




**ISLAMIC DEVELOPMENT BANK**  
ISLAMIC RESEARCH AND TRAINING INSTITUTE

# **LAND OWNERSHIP IN ISLAM**

**(A Survey)**



*Research Paper  
No. 14*

## ISLAMIC RESEARCH AND TRAINING INSTITUTE

### Establishment

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The Islamic Research and Training Institute (IRTI) was established by the Board of Executive Directors of the Islamic Development Bank (IDB) in 1401H (1981.) The Executive Directors thus implemented Resolution No. BG/14-99, which the Board of Governors of IDB adopted at its Third Annual Meeting, held on 10 Rabi Thani 13991-1 (14 March 1979.) The Institute became operational in 1403H (1983.)

### Purpose

The purpose of the Institute is to undertake research for enabling the economic, financial and banking activities in Muslim countries to conform to *Shari'ah*, and to extend training facilities to personnel engaged in economic development activities in the Bank's member countries.

### Functions

The functions of the Institute are:

- (a) to organize and coordinate basic and applied research with a view to developing models and methods for the application of *Shari'ah* in the fields of economics, finance and banking;
- (b) to provide for the training and development of professional personnel in Islamic Economics to meet the needs of research and *Shari'ah* observing agencies;
- (c) to train personnel engaged in development activities in the Bank's member countries;
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The Institute consists of three technical divisions (Research, Training, Information) and one division of Administrative and Financial Services.

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Mahmoud A. Gulaid

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## FOREWORD

The Islamic Research and Training Institute (IRTI) was established by the Islamic Development Bank (IDB) in 1401H (1981). It became operational in 1403H (1983). The primary objective of the Institute is to carry out research in the area of Islamic economics, banking and finance, to develop the capabilities of professional personnel in Islamic economics so that they may meet the needs of . research and Shari'ah-observing agencies, to train personnel engaged in development activities in the Bank's member countries, and, among others, to develop databases in fields related to its activities in order to foster development in the IDB member countries.

The academic activities of the Research Division of the Institute are conducted within the framework of two major research groups, namely, the Islamic Economics Group and the Islamic Banking and Finance Group. *Shari'ah* studies and those on economic cooperation among member countries are conducted within these groups depending on the emphasis or concentration of the study.

This research paper on land ownership in Islam was conceived as a basic study from which several other studies could be generated. The objective is to point out the direction future research should take. As a precursor, one such derivative of this research had already been published by IRTI under the title *Effect of Islamic Laws and Institutions on Land Tenure with Special Reference to Some Muslim Countries* (1990). Other research efforts based on still unresolved issues of interest to Muslim countries may be generated with a view to addressing some of the inherent problems.

The paper starts with the definition of major terminologies pertaining to ownership in Islam, and proceeds to set the premises for *Fiqh-based* ownership modes and conditions thereof. A sharp *Fiqh-based* classification of ownership and use-rights is given in the subsequent pages . Land is treated as a property, therefore ensuing rights and obligations are given practical juridical relevance. Classification of land in Islam is given due emphasis in section II. The role of the state in Islamic perspective, especially in directing land use efforts and in formulating and implementing fiscal and financial policy, therefore legislation,



relevant to land is discussed in section III. Normality of private ownership of land in Islam is discussed in section V.

It is hoped that contemporary scholars will take up some of these `academic challenges in the future.



**Prof. Dr. Abdel' Hamid El-Ghazali**  
Director, IRTI

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## OWNERSHIP RIGHTS

### 1 - INTRODUCTION:

The purpose of this paper is to survey major issues in land ownership in Islam deriving evidences from the Quran, the Sunnah and Fiqh schools of thought and to define, demarcate and establish rules for governing land and land-use in Islam.

We will begin with the definition of important terminology in the area of ownership in Islam, discuss the methods of and conditions for Fiqh-based acquisition, and then present the Fiqh-based- classification of ownership and use rights. This will be followed by a discussion of land as property, with rights and obligations, giving as much practical juristic evidence as possible. The classification of land in Islam is dealt with in Section III. The role of the State in Islamic economics and economics in general, especially in the directing of land-use, and certain fiscal and financial instruments used in land economics are also analysed.

### 2 - EVIDENCE IN THE *QURAN, SUNNAH AND FIQH*

This study contains four key words that need to be clearly defined. The term "ownership" , if not precisely defined, may pose serious problems. The expression "rights" in Islamic jurisprudence is complex and should be given special attention. The word "proprietary" in connection with use and use rights is so important that we must define it clearly in order to be able to intelligently discuss the subject of this study.

The terms "land" also needs to be carefully defined, and finally, in order to eliminate any ambiguity, we must clarify the issues upon which the analyses in this study will be based.

The key word *Mulk* and its derivatives take different forms. In Arabic, the word *Malaka* (verb) means to take possession of some thing. *Malik*, the personal noun form, indicates that which owns or has taken possession of some object or thing. *Mamluk* refers to that object which is possessed and *Milkiya* signifies the authority, often exclusive, which is vested in the hands of *Malik* in relation to objects owned.

In the *Quran*, *Mulk* can be seen as an attribute of Allah. The Verse "He to whom *belongs* The Dominion of the Heavens And Earth"<sup>(1)</sup> indicates the all-inclusive power and authority in Allah beyond which ownership of all things on earth and in heaven can hardly transgress.<sup>(2)</sup>

The Verse

Say: "O God!  
Lord of Power (and Rule),  
Thou givest Power  
To whom Thou pleasest"

of *Surat III (Al Umran): 26*, combines *Malik* with *Mulk* to accentuate the fact that Allah is the *authority* itself, the owner of such a dominion and the delegator of authority. Ownership of things, therefore, cannot by virtue of this dictum go to or be shared with Him by others. Only Allah has the exclusive authority to own heaven, earth and all that are in between.<sup>o</sup> This is one interpretation of the key words *Mulk/Malik i.e.*, authority, and *Mamluk* - the object upon which ownership authority is exercised.

*Mulk* also appears in the Quran as a delegation of authority. In this capacity, Man is the heir chosen to exercise some authority over those earthly things surrounding him. The key expression here is the *delegation of authority* by Allah to Man. The understanding is that he may use that authority subject to the strict code of conduct and rules dictated by *Allah*. In this regard, *Surat LVII (Al-Hadid)*, Verse 7 reads:

".....And spend (in charity) Out of the (substance) Whereof He has made you *Heirs...*"

*Mu/k* may also be interpreted as a function closely related to Man in that the word *Mal* implies *Mu/k* in so far as the possession of wealth subsumes the exercise of ownership rights over things owned. This condition of authority over things (in the case of *Mal*, for instance) and the virtue of having ownership rights vested in Man appear in the Quran extensively.<sup>(4)</sup>

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1. See *Surah: VII (Al A'raf):158; XXV (Al-Furqan):2; XXXV (Fatir):13; XLII (Al-Shura):49; XVIII (Al-Mulk):1; LXXXV (Al-Buruj):9.*
  2. For an extensive list indicating this attribute of exclusiveness of ownership, see: "Al-Milkayah Fi Al Shariah Al-Islamiyah" ... (Ownership in Islamic Shariah...), Abd Allah Mukhtar Abdul Qafar Younis, Jamiat Tunis, Al Kuliyah Al Zaytuniyah, 1984.
  3. This apparently includes Man, as a subset of "all things on earth", upon whom authority, par excellence, may be imposed and/or to whom such an authority may be passed on by Allah.
  4. See, for instance: )XXIV (Al-Nur): 61.

*Mulk* may alternatively be interpreted as a reward payable to Man for doing something sacred. Work is one such effort rewarded with Mull( over things earned.)<sup>1)</sup>

In the traditions of the Prophet (Peace Be Upon Him), Bukhari narrates a message given to Mu'ath Bin Jabal, who was sent on a mission to Yemen,to:

" .....Tell them Allah has made *Zakah* compulsory on them to be taken from the rich, payable to those amongst them that are poor. If they obey this, beware of their properties" <sup>(6)</sup> and heed the prayers of the oppressed, for there is between him and Allah no obstacle.<sup>1)</sup> "

Similarly, Al Bukhari and others narrate from Jabir Bin Abd Allah that the prophet (PBUH) had said: " He who brings to life land that is uncultivated, that land belongs to him" <sup>(8)</sup>

Abu Daud narrates from a companion of the Prophet who said:

.....I fought along side the Prophet (PBUH) thrice. I heard him say: Muslims share three - Fodder, Water and Fire."<sup>(9)</sup>

It appears reasonable to interpret these traditions as indications of acceptability of at least three different types of ownership, viz:

First, Mu'ath Bin Jabal's mission to Yemen bears witness to the warning against intrusions into the privately held properties that belong to those believers in Yemen. This is clearly a policy upholding the freedom of private ownership, however, subject to conditions stipulated in the message borne by the executive bearer (Mu'ath in this case).

In the second Hadith, acquisition and ownership of land appear to rest on efforts aimed at bringing land to "life". In economic terms, this would seem to imply a highly coordinated system of resource commitment to productive enterprises with the intensity of the use of the land being shifted from lower to higher

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5. In economics, work is synonymous with human labour, a factor of production which generates returns. The term "*Kasb*" may in this connection be taken to mean returns that accrue to whoever exercises productive undertakings.
  6. The word "*Amwal*" may take any of the following forms: wealth, possessions, fortune, estate, assets, property, chattels, cash, etc.
  7. The text of this "*hadith*" in Arabic may be found in Al-Bukhari, *Kitab al Zakah*, p. 1306.
  8. See: Fath Al Bari, *Kitab Al Harth Wal Muzara'* - Bab Man Ahya Ardan Mawatan.
  9. See: Mukhtasar, Sunan Abu Daud, *Kitab al "Buyu"* - Bab Fi Man Al Ma'. pp. 121-123.

levels justifying private ownership. As such, the scale of production establishes the necessary conditions for acquiring land brought to "life" on a private basis.

The third *Hadith* seems to define the scope of the communal ownership of certain goods. Here the entire community of Muslims in a given time and place has the right of access to the use of water, public grazing land, and fire. Fundamentally, these goods are not subject to the rules governing private ownership and to the key exclusionary powers embedded in the principles of proprietorship.

Islamic jurists, on the other hand, have explained ownership by means of inter relationships between *Malikiya*, *Mamlukiya* and *Milkiya*. The Hanafi school of thought is exemplified in the words of Ibn Al Humam: "Ownership is a legal authority that begins with the right of disposal".<sup>10</sup> The *Maliki* school defines "Ownership as a legal authority that allows a person or his delegate to process the use or ownership rights, and also to accept compensation in case of transfer of owned properties or use rights to others."<sup>11</sup> Ibn Taymiya, from the *Hanabila* School, defines "Ownership as a legal authority justifying the right of disposal."<sup>12</sup>

The strength of these definitions lies in their ability to reflect the legal authority of ownership, and the right to dispose of property in any form and for whatever purpose the owner deems appropriate. To these outstanding attributes of ownership must also be added the ability of the owner to exclude others from posting claims to similar use rights on specific property. Taken together, private ownership becomes unambiguously defined.

The term "rights" in Islamic jurisprudence is often used in the context of ownership (*Milkiya*). Some of the features of ownership rights include the specification of *access limitations* by others to the property and the confinement of its use and use rights to property owners. As such, owners are, by law, free to exercise these use rights for their own benefit so long as they are in accordance with *The Shariah*.

The use of this terminology by Islamic jurists essentially stems from the interpretation given in the linguistic definition of the word "rights" in Arabic. Jurists, apparently, did not modify or elaborate on the linguistic interpretation of the term

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10. See : Ibn Al-Humam, *Fath Al-Qadir*, p. 248.

11. See : "Ibn Al-Shati", *Hashiyat Idrar Al-Shuruq Ala Anwar Al Fariq*, p. 209.

12. See : Ibn Taymiyah, *Majmuat Fatawa Ibn Taymiyah*, pp. 347-348.

"rights" so as to give it a more explicit juristic connotation. Jurists have, however, attempted to differentiate between several forms of "rights" in order to clarify the concept of ownership in Islam. *Ibn Al Qayyim*, for example, differentiates between *Allah's rights* and those of *people*. Whereas peoples' "rights" are subject to negotiations (and may be pardoned or otherwise compensated for), *Allah's* rights are not negotiable nor in the least compensable.<sup>(13)</sup>

*Al Qarafi* identifies three kinds of rights, viz: Allah's, people's and an intermediate mode. Allah's rights are His injunctions exemplified in His instructions which often are expressed in the form of that which is permitted or that which is denied. People's rights (even though distinct) are defined along similar lines of reasoning. The third type of rights often covers ownership rights as detailed in *Ibn Qayyim's*.<sup>(14)</sup>

Among Islamic jurists are those who think in terms of aggregate or composite rights. These are broken down into: financial rights, personal rights and permanent rights.<sup>(15)</sup> Others, such as *Ibn Rajab Al Hanbali*, define a larger domain that includes a classification of rights under five groups : the right to possess, the right to the wealth of one's own son, the use or benefit right, the priority right, and the composite rights.<sup>(16)</sup>

The definition of ownership rights may, given the arguments of different juristic schools of thought, be summarized as follows: an authority or power vested in the owner of a property, often in the form of legal rights, to use, dispose of and/or enjoy the said property in his best interest." These functions are to be exercised subject to the limits allowed in Islam, which shall be explored in the following section.

### 3 - ACQUISITION OF OWNERSHIP AND USE RIGHTS IN ISLAM

In its most fundamental form, the concept of ownership may be understood as a relationship between "Man" and "Objects" upon which he might exercise legal claims. In Islamic jurisprudence, Man's instincts to fervently seek, acquire and own property is not only magnanimously tolerated but also honored and

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13. See Ibn Al-Qayyim: *I'lam Al-Mawwqi'in An Rabb Al'Alamin*

14. See: Ibn al Qayyim, *Ibid*.

15. See: Al-Nawawi, in *Al-Majmu' Sharh Al Muhadhdhab*, pp. 140-141.

16. See: Bin Rajab Al-Hanbali, in *Al-Qawa'd*, pp.188-195.

17. For the Hanafite position, see: Al-Babirti in *Sharh Al-Inaya 'Ala Al Hidayah*. For the Malikites, refer to A( Rasas in *Hudud Ibn Arafah*, p. 149. For the Shafi'i school of thought, see A( Iz Bin Abd Al-Salam in *Qawaid Al Ahkam Fi Masalih Al-Anam*, p.6. For the Hanabilah, see Ibn Qudamah in *Al-Mughni*, pp. 128, 193, 200 and 238.

encouraged. This magnanimity, however, has bounds. It is often conditioned by a sophisticated system of checks and balances so that the searching and acquisition become, in the end, a highly tempered and civilized drive. The end result is a just method of distribution deeply rooted in Islamic jurisprudence.

Land classification systems in Islamic jurisprudence draw distinctions between objects which may be owned and those which are considered forbidden and, therefore, are not subject to ownership of any kind. These classification systems are based on the premise that ownership can best be exercised by either the individual, the community or the State. Communal interests, for example, would be served if property in which the community has an interest is relegated to an authority that best serves its needs. This suggests that all those objects in which the community has a stake should be in the hands of an authority that ensures the community's access and use rights. Rivers, roads, mosques, etc., are examples of communal property, which should never be privately owned.

Some other objects exist outside of any ownership scheme or classification system. The air surrounding us, sunshine or any uses put to it, and rainwater cannot be appropriated either by an individual, a community or a State, and as such they are goods that bear no specific relationship to the pricing mechanism. Since appropriation by definition is closely tied to use or benefit rights, it also becomes juridically difficult to cede (into a definitive ownership scheme) something that is free of charge and cannot be physically demarcated. Once, however, benefits become available from the uses to which these objects have been put, then their classification, within a definite scheme or basket of appropriate items, becomes justified.<sup>(18)</sup>

#### **4 - ACCEPTABLE AND UNACCEPTABLE MODES OF ACQUIRING OWNERSHIP AND USE RIGHTS**

According to Islamic jurisprudence, acceptable modes of acquiring property include:<sup>(19)</sup>

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18. In fact there is a considerable debate on the uses to which some insects are put and whether these can be classified among the items covered under ownership. If it can be established that such insects could generate benefits to their owners, then their appropriation may be classified in one of the existing schemes already defined in the Shariah. Bees are a case in point. Some *Hanafi* jurists have given this concept a great amount of thought. See, for instance: Shaikh Zadah in *Majma Al-Anhur Sharh Multaqa Al Abhur*, p. 108.

19. See: Al Abbadi, *Al Mulkiyah fi Shariah Al-Islamiyah*, Vol.2, pp. 30-31.

- A - Search (surveillance) and capture of permitted objects. Such activities include hunting, fishing, cultivation of otherwise "bad" land (reclamation), gathering wood, exploitation of underground minerals, laying claim to conquered booty, etc.
- B - Transferable contracts. Among these are title deeds, commutative contracts, donations, endowments, grants, sales contracts, rental contracts, leasing, trusteeship etc.
- C - Inheritance.
- D - Compensation, such as guarantees on damages caused by someone to other people's property, "blood money" (*Diyah*), etc.
- E - Offspring of owned livestock and produce of fruit or other trees, etc.

Islamic jurists differ on two major issues regarding ownership: (a) staking out for long periods in order to establish a claim, and (b) gleaning of property (including financial) after identification. In the first case, the majority of juristic schools are of the opinion that staking out for a great length of time cannot be considered a way of establishing ownership. However, a number of *Hanafi* jurists believe that this can, in fact, be considered a legitimate method under certain priorly stipulated conditions. The *Malikis* argue that this method prevents others from making claims on the object in question and, therefore, should not be considered as a legitimate claim.<sup>(20)</sup> Regarding the issue of gleaning properties after identification, the *Hanafi* jurists maintain that such a method does not constitute an establishment of ownership rights. The *Shafi'i*, *Maliki* and *Hanbali* jurists agree, on the other hand, that taking into account certain conditions' this is sufficient to establish ownership."

Islamic *Shariah* also forbids acquisition of ownership by means of any unjust or inequitable method. Often cited among these methods are usury, hoarding, gambling, theft, compulsion, cheating, in all its diverse forms, and the like. Also included among these are any acquisition activity that might result in serious negative consequences to other individuals or groups or to the community at large. Trading in commodities which are declared forbidden under *Shariah* laws (such as, intoxicants including alcoholic beverages) is considered unacceptable, and, therefore, does not constitute a legitimate method of acquisition.<sup>(22)</sup>

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20. For detail(s), see *Al-Furuq* by Al Qarafi, Vol. 4, pp. 73-74 and others.

21. See: *Hashiyat Al-Bajuri*, Vol. 2, pp. 55-65, also *Al-Nadhariyah Al-Ammah*, by Abu Sannah, p. 290.

22. See: Al Abbadi, *op. cit.* pp. 35-36 for a detail(ed) discussion of these issues, including supportive literature based on the Quran, Sunnah and Islamic Jurisprudence.



## 5 - CONDITIONS GOVERNING OWNERSHIP AND USE RIGHTS

The desire to own property often begins from a real or perceived need that may formerly have been unsatisfied. Ownership, in and of itself, does not constitute an end that man should genuinely covet. By acquiring property, man often finds a way of indirectly satisfying his needs. The benefits derived from use of property may often satisfy, in part or in whole, real or perceived needs. These benefits accruing to the owner are the core elements upon which the proprietary laws in Islamic jurisprudence rests. As such, some definitive criteria and boundaries limiting the norms of proprietorship have been developed.

These include the following.<sup>(23)</sup>

- A that the owner exercise his best judgment and discretion in the use of owned properties. Islam recommends moderation and does not condone waste, overindulgence or excessive consumption;
- B that the owner develop his property usefully. Islam does not allow property to remain idle that could, otherwise, have been productive and could have been developed to serve some real or perceived needs; that owners abide by the rules, laid out by the *Shariah*, governing the code of conduct in the use and development of property and other closely related activities; and
- D that the owner, while exercising his rights does not enter into transactions which have a negative effect on others.

Having defined these major juristic issues, we present classifications of ownership in the following section.

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23. it can be seen from the list of obligations on the part of the owner, herewith listed, that these involve the freedom to develop, use and exploit property in his best interest and also to save or secure such property in any form for any span of time that best suits him so as to satisfy his real and/or perceived needs. This degree of independence of action also includes the freedom to transfer property to others using such permissible methods of transfer as sales, lease, rent, grants or others permitted by Islamic Shariah. For a detailed discussion of these and other related matters, see: Abbadi, *Ibid.* pp. 71-151.

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## II

# CLASSIFICATION OF OWNERSHIP

Classification systems pertaining to ownership and proprietary rights in Islam may be viewed either from the perspective of Islamic jurists or from the more pragmatic approach adopted in the Islamic *Shariah*.

Although these classification systems are thoroughly grounded in *Shariah* principles, that of the Islamic jurists is often considered theoretical and sometimes less attuned to the social and economic conditions found in the real world Islamic State. The *Shariah* based classification system, however, differs from the juristic system in that it takes into account past trends in ownership and also other conditions governing the social and economic realities of the Muslim community. This classification system is, therefore, more practical in so far as it is permitted by the state of affairs in any given place and time.

This distinction is important in that juristic classifications do not always prove to be adaptable to the socioeconomic conditions prevailing in all Muslim countries. Rather, these classification systems define and explore the overall elements and juristic conditions that make ownership systems feasible in Islam. However, classifications stipulated in the *Shariah* are already tested and proven concepts. This distinction is important and suggests that the set of classification established by the different schools of Islamic jurisprudence is merely a subset of the larger set of rulings on proprietary rights and ownership regulations sanctioned in the *Shariah*.\*

### 1 - JURISTIC CLASSIFICATION SYSTEMS

Jurists employ three major systems in the classification of ownership. These are:

#### **A - Classification by Proprietary Rights and Extent of Use Rights Granted.**

There are four major subgroups to this classification:

- (I) Proprietary rights, including use or benefit rights, granted to those who have acquired the title to a property. Ownership may be specified as being

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For elaborations, see Abdallah Yunis, op. cit., pp- 126-128.

"complete" in the sense that both the legal authority to own (the deed, for instance) as well as the freedom to exercise whatever economic prerogative the owner may find beneficial are explicitly stated. The use or benefit rights *must, however, be subject to approval by Islamic Shariah*. The *criteria often invoked is whether these activities are gainful, ceteris paribus.*<sup>(24)</sup>

- (ii) Proprietary rights granted without use or benefit rights. This is common in Islamic inheritance laws in that the deceased may grant someone, different from the heir, all the use or benefit rights of a given property while ownership still rests with the legitimate heir. Use or benefit rights revert to the heir after a specified period of time had elapsed. The recipient of the benefit rights enjoys all the uses put and, therefore, benefits derived from the said property during *the time period stipulated in the will.*<sup>125j</sup> *After that, use rights are transferred to the heir, who then has the proprietary as well as the use or benefit rights.* This type of classification, in juristic terms, is known as "incomplete" ownership since, by definition, it contains only one of the two key elements that define "complete" ownership.
- (iii) Use or benefit rights granted without proprietary rights. This situation, which is the reverse of that of the preceding paragraph, is generally found in cases in which those individuals who have acquired the use or benefit rights are different, legally, from those who own the property. In this case the classification of ownership depends upon the owner of the proprietary rights choosing to lease, rent, put under trusteeship or delegate his property to *Waqf.*<sup>(26)</sup> *Whatever the mode of transfer chosen, the use or benefit rights are automatically put in the hands of beneficiaries.* The proprietary rights, however, remain with the owner of the property in question.

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24. The *ceteris paribus* items specified here includes all things forbidden to be owned by Shariah, (e.g., corpses, pigs, etc). It is also understood that the so-called "complete" ownership in *Fiqhi* terms denotes the simultaneous possession of both the proprietary plus the benefit rights. According to Ibn Abidin, "What is meant by *complete ownership* is ownership of an object and all the uses put to it". See: Ibn Abidin in *Hashiyat Rad Al Muhtar Ala Al-Daurr Al-Muhtar*. Other juristic schools concur with this definition. For a detailed discussion by the Shah's, see: *Hashiyat Al-Jamal Ala Sharh Al Minhaj*; for the Malikis see: *Hashiyat Al-Dusuqi*, pp. 431-457 and for the Hanbelis, see: *Al-Bahuti in Kashshaf Al-Qina'*. In general, any classification that does not include the combined authorities of proprietorship plus freedom to exercise use rights is considered *incomplete*. These are discussed under items (ii), (iii) and (iv).

25. See: Mustafa Zarqa in *Al-Madkhal Al-Fiqhi Al 'Am*, pp. 240-241.

26. See: Mohamed Abu Zahra in *Al-Milkiyah Wa Nadhariyat Al A'qd Fi al Shariah Al Islamiyah*, (Ownership and Theory of Contract in Islamic Shariah), pp. 78-79.

(iv) Use or benefit rights alone. In this case, it is difficult to classify ownership and the extent of use rights. Islamic jurists disagree on whether the establishment of benefit rights alone can constitute a distinct class of ownership without being preceded, or alternatively, succeeded by proprietary rights.

Property must first have a legal (and, implicitly, an economic) connotation before use or benefit rights can legally be assigned. We will not delve into the legal discussions here regarding jurists' positions on these issues.

### **(B) Classification by Type of Owner**

Classification of ownership by type of owner establishes a relationship between the object owned and the person exercising ownership rights. Three major subclassifications are often suggested: (i) privately owned property, (ii) property owned by the community, and (iii) property of the "*Baytul Mar'*".

In the case of privately owned property, the owner may be an individual or a group of individuals, who collectively constitute a legal entity similar to that of the individual. In the latter case, the individual's share of the overall property is predetermined, but the form that this property takes, however, reflects the collective proprietorship rather than the individual shares held by each member of the group.

Community owned property is that to which the entire *Ummah*, or a part thereof, has the legal title. Such property is barred from private ownership as this would conflict with the interest of the community in terms of access and use and benefit rights.

The use of the property of the "*Baytul Mar'*" is left to the discretion of the Imam, or whoever happens to bear and exercise that authority. This authority may be delegated formally or bestowed upon the Imam by consensus. The Imam, in turn, has the power to independently use, commit, or transfer the property of the "*Baytul Mar'*" on condition that this is in the interest of the community, and that it conforms to the Shariah and hence is juristically acceptable.<sup>27</sup>

### **(C) Classification by Nature of Property**

The system of classification depends on the nature of the property in question, which can be specific as in the case of "fee simple" ownership or broad and, therefore, not easily subdivided. Barlows characterizes the "fee simple" (i.e.,

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27. See : Classification in section 2.2

absolute) owner of a specific and definable property as one who : .....has the right to possess, use and exploit his land property. He can sell his land with or without deed restrictions that affect its future use. He can give it away, trade it for other things, or devise it in any of a number of ways to his heirs. He can lease his use rights to others. He can mortgage his property or permit liens to be established against it. He can subdivide his land holdings or grant easements for particular uses. He can enter into contractual arrangements involving the use or disposition of his resource holdings., (28)

When these aspects are applied to a specificable and distinctly definable property, (e.g., land, buildings or parts thereof), then the location and other specific characteristics of a given property become a useful classification system. This is referred to in Islamic Jurisprudence as "Al Milkiya Al-Mutamayizah."<sup>(29)</sup>

## **2 - SHARI'AH CLASSIFICATION SYSTEM**

As we have already pointed out, there is a subtle difference between ownership classifications adopted by Islamic *Shariah* and those found in the juristic deliberations. The former has internalized the socioeconomic conditions of the real world of Muslims', *ceteris paribus*. This transforms the theoretical deliberations propounded by jurists into practical day-to-day legal rules to be applied to ownership-related affairs and to resolve crises.

Islam takes into account the factors that affect a Muslim's state of economic, social, political and spiritual well-being and taking into account the individual's real and perceived needs, establishes rules for the regulation of normal earthly pursuit. Islam upholds the right of the individual as well as the community to pursue ownership objectives in such a way that these can be, simultaneously and harmoniously, achieved. In essence, the pursuits of the individual need not conflict with the community's desire to prosper through the exercise of property rights in land and other physical resources.

In Islam, the community, as well as the individual, is free to pursue real or perceived goals in an attempt to satisfy its needs. The group of individuals in any given place and time that define the extent of the Muslim community reflect its overall needs. Islam establishes the conditions necessary for minimizing conflicts between the needs of individuals or groups thus ensuring that harmony is established among all groups making up the community. Once established, the

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28. See: Raleigh Barlow, p. 378. 29.

29. See: A(i A( Khaff in *Al Milkiyah Fi al Shariah Islamiya*, (Qwnership in (Islamic *Shariah*), p. 81.

legal framework of the *Shariah* maintains collective interests and efforts. The result is an equitably distributed set of property rights and the freedom to own, use and benefit from land and other resources of the *Ummah*.

Should the balance be upset as a result of the excessive drive or zeal of an individual or a group of individuals against the interests of the community, then a third party must intercede to establish justice and to unite all parties under the banner of Islamic unity. The role of the *Imam*, then, in Islamic Jurisprudence becomes all the more important. Ownership under the "Baytul Mal" (i.e., the *Imam* or whoever exercises that authority) becomes the third party likely to be involved in the ownership of property (30)

We now turn to ownership classification systems as outlined in the *Shariah* giving justifications based on the *Quran*, *Sunnah* and Islamic Jurisprudence.

### **(A) Individual Ownership:**

Individual ownership as stipulated in the *Shari'ah* refers to that legal condition in which the individual has the priority relative to others over things upon which claims are held. The exclusionary rights exercised by the owner forbids others from invoking use rights to properties already sanctioned to the owner by the *Shari'ah*. As already discussed, the individual may legally own both the proprietary and the use rights permissible under the law, in which case he becomes the "fee simple" owner of the property in question, subject to limitations imposed by the *Shari'ah*.

The limits of individual ownership are defined in the *Quran*, the *Sunnah* and *Fiqh* literature. For example, the *Quran* sanctions the exercise of the individual's prerogative to earn profit as long as it does not conflict with the fundamental norms of the Islamic ethics. The use of capital to generate profit from economic enterprises, and the divine ordinance of *Zakah* appear to form the essential sphere of individual ownership.

*Zakah* imposed on earnings from economic activities implies, *a priori*, the existence of *Zakahable*\* enterprises which, by definition, can only be classified as individually owned property. Hence, the *Quranic* injunction that owners *pay Zakah* on owned property (*Amwal*) so that they might be purified and sanctified *Surat IX (Al-Towbah)*, 103:

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30. See: Mohammad Baqir A( Sadr, *Iqtisaduna*, Dar Al Fikr, Beirut, p. 392.

The term "*Zakahable*" (*adj.*), i.e. something being subject to *Zakah*, has, in some studies been spelt as *Zakatable*". I prefer to add the suffix "able" to the noun without changing the "h" to "t". This version is adopted throughout the paper.

"Of their goods take alms,  
That so thou mightest Purify  
and Sanctify them .....

In the case of individual ownership of real estate and consumer goods , we cite *Surat LIX (Al-Hashr)*, which refers to the Muhajirs, who forsook their homes and property in order to assist the Prophet (PBUH) in his *Hijrah*:

"(Some part is due)  
To the indigent Muhajirs,  
Those who were expelled  
From their houses and their property"

*The exclusionary clause*<sup>(31)</sup> *contained in the ownership/ use right ordinance* appears adequately expressed in the following injunction, *XXIV (Al-Nur): 27, viz.*

"O ye who believe!  
Enter not houses other than  
Your own, until ye have  
Asked permission and saluted  
Those in them..."

Alternatively, the legality of individual ownership can be justified via narrations from the Prophet (PBUH) or via traditions of the companions, as a second source of evidence.

Muslim and others narrated from Abu Hurayrah that the Prophet (PBUH) said: "Every Muslim is forbidden/prohibited to commit transgressions on to other Muslim's life/blood, property and *honor*."<sup>(32)</sup>

Al Bukhari, Muslim and others have narrated from a group of companions that the Prophet (PBUH) said in his farewell Friday sermon: "Transgressions onto *your lives, properties and honor amongst yourselves are forbidden...*"<sup>(33)</sup>

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31. The visitor must receive permission before entering other peop(e's property/houses. This permission should be expressed by knocking three times. If there is no response, then the visitor should depart. The consensus of juristic opinion is that the act of granting permission to enter *precedes salutation* and *that the visitor is expected to stand aside and not face the door* directly.

32. See : Sahih Muslim: *Kitab Al Birr wa al Silat wa Al Adab; Bab Tahrim Dhulm Al Muslim wa Khadhlih wa Ihtiqarih wa Malihi.*

33. See: *Sahih Al-Bukhari, Kitab Al 'ilm, Bab (Jawl Al Nabi.*

Equally relevant in this regard is the time that the *Haram* (the Grand Mosque in Makkah) became congested and could not accommodate all of the pilgrims. *Umar Bin Al-Khattab* decided to solve the problem by widening the Mosque. However, in order to do this, he had to buy the land adjacent to the Mosque from its owners, some of whom did not want to sell their property. Umar- resorted to the authority vested in him as the *Khalifah* and confiscated the surrounding land depositing the market value of the property in the public treasury where it remained uncollected for quite some time. Similar incidents, such as those reported during the *Khilafah* of Othman Bin Affan, emphasize the accommodation given to private ownership rights and privileges thereof in Islam, in particular the compensation of individual property owners in case of confiscation. Equally significant is the choice of method of determining the rate of compensation. Umar's decision to set the value of compensation at the market price established a precedent reflecting the fairness of pricing property at its market value.<sup>(34)</sup>

### **(B) Community Ownership :**

Two standard methods of applying the rule of common ownership involve the booty and the property abandoned by the enemy or taken from them without a formal war (Fay'). The distribution of such property among Muslims is described in the (Duran. Booty, for example, is defined as being common property to which all Muslims have equal access before subdivision. Once subdivided among Muslims, however, a part is allowed is owned by the commodity and remains common to all. This part is physically defined by the size of the share that is allotted to Allah, His Prophet (PBUH), and other stipulated beneficiaries, vide Surah VII (Al-Anfal):41:

"And know that out of All  
the booty that ye May  
acquire (in war)  
A fifth share is assigned  
To God - and to His Apostle  
And to near relatives,  
Orphans, the needy  
And the wayfarer.."

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34. See: Ali Al-Khafif in *Al Miliyah Al-Fardiyyah wa Tahdiduha fi Al-Islam*. The distribution of the conquered lands of Khaybar to Muslims in which Omar received a share has relevance here. Omar later commissioned his land to *Waqf*. This suggests the acceptability of individual ownership of land. See 'Sunan Al-Tirmizhi, *Kitab Al Ahkam Bab fi Al Waqf*, p.650.



In the case of property abandoned by or taken from the enemy without a formal war, the Quran indicates that such property belongs to Allah, the Prophet (PBUH), and the same beneficiaries stipulated in the distribution of booty, except that, in this case, the division of property is left to the discretion or the judgement of the leader, viz. Surah LIX (Al-Hashr): 7:

"What God has bestowed On  
His Apostle (and taken) Away  
from the people  
Of the township, belongs To  
God - to His Apostle  
And to the Kindred and Orphans,  
The needy and the wayfarer, \_ In  
order that it may not (Merely) make  
a circuit  
Between the wealthy among you.."

If the leader is interpreted as being the Imam the "Baytul Mal" or alternatively the Islamic state, then these may be considered to be agents catering for the common good, whose primary function would be to ensure, among other things, equal access to property under Fay and the-equitable distribution of use rights.

The "*ahadith*" on communal fodder, water and fire<sup>(35)</sup>, reserves, Waqf<sup>(36)</sup>, etc. indicates the position given to ownership under equal access conditions. The reserves, for instance, established by the Prophet (PBUH) to secure grazing for the Muslims' combat horses and the *Sadaqa* camels enabled part of the uncultivated lands, which were not owned individually, to be zoned. The Prophet (PBUH), for a similar reason, zoned the *Baqi'* land in Madinah. Umar, during his reign, did the same with other parcels of land.

### **(C) Islamic State Ownership:**

Any land that has no owner belongs to the Islamic State. Implicit in this dictum, on which Islamic jurists are in agreement, is the hierarchy of ownership beginning with Allah, then His Prophet (PBUH), then the leader of the State.

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35. Abu Yusuf states something closely related to this *Hadith*, viz. "Muslims share in Tigris and Euphrates and all great rivers or large waterbeds that they might drink from. No one is to be excluded..." see: *Al-Kharaj*, p.96.

36. For details, see: Mohammad Abu Zahrah, *Al-Takaful Al-Ijtima'i*, p.53.

The authority of the Islamic State lies in the Imam (*the Waly al Amr*). Under the Imam, comes the institution referred to as the "*Baytul Mar*", which is the public treasury as well as the authority over revenue generating policies and areas regulated by these policies. Thus, the terms *Islamic State*, Imam and Baytul Mal are highly interchangeable, and it is imperative to consider them, at least for the purpose of this study, as being necessarily synonymous.

It is difficult to differentiate land that falls under the jurisdiction of the State from that previously defined under community ownership. This is due to the role of *State- Imam-Baytul Mal*, which inextricably directs or manages the affairs of community owned land of which the most important is distribution of equal access and benefit rights to all interested parties in the community.

Land vacated by its owners or newly acquired by the State prior to subdivision and land zoned for one purpose or another falls under State ownership with proprietary as well as benefit or use rights assigned to the State as the primary owner. The State may, however, find it desirable to transfer the use and benefit rights of a piece of land to whoever may wish to deploy them for their own benefit. Under these conditions, the rule is that the State must be compensated for these privileges and that the activity must be in accordance with prevailing *Shariah* law. Proprietary (real ownership) rights nevertheless always remain with the State.

This type of ownership will be made clearer in section III, which deals with land ownership in Islam.

## LAND OWNERSHIP IN ISLAM

### 1 - NORMALITY OF PRIVATE OWNERSHIP OF LAND IN ISLAM :

From antiquity ownership laws have been subject to divergent and often diametrically opposed views on whether land is in the domain of the individual or of collective ownership. Economists have often supported the argument that land, an important factor of production, should be viewed as being privately owned and open to individual enterprise initiatives. On the other hand, others, more communally oriented have advocated the ownership of land strictly on a collective basis subject to the directions of the State or any such authority that might ensure equal access and parity to all.

Some scholarly literature points out that in Islam, there is support for the idea that the *Shari'ah* does not condone or permit the private ownership of land. It is maintained that this view is justified on the basis that inheritance laws are sanctioned in the *Quran* - and that these laws refer to society as the primary beneficiary with the State rather than the individual taking possession of land. The *Quran* offers limited use and benefit rights to individuals, but never ownership or proprietary rights.

However, the counterargument is that the *Quran*, beyond any doubt, confirms the normality of private ownership of land whether this is defined as a factor of production or as a quantity of real property."

It is clear that if the concept of "limited use rights" is used to define the ownership of land , then an element of exclusion exists and others can be barred from simultaneously exercising similar use rights. This is a necessary condition

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37. While there has been lengthy discourse on this subject, we only define, here, some major points: (a) The ownership of land on a private basis was a normal practice even before the revelation of the Holy *Quran*. When revealed, the *Quran* neither abrogated these ancestral practices nor suggested alternative approaches as replacements. (b) The Islamic era continued to follow similar norms in the implementation of ownership laws. (c) Cited in support of these practices is *Quranic* evidence confirming "limited ownership rights", which allows use rights in so far as earnings derived from land by deploying human labor and/or other input factors become the property of the individual who exerts the effort. During the Prophet's (PBUH) time, specific steps were taken to tailor land classification and distribution practices to the *Shariah*. For details, see: A.S.Al-Abadi, Op.cit. Vol. 1, pp. 268-273.

of the ownership of privately acquired rights. *The Quran* permits such private ownership for residential sites, cultivation, etc. The right of the proprietor to develop, maintain and defend his land is also acceptable in Islamic *Shari'ah*. Taking this into consideration, one can define the extent to which land can be used and managed for private ends, subject, however, to the existence of an authority above and beyond that which has already been relegated to the individual or, for that matter, the State.

## **2 - SURVEY OF LAND OWNERSHIP SYSTEM:**

In order to define authority over ownership rights, either complete or partial, it is first necessary to sort out a number complex interrelationships. In the end, we hope to establish land ownership classifications as the domain of the individual, the *Waqf*, the State or the Muslim community as a whole. To do this requires an explanation of the intermediate processes and the stages and their relationship to fundamental *Shariah* rulings, which is one of objectives of this section.

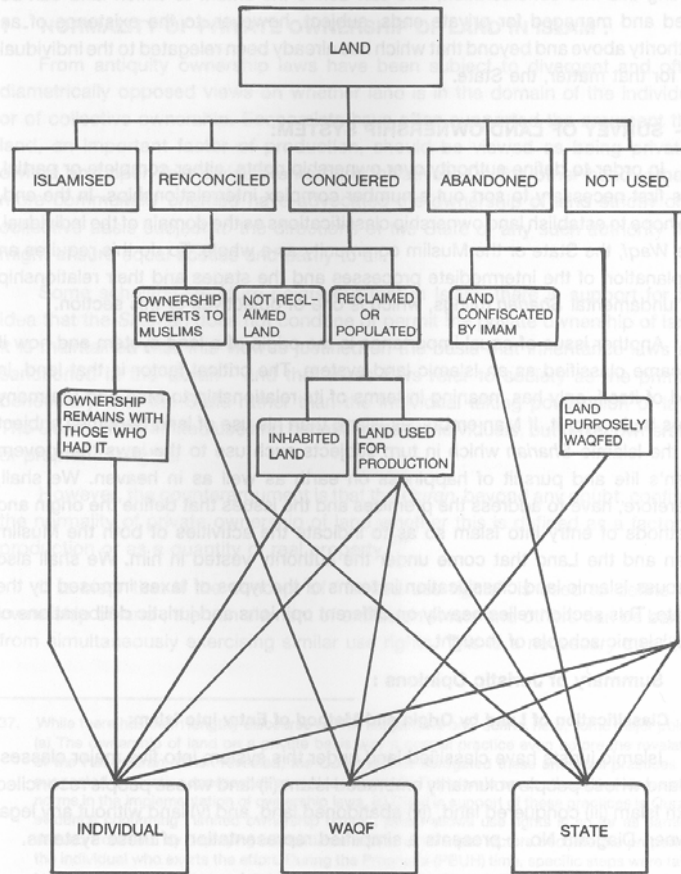
Another issue of equal importance is the origin of a land system and how it became classified as an Islamic land system. The critical factor is that land, in and of itself, only has meaning in terms of its relationship to Man and the many uses he has for it. If Man embraces Islam, then his use of land becomes subject to the Islamic *Shariah* which in turn subjects such use to the laws that govern Man's life and pursuit of happiness on earth as well as in heaven. We shall, therefore, have to address the premises and the issues that define the origin and methods of entry into Islam so as to indicate the activities of both the Muslim Man and the Land that come under the authority vested in him. We shall also discuss Islamic land classification in terms of the types of taxes imposed by the State. This section relies heavily on different opinions and juristic deliberations of the Islamic schools of thought.

### **A. Summary of Juristic Opinions :**

#### **(i) Classification of Land by Origin and Method of Entry into Islam:**

Islamic jurists have classified land under this system into five major classes: (i) land whose people voluntarily embraced Islam,(ii) land whose people reconciled with Islam (iii) conquered land, (iv) abandoned land, and (v) land without any legal owner. Diagram No. 1 presents a simplified representation of these systems.

**Diagram 1: CLASSIFICATION OF LAND BY ORIGIN AND METHODS OF ENTRY INTO ISLAM - A SIMPLIFIED REPRESENTATION**



- Land Whose People Voluntarily Embraced Islam:

The consensus among Muslim jurists regarding this class of land is that whatever real property, assets, etc. that was in the hands of those who embraced Islam voluntarily at the time of enlightenment belongs to them as Muslims. Islam does not question or attempt to contest the method of acquisition of these properties. Rather, it legalizes them as individually owned and defines a status for them subject to the laws of the *Shariah*. (Ibn Qiyam, *Zad Al-Ma'ad*, page 68).

Land brought into Islam by people who voluntarily became Muslims is classified as privately owned with the owners having full proprietary rights including the right to buy and sell, pass the land on to future generations, etc., subject to the laws of the *Shariah*.

Abu Yusuf, in the following *Hadith*, asked the Chief of the Believers (*Amir Al-Mu'minin*) about the laws which govern those who embraced Islam and on the property they brought with them. The response was that their lives were forbidden on to other Muslims. So were all the things they brought into Islam with them. "Their wealth shall remain with them; so would their lands, which will be *Ushr* lands exactly in the same status as Madina and its people, who embraced Islam with the Prophet (PBUH).. So would be all other lands in other far away places where its people voluntarily embraced Islam" <sup>(38)</sup> By ,the same token, Yemen, Indonesia, Somaliland and the majority of other Muslim countries fit in this category.

In Diagram No. 1, this is depicted as the first column under the caption "ISLAMIZED". The arrow downwards represents status classification which in this case suggests individual ownership.

Land Whose People Reconciled with Islam:

The consensus among Islamic jurists regarding those who reconciled with Islam and decided to lead their own lives in harmony with the Islamic laws of the state in which they reside is that they should be accorded protection and respect and the content of the reconciliation documents entered into by the reconciled and the Islamic State should be up held. Muslims are requested to abide by the terms of the agreement and to execute it without imposing undue hardship on those who have reconciled.

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38. Abu Yusuf, *Al-Kharaj*, pp.62-63. A(so, A.S. Al-Abadi, */bid*, p.374.

39. Abu Ubaid, *Al- Amzal*, p.211.

Abu Ubaid narrates that "the *Sunnah* for lands whose people reconciled with Islam is that Muslims should not transgress the terms stipulated in the reconciliation agreement, even if these people could bear larger tax (payment) capabilities."<sup>(39)</sup>

The reconciliation agreement (or contract) often stipulates that ownership rights of reconciled land either: (a) eventually revert to Muslims, even though those who reconciled may remain as users subject to payment of land use taxes, or (b) remain with the people who reconciled for them to exercise all proprietary rights subject to payment of *Jizyah*.

In the case of the former, land that reverts to Muslims comes under *Waqf* management. Only rents are payable and those who have acquired the use or benefit rights are expected to confine themselves to the privileges granted. Proprietary rights, nevertheless, belong to the *Waqf* institution which manages the land.

In the latter case, payment of the *Jizyah* ceases with the Islamization of the reconciled people and they become proprietors of all reconciled land. In this event, the relevant property would be transformed into *Ushr* land.

This is represented in Diagram No. 1 as the second column from the right under the caption "RECONCILED".

- Conquered Lands :

Opinions among major Islamic schools of thought differ substantially on the classification of conquered land, i.e., land over which wars were fought and whose inhabitants were defeated.

The *Shari* school stresses the opinion that the *Imam* (i.e. the leader of the Islamic state) should, as in the case of booty, impose the rule of subdivision on conquered land. This is a feasible solution provided that the beneficiaries do not, instead, prefer to commit the conquered land to *Waqf*. If they so desire, then their legal claim over the conquered land is automatically assumed by the *Waqf*.

The *Malikis* suggest that all conquered land technically becomes *Waqf* managed property. As such, this land is not subject to subdivision, cannot be bought and sold and therefore, is not subject to other proprietary laws. The *Imam*, in the opinion of this school of thought, may impose *Kharaj* on these land which is payable by those who secure use rights as a means of compensating other Muslims who have similar legal claims over such land. Under these circumstances, the State or the *Waqf* institution would serve as the caretaker on behalf of all the owners.

The *Hanbali* school takes the view that the *Imam* must choose the option that best serves the interests of the Muslim community, either by subdividing the conquered land or, alternatively by, relegating them to *Waqf*.

The *Hanafi* school supports the Hanbali position, but adds that the *Imam* might find it justifiable, in certain circumstances, to leave the ownership to the people in the conquered land, with only *Jizyah*, imposed as a head tax, and *Kharaj* on the land. Alternatively, the *Imam* may find it appropriate to evict those who previously held the conquered land in favor of other Muslim or non-Muslim proprietors. In this case the non-Muslims would pay *Jizyah* and *Kharaj*, but Muslims would pay only *Ushr* and *Zakah*, whichever applicable<sup>(40)</sup>.

In Diagram 1, we see that conquered land can be classified according to whether or not it is reclaimed. Unreclaimed land is not difficult to classify. The *Shari'ah* states that "any land with no known owner(s) belongs to the State".

However, system of classifying reclaimed land is more complex. There is an implicit assumption that such land has been developed and thus transformed from its original state by its inhabitants. This may be the development of the infrastructure or real estate, or it may be recreational, utilitarian or economic in nature. As such, the classifications and regulations established to govern reclaimed land are different from those for non-reclaimed land.

Land reclaimed prior to Islamic conquest may further be subclassified into inhabited and/or naturally endowed land used for agricultural, mining or other forms of production. Inhabited land contains cities and communities. For such land, there also exists a different set of rules that regulate their acquisition, transaction and ownership. Such land is generally individually owned. Land used for production can be individually owned or can be owned by *Waqf* or by the state.

- Abandoned Land:

The majority of *Fiqh* schools agree that land abandoned by people out of fear of conquest or for other reasons shall be classified as *Waqf* land for the benefit of all Muslims. These schools, however, differ on whether such land becomes *Waqf* by confiscation or whether the *imam* declares them *Waqf*. In any event, if the *Imam* pronounces them *Waqf*, then he imposes a *Kharaj* that serves

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40. For the *Shafi'i* position, see: Al-Mawardi in *Al-Ahkam Al-Sultaniyah*, p.137. For the *Malikis*, see: Al-Mawdudi, *ibid*, p. 147. For the *Hanbalis*, see: *Al-Mugni* by Ibn Qudamah, p.24. The *Hanafi* school position is discussed in *Al-Kharaj* by Abu Yusuf, pp. 68-69. These are only a few citations. The source, for these are many and cannot all be listed here.



as a rent or a user tax. The rents so imposed are payable by those who receive the benefit rights irrespective of whether they are Muslims or non-Muslims (*Dhimmis*). Under these conditions, such land is not subject to sale or purchase contracts.

It is also understood that abandoned land technically has no explicitly defined beneficiaries. From the *Fiqh* point of view, abandoned land is classified as the *Fay*. The use and operation of such land, therefore, is subject to the regulations that govern *Fay*' properties. In this regard, the *Hanbali* school of *Fiqh* proposes that it is left to the discretion of the *Imam* to choose between subdividing such land as booty (since abandoned land is by definition *Fay*) or relegating it as *Waqf* for all Muslims. These options were particularly advocated for land in, what was then, Egypt, Syria and Jordan. If the *Imam* does not declare such land to be *Waqf*, they will then be left to the State and individuals will have the right to reclaim it through the process of *Ihya Al-Mawat*.

- Land Never Used :

Land unowned by and, therefore, most often unreclaimed, can be considered a subgroup within each of the three classification groups listed previously. For example, the category of land whose people reconciled with Islam contains land not owned by anyone. Such land is referred to as unreclaimed land of the reconciled. Unreclaimed conquered land, unreclaimed abandoned land and unreclaimed land whose people voluntarily embraced *Islam* refer to similar subgroupings with identical characteristics in the parlance of *Fiqh* terminology.

The majority of *Fiqh* schools seem to agree that unreclaimed land of all the four major classifications can be acquired privately if reclaimed by the use of human labor. Whoever labors on what is, by virtue of its state of poor performance, generally defined as unreclaimed land by has the priority, over others to that piece of land.

The *Shafi'i* school makes the exception that only unreclaimed conquered land may be subject to ownership based on the reclamation efforts of an individual, unless the Muslim army specifically fought to take over such land. If such is the case, then the unreclaimed land would be considered booty that is subject to subdivision among beneficiaries. Unreclaimed reconciled lands would be under the ownership of those who reconciled provided that the reconciliation agreement so stipulates. Under these conditions, the unreclaimed land would go to non-Muslims. Muslims cannot appropriate or reclaim this land.

The *Hanbali* school is of the opinion that only unreclaimed conquered land can be owned as a result of reclamation efforts, stressing that such land belongs to Muslims in general and therefore, should be considered land that is technically outside the realm of individual ownership.

In Summary, unreclaimed land (of all categories) has the following characteristics:

it is State-owned;  
reclamation by individuals is, in principle, permissible, subject to the consent of the *Imam*;  
if an individual reclaims this type of State-owned land, he acquires the use or benefit rights which forbids similar access by others. Such an individual does not, however, own the proprietary or exclusive rights to the land, and ;  
the *Imam*, being the legal owner or proprietor of such land, has the right to impose a user-tax (*Kharaj*) on those who have access privileges and have fully reclaimed the land.

Diagram No. 1 shows that all categories of unreclaimed land fall either under the jurisdiction of the individual, after reclamation, or under the State, which often is the legal authority over such land.

**(ii) Classification of Land by Type of Tax Imposed:**

In Islam, as an alternative to the system discussed in the preceding section, land may be classified according to the type of tax imposed. Islamic jurists have categorized land into two major types depending upon the nature of the tax payable, (i.e., *Ushr* or *Kharaj*).

- *Ushr Land* :

*Ushr* land, by definition, is that from which *Zakah* is due. The produce and output from such land are "*zakahable*", and the amount of *Zakah* imposed on agricultural land is specific and well defined. This amount is a tenth (or 10 per cent) of the produce (in either money or in kind) if it has been grown without resort to a man made system of irrigation. If the land is irrigated by means of technology, then the total produce from the land would be *zakahable* at the rate of a half-of-a-tenth (or 5 per cent). Hence, the expression "*Ushr*" which, in Arabic, means "tenth".

According to the *Hanbali* school, *Ushr* land includes the following:

land whose people voluntarily became Muslims;  
conquered land that has been subdivided among Muslim beneficiaries;  
land that was initially conquered by force, but which reverted to the original owners when they became Muslims, and  
land which initially was classified as unreclaimed but which later was reclaimed (revised) by Muslims either through the use of *Ushr* water as advocated by Imam Abu Hanifa, or, alternatively, by virtue of its contiguity with *Ushr* land, as in the opinion of Abu Yusuf.<sup>(41)</sup>

*Ushr* land technically belongs to the people who hold the ownership and proprietary rights. They can sell it or declare it *Waqf* if they so desire. This land can also be inherited by future generations upon whom the ownership rights are conferred.<sup>(42)</sup>

- *Kharaj Land* :

There are two types of *Kharaj*, or land tax: "*Kharaj Al-Wazifah*" or use-rights related *Kharaj* and "*Muqasamah Kharaj*." The former is a specific and non-variable amount payable annually, subject to the judgement of the Imam. It is closely associated with the use-rights that individuals may exercise on such land. The latter refers to a variable proportion of the output that is often based on the Imam's valuation of what tax the land can bear.(Ibn 'Abidin, Vol. 4, p.117).

Given the tools available to today's economists, it would seem that these definitions have been devised in order to reflect the difference of opinions among Islamic jurists on how best to arrive at the real rental rate. Without a rigorous system of rates, the amount of tax to be levied seems difficult to determine. As a result, the Imam's judgement most often becomes the sole factor in determining the *Kharaj*.

Conscious efforts were taken to make the *Kharaj* a realistic reflection of the capacity of the land to bear the payment of tax. Ibn Abi Hubayra recognizes that it is not advisable to impose a rate of tax that either prevents the State from attending to the affairs of Muslims or proves harmful to the land upon which is imposed. Such a tax, he maintains, should not be more than the land can bear, nor should it be a serious economic burden.<sup>(43)</sup>

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41. For details, see: Al Abbadi, op.cit., Vol. 1, p. 313.

42. See: Hashiyat Ibn 'Abidin, Vol. 4, p.154. 43 See: Ibn Abi Hubayra in Al-Ifsha, Vol. 2, pp.437-438.

These efforts point in the direction of a modern day "optimal Kharaj rate" that should be discussed in Islamic Economics. Indeed, jurists have, on many occasions in the past, suggested that the *Imam* seek the advice of experts, thereby modifying the position on the discretionary authority of the Imam <sup>44</sup>

In Diagram No. 1 *Kharaj* land is classified, according to Hanafi scholars,<sup>(45)</sup> into:

conquered land whose people do not embrace Islam, but remain owners subject to the payment of tax;  
reconciled land with the Imam establishing an agreement with the non Muslim resident owners as to the payment of *Kharaj*;  
land reclaimed (or revived) by Muslims by means of the use of *Kharaj* water or the use of land adjacent to other *Kharaj* land; and  
*Ushr* land which when bought by non-Muslims (*Dhimmis*) is transformed into *Kharaj* land.

### **B. Other Ownership Classification Systems :**

Aside from those already discussed, there are land ownership systems designed to augment or support the major classification systems. Under State ownership (referred to as "*Baytul Mal*"), for instance, comes the large group of land which is left to the discretion of the *Imam*. In this section, we shall show how the distribution of unreclaimed land was employed to further private ownership in Islamic history. We shall also discuss the typology of land ownership in Ottoman Law with emphasis on "Amiriyah" land in contrast to inheritance law.

#### **(i) Land under the '*Baytul Mal*' :**

"*Iqta*" in Arabic may mean the acquisition, with the consent of the *Imam*, of a piece of unreclaimed land. Islamic jurists have identified three types of *Iqta* : ownership *Iqta*, use or benefit rights *Iqta* and mineral rights *Iqta*'.

Jurists have referred to an "*Iqta' Tamlik*" which is the acquisition of unreclaimed land on which no prior claims have been filed. The Imam may give the ownership rights of such land to whoever revives or reclaims it. Land under "*Iqta' Tamlik*" may be individually owned with all the rights and privileges of private proprietorship. Examples of land being acquired in this way include the case of the Prophet (PBUH) giving Zuibayr Bin Al-Awan a piece of the unreclaimed *Naq?* land.<sup>(46)</sup>

44. See: Ma(ik in Ibn Abi Hubayra's *Al-Isha*, op.cit., also Al-Moward<sup>ii</sup> *Al-Ahkam Al-Sultaniya* p.146.

45. For the position of the majority of Fiqh scholars, see: Al-Abadi, *op.cit.*, pp. 315-318.

46. See : Abu Yusuf's *Al-Kharaj*, p.62. Also Abu Ubayd's *Al-Arwal*, pp.366-399.

This is but one illustration of the use of "*Baytul Mat*" land for private ownership. Equally, the *Imam* might offer land to an individual or a group in the event that there is proof that the land had been pre-Islamic ruins and, therefore, by definition, unreclaimed land. The revival of such land is the criterion for individual ownership. Alternatively, the *Imam* may give away land on which Muslims have lived, but which now due to neglect or other causes is in ruins. However, this is possible only if there exist no known owners who would otherwise be entitled to claim such land. If it can be established that no such right of ownership exist, then this land is subject to the discretion of the *Baytul Mal*( hence of the *Imam*) to subdivide and/or distribute. This is referred to as use or benefit rights *Iqta'*.

The third type of acquisition of land through the *Baytul Mal* is when the *Imam* gives an individual or a group of individuals land from areas likely to be opened up by Islamic conquests. This is land which is expected to be annexed to Islam. In such a case, the *Imam* may accept ownership requests from Muslims who wish to settle on such land. We cite the time the Prophet (PBUH) gave the title deed to a piece of the land of Rome ( *Sham*) to Tha'labah Al-Hosainy.

#### **(ii) Typology of Land Ownership Under Ottoman Law :**

The first systematic land ordinance in the Ottoman Empire was promulgated by Sultan Suliman the Magnificent in 1274H. This ordinance, which had its roots in the *Hanafi* school of thought, classifies governorate land into five major groups: Owned land, State land (*Amiriyah*), *Waqf* land, Zoned land, and Unreclaimed land.

Under the ordinance, owned, *Waqf* and the Unreclaimed land is similar, legally, to that previously presented in this text. However, Zoned and *Amiriyah* land present differences that shall be dealt with in this section.

#### **- Zoned Land :**

Land in this group is said to be "zoned" in the sense that it is set aside for the specific use of the community. The Arabic expression *Al-Ard Al-Mahmiyah*, suggests that land in a village may be set aside for establishing streets, markets, festival grounds, etc. Such land becomes property shared by all the inhabitants of the village. The proprietary rights of Zoned land remain with the *Baytul Mal* which is expected to ensure that the pressures of special interest groups and of private owners be kept to a minimum.

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47. For details of the use or benefit and mineral rights *iqta'*, see: *Al-Kharaj* by Abu Yusuf, p.217. Also, *Al-Amwal* by Al-Ubayd, p.388. Al-A'badi, op.cit, has a useful summary of the classes of *Baytul Mal* land and their subdivisions, see: pp.313-336.

It is generally agreed that there are two types of Zoned land: (a) that which has been earmarked for common or public use and, (b) that which has been set aside for a specific purpose such as grazing. The latter type of Zoned land cannot be bought or sold and may not be owned by anyone, including the *Baytul Mal* itself. The State acts as a policing and regulatory authority but cannot appropriate such land.

**- Summary of Amiriyah Land:**

*Amiriyah* land is that which is owned by the *Baytul Mal*. Although the use or benefit rights of such land may, in conformity with State regulations, be acquired by any individual or group, the proprietary rights rest with the State.

Scholars of the Ottoman land ownership ordinance suggest several conditions under which such land may be classified *Amiriyah* or State land. These include the following:

After conquest, the original owners may have voluntarily vacated the land giving others the opportunity to settle in their place. The new settlers would use this land without acquiring ownership rights.

Land which became State owned from the date of conquest or which eventually, for one reason or the other, became classified as State owned property.

Land which was initially privately owned but whose owners died without leaving a legal inheritance or trust. In such cases, the land becomes *Amiriyah* or State owned. The scholars of this ordinance appear to accept *Hanafi* positions, which suggest that all the land in Egypt, Syria and Jordan (*Sham*) and Anatolia (in Turkey) could be classified as *Amiriyah* land, following the death of their original owners.

Any land whose owners are not known or cannot be identified reverts to the State and is classified as *Amiriyah* land.

Finally, any land originally defined as unreclaimed but which through the consent or approval of the Imam becomes reclaimed, may be classified as *Amiriyah* land. In this case, those who transform the land are entitled to and often granted the use or benefit rights. The full proprietorship remains with the *Baytul Mal*.

The *Hanafi* jurists have consistently argued that those who farm *Amiriyah* land do not actually own it but only have cultivation rights. This is a practical illustration of the application of use or benefit rights which govern the relationship between a user, i.e. the cultivator, and the land being cultivated - thus illustrating the linkage with the authority exemplified in the *Baytul Mal*.

The Ottoman land ordinances appear to have considerably expanded the flexibility and freedom given to beneficiaries in exercising their use rights - especially under the acquired *Amiriyah* land tenure arrangement.<sup>(48)</sup> However, this arrangement does not allow such land to be inherited or consigned to *Waqf* or trusteeship. The reason for this is that use right owners do not possess the proprietary rights to this land. This has created a conflict with the *Shariah* inheritance laws. This conflict essentially rests on the fact that the users of *Amiriyah* land are subject to conditions established by the *Imam* as the authority over this land, as opposed to the rules dictated in the *Shariah* inheritance laws. In justification, the Ottoman land ordinance takes the position that the *Imam*, in practice, may establish rules and regulations governing the distribution of *Amiriyah* land for the common good. In doing so, he is exercising an authority similar to that of the person who, in putting his property under *Waqf*, specifies beneficiaries and also indicate exactly how his property should be divided among these beneficiaries. The conflict does not rest in the method of distribution, but rather in the stipulation that equal shares be given to males and females under the Ottoman land ordinance. This is the core of the conflict between the Ottoman land ordinance and the inheritance laws.

**(iii) Ownership under Islamic Inheritance Laws :**

The Islamic inheritance law applies to individually owned property (land and other forms of *Mal*) following the death of the owner. Only individual ownership is subject to this law, since by definition the other types of ownership discussed in the preceding pages, fall under either State, *Waqf* or community jurisdiction.

The Islamic inheritance law is distributive, with rules that are meant to insure an equitable distribution of inheritance based on several valuation criteria, including relative need, capability to earn a reasonable income, sex, state of parenthood, etc. The following are some of the major conditions stipulated in the Islamic inheritance laws:

the procedures and norms established in the inheritance laws are compulsory and are to be implemented precisely as laid out by the Islamic *Shariah*;

the institution of family is the foundation for building a Muslim society. The Islamic inheritance law, therefore, defines the distribution of proceeds

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46. For details on this and *Amiriyah* land, see: A( Abbadi, op.cit., pp.338-341.

primarily on the basis of a hierarchy of relationship between the deceased and the legitimate heirs. The immediate relatives are the first beneficiaries of the wealth of the deceased in a fashion meticulously defined and promulgated by *Shari'ah* laws. *The consent of the departed is not binding* since this specification is decreed in the Quran and implemented by the *Shari'ah*. The deceased also *cannot dictate the shares that his* relatives will receive, as this, also, is precisely stipulated in the inheritance laws;

the Islamic inheritance law neither gives the deceased full authority to choose his heirs and the share of their inheritance, nor does it completely forbid inheritance per se. Rather, it gives the deceased the freedom to decide who should get what of a specific share of the total inheritance, subject to the fulfilment of certain conditions. This share is equal to one-third of the total;

*in implementing inheritance laws, Islamic Shari'ah defines beneficiaries in terms of their relationship to the deceased, on the one hand, and the degree of their established need, on the other. The closer the relative to the deceased and/or the greater the need, the larger the share received. Also, male relatives receive larger share than female relatives;*

the inheritance law does not make distinctions between immediate male beneficiaries. This implies the absence of age distinctions and/or the tendency to give older sons preference over their younger brothers; inheritance laws do not prevent women from receiving their share of the wealth of the deceased. Shares for females are defined in terms of the females relationship to the deceased. It is understood that females have no financial or physical responsibility for providing for the family. They bear no financial responsibility for securing the family's livelihood or for its expenditures. This is one of the reasons for smaller shares being allotted to females. However, there are times when the female share either equals or exceeds that of the male. This may be due to a greater degree of need and indicates that the justice of the laws of inheritance transcends the *distinction between male and female.*<sup>(49)</sup>

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49. Illustrations of these issues can be found in any applied Fiqh literature on Islamic inheritance. In particular, we suggest : Abbadi, op.cit., Vol. 2, pp.151-196.



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## SUMMARY .OF ISSUES IN LAND ECONOMICS

The Islamic State is an important element in land economics even though it may have precedence over other interested parties and may be involved in land ownership classification or litigation. The rights of the Islamic State are expected to be defined and implemented with a view to enhancing the welfare of the Muslim community. If the intervention of the State compels the individual to remain within the boundary of Islam (i.e., to be guided by it), then such shall be the function of the Islamic State (50)

Kahf lists specific economic functions of the State that include, among others, property allocation with the intent, on the part of the State, to maximize utilization and production.<sup>(51)</sup> The stress here is on maximizing the benefits of Muslims in utilization and production.

From the point of view of land economics, the Islamic State is responsible for ensuring the effective distribution of use rights. This is implicit in the extent of the involvement of the State in directing the acquisition, distribution and transfer of land while faced with the interests of a variety of groups, including the State (the *Baytul Mal*) itself, the *Waqf*, the individual and the community at large. The subject is vast and in all fairness, deserves a study of its own.

We propose that the following subheadings be carefully considered with a view to analyzing policy options and goals. The role of the State should be studied in order to assess whether opportunities are enhanced (by the activities of the State) so as to achieve the optimal distribution of land as well as the maximum utilization and production. This, as suggested earlier, is an important area of investigation that could add to our knowledge of Islamic policy analysis.

Regarding land tenure systems in Islam, our view is that this subject is so complex that no partial coverage can do justice to it. Such an attempt would, at best, tend to skim over the important issues, among which are the impact of inheritance laws on land tenure in Islam, the link between the size of holdings

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50. See: Siddiqi, *Islam Ka Nazariyat Milkiyat*, 1978,p.64.

51. See: Kahf, "Towards a Theory of Taxation..", pp.11-12. Illustrations of the role of the State may be found in Ibn Taymiyah's *Al-Hisbah Fi Al-Islam*, Mohammad Al Mubarak, Dar Al-Kutub Al-Arabiyyah, 1967.

and the possibility of breaking the land into smaller pieces, etc. Given the nature of these problems, it is feasible to seek solutions in the diversification of earnings by families, the higher intensity of use of existing holdings, the adoption of new techniques and/or the vertical and horizontal integration schemes applicable to small holdings. These are all potential areas of research through which assessments could be made on the economic and social issues at stake in Islamic land economics.

Equally important are the fiscal and financial issues involved in land economics in Muslim countries. Such fiscal parameters as the *Kharaj*, for example, require further attention so that they can be quantified appropriately. Other forms of tax instruments, such as the *Ushr*, pose no problems because they are, by definition, predetermined and invariable. These matters require further attention by contemporary economists.

Recently, there has been a well-deserved and renewed interest on the part of Islamic economists in financial methods and instruments. However, the evaluation of these ideas and their application to land has yet to be undertaken. This is one further area in which future research could be undertaken.

Finally, assuming that land in the majority of Muslim countries fails under the definition of *Ard Al Sulh* (i.e., voluntarily reconciled with Islam), how could it be established that, in these countries, land belongs to the individuals who live on it? How is this reflected in the contemporary land legislation of these countries? In such a situation, is the role of the State any different from that regarding *Ard Al Unwah* (i.e., land conquered by force)? What course of action, if any, should be taken for the distribution of land to the needy? These fundamental queries form the basis for formulating practical solutions to some of the most important contemporary issues facing some Muslim countries today.

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18. Sunan al Timidhi, Kitab Al Ahkam, Bab fi Al Waqf, p.650.

## .GLOSSARY OF JURISTIC TERMINOLOGY

1. Al Ard Al Mahmiyah: This refers to land set aside for public use, which may technically be referred to as Zoned land
2. Al Ard Al Mawat: The root word, in Arabic, is *Mayit* meaning dead. *Mawat*, therefore, is that land which is not productive because it has simply "died" for some reason or the other. The expression "bad land", though often used, fails to take into account the modern technology of reclamation and revival. There is no such thing as bad land in the real sense of the term taking into account the possibility of reviving land that is seemingly *bad* or, in juristic terms, *Mawat*. When used by jurists, Al Ard Al Mawat is land which is not used for any form of production and not owned by anyone
3. Amir Al Mu'minin: Leader of the Faithful. This term may be equivalent to *Walya/ Amr*, or *Imam* depending on who is using it and in particular time reference.
4. Amiriyah Land: Land under the jurisdiction of the State. This expression was commonly used during the Ottoman Empire to indicate land under the jurisdiction of the State.
5. Ard Al Sulh: Land whose people reconciled with the Islamic state is referred to as *Ard Al-Su/h*. Ownership of such land remains with those who reconciled. Hence the term Sulh which, in Arabic, means to come to live with or reconcile.
6. Ard Al 'Unwah: This expression refers to the opposite of the preceding one. Here, land is taken over by force because unlike the case of Sulh, people have decided to put up a fight and have therefore resisted *Islam*, Once defeated, their land becomes classified as *Ard Al Unwah*.

7. Bayt al Mal: National Coffers. An institution serving as the depository or treasury of a Muslim State's financial resources.

A non-Muslim who is a citizen of an Islamic State. War booty.

8. Dhimmi: From the Arabic word Qata'a meaning "slice out a piece". In relation to land, *iqta'* means a piece of uninhabited land sliced out for someone to use.
9. Fay': uninhabited land sliced out for someone to use.
10. Iqta': Ownership of such land lies with the State. Hence, variants of different types of Iqta such as, *iqta' Tamlik*, *iqta' Irfaq*, *iqta' Istiqlal*, etc.
11. Jizyah: Poll or head tax payable by non-Muslims under a Muslim government.
12. Kharaj Al Ard: Land that is subject to Kharaj which is a land tax payable by non-Muslims who are under the protection of an Islamic State.
13. Kharaj Al-Muqasamah: Land leased out to cultivators on the basis of a proportional share of output.
14. Ushr Land: Land that is subject to Ushr which is literally one-tenth of the output from land. This is payable by Muslims only.
15. Waqf: A benevolent institution in Islam. The act of subscribing to Waqf subsumes the preference of future reward to present worldly benefit, hence sacrifice. *Waqf* land, therefore, is that which has been put under the management and protection of this benevolent institution.

**TRANSLITERATION SCHEME**  
(Arabic, Persian & Urdu)

هـ	'
ا	a
ب	b
پ	p
ت	t
ث	th
ج	j
چ	ch
ح	h
خ	kh
د	d
ذ	dh
ر	r
ز	z
ز	zh
س	s
ش	sh
ص	ṣ
ض	ḍ
ط	ṭ
ظ	ẓ

ع	'
غ	gh
ف	f
ق	q
ك	k
گ	g
ل	l
م	m
ن	n
ن	n
و	w
هـ	h
ی	y
ے	è
- فتحة	a
- كسره	i
- ضمه	u
- آى	à (in 'adam)
ز	ù (in 'uyùn)
ي	î (in siddiq)
- تشديد	for double the letter