is the internal Islamic authentic process through which Islamic land tenure and property rights can be more systematically clarified.

3.3 ISLAMIC LAW IN A PLURALIST WORLD

3.3.1 Schools of Islamic Jurisprudence (Maddahib)

There is a plurality inherent in Islam and Islamic law, which is reflected in and shaped by the two major sects of Islam, Sunni and Shi’a. The Shi’a minority within the Islamic communities (umma) accepts the Qur’an, but consider the only acceptable interpretation as emanating from their spiritual leader (Imam). Among the Sunnis, who constitute the majority of Muslims in the world, there are four main jurisprudential schools (maddahib, singular maddhab) Hanafi, Maliki, Hanbali and Shafi. These schools (maddahib) were named after their leading jurists and each is the dominant authority in different parts of the world. Recognition of the prevailing Islamic school of jurisprudence is necessary to engage with the Islamic legal discourses in a particular context. For example Hanafism, the more widespread of the four school considered the most flexible open to innovative interpretations of its core doctrines.

3.3.2 Diversity of Islamic Legal Systems

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. The legal systems of many Muslim countries have undergone extensive secularization to varying degrees, notwithstanding the principled irrevocability of its religious origins, owing to Western influences. Despite divergent histories and forms of government, there is surprising resemblance among the various judicial systems of the Arab world.

3.3.3 Islamic Legal Pluralism

The practice of Islamic law in Muslim world, thus, suggests complex and contentious relationship between particular brands of Islamic law and others forms of law – state or
customary law. The normative systems are sometimes referred to as quasi-legal or informal, but legality and illegality are not so clearly delineated. Morocco, Indonesia and Egypt show how paying attention to 'legal pluralism', or 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.

3.3.4 Role of Custom (urf)

Islamic law, as it emerged from the Prophet’s time, was built over pre-Islamic customary practices and as the faith spread it brought in various levels of symbiosis and amalgamation between Islamic legal theory and customary norms of the newer Islamic communities. Classical Islamic jurists actively engaged with the validity of a custom (urf) in the Islamic context, and generally accepted the same unless it was in direct contradiction with Islamic principles. In most Muslim societies, Islamic and customary norms have almost been fused together requiring a conscious effort to distinguish the two as with land practices. Where there are injurious customary practices, positive Islamic principles can be used to weed out traditions that are unjust and unacceptable.

3.4 ISLAMIC LAW IN ACTION

3.4.1 Islamic Legal Structures

Despite the general application of Islamic law in Muslim societies, there has always existed – since the Islamic Ummayad and Abbasid empires- the dichotomy between Islamic law and secular law. It was during the Ottoman period that while Islamic law was codified and promoted, a series of secular codes referred to as qanun (secular laws) were also promulgated. Even within Islamic legal systems then, there exist numerous institutions or personnel that implement the range of laws and interests. These include not merely the judge within an Islamic jurisdiction (Qadi), judges dealing with secular matters, administrative offices such as the Muhtasib (ombudsman) and informal legal authorities such as the mufti (one issues fatwa or responsa, advisory opinions) and the mujtahids (those exercising ijtihad or personal reasoning).

3.4.2 Role of the Judge (Qadi)

Muslim judges were generally conscious of moral contexts and social visions and the need to garner legitimacy across multiple schools of legal thought. The Judge within the Islamic legal system (Qadi) balances the ‘rights’ or duties owed to God with the rights of individuals through elaborate procedural guarantees. Classical jurists devoted much attention on the Qadi and his qualifications, court procedures including evidence. Adab al-qadi is a genre of legal literature that expresses the model behaviour of the judge and the courtroom. Judicial independence is an importance feature of Islamic legal systems with procedural guarantees.

3.4.3 Alternate Dispute Resolution & Access to Justice

The Islamic legal system did not generally require any lawyers since the litigants themselves generally pleaded their own case. Disagreements and disputes were settled within the organic society through the community as well as formal processes. 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), mediation (wasta) and arbitration (takhim). In assessing the applicability of Western-based conflict resolution models in non-Western contexts such as the Arab-Islamic culture area, theoreticians and practitioners alike have begun to recognize the importance of indigenous ways of thinking and feeling, as well as local rituals for managing, reducing, and resolving conflicts.

3.4.4 Ombudsman (Muhtasib)

Among the duties of the Muslim State, as well as members of the society is to promote good (ma ‘ruf) and prevent wrongdoing (munkar). These public duties contained in the institution of hisba are relevant in the wider context of a just society and an efficient market economy. Since earliest Islamic history, this hisba agency was headed by a learned jurist (muhtasib) who functioned like a market inspector, chief public health officer, receiver of complaints and land use enforcer. This Islamic institution can be put to good use in the modern context.

3.4.5 Islamic law in relation to land

Land and property rights being part of the Islamic legal sphere relating to social relations (muamalat) is inherently more susceptible to flexibility and innovation though egalitarian Islamic principles apply. Islamic history, particularly Ottoman experience, demonstrates that these matters were considered amenable to secular and efficiency approaches though cast in Islamic language. Despite the fertile Islamic rights literature supporting pro-poor, innovative and inclusive land and property regime, Islamic legal theory appears to be detained by transactional details rather than express its lofty ideals and objectives. More juristic work needs to be done to systematically develop equivalent doctrines of access to land, security of tenure and protection from forcible eviction though Islamic legal raw materials and concepts exist.

3.5 STRATEGIES FOR EMPOWERMENT THROUGH ISLAMIC LAW

3.5.1 Recognise the importance of Islamic Legal Discourses

Islamic law is a central feature of the lived experiences and consciousness of Muslims across the world, whether or not their States ‘officially’ implement the law. As such, Islamic legal conceptions inform and influence the lives of a majority of Muslims as well as their attitudes towards land and property rights. However, much of the Western perspectives regarding tends to be limited, partial or hostile creating a gulf of cross-cultural misunderstanding. It also allows myths about Islamic law to develop and the field is left clear for extremist and obscurantist constructs of Islamic law. Recognising the potency of Islamic legal thought processes paves the way for active and constructive engagement with the internal discourses.

While secular approaches towards property and land rights are evident in interventions from both within and outside, delving into the ‘authentic’ forms of argumentation has its advantages, at the least it is an additional form of securing those rights. Islamic laws relating to property and land rights have to be assessed within the broader Islamic legal
systems since there is considerable overlap and cross-application of different Islamic legal doctrines. Decoding the sources, structure and normative frameworks of Islamic law enables those working within Muslim societies to explore innovative, proactive and inclusive land tools potentially available within Islamic law. This is particularly relevant for strategies towards developing access to land and security of tenure.

3.5.2 Engage with Islamic Legal Methodologies

Contrary to general assumptions, Islamic law is not a ‘religious’ law but rather a man made code whose primary source is the holy scripture Qur’an which is subject to human interpretation of divine intent. While there are dominant conservative legal opinions alongside egalitarian foundational principles, there exist significant opportunities for interpretation strategies within Islamic law that can promote access to land and security of tenure for all. However, general interpretation techniques based on logic and reasoning are not persuasive Islamic legal interpretation as they are merely considered ‘opinions’ (ra’y). In order to be legitimized within an Islamic jurisprudential praxis, interpretation must comply with certain authenticated methodology. How one goes about interpreting Islamic legal principles in compliance with certain protocols is therefore vital to success of the venture.

Islamic law has a well developed field of usul-al-fiqh (methodology in Islamic jurisprudence) which deals with the processes of reasoning and interpretation. The primary source is the Qur’an which has a limited number of ‘law verses’ some of them being explicit, others general. These are interpreted in their context alongside the practice of the Prophet’s generation (Sunna), some of which has to be verified for their accuracy, credibility and compatibility with the Qur’an. The two other sources, interpretation by analogy (qiyas) and through consensus (ijma) need to be appreciated. A major avenue for exploring the true spirit of Islam is personal reasoning within the Islamic framework (ijtihad) which is a well recognized Islamic jurisprudential tool. There are other supplemental law-generating mediums such as juristic preference (istishan) which enhance the flexibility and responsiveness of Islamic law (Shari’a), the principle of ‘necessity and need’ (darura), actions to promote public interest (maslaha) and human welfare (istislah). The deployment of these mechanisms and tools could well enable the emergence of inclusive, innovative and empowering land management tools.

3.5.3 Appreciate Islamic Legal Pluralism

Islamic law is not a monolithic, static or autonomous field. There is a gap between the theory of Islamic law and its practice in the Muslim world. There is considerable divergence among Muslim countries with regard to form and extent of Islamic law in their legal and political systems. This may have to do whether the Muslim community in question follows the Sunni and Shi’a creed of Islam. Among the Sunnis, who constitute the majority of Muslims in the world, there are four main jurisprudential schools (maddahib, singular maddhab) Hanafi, Maliki, Hanbali and Shafi which are named after their founders and each is the dominant authority in different parts of the world. Legal systems throughout the Muslim world also 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. To consider a particular brand of Islamic law as generally applicable to all parts of the Muslim world would miss the specific national or local contexts which they operate.
In most Muslim societies, complex and contentious relationships exist between particular conceptions of Islamic law and others forms of law – state or customary law. There may be visible or understated but these legal, quasi-legal or informal systems are equally important for Muslims and represent choices which Muslims clearly make between competing choices. Islamic law, in fact, recognizes custom (urf) unless it is in direct contravention of Islamic principles. In some case, it may be necessary to differentiate Islamic and customary practices in order to weed out discriminatory practices. Paying attention to 'legal pluralism', or 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.

3.5.4 Support legal institutions in Muslim countries

Discussion on Islamic law in the Muslim world often focus on the law as it is written less than the law as it is applied. Also, there is a need to enhance our understanding of how Courts and other legal institutions deal with property rights. Since Islamic land and property rights, though based on the conception of ultimate ownership of God, lie in the sphere of social transactions (muamulat) rather than religious worship, they could be dealt with either through Islamic legal systems or secularized legal institutions (for example the qanun law and courts in the Ottoman period). Even within Islamic legal systems then, there exist numerous institutions or personnel that implement the range of laws and interests. These include not merely the judge within an Islamic jurisdiction (Qadi), judges dealing with secular matters, administrative offices such the Muhtasib (ombudsman) and informal legal authorities such as the mufti (one issues fatwa or responsa, advisory opinions) and the mujtahids (those exercising ijtihad or personal reasoning).

Whether it is the judge in the Islamic court (Qadi) or a judge dealing with secular jurisdiction dealing with property or land issues, use of Islamic foundational principles such as justice (adl) or rights (haqq) could promote inclusive, pro-poor and innovative legal solutions. Judicial independence and procedural guarantees are well established in Islamic thought but in general courts suffer from lack of organization, resources, training and a human rights perspective. In all parts of the Muslim world, efforts are underway to modernize and streamline the judicial system. Supporting the capacity building and more efficient mode of justice delivery is needed while recognizing the particular context and needs of courts in the Muslim world.

3.5.5 Facilitate alternative dispute resolution mechanisms

The Muslim world demonstrates not merely distinctive formal legal systems but also a wide array of alternative dispute resolution (ADR) mechanisms. Modernisation of Muslim legal systems has been facilitated in part by colonial encounters usually involving the importation of Western legal structures. However, even where an existing system of property rights is judged inadequate, one must be careful in replacing it, particularly where it is culturally embedded. Attempts at reform of customary systems that do not succeed in changing behavior can create confusion and conflict between claims based on custom and others based in national law. Thus, while State adopts legislation and policy to ‘create’ new frameworks or norms, it may not have the legitimacy or ownership from the general masses.
In assessing the applicability of Western-based conflict resolution models in non-Western contexts such as the Arab-Islamic culture area, theoreticians and practitioners alike have begun to recognize the importance of indigenous ways of thinking and feeling, as well as local rituals for managing, reducing, and resolving conflicts. 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), mediation (wasta) and arbitration (takhim) which are widely practiced in the Muslim world. Among the duties of the Muslim State, as well as members of the society is to promote good (ma `ruf) and prevent wrongdoing (munkar). There are other institutions such as the ombudsman (muhtasib) who functioned like a market inspector, chief public health officer, receiver of complaints and land use enforcer. Access to justice implies not merely the existence of mechanisms, but those that the consumers are able to relate to and use efficiently. Informal dispute resolution mechanisms therefore need to be recognised and, where beneficial, promoted.

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