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Research Series

PAPER 4: Islamic Human Rights
and Land

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**Paper 4: Islamic Human Rights and Land**

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INTRODUCTION TO THE ISLAM, LAND & PROPERTY RESEARCH SERIES

UN-HABITAT’s (United Nations Human Settlements Programme) global mandate and activities 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. The paper 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 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.
Human rights in Islam [are] not about how man asserts his rights against man but how man discharges his duties towards God. It is not preoccupied with the horizontal relationship of man with his fellow man but with the vertical relationship that subsists between each man and his maker. If the vertical relationship is properly tended, all human rights problems fall automatically into place.

(Weeramantry 1988: 116-117)

OVERVIEW

At the international level there exists a recognisable and well-articulated set of rights and expectations relating to land, property and housing rights. These rights are generally considered by the community of nations to be universal, indivisible and interdependent and applicable to all societies, including Muslims. Despite assertions to the contrary, Muslim societies are pluralist, exhibiting a range of religious and secular ideals. However, at least since the inception of the 1948 Universal Declaration of Human Rights, there appears to have been an ideological challenge – diverse in strategy, scope and effect – in relation to the ownership, substance and form of modernist human rights. This paper 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.

Scope of this Position Paper: This position paper considers the participation of Muslim countries within the International Human Rights Framework in Section 1. It explores the differing conceptions of rights under universal human rights and Islam in Section 2. Section 3 maps the issues in regard to of the Islamic human rights discourse and its implications. Section 4 evaluates international and Islamic rights standards with respect to the current land rights of women, children, minorities and migrants. Section 5 considers the prospects for enhanced protection and implementation of land rights in the Muslim world. Section 6 offers five strategies for empowerment through land rights

* Engage with Islamic human rights discourses
* Study Islamic land rights
* Encourage State participation in international human rights treaties
* Facilitate the State implementation of land rights
* Build partnerships for effective land rights strategies
4.1 INTERNATIONAL HUMAN RIGHTS AND MUSLIM COUNTRIES

4.1.1 The International framework for rights to land

Rights relating to access to land, property and housing, its ownership and use, security of tenure and the guarantee against arbitrary deprivation were developed, clarified and elaborated in recent decades at international, regional, national and local levels to now comprise an identifiable body of tangible and enforceable rights. These rights arise out of a variety of constitutional and legal principles, international human rights treaties, political declarations, customary practice and international standards.

4.1.2 Political resolutions promoting land rights

The promotion of land, property and housing rights was propelled by global initiatives seeking to prioritise and mainstream these rights, in which Muslim countries have generally participated. These initiatives include the 1976 UN Conference on Human Settlements, the 1988 Global Strategy for Shelter to the Year 2000 and the Second United Nations Conference on Human Settlements (Habitat II) in 1996, which led to the Istanbul Declaration and the Habitat Agenda which constitute the framework for realising land and housing rights. Taken together, they could be seen as a consensus forming part of international expectations and standards which make up part of a ‘soft law’ creating various levels of recognition and obligation on the part of States.

4.1.3 Muslim Countries and the International human rights framework

A considerable and increasing number of member States of the 57 member Organisation of Islamic Conference (OIC) have ratified the relevant international human rights treaties. They have also participated in the conferences and drafting and making of resolutions towards protection of property, land and housing rights.

4.1.4 Universal Declaration of Human Rights

The drafting of the 1948 Universal Declaration of Human Rights (UDHR), which was adopted by the UN General Assembly on December 10, 1948, is generally agreed to be the starting point of the modernist conception of human rights. Though the UDHR spawned a series of international human rights instruments, which have been elaborated by international standards, Flexibility and dialogue are needed to enhance its cross cultural validity.

4.2 ISLAMIC HUMAN RIGHTS AND LAND RIGHTS

4.2.1 Plurality of approaches to Islam and human rights
There are four major premises and methodologies currently in circulation evaluating Islam's relationship with universal human rights conceptions - universalist, Islamist, cultural relativist and pragmatist. There is also a vibrant internal debate within Muslim societies over the role of modern human rights.

4.2.2 Universal Islamic Declaration (UIDHR) and the Cairo Declaration

The 1981 Universal Islamic Declaration of Human Rights (UIDHR) adopted by the Islamic Council of Europe or the OIC 1990 Cairo Islamic Declaration on Human Rights in Islam are influential with Muslim governments. Both the UIDHR and Cairo Declaration offer a wide range of property rights. Land rights as declared by these documents are less in conflict with universalist principles. It may well be possible to find, through a more dynamic or liberal methodology fuller Islamic property, housing and land rights conceptions.

4.2.3 Land Rights and Islamic human rights principles

There may be differences in articulation of the classical Islamic conception of rights and modern human rights expectations. However, in the comparative study of Islamic and International human rights regimes there appears to be less of a conflict with respect to land, housing and property rights. This is not surprising because Islam has a strong socio-economic rights ethos and promotes equitable distribution of resources.

4.3 ISLAMIC LAND RIGHTS FOR SPECIFIC CATEGORIES

4.3.1 Women’s access to land

Women’s rights to acquisition, management, administration, enjoyment and disposition of property have been an increasing component in efforts to mainstream gender rights. 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. There are difficulties in terms of both fixed Islamic inheritance rules and the prevalence of patriarchal or gender deprecating practices in the name of Islam, but there are definite possibilities to workout a far more gender egalitarian Islamic approach to women’s property rights through independent reasoning (ijtihad).

4.3.2 Children’s access to land

Children’s access to land and housing are often ignored on the assumption that the family will provide housing security and that property rights are almost exclusively an adult concern. Ironically, in endorsing several child centred guarantees in the CRC, the child was privileged over the adult by Muslim countries since the formal acknowledgement of corresponding rights for the adults had often been withheld. Islamic conceptions of child rights contain several strengths, such as the rights of orphans. However, there are some problems relating to 'adopted' or illegitimate children.
4.3.3 Minorities’ access to land

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

4.3.4 Migrants and asylum seekers’ access to land

Migrants and the displaced are among those most defenceless against arbitrary deprivation of property, forced evictions or exclusion from access to housing. The Refugee Convention, which has over 140 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’.

4.4 IMPLEMENTING LAND, PROPERTY AND HOUSING RIGHTS

4.4.1 Nature and scope of State obligations with respect to land rights

Land, housing and property rights cannot be seen in isolation or in the abstract but are part of the interdependent and indivisible human rights regime, where the fulfillment of land rights is dependent on the existence of a broad range of rights. The State has two types of obligations with respect to land rights. First, there are negative obligations where the State has to abstain from interfering in the enjoyment of rights, while at the same time recognizing and protecting them. Second, there are positive obligations, that is the duties to provide and fulfill, which require State intervention. While at first glance land rights as socio-economic principles have limitations of resources and capacity and States are only called upon to do their best, there are basic minimum thresholds and obligations of conduct.

4.4.2 Implementing human rights treaties

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

The 1981 African Charter on Human and Peoples' Rights deserves a closer look in this project since 10 of the 22 Member States of the League of Arab States are also African. The African Charter makes no specific mention of the right to adequate housing but it speaks of other property and land rights. The African Court of Human and Peoples' Rights is expected to pave the way for more effective enforcement of human rights in Africa.

4.4.4 Arab Human Rights Charter

A revised Arab Charter on Human Rights was adopted at the sixteenth meeting of the League of Arab States at Tunis, on May 22-23, 2004. The Arab Charter on Human Rights has been since 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.

4.5 STRATEGIES FOR EMPOWERMENT THROUGH LAND RIGHTS

4.5.1 Engage with Islamic human rights discourses

The relationship between Islamic and International human rights conceptions has often been cast as dichotomous and incompatible. Universalists uphold international standards as applicable, generally without exception, to all people at all times. They fear that yielding to Islamic discourses could unravel the tentative and hard fought consensus over human rights. Islamic cultural relativists, on the other hand, debunk the notion of international human rights standards trumping faith-based human rights perspectives and query both the legitimacy and agenda of the modern human rights movement. However, there is a vibrant internal debate in Muslim societies regarding the role of human rights and several efforts at reconciling the differences are evident.

While international human rights may be taken to reflect the general aspirations of all people, it would be beneficial to engage with the range of Islamic voices in order to generate authentic and durable human rights implementation strategies. This is important since some of the Islamic dissent is largely rhetorical, and develops in response to the perception that the West seeks to impose its values on Muslim societies and produces negative stereotypes of Islam. A cross cultural dialogue over how to secure rights could, in the long run, help render the human rights movement more inclusive and effective.

4.5.2 Study Islamic land rights

One of the main reasons for universalist resistance to the study of Islamic human rights is the plethora of conservative Islamic ideas permeating the articulation of Islamic human rights theories. Given the classical period of the formulation of Islamic law, it is not surprising that there are differences with recent human rights formulations.
However, despite some common fundamental principles, Islam is seen as contested, interacting with other cultures and evolving to provide a responsive human rights framework. 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.

There is considerable scope, using personal reasoning (ijtihad) within the Islamic jurisprudential framework, to elaborate on the Islamic principles regarding access to land and security of tenure. As this study points out, Islamic land rights are extended to specific categories such as women, children, migrants and minorities. It may well turn out that Islamic human rights land rights principles offer a broader net of protection since these are not merely temporal rights but obligations owed to God. Likewise the Muslim welfare state, acting in the public interest and carrying out faith based principles, is mandated to work towards achieving equitable distribution of wealth and rights for all.

**4.5.3 Encourage State participation in international human rights treaties**

Islamic human rights conceptions are a way of understanding the scope and implementation of 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. On the other hand, a number of Muslim countries have signed international human rights treaties and should be held to account, just as other States, over their obligations. These treaties often provide clear principles relating to land, property and housing rights as well as implementation mechanisms. While some States have entered reservations with regard to provisions in several treaties, there are none specifically relating to land, property or housing rights.

In the light of the positive land rights provisions in Islamic human rights statements, there appears to be no fundamental contradiction between international and Islamic human rights norms in this area except for the equality of land rights. Equality of land use rights is the preferred language. Human rights treaties are the cornerstone of the international human rights protection regime and States must be reminded not only of their duties towards fulfilment of those rights but their participation in the treaty monitoring process, particularly through timely submission of complete periodic reports. In addition, Muslim States should be encouraged to sign these treaties, if they have not done so.

**4.5.4 Monitor State implementation of land rights**

Norms relating to land, property and housing rights are easier to establish under the Islamic and international human rights framework as compared to implementation strategies. States, while agreeing with land rights principles in general, appear to take a view that their obligations with respect to security of tenure and access to land are limited and incremental, and can be justified on the basis of limited resources. However,
the nature of State obligations has 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.

Muslim States, just as other States, need to work towards prioritising and realising these rights through legislative, administrative, judicial, policy and other measures. Islamic human rights also conceive a proactive role for the State in realising adequate standards of living, of which land rights are an important component. Moving beyond the theoretical debates, in regard to the identification of the procedural and implementation rules with respect to land rights within both systems, are needed to guarantee land rights at a practical level.

4.5.4 Build partnerships for effective land rights strategies

While the State bears primary responsibility with respect to realisation of land rights, it is equally important to involve all stakeholders in the process. One of the reasons why land rights have faltered, in Muslim as in other countries, has been the lack of space for civil society to articulate its concerns or input into policy responses. A top down State driven approach will not work as satisfactorily as a broader consultative and participatory initiative involving all sections and interests in society, both in the formulation and implementation of rights. Inclusion for all stakeholders in the land rights approach could alter State perspectives and responses to problems such as forced evictions and discrimination against various vulnerable sections of society.

As seen in the International Covenant on Economic, Social and Cultural Rights Covenant (Article 2), land rights may benefit from international assistance and support. Muslim States do seek partnerships with international agencies and must be encouraged to enhance these links. There is also scope for improved facilitation of land rights through participation in regional development and human rights frameworks, particularly in sharing best practice. Regional bodies have a significant role in the promotion, standard setting and protection of land rights in the Muslim world.

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