

**ISLAM, LAND & PROPERTY
RESEARCH SERIES**

**PAPER 6: ISLAMIC INHERITANCE
LAWS AND SYSTEMS**



UN-HABITAT

2005

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Paper 6: Islamic Inheritance Laws and Systems

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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 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 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 a two day workshop on 'Land tenure and Land law tools in the Middle East and North Africa' in Cairo, Egypt on December 15-16 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 6: Islamic Inheritance Laws and Systems

Any person contemplating death and considering the future distribution of his or her property will place in the balance a whole range of factors, which will be specific to his or her personal, family and social circumstances. In Muslim societies, a person's ability to make such calculations is frustrated, in theory, by the compulsory Islamic inheritance rules that impose substantial constraints upon the freedom of a person ... to determine the devolution of his property'.

(Powers 1999: 1167)

OVERVIEW

Inheritance is often treated as peripheral to, or semi-detached from, general debates and policy formation concerning security of tenure, land rights, land reform or regularisation. However, inheritance is one of the commonest ways of acquiring land or access to land. In Muslim societies generally, irrespective of the nature of faith of the Muslims concerned, inheritance rules are derived from religious sources for the division of an individual's property upon death. The rules are in the main rigorously implemented by the family, and community, and upheld by the State. Yet, 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. Demystifying the complex dynamics of Islamic inheritance rules and practice may reveal important information for the implementation of strategies designed to enhance security of tenure.

Scope of this Position Paper: This position paper contextualizes the Islamic Inheritance Systems in Section 1. It examines some of the key features of the Islamic legal rules of inheritance, including the benefits and disadvantages of the fixed share system in Section 2. It explores some of the legal rules on inheritance as part of wider Islamic inheritance systems and their implications in Section 3. Section 4 examines post-inheritance adjustment practices including consolidation and renunciation of inheritance rights, with particular reference to the position of women. Section 5 considers proposals for, and contemporary debates around, legal reform of Islamic inheritance rules. Section 6 offers five strategies for empowerment through inheritance rights

- * *Demystify Islamic inheritance*
- * *Promote Islamic reasoning (ijtihad)*
- * *Facilitate social legitimacy*
- * *Resist abuse of consolidation & renunciation*
- * *Secure land tenure*

6.1 CONTEXTUALISING ISLAMIC LAWS OF INHERITANCE

6.1.1 Islamic laws of inheritance

While modern reforms and changes have influenced several fields of Islamic law, the detailed classical inheritance structure has been one of the enduring legacies of classical Islamic law or the *Shari'a*.

The formal inheritance rules have several distinctive features. First, there are predetermined percentage shares for pre-selected beneficiaries while at the same time allowing some flexibility through bequests and legitimate estate planning. Second, a Muslim's ability to bequeath is restricted to only one-third of an individual's estate under certain rules with the remaining two-thirds devolving according to the compulsory inheritance rules. Third, the scheme of mandatory fixed shares is remarkably inclusive and provides access to property to a range of family members. Finally, the inheritance rights cannot be generally taken away. Rather than a set of abstract rules, Islamic inheritance rules are intended to facilitate distinctive Islamic conceptions of property, family, community, empowerment and justice.

6.1.2 What property may be inherited?

The Islamic law of succession makes no distinction between different kinds of property. It is immaterial whether property is real (land) or personal, movable or immovable - it covers all assets.

6.1.3 Who may inherit property?

Given the wide range of beneficiaries that the Islamic inheritance system seeks to cater to through a sophisticated balancing process, the results can turn out to be hairsplitting permutations and combinations varying according to a given scenario. There are some differences in *Sunni* and *Shi'a* positions.

6.1.4 Benefits of the rules for fixed shares

There exist some easily perceived potential benefits to a scheme of specified shares, as compared with systems of inheritance which provide greater apparent legal freedom to the individual seeking to control devolution of his/her property upon death.

6.1.5 Fragmentation of property vs. cohesiveness of the extended family

The fixed inheritance share rules – which apply to big or small estates, residential or commercial property, liquid assets or investments – can lead to minute divisions, making fragmentation of property a problem, particularly, although not exclusively, in relation to agricultural land.

6.2 INHERITANCE RULES AS PART OF ISLAMIC INHERITANCE SYSTEMS

A variety of legal tools have developed in different contexts to permit individuals to make arrangements for the transmission of property, according to their own determination.

6.2.1 Islamic wills (*wasaya*)

Gifts can be made to take effect upon death, by means of a will, but only up to one-third of an individual's estate can be bequeathed in this manner with the remaining two-thirds devolving according to the compulsory rules.

6.2.2 Women's inheritance shares as part of a wider property system

Female relatives and spouses are accorded shares, but half that of a male in a similar position and male relatives are more likely to inherit and to enjoy a greater share of the estate. This difference in treatment between men and women is usually explained by reference to the fact that it is also a feature of Islamic law that a wife is entitled to maintenance from her husband, in terms of shelter, clothing, food and medical care. Despite the argument that women are compensated for their unequal inheritance shares through such material obligations on the part of husbands to their wives (and other tools such as dower and gift), the apparent formal paper inequality remains a matter of vigorous debate and gives rise to calls for legal reform.

6.2.3 Unborn, illegitimate and adopted children and orphaned grandchildren

Since a child is deemed to be in existence from the point of conception, a child in the womb is competent to inherit within Islamic law. However, an illegitimate child whose paternity was contested may not inherit from the wife's husband, although that child may inherit from its mother and its mother's family.

Adoption is not recognised under Islamic law (*Shari'a*), so inheritance through legal adoption into a family is not feasible. A bequest in favour of an adopted child may not exceed one-third of an estate, under the rules. An orphaned grandchild is unlikely to inherit from a grandparent under Islamic inheritance principles.

6.2.4 'Estate planning' and lifetime transfers

There are a variety of legal techniques that a person contemplating death may deploy as a form of 'estate planning', in order to avoid the strictures of the compulsory inheritance rules. These include the lifetime transfer or gift (*hiba*) and the establishment of a family endowment (*waqf ahli*). The tools deployed for estate planning are subject to debate but the modernisation of Islamic societies has resulted in a propensity towards several kinds of estate planning.

6.2.5 Family endowments

Another legal strategy for an individual seeking to control the devolution of his or her property is to establish a family endowment (*waqf ahli*). A major source of women's

historic wealth appears to have arisen from beneficial interests in endowment (*waqf*) properties, but these endowments have now either been abolished or subjected to severe limitations in most countries.

6.2.6 Non-registration of land to avoid inheritance rules

There is evidence in some Muslim communities that individuals keep their property outside the formal land registration system, because of the costs involved and to avoid giving women their allotted shares under the Islamic inheritance rules.

6.3 POST-INHERITANCE ADJUSTMENTS

6.3.1 Women, law and custom

Inheritance law often lies at the heart of discussions about gender equality and women's property rights.

6.3.2 Consolidation of property

In a process known as consolidation, the division of an estate into fractional shares may be followed by a series of sales and exchanges designed to reduce the number of co-owners. It is women who usually exchange their rights in land for movable property, cash or gold and it is women in the main who decide to give up their fractional shares, particularly in land.

6.3.3 Renunciation of inheritance rights

There is a widespread practice after the inheritance shares are distributed whereby a person, typically a woman, may renounce her inheritance rights (*tanazul*). While gender rights' advocates are justifiably concerned over women being forced to renounce their limited property rights, the reality may be far more complex. It may be a choice over empowerment through property or enhanced family support.

6.4 LEGAL REFORMS TO INHERITANCE SYSTEMS

6.4.1 Codification and secularisation

There has been little legislative interference with the compulsory inheritance rules and daughters continue to enjoy only half as much as their brothers from the estate of a parent, which is a cause of concern for some women's organisations.

6.4.2 Changes regarding adopted children, grandchildren and others

One example of a change in inheritance law in several countries, though subject to juristic debate, which has been widely justified on the basis of the *Qu'ranic* "verse of bequest" and social practice is the obligatory bequest for orphaned grandchildren.

6.4.3 Islamic inheritance systems and the equality debate

The differential treatment on the basis of gender regarding inheritance shares, on the face of it, violates international human rights. A number of NGOs and liberal personalities in Muslim countries have called for equal inheritance rights. However, a more dominant position is the general position, even from Muslim women, that what God has ordained for shares cannot be changed.

6.4.4 Opportunities for empowering women

The Islamic inheritance rules despite their apparent discriminatory nature, where implemented in letter and spirit and construed holistically, provide a solid starting point for women – and other members of the family - in asserting the full range of their property rights.

6.5 STRATEGIES FOR EMPOWERMENT THROUGH INHERITANCE RIGHTS

6.5.1 Demystify Islamic inheritance

General knowledge of the basic legal system pertaining to inheritance appears to be embedded within Islamic communities, but the specific rights are generally not publicised, and certainly not widely articulated or agitated. This is due to several factors, the widespread illiteracy of particularly Muslim women in some societies, a perception that the rules are complex, which is deliberately reinforced by authority figures and the marginality of certain categories within families and communities. Though inheritance is only a part of the wider Islamic property regime, inheritance rules are presented as a complete divinely ordained code without room for compensation through other tools. With regard to entitlement of shares and the impact of estate planning, consolidation of property and renunciation of shares, those involved and affected must have the fora and opportunities to discuss and deal with the impact of their decisions.

6.5.2 Promote Islamic reasoning (*ijtihad*)

Islamic inheritance is closely associated with Islamic identities and social structures and a general concern about secularisation as a threat to Islam. As such, there is widespread resistance against anything other than very limited state intervention into this area, even amongst women. The reforms – towards materialising the egalitarian and distributive aspects of Islamic law- have to come primarily from within the community and be compatible with the Islamic frameworks. The main features of the inheritance rules appear to be clear-cut, particularly when they are deemed to be clear, and unambiguous (*qat'i*) and not readily open to any modification. However, any set of Islamic principles are to be re-interpreted and applied in the backdrop of the objectives of Islamic law (*maqasid e sharia*). Despite the limited forays into the realm of Islamic inheritance rules, the return to first principles and continuing development of these principles suggest that several inheritance practices may in the near future be subjected to *ijtihad* (interpretation as an Islamic jurisprudential tool) leading to newer forms of interpretation.

6.5.3 Facilitate social legitimacy

Inheritance rules have to be understood within the myriad systems of property relations, including such matters as dower and maintenance, and within inheritance systems, of legitimate methods of estate planning. Legal techniques, notably lifetime transfers and the establishment of family endowments, have developed to enable individuals to determine the devolution of their property to meet perceived social needs, to avoid fragmentation of agricultural land and family businesses. In some communities the lifetime transfer is seen as a means of adjusting for discrimination against women under the inheritance rules, but in other contexts to prevent family property moving out of male control or into the hands of 'outsiders'. Where these 'legal' techniques serve to achieve progressive and inclusive results, efforts to enhance their social legitimacy must be facilitated.

6.5.4 Resist abuse of consolidation and renunciation

The transfer of property through inheritance is only one point in the cycle. The subsequent processes of consolidation and renunciation of the inherited property must also be queried. Given the propensity towards consolidation of family property and its smooth intergenerational transfer, property- particularly farmland or a family business- is likely to be transmitted and retained in the hands of men. The social convention being to the effect that, men as the producers should manage and control both the business and the land it sits upon. Moreover there are compelling pressures on women, of affection, notions of honour and shame, and economic necessity, which have a bearing on whether they will assert a claim upon a share in an inheritance, agree to sell a share, whether for cash or symbolically, or whether to renounce a share. These are not Islamic principles but socio-economic and cultural practices which have to be tested for their utility and legitimacy, in view of the evolving family and community structures.

6.5.5 Promote Security of land tenure

Strategies designed to enhance security of tenure and to relieve poverty within Islamic societies, inheritance law and inheritance systems, particularly as they pertain to women, should not be regarded as a peripheral matter. Inheritance is an essential component in access to land. The inheritance process is not dependent on formal legal decrees on inheritance which are only one element of the picture. The specifics of the inheritance system in any context must be demystified, including the dominant legal techniques of estate planning in that context, the motivation for using those legal techniques and the social meanings attributed to the use of estate planning methods. However, in many political and social contexts the full implementation of the inheritance rules under Islamic law could be a realisable goal and a good starting point to extend rights in land to less powerful members of society.

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