Land, Law and Islam

Property and Human Rights
in the Muslim World

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Researching Islam, Land and Property

> The concept of dual ownership [human being–God] is one of the special features of the Islamic doctrine of economics. Islam protects and endorses the personal right to own what one may freely gain, through legitimate means…. It is a sacred right. Yet, human ownership is tempered by the understanding that everything, in the last analysis, belongs to God…. What appears to be ownership is in fact a matter of trusteeship, whereby we have temporary authority to handle and benefit from property. (Abdul-Rauf 1984: 19)

Land, property and housing rights are generally cross-cultural and asserted within every socio-economic and political system, but the practice regarding their regulation and protection may take many forms. However, there has been little research on the complex and distinctive forms of land tenure and land rights found in Muslim societies, despite the fact that over 20 per cent of the world's population is Muslim. Although there has been extensive literature generally on Islam and human rights, there has been very little focus on Islam and property rights. This book seeks to address this gap in the literature. Too often global reviews of land tenure and strategies fail to take into account Islamic principles and practices because they are assumed to be either non-existent or irrelevant. By way of illustration, Hernando de Soto's (2000) influential and best-selling work *The Mystery of Capital*, which predicates economic development and poverty alleviation upon the formalization and legal protection of land titles, does not explore Islamic conceptions of land, property and housing rights. His proposals for converting 'dead capital', by which he means informally owned property, into formally recognized property rights, through surveying, mapping, registration, monitoring, maintenance and facilitative mechanisms, have led to plaudits (Clinton 2001; USAID 2002), as well as critiques (Home and Lim 2004; Payne 2002) but are considered

automatically applicable in the Muslim world. Though Egypt is on de Soto's study list, he merely explores its symptomatic problems, particularly the bureaucratic delays in asserting property rights. The issues faced by Muslim countries, however, are far more complex than problems with red tape and apathy.

Islam is considered by Muslims to be a complete way of life, and property conceptions go far beyond theorization to impact on the lived experiences of Muslims. They also inform, to varying degrees, state policies and land rights discourse. Better understanding of, and engagement with, Islamic dimensions of land may potentially support land rights initiatives in Muslim societies, which have implications for programmes relating to land administration, land registration, urban planning and environmental sustainability. No generalization can be made about the extent to which Islamic dimensions may be relevant or appropriate to a particular context – that is for land professionals, policy makers, civil society and ultimately the people to determine. The fear of Islamizing the land discourse is exaggerated because Islam, as this research demonstrates, is never a stand-alone and there is a dynamic interplay between universalist, human rights, customary, informal and Islamic conceptualizations and applications. Rather, the lack of engagement with the internal Islamic dialogue risks creating land systems that are bereft of authenticity and legitimacy and thereby of effectiveness and durability. Even where well-intentioned donor-driven efforts to establish modern land systems succeed, the obduracy of informal norms, practices and processes leads to unattended dualisms that undermine the prospect of integrated and unifying land policies.

This chapter provides an introduction to the context, methodology and scheme of this research, to distinctive conceptions of land tenure and rights in Islamic theory, as well as to key economic principles promoting private ownership and their present and potential role in promoting access to land. Furthermore, it outlines the application of Islamic perspectives on land registration, urban planning and environmental sustainability.

Scope of the Research

This research was initiated by the Land and Tenure Section (Shelter Branch, Global Division) at UN-HABITAT, which carries out systematic research into distinctive land, housing and property issues and approaches in various regions of the world. 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. It therefore commissioned us 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 eight research papers which emerged from the study provided the chapters of this book.

The general findings of the research point to distinctive Islamic conceptions of land and property rights that vary in practice throughout the Muslim world. Though Islamic law and human rights are often important factors in the Islamic conceptualization of land and property rights, and their 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.

This chapter will show that Islamic property and land concepts are part of a mature and developing alternative land framework operating alongside international regimes. The roles of Islam, history, politics, culture, kinship and custom – operating in different dimensions within Muslim societies – are intertwined in distinctive property conceptions and structures. In the Islamic system, private property rights are promoted but the ultimate ownership of God over land is assumed and requires all rights to be exercised within the Islamic legal and ethical framework with a redistributive ethos. It is argued 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.

Chapter 2 considers Islamic law in relation to land rights and tenure systems in Muslim societies. A striking feature of Islamic societies is the high degree of reliance on legal cultures, arising in part because of the sophistication and breathtaking scope of the Shari'a. Though it is a site of struggle between conservatives and liberals, Islamic law is not medieval and static, but a 'living' field. An appreciation of the distinctive features and sources of Islamic law, its methodologies and diversity in application and its dispute resolution mechanisms may contribute towards strategies aimed at enhancing security of tenure.

Chapter 3 explores how the multifaceted, generally distinctive and certainly varied nature of land tenure concepts, categorizations and arrangements within the Islamic world leads 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 the development of authentic and innovative strategies for enhancing access to land and land rights.

Chapter 4 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.

Chapter 5 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 potentially empowering strategies for women through Islamic law that can enhance women's access to land and enforcement of their other property rights.

Chapter 6 considers how Muslim societies generally derive from religious sources their inheritance rules 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 systems of inheritance practice.

Chapter 7 outlines the *waqf* as 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 or nationalized religious endowments, or subjected them to strict regulation, but the *waqf* remains influential and there are clear signs of its reinvigoration. The chapter evaluates the role of the *waqf* in strategies to improve security of tenure based on its legal foundations, history and socio-economic impacts.

Finally, Chapter 8 considers the increasing demand from within Islamic communities that financial services be compliant with the Shari'a. This chapter explores the Islamic context which stimulates such alternative credit systems, the key distinguishing features of Islamic banking models, the development of Islamic microfinance practices, 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 help to transform the lives of the poor.

This is a preliminary study which seeks to contribute to the debate about appropriate strategies to realize innovative and pro-poor land tools in their particular context. With that in mind, it has been written for a general audience without any assumption of knowledge regarding Islam, law or property rights, offering basic information as well as an opportunity to revisit first principles.

Methodology

A project that seeks to explore key themes and developments within the Muslim world raises fundamental questions regarding the scope and methodology – even feasibility – of such an endeavour. Resident in over 57 Muslim-majority countries (member states of the Organization of Islamic Conference, OIC), or as

significant minorities in the West and from China to Russia, there are an estimated 1.2 billion Muslims amongst the world's population. Though Muslims see themselves as a universal community (*Umma*), they are, in fact, divided into several nationalities and, contrary to popular assumptions, only 20 per cent of Muslims reside in the Arab world. They include many different ethnic groups and speak dozens of languages, including Arabic, Turkish, Urdu, and Persian. The lived experiences of Muslims – reflecting various socio-economic conditions, political affiliations and religious practices – cannot be essentialized or simplified. The Muslim holy book, the *Qur'an*, celebrates this diversity:

> O mankind! Truly We have created you out of a male and a female, and We have made you into nations and tribes, that you may know one another (*Qur'an* 49: 13). And among His signs is the creation of the heavens and the earth, and the difference of your languages and colours. Verily in that are signs for men of sound knowledge. (*Qur'an* 30: 22)

Callaway notes, in the context of Africa, that 'in each major region of each country, the impact of Islam is different. No study can reasonably blanket the region with one set of generalizations about how Islam interacts with society and shapes it' (Callaway 1994: 1). Given the enormous range of Muslim identities intertwined with indigenous and Western practices, a project such as ours, which uses thematic approaches, can only provide selective case studies, often in a comparative mode. It cannot generalize or universalize these experiences as a homogeneous Muslim position. Rather, the research underscores the considerable variations in the doctrine and practice of land tenure arrangements driven by local socio-economic, customary, cultural and political factors, as well as by secular influences. The prefix 'Islamic' has been preferred to 'Muslim' for conceptual formulations or attempts at authenticity because land issues are mostly theorized from the *Qur'anic* and other Islamic legal principles. It is equally true, though, that Islam is a contested zone and is ultimately a matter of human interpretation of divine intent. There are differences between the Muslim Sunni and Shi'a sects, as well as within the *maddahib* (schools of jurisprudence) within the sects. However, this project avoids referring to states, societies or individuals who invoke Islam as 'Islamic' (except sometimes by way of emphasizing distinctive puritanical approaches), preferring 'Muslim' because they are practitioners of Islam rather than embodiments of it.

At the same time there is much that unites Muslims. The term 'Islam' comes from the Arabic word-root *s-l-m,* which has a general reference to peace and submission. Specifically, Islam means submission to the will of God, and a Muslim is one who makes that submission. Muslims are identified as those who share *shahada* (common faith) in the oneness of God (Allah or the God, in Arabic), acceptance of the Prophet Muhammad (peace be upon him, hereafter referred to as 'the Prophet') as being the final Prophet in a long line of Judeo-

Christian messengers including Adam, Abraham, Moses and Jesus (peace be upon them). This first pillar of Islamic faith is accompanied by four others: *salat* (prayer) which is performed five times a day, *zakat* (charity, literally purification), fasting during the Islamic month of Ramadhan and the Hajj (pilgrimage to Makkah), although the last is only an obligation for those who are physically and financially able to perform it. As Esposito (1980: ix) points out: 'A distinctive feature of the Islamic tradition is the belief that Islam is a total, comprehensive way of life'; it is 'integral to all areas of Muslim life – politics economics, law, education and the family'. It is not surprising, therefore, that Islam has much to say about various aspects of land, property and housing rights and regulates property relationships within the family, communities and between individuals and the state.

This book is co-authored by a Muslim and a non-Muslim, a male and a female, a Southerner and a Northerner coming from different fields of expertise and experiences. Together, the team has sought to be academically neutral, pursuing internal and external critiques and debates. Through a dialogic method of research, they have adopted a general approach that Islam, like other religions and cultures, must be constructively analysed to discern its potential benefits as seen by Muslims as well as other communities. This research uses international, cross-cultural human rights and development standards as the framework for engaging with Islamic principles. A range of materials was used, including Muslim and non-Muslim sources, though largely restricted to English-language resources and translations. However, the researchers have been sensitive to arguments over orientalism (Said 1978; Tibawi 1964; Macfie 2000) – texts that generate essentializing statements about 'the Orient', amounting to an exercise of power. Postcolonial approaches to and critiques of Western imperialism were incorporated along with caution over occidentalist trends in literature, as reactive to orientalism (Buruma and Margalit 2004). As Smith argues, scholars and foreign affairs experts agree that Islam's teachings are humane but many Westerners have considered 'radical Islam one of the gravest threats facing the free world' (Smith 2000). At the root of this constructive endeavour is a predisposition to see land, property and housing rights as basic and universal aspirations though there may be different pathways to realizing them, including Islamic approaches.

Land and Property Rights in Muslim Societies

The extent to which land rights are protected within Muslim countries is difficult to detail or even generalize because of the sheer diversity of Muslim countries as well as the lack of systematic and reliable data. The annual *Index of Economic Freedoms* published by the Heritage Foundation and the *Wall Street*

Journal points to why a comprehensive review of land rights is difficult to achieve (Feulner *et al.* 2005). The *Index*, with its free market orientation, recognizes 'property rights' as one of the ten broad categories or factors guaranteeing economic freedoms. Other factors include trade policy, fiscal burden of government, government intervention in the economy, monetary policy, capital flows and foreign investment, banking and finance, wages and prices, regulation and informal market activity (Feulner *et al*. 2005). The *Index* is primarily concerned with the extent to which private property is recognized by the state and protected from expropriation. To assess this it reviews law and practice, the rule of law and the independence of the judiciary, freedom from corruption and the ability of individuals and businesses to enforce contracts. The *Index*, thus, takes a particular view of property rights and is not concerned about issues of broader access to land or security of tenure nor is it able to recognize informal or collective forms of land ownership (Feulner *et al.* 2005).

The *Index* of 2005 covers 161 countries, including a large number of Muslim ones. Egypt, Qatar, Oman, Saudi Arabia, Tunisia, Turkey and the United Arab Emirates are assessed at 'Level 3' property protection. This classification indicates 'a moderate court system, inefficient and subject to delays; corruption may be present; judiciary may be influenced by other branches of government; expropriation possible but rare'. Pakistan, Indonesia, Kuwait, Lebanon, Malaysia, Morocco and Yemen are found to have 'low property ownership; weakly protected; court system inefficient; corruption present; judiciary influenced by other branches of government; expropriation possible' (Level 4). Iran and Libya are ranked at the bottom of the table at Level 5 with 'very low private property outlawed or not protected; almost all property belongs to the state; country in such chaos (for example, because of ongoing war) that property protection is non-existent; judiciary so corrupt that property is not effectively protected; expropriation frequent'. No Muslim country figures in the top list (Levels 1 and 2) where protection of property is very high or high and an independent uncorrupt judiciary enforces those rights (Feulner *et al.* 2005). This top list is composed in the main of Western countries.

These tables, problematic as they may be in their standpoint, methodology and sources, fuel general assumptions about the precarious state of land, property and housing rights in the Muslim world. These are by no means conclusive. Public opinion polls carried out in Algeria, Jordan, Lebanon, Morocco and Palestine in late 2003 by the United Nations Development Programme (UNDP) found that the right to own property ranked high on the list of freedoms presently enjoyed in the five countries (UNDP 2005). Yet there are concerns about property rights in the Muslim world that in turn raise a number of questions. Is there something inherently Muslim or Islamic that frustrates property rights in these countries? Do competing Islamic property rights regimes impede universal land, property and housing rights standards? If Islamic

principles do exist as a coherent, sophisticated body of rules and arrangements, what are their implications and relevance to contemporary land rights debates? Islam may well be considered irrelevant or problematic in some contexts, but often it cannot be ignored. As a holistic, authentic and workable system it could invigorate the search for universal property rights in several contexts in the Muslim world.

Theorizing Islam, Land and Property

We have said that the Islamic property rights framework conceives of land as a sacred trust but promotes individual ownership with a redistributive ethos. However, at the outset it should be emphasized that Islam is by no means the only factor in Muslim societies and often coexists with customary, secular and other influences. The impact of Islamic land theories is best understood through an analysis of particular national and local histories, dominant economic principles and the interplay of customary and cultural practices in each context. The present structures may reflect choices at the societal level or through a top-down, state-dominated approach. The land rights paradigm in Islamic theory is circumscribed not only by external human rights and development strategies promoting a just and equitable society, but equally by internal dynamics. These religious and moral dimensions of land may be internalized and incorporated into property transactions of many societies in multiple ways. Our research explores how Islam potentially impacts on all stages of the property cycle, from acquisition to management and transmission. In this chapter some of the factors impacting on contemporary land discourse are identified, including religion, history – particularly Ottoman history – family, kinship and culture. Disentangling these factors will help to clarify the potential and limits of an Islamic dimension to land rights.

   In investigating the various factors impacting on the development and practice of Islamic land theories, the role of the Muslim state in ordering and implementing Islamic and internationally guaranteed land rights is considered. Under Islamic theory, the state's role in land management is seen as supervising land ultimately beonging to God. Thus, the state is mandated to administer land, efficiently and fairly, in accordance with God's laws and ethical and moral principles. While it may be argued that there is no specifically Arab or Muslim mode of governance, the Islamic framework does contain the important and influential concepts of *shura* (consultation) and *adl* (justice). The experience of Ottoman land administration is utilized to demonstrate that effective land management systems, land registration, titling and cadastre have been enduring features of the Muslim world. Potentially, within the Islamic framework states have the scope and the means to promote security of tenure and access to land.

That same framework is capable of responding also to modern urban planning and environmental challenges, although the nature of these current demands could not have been envisaged in the classical Islamic period. In several aspects Islamic land principles and practices run parallel or are similar to contemporary international standards; in other ways they offer an alternative paradigm. However, Islamic land concepts and models in all their diversity potentially support the quest for security of tenure and offer a sophisticated and alternative land framework *vis-à-vis* international regimes.

Rights to land are part of a broader set of property rights that includes real (landed) property interests and personal property, the latter in turn distinguished as tangible and intangible property (stocks, intellectual property). Land rights include not only the right to use land but also benefits from property, such as usufruct or rent. Generally, they imply the right to exclude others. Lawyers, philosophers, sociologists, anthropologists and economists have differing per-spectives on the nature and scope of property rights, but they are conventionally understood to be a bundle of rights that includes the acquisition, ownership, control, use, management, transfer and sale of property (Alchian 1977). Despite the widespread assumption that property rights originated in Western philosophical and socio-political thought, they are evident also in Islamic theory ('Abd Al-Kader 1959). Property governs relations not merely of persons to things but, equally, relations between persons with respect to things (Vandevelde 1981; Munzer 1990). As such, human relationships are a part of social relations, as distinct from matters relating to *ibadat* (worship). Property, however, is a part also of a larger scheme, as Harris notes (1996: 3), 'governing the use of most things and the allocation of some items of social wealth', the latter being 'all those things and services for which there is a greater potential total demand than there is a supply'. While property rights are mediated within society to maximize wealth, they are often subject to transaction costs (in distributing resources) and the vagaries of individual power and leverage. Property rights are allocated in different ways, through the private use of markets, informal communities or governmental actions.

The nature and scope of property rights have long been at the centre of philosophical debates over natural law (God-guided or morality-driven principles) and legal positivism where legitimacy is derived from the authority of the law maker rather than morality (Becker 1980). Islamic law relating to land is inspired by the concepts of sanctity of land, divine ownership and righteousness of use. While Muslims may show the same drive as non-Muslims towards acquiring land, it is generally understood that land is a sacred trust rather than just a property, commodity or wealth (*mal*) ('Abd Al-Kader 1959). While Muslim societies are absorbing secular practices, religion and politics in the Islamic context are not viewed in any sense as separate from one another. Therefore, Islamic arguments on property rights, like those on other human

rights, are ordered in more absolute terms within a vertical relationship governing 'how man discharges his duties towards God' in dealing with fellow human beings (Weeramantry 1988: 116–17). This is similar to other religious approaches that consider property as God's bounty and hold human beings accountable for its use.

There are scores of references to land in the *Qur'an* (Hamza 2002) that provide for and respect property rights (*Qur'an* 2: 205, 2: 220, 4: 2, 4: 5-6, 4: 10, 4: 29, 16: 71, 38: 24, 59: 8). Private property rights are well established but constructed as a sacred trust based on *tawhid* (doctrine of unity), *khalifa* (steward-ship) and *amana* (trust). Property and land vest in God, but are temporally enjoyed by men and women through responsibility or trust (*Qur'an* 2: 30, 36: 54; see Moors 1995). According to a literal religious philosophical tradition, man is allowed to use resources such as land but can never own it. Abdul-Rauf quotes extensively from the *Qur'an* and *Sunna* (tradition of the Prophet) to conclude that there is a concept of dual ownership (human–God) under Islamic principles (1984: 19). The existence of rights to own (*raqaba* or full ownership), enjoy or alienate land is not in the main contested but these rights are conditional on their legitimacy as derived from Islamic principles.

Some argue that Islamic conceptions of property rights, which promote private ownership with limits arising out of ethical and redistributive con-siderations, are amenable to socialist dogma (Mannan 1970). Others such as Behdad (1989: 185) view Islamic property rights as largely oriented towards a capitalist economy. Since the 1973 oil boom in the Middle East, there is more talk of Islam and capitalism in contrast to the weakening influence of Arab socialism (Cummings 1980: 25). At the same time, the 1979 Iranian Islamic revolution and resurgence of Islamic economics from Sudan to Pakistan have intensified the debate over the true potential of 'stand-alone' Islamic economics. There is a growing literature on Islamic economic principles and practice (Chapra 1970; Khan 1994), although at this stage in contemporary life the cohabitation of Islam with principles according with a capitalist economy seems more in evidence (Pryor 1985).

What are the implications of a distinctive tradition in Islamic property rights as a 'third way'? Are Islamic economic principles merely rhetoric or part of a more fundamental quest for authenticity, as indicated in the recent OIC call for greater adherence to Islamic economic principles? For many Muslims, the question is not merely one of economic development but rather 'whether [Muslims] want the right things in the light of the Shari'a … [and that] the development involving production, distribution and exchange process has to be distinctive to Muslim societies' (Mannan 1984: 62). Rosser and Rosser (1999) find that Islam as a 'new traditional economy' may not exist as a fully developed system yet, but 'it exists as a perspective in the form of an ideal model which has become an ideological movement of significance around the world in many

societies'. Kuran (1977: 37) argues that 'the significance of the steps to give economics an Islamic character lies only partially in their economic content. Much of their importance lies in their symbolism, in the present and future distribution of political power and their cultural meanings'. Whether or not Islamic economics are a pragmatic strategy or a utopian ideal, their guiding principles, particularly regarding property rights, can be used to promote access to land.

Despite similarities with Western liberal conceptions of property rights, Islamic rights to legitimate use of property have 'much wider significance than [those] enjoyed in the narrowly material accounting of capitalism' (Tripp 1997: 15). Writing on the 'Islamic approach to development', Ishaque (1983) notes the 'radical difference between the vision of a good and successful life in the worldview of Islam and that of the capitalist or the socialist world'. He contends that in 'the former it consists of fulfilling one's covenant with Allah and of living out the worldly life in terms of divine guidance as preparation for a more beautiful life awaiting mankind' (quoted in Esposito 1983: 268). One of the basic aims of Islam is to create an egalitarian society where every person may obtain his/her basic rights and enjoyment from life, and the Islamic approach includes several economic regulations – some moral and others material. Thus, Islamic property conceptions and arrangements have potentially important implications for individual ownership, access to land and secure tenure. It is an argument which will be returned to in succeeding chapters, particularly with respect to the potential for Islamic credit and microfinance, but also in discussions about the distinctive Islamic charitable endowment or *waqf*.

Islamic Concepts of Land Tenure and Access to Land

In theory capitalist private property rights are largely unfettered, while property rights in Islam are circumscribed. Rights in land depend upon Islamic principles emphasizing that land is a sacred trust for human beings and should be put to continuous productive use. However, excessive exploitation and hoarding of land are prohibited. Islamic property rights are conditional on the requirement that property not be used wastefully or exploitatively, or in a way that will deprive others of their justly acquired property (*Qur'an* 2: 188; see Rodinson 1973; Mannan 1970). As Guner (2005: 4) notes, 'Islam is against those who accumulate property for the purpose of greed or oppression as well as those who gain through unlawful business practices.' These Islamic principles contribute to a distinct framework shaping categories of land tenure and usufruct rights that are capable of giving rise to flexible and creative arrangements for access to land.

Property rights in Islamic law may be divided conveniently into three categories – public, state and private (Normani and Rahnema 1995). Public

property includes forests, pastures, rivers and mines and everything found in the sea. However, like *mewat* (dead land) which can be converted into private land by reclamation, fish caught from the sea and trees felled for timber convert from public to private. With regard to public land, the state exercises supervision to ensure that no exploitation of it occurs contrary to public benefit. Hussain (1999) points out that one of the features of the Islamic property regime is that public and state land can be converted to private ownership by private use and the state's determination of public interest, just as unused land can in some cases revert back to the state. Thus, land ownership in Islam is linked to land use. Behdad (1989) points out that while private property rights are well established, an individual who uses the land will have priority of access to a patch of land over another who has failed to use it. Unworked land cannot be owned, and according to theorists cannot be rented (Behdad 1989); indeed, whether any land can be rented at all was itself a matter of Islamic debate, although leases are now widely accepted (Johansen 1988). This debate arose out of the *hadith* (saying of the Prophet): 'He who has land should cultivate it. If he will not or cannot, he should give it free to a Muslim brother and not rent it to him.'

That unproductive land should not create wealth is similar to the well-known Islamic prohibition on *riba* (interest), which stipulates that money by itself should not create money. There are those such as Bethell (1994) who find the injunction against hoarding and the emphasis upon use of land as fundamental to secure tenure to be both unwelcome and obstructive. However, the ethical and moral dimensions of Islamic property doctrine, as found in the Islamic legal principles prohibiting unreasonable profiteering, exploitation through 'usury' or *riba* and hoarding, are part of a broader structure assuring important rights, including respect for property rights of all persons regardless of religious faith (*Qur'an* 3: 75). Minority rights have been posited as a problem in some commentaries regarding the application of Islamic law, but non-Muslims enjoy the same property rights as Muslims, although, as will be explained in more detail later in this chapter, the tax structure varies (Doi 1997: 426). The *Qur'an* also has rules ranging from the guardianship of the property of orphans and warnings against its misuse (2: 2, 2: 5 and 4: 10) to the inheritance rights of women (4: 7, 4: 24, 4: 32).

The flexibility of the Islamic framework is enhanced further by distinctive Islamic land tenure arrangements such as *milk* (private full ownership), *miri* (state), *waqf* (endowment) and *metruke* (common land). However, there are other classifications such as *mehlul*, which is unused state land liable to be confiscated and *mewat* land (Lambton 1953). Also recognized, in practice, are *musha* (communal land) and other forms of collective ownership that are based on custom. In the case of state land – *miri* or *emir* land – the state owns the land, as a representative of God, but creates a range of access and usufruct rights for individuals through cultivation or payment of taxes. State land can also be

converted by the state into *matruk mahmiyya* (property for general public use such as roads) or into *matruk murfaqa* (property for use by a particular community such as marketplaces and cemeteries). Land in a *waqf* is explicitly designated as owned by God, putting the brakes on private or state ownership over it. It is a form of land tenure with a significant role in promoting access to land for a wide range of beneficiaries and a later chapter is devoted to the *waqf* and Islamic philanthropy. However, it is worth noting even at this stage that the *waqf* and theories relating to the Islamic doctrine of *shuf'a* (rights of pre-emption) were viewed within the colonial perspective as examples of the backwardness of Shari'a law in terms of limiting individual ownership, as opposed to key elements in a creative and flexible arrangement (Messick 2003).

Security of Tenure

Security of tenure is an aspiration, if not a legal expectation, the world over – including Muslim societies. It implies that the right of access to and use of land/property is underwritten by a known set of rules, and that this right is capable of enforcement. Tenure can be realized in a variety of ways, depending on constitutional and legal systems, social norms, cultural values and, to some extent, individual preference. Islamic law provides such a framework, with the recognition and protection of private property rights, remedies for individuals deprived of their property rights and prescribed punishment for theft. As with other branches of Islamic law and practice, every property transaction can be characterized through the Islamic value system as *wajib* (obligatory), *mandub* (recommended), *mubah* (permissible), *haram* (prohibited) or *makruh* (repugnant) (Hallaq 1997: 40). Protection of property rights is well established in Islamic law ('Abd Al-Kader 1959). The Prophet emphasized the importance of property rights in his farewell pilgrimage by declaring to the assembled masses: 'Nothing shall be legitimate to a Muslim which belongs to a fellow Muslim unless it was given freely and willingly.' Kadivar (2003) argues that property and housing fall within the private domain in Islam, and are therefore respected and protected from intrusion, whether by another ordinary man or woman or by government.

Certainly, the *maqasid al-sharia* (hierarchy of legal aims) of the noted Islamic jurist Al-Ghazali (1058–1111 AD) 'included, at its top, the principles of protecting life, private property, mind, religion and offspring' (Hallaq 1997: 112). Muslim scholars are unanimous that these are the five essential values of Islamic law which 'must be protected as a matter of priority … [and] the focus is on the individual' (Esposito 1999: 147). Further, the Shari'a provides remedies for individuals wrongly deprived of property by official action (Mayer 1999a: 45; Behdad 1989). Another well-known Muslim writer, Ibn Khaldun (1332–95 AD), writes:

> To exercise political leadership, the ruler, together with his helpers, must enforce restraining laws among the people, in order to prevent mutual hostility and attacks upon property. Attacks on people's property remove the incentive to acquire and gain property. People then become of the opinion that the purpose and ultimate destiny of (acquiring property) is to have it taken away from them. Those who infringe upon property (rights) commit an injustice. (Al-Araki 1983: 148)

Such is the importance attached to property rights, that theft under Islamic law falls within the crimes which are punishable by a pre-established severe punishment (*Hadd*) found in the *Qur'an* 5: 41.

Islamic Land and Land Reform

Islamic theoretical insistence that ownership of everything belongs to God alone (*Qur'an* 2: 108; 3: 190) signifies that ownership is subject to equitable and redistributive principles. The divine ownership is coupled with repeated *Qur'anic* references to the effect that all of humanity benefits from nature's resources. The Muslim state, as the repository and means of implementation of God's laws and objectives, came to acquire and exercise 'ownership' over large swathes of land out of which a range of land tenure arrangements were created. Further, the interactions between Islamic and customary approaches to land add their own dimensions to this diverse body of land rights, most obviously with respect to communal conceptions of property. However, the Islamic framework does not merely shape diversity in landholdings, but also has redistributive elements.

The central role given to the Muslim state, in which ownership of land is vested on behalf of God, lends itself to the deployment of arguments based on Islamic principles in order to legitimate land reform programmes. Bonne (1960) notes that the concept of *miri* was much broader than Western conceptions of state or crown land since the *raqaba* (nominal ownership) vested in the state but 'possession and extensive rights of usufruct are vested in the private owner'. He further elaborates:

> The idea of supreme ownership on the part of the state and consequently the dual concept of ownership under Islam emerges also from the fact that, contrary to Roman law where a distinction is made between ownership and usufruct, a twofold right of disposal is admitted, that is, one in respect of the land itself and one in respect of its yield. Consequently, a house and the site on which it is built may belong to different owners. (Bonne 1960: 116)

The state therefore assumes land 'ownership' on behalf of God but for the benefit of the community. Caliph Umar, a companion of the Prophet, 'guided by old ideas of divine ownership left large parts of the conquered territories to God, that is, the Moslem community. The interest, that is, yield from the land

should belong to man, the capital to God' (Bonne 1960: 118). As noted earlier, Islam obligates Muslims to pay *zakat* (a charitable levy), as one of the five 'pillars' of faith (*Qur'an* 9: 60). Islamic property rights therefore incorporate a redistributive element, which is evident also in institutions such as the *waqf*. Al-Maamiry (1987: 59) notes that in Islam 'what is owed to the poor is a duty on the state as well as the wealthy. It is not a grant or gift; it is an obligatory right as long as this poor person is unable to earn or if the means of earning are not easy for him'. This emerges from a number of *Qur'anic* verses, for example 2: 77:

> It is righteousness to spend your wealth out of love for God, for your kin, for orphans, for the poor, for the travellers, for those who ask and for the release of slaves. Be steadfast in prayer and establish regular charity.

A further instance of the redistributive elements in the Islamic framework arises with respect to the inheritance rules. These establish a broad category of mandatory beneficiaries – albeit, as will be explained in Chapter 5, with opportunities for 'estate planning' by the benefactor. The fixed *Qur'anic* inheritance rules, by guaranteeing access to property for a large number of individuals, foster the break-up of large estates and land monopolies. Furthermore, these rules provide possibilities of co-ownership (Warriner 1948: 64). The view of some commentators that Islamic law creates wasteful land subdivisions will be discussed in later chapters; it does, however, create opportunities for land readjustment and co-ownership of holdings. In addition, there has been considerable interplay between Islamic property conceptions and customary practices where communal or tribal land are a feature of Muslim countries (Warriner 1948: 18; Bonne 1960: 117). An example is *musha* (Arabic for shared) lands, mostly relating to rural agricultural land where the custom is of 'reallocating land in unequal shares (at regular intervals) to which a customary right of ownership attaches' (Warriner 1948: 19). Similarly, *muzara'a* (share-cropping), a contract under which one party works the land owned by the other party in consideration of a share of the crops, has been discussed in Islamic jurisprudence. *Musha*, however, has been on the decline following colonial disapproval and the emergence of liberalized individual property rights regimes.

Islamic conceptions of property therefore offer a range of land rights and a choice among land tenure arrangements. As Kuran (2003: 5) argues:

> During the first few centuries following the rise of Islam, Islamic law had produced a rich set of principles, regulations and procedures to govern contractual relationships. There were rules to support the joint ownership of property. There were also rules to support the pooling of resources for commercial missions.

Muslim governments have often sought to derive legitimacy for their land reform or redistribution measures from Islamic first principles of redistribution, or violation of such principles, as in the case of the nationalization of Islamic endowments. This adaptation points to the political or pragmatic use of Islamic

argumentation. For example, the question of whether a land ceiling or redistribution of land was Islamic was hotly contested by the government and the landed class in Pakistan.

Factors Influencing Islamic Land Doctrines

Despite the general principles relating to property rights, the *Qur'an* did not elaborate on land tenure – on its regulation and administration, or on the mechanics for its protection – leaving it to succeeding generations to develop the field. Property rights were widely asserted during the Prophet's lifetime (570–632) given that he and many of his companions were traders and businessmen. The right to property is promoted by a key document, the Prophet's Farewell Sermon (*Khutbatul Wada', 632 AD*), which states 'regard the life and property of every Muslim as a sacred trust. Return the goods entrusted to you to their rightful owners' (see Haykal 1976: 486–7). From the time of the Prophet onwards, property rights were not only asserted but also subjected to litigation (Hamza 2002: 29–30). In the next period of Islamic legal history, the four 'rightly guided Caliphs' Abu Bakr, Umar, Uthman and Ali (632–61) consolidated those principles and developed land surveys, prohibited land as war booty and created equitable land tax structures. Though no generalization can be made about the later rule of the Ummayads (661–750), Abbasids (750–1258), Ayyubids (1171–1250), Mamluks (1250–1517) and Safavids (1501–1722), or the Shi'a Fatimids (969–1171), private land rights were always understood to be promoted by Islam irrespective of some centralization of land processes (see, generally, Humphreys 1995).

It is the records and laws from the Ottoman (Uthmani) period 1281–1918 that establish the highly developed land tenure regimes and land administration system and vibrant land markets, as will be discussed further in the chapter on Islamic land tenure and land reform (see Inalclk 1969; Islamoglu-Inan 1987). Modern land regulation laws in most parts of the Sunni Muslim world are derived, at least in part, from categories of land in classical Islamic law and Ottoman land law, culminating in the Ottoman Land Code 1858 (see Jorgens 2000), which were further fashioned and distorted by the colonial encounters. As will be explored in some detail in later chapters, historical narratives have an impact on the development of contemporary land tenure regimes in Muslim countries. Such narratives offer an explanation as to why classical/traditional concepts persist in the contemporary tenure web. These histories also provide insights into the potential for innovative but authentic tools for enhancing access to land. Equally, the Islamic history of an institution such as the *waqf* clarifies not only its continuing relevance, but also its potential contribution to current debates on land reform. Particular episodes, including colonialism and

distinctive local histories, have also been a factor in the evolution of contemporary land regimes in different Muslim countries.

Property rights across the 57 Muslim majority countries, however, cannot be generalized about or too easily attributed to religious influence or history alone. They are as much an outcome of contemporary economic conditions and choices. Some Muslim countries have been quicker to adapt to the calls for economic liberalization or the challenges of globalization than others, a reaction which in turn has often been determined by a variety of factors, including a country's specific socio-political, religious and historical context. The economic performance of parts of the Muslim world, for example the Arab world, has been analysed by various authors (Rivlin 2001). Writing in 1948, Warriner forewarned that there was a need for new forms of tenure in the Middle East to combat poverty due to the high density of the population, unequal land distribution and low productivity (1948: 120). Such warnings are not confined to the Muslim world, but it is perhaps the case, as argued in research on the moral economies in Islam, that the close links between Muslim countries, coupled with the varying economic development between countries, have led to obvious and continuing tensions (Institute of International Studies 1998).

The convergence of customary and Islamic law has also been a particular feature in the development of laws and practices with respect to land in Muslim countries. Land is a fundamental asset: shelter, food production and other activities are all dependent on it (DfID 2002). But it is often more than that. For indigenous peoples, for example, land is fundamental to lifestyle since it is imbued with sacred or ancestral values, and often cannot be traded or compromised. In Muslim societies, too, land has multiple cultural meanings and implications. Writing in the context of the Palestinian Arab community, Husseini and Baidoun (2001) point out that historically land was seen as the most valuable asset of the Arabs as well as fundamental to their personal esteem and honour. It is a status symbol as well as part of familial, tribal, national and religious identities. In many societies, Muslims take their name from the land they come from. The term *milk* or *mulk* in relation to land signifies more than an individual's property; it is their permanent temporal abode. Barakat (1993: 55), however, points out that the significance of formal land ownership differs from the peasant to the nomad (Bedouin), even though both use land:

> Peasants derive their identity from the land and village life. Their relationship to the land is inseparable from their intimate and interdependent kinship relationships. What differentiates Bedouin from peasants is the latter's relationship to land rather than kinship ties. The Bedouin view attachment to land as a source of humiliation. They look down on peasants and see them as slaves of land and of those who have control over it. The peasants, by contrast, seek land and consider it to be the source of their dignity.

Even within communities, there are other important factors such as family and kinship that play an important role in determining the operation and effect of property rights. For instance, Muslim women's access to property, as will be argued in a later chapter, is best understood through the dynamics of custom, family, kinship and the construction of property itself. Conservative interpretations of Islamic law and customary/traditional structures/practices often combine to diminish or altogether extinguish women's rights to property (Doumani 2003; Moors 1999). Vulnerable categories of people such as squatters, slum dwellers, minorities, migrants and children often have great difficulty in accessing land rights. Therefore, it is necessary to determine the true import of Islamic norms in order to distinguish them from other deprecating customary or patriarchal norms where applicable.

Land Administration and Good Governance

The link between good governance and an efficient land policy is well established. It has been the driver of international initiatives from the United Nations Development Programme (UNDP), World Bank, International Monetary Fund (IMF) and UN–HABITAT. With effective governance, it is argued that business, government and citizens, acting as partners, will build a stronger economy, a better society and an effective polity. The UN Millennium Development Goals stress the importance of governance as part of an enabling environment conducive to development, drawing from the familiar language of civil and political human rights. Good governance implies the existence of participatory, transparent and accountable socio–political and economic processes and interaction/dialogue between state and non–state actors. However, the *Arab Human Development Report 2004* concludes that the situation of freedom and good governance in the Arab world ranges from deficient to seriously deficient. Despite sporadic improvements in the human rights situation in some Arab countries, the overall human rights picture in the Arab world appears grave and deteriorating (UNDP 2004).

The problems of land administration faced in Muslim countries are undoubtedly related to the democratic deficit but they also arise out of misuse of limited resources as well as inefficient structures. In many societies, whether Muslim or non–Muslim, land is seen as a currency of political patronage and corruption. Where land administration is complex or dysfunctional, rent-seeking behaviour flourishes at the expense of the poor (DfID 2002). The outcomes of the World Bank's Middle East and North Africa Programme (MNA) 2002 governance workshop in Beirut are instructive. They challenge the 'message' in the *Arab Human Development Report 2002* that the region is exceptional or that governance problems are qualitatively different from other regions. Moreover,

they emphasize that there is no 'Arab' or 'Muslim' model of governance. Islam is neither a critical factor in determining the quality of governance nor inherently incompatible with good governance (World Bank 2002; see also Grant and Tessler 2002).

It should be acknowledged, however, that much of the literature regarding Islam revolves around the Islamic state as a utopian past or idealized future. The concept of the Islamic state, and its limits in the postmodern world, has been explored by several commentators (Ayubi 1995; Zubaida 1993). Whatever their orientation, Muslim governments routinely deploy Islamic justifications for their political legitimacy and survival (Esposito 1987: 239). Specifically, there is no doubt about the influential quality of *adl* and *shura*, the concepts of justice and consultation, which are embedded in Islamic consciousness and administrative practice (Rosen 2000). This quality is evident not only in modern liberal thought but equally in the works of Muslim revivalists like Hassan al-Banna, Abul Ala Mawdudi and Sayid Qutb.

Accountability, particularly against misuse of power and corruption, in both the temporal and religious sense, are repeatedly stressed in Islamic literature. As such, these concepts and ideals are deeply entrenched in Muslim consciousness and need to be employed more in land administration issues. In contrast to those who find Islam and democracy incompatible (Kedourie 1994), there is abundant scholarship arguing the opposite, although it is clear that Western and Islamic models vary (Abed 1995; Al-Suwaidi 1995). Brumberg (2002) argues that over the past two decades the Middle East has witnessed a 'transition' away from authoritarianism but seems to be moving back towards it. Zakaria (1997) argues that the mere existence of the opportunity to vote is not enough and that liberal democracies with built-in protections for citizens must be promoted. The record of Muslim states has generally been problematic in terms of open or good governance, but, as Ahmad (2004) argues, often the state in the Muslim world has enjoyed a monopoly position and consequently untrammelled powers to control potential critics in the media or through the polls.

A wide literature exists on the traditional and modern Muslim civil society (al-Ghannouchi 2000; Sajoo 2002). Traditional Muslim civil society, through institutions such as the *waqf* (Hoexter 2002), contrasts in structure and scope with Western-inspired models, though there are now a range of Islamic and secular spaces created by civil society in various parts of the Muslim world. Apart from state restrictions on their operation in several Muslim states, there are theoretical dilemmas for non-governmental organizations regarding the extent to which they can adopt universal standards and methodologies and their relationship to Islam, which often affects their standing with the government and society (Al-Sayyid 1997). However, civil society in most parts of the Muslim world appears to be expanding and gaining a stronger voice commensurate with the inability of many Muslim states to cater sufficiently to the needs of their

peoples and adapt themselves to 'the demands of an ever-growing globalizing world economy' (Sahliyeh 2000). This diminishing power of the state – driven by the media and Internet revolution – has spurred civil society, which manifests itself in assorted ways, one of which is through religious and philanthropic organizations.

Islamic activism itself is often directed at efforts to 'produce a viably authentic political and social synthesis which is both modern and true to their indigenous (Islamic) history and values … and the desire to articulate a more authentic identity' (Esposito 1987: 152). Bowman and Green (1997: 253) note, in the context of urbanization, that

> Islam can function as an important source of political mobilization when abysmal conditions in many of the region's cities lead to popular political dissatisfaction…. It is here that Islamic groups can mobilize urban dwellers on the basis of a government's inability to respond effectively to many of the ills that are by-products of massive urban growth. Such Islamic groups generally portray themselves as viable alternatives to prevailing political orders that do little for their constituents other than to oppress them. Thus, the relationship between massive urbanization and political protests may have as an intervening variable religio-political mobilization.

As Bowman and Green (1997) argue, Islamic groups have taken on a significant role as relief providers: they give the example of aid following natural disasters such as an earthquake which destroyed a part of Cairo, where the Egyptian government itself failed to respond effectively. The extent to which religious and philanthropic organizations can respond more generally to the lack of adequate secure housing and infrastructure for the residents of many cities across the Muslim world is a matter that warrants further attention and will be discussed further in Chapter 7 which focuses on *waqfs* and Islamic philanthropy.

Ottoman Land Administration

Ottoman land history offers an expansive case study of the application of Islamic land principles in a specific context, lessons from which can also contribute to modern debates. The Ottomans by the mid-sixteenth century ruled much of the Middle East, North Africa and Eastern Europe, and, through much of their 600-year dominance, developed an extensive land administration system based on Islamic and local principles. While the time and circumstances of each conquest varied, progressively Byzantine, Mamluk, Turkish and Hungarian practices, together with other land traditions, were incorporated. In theory, conquered land became the tithe land or *'ushr* (based on an obligatory charge on farm produce), whereas land left in the possession of its former holders was subject to *kharaj*, the levy of land tax. *Kharaj* tax, levied on non-Muslims at a higher rate than *ushr*, is usually synonymous with *jizya* (Arabic for 'compensate', in the

context of non-Muslims being exempt from other obligations). Relationships governing landholders and the state, or between peasants and landlords or the state, or to do with the cultivation of *mewat* lands, were all inspired by Islamic principles. These continue to inform contemporary land classifications in many of the successor states, despite colonial and postcolonial modifications. Even today the Ottoman land records are being used in land transactions in a number of countries.

Ottoman land administration was driven largely by interests of revenue and taxation, though these had implications for the social and land structures (Cosgel 2004). Land administration was generally carried out through an elaborate network of laws and guidelines. A land grant (*iqta*) was given to soldiers in lieu of a regular wage at a time when the state had limited revenue, and did not create juridical or hereditary rights. At the time of Sultan Suleyman (the 'Magnificent' or the 'Lawgiver'), the empire's territories consisted of 36 administrative provinces. Districts of varying sizes were controlled by a *dirlik* appointed by the sultan and granted his own budget. The *dirlik* managed tax collection and land distribution and could be removed if found to be unsuitable (Biyik and Yomralio 1994). Despite the centralized nature of the Ottoman land and revenue bureaucracy, the vastness of its lands required more local management.

With weakening state power, in the seventeenth century *iltizams* (tax farms) were created where *multazims* (wealthy notables) were in charge of collecting land revenues for the state, initially for a year. The essence of the system was thus the leasing of the right to collect taxes on state land (Baer 1962). The *multazims* were allowed to keep part of the tax for a little more than their overheads but in practice exploitation did occur. Over time, *iltizams* were routinely renewed and even extended for the lifetime of the holders, who came to treat them as their own private property. In 1813, however, Muhammad Ali (or Mehmet Ali), the Ottoman Viceroy for Egypt, brought back centralized land assessment and control as a way of improving state revenues: he cut out the intermediaries and established a direct relationship with the working peasants, who were an important part of his economic agenda (see Pennell 2005). In the second part of the nineteenth century, the landowning class grew in economic and political power as a result of the breakdown of the state's monopolies, Ottoman law (introduced in the 1840s) regarding land ownership, the state's fiscal crisis (necessitating the sale of state lands to private individuals) and the establishment in 1866 of the Consultative Assembly (Moaddel 2002).

The Ottoman land administration experiences, derived theoretically in part from Islamic principles but equally conditioned by other socio-political considerations, establish several facts. First, *milk* freely existed for the landed classes, while for peasants there were limited but definite opportunities to access land – for example, through the reclamation of *mewat* land. Second, there was a concentration of state land (*miri*), although there were interests and rights

created for intermediaries and peasants. Third, the cadastre (register of lands) and tax collection indicate that Islamic principles do not inhibit effective land administration systems. Fourth, land settlement patterns were determined by the availability of water and the nature of the irrigation system. Fifth, the role of the state with regard to land was not static but diverse and evolving. The Ottoman experience, a product of its times, went through several phases of centralization and decentralization. Finally, Ottoman land administration has contributed to contemporary land registration systems, as discussed below.

Islam and Land Cadastre, Registration and Titling

One of the significant challenges for land administration is the development of appropriate cadastral systems which can provide necessary information and clarify legal rights. The Cadastre 2014 initiative builds on earlier conceptual-izations by seeking a modern integrated system giving a complete description of all legal conditions effective for a piece of land, including all public rights and restrictions. However, as van der Molen (2003) argues, there are 'significant differences' exhibited by the cadastral arrangements in 30 to 50 countries, which either possess, or will possess in the near future, appropriate land administration systems; but another 140–160 countries will not be anywhere near sufficiently prepared. The joint 1999 United Nations–FIG (International Surveyors Federation) Bathurst Declaration on Land Administration for Sustainable Development recognizes the multidimensional, evolving nature and plurality of cadastral work (Williamson and Grant 2002). It is noteworthy that among the members of the working group of FIG Commission 7 (Cadastre and Land Management) were representatives from Algeria, Egypt, Jordan, Malaysia and Turkey. Far from it being a Western concept, cadastre has been found since the time of the Prophet Mohammed, when at his suggestion collective lands around the city of Makkah were marked out with stones (El Ayachi *et al.* 2003). Likewise, the 'fencing' of *mewat* (dead land) properties to establish rights has been a common practice. For Muslim states in later historical periods, land records were considered necessary for resolving land disputes between (usually) private parties as well as to meet the state's desire for land information for purposes of revenue (Larsson 1991).

The Ottoman rulers realized the importance of land information and management, with periodic surveys and reviews of expected tax revenues (Cosgel 2004). During the Ottoman period, a land registration system flourished: particularly in the period 1534–1634, extensive land information records *(Kuyud-u Hakani)* contained all available land-related information. These records included names of villages and farms, landholders' names, annual income of lands, land classifications, boundaries of public-use areas, the natural resources

on the land, population and paid tax. In fact, a land registration guide called *Kanunname-i Kitabet-i Vilayet* is available in the Ottoman archives. In addition there were further books, providing more detail with respect to landholdings in a particular province, such as boundary descriptions on the basis of which landholders were given certificates, land tenure and crops (Biyik and Yomralio 1994).

Despite its ambitious scope, the registration was not completed for the entire Ottoman territories but the advantage of Ottoman cadastral experience has meant that Egypt, for example, has had comprehensive land statistics available since 1907, with the techniques of assembling them becoming gradually more accurate (Baer 1962: 71). In Palestine, the Israeli state used the legal basis of Ottoman land law as the framework to aid its nationalization of Palestinian land (Kedar 2001). The power of the Ottoman legacy is illustrated by the fact that the Israeli land title registration office is still referred to as the 'Tabu' office and title registration certificates as 'Tabu' papers, a term which is Ottoman in origin. Many Muslim countries that were colonized experienced the Torrens system or similar titling programmes. The FIG country reports on Muslim countries such as Jordan, Algeria and Morocco show considerable cadastral preparation activity, often with international support. Several other Muslim countries such as Yemen, as well as countries with Muslim minorities such as the Philippines, have received extensive support for land-titling projects, with mixed success. In Muslim countries attitudes towards cadastre or tiling vary, but there is nothing in Islam that frustrates these attempts; indeed, the contrary is the case.

Islamic Urban Planning

Rapid urbanization with its attendant problems is a serious challenge in Middle Eastern and other Muslim cities. Referring to the complications arising from rising population, poverty and politics in urban centres, Bonine asks, 'Are Cities in the Middle East Sustainable?' (1997: 339). Echoing Santos's experience with informal settlements (*favelas*) operating outside formal structures in Brazil (Santos 1995), Hanna addresses the context of Egypt's migration-fed housing problem:

> When a government, anywhere in the world, does not set up a plan to satisfy the basic needs of its people [the people] have to seek ways and means to satisfy their basic needs. They do things according to their means…. There is no clear plan to control or guide this flow, nor is there a plan to solve the housing problem for these country people. (1985: 206)

Many of these urban management problems are similar to those faced by non-Islamic cities but they also have socio-religious dimensions as Islamic concepts of planning have permeated the wider planning debate. Since 1980 the Organization of Islamic Capitals and Cities (OICC), which is a global

non-governmental and non-profit organization, has been affiliated to the OIC. It has 141 cities as active members in 54 OIC countries spread across the four continents of Asia, Africa, Europe and South America. Its activities are focused on the achievement of its goals within the framework of sustainable development of human settlements. It publishes a biannual magazine, *Islamic Capitals and Cities*, and through its seminars has produced several books relating to housing, the environment and urban planning.

Contemporary urban planning faces challenges, both in scale and nature, and limitations of resources perhaps not encountered by pre-modern societies, and modern secularized principles of planning efficiency seem to make Islamic concepts of doubtful relevance. However, there is much in Islamic civilization and history on which town planners and architects can draw. Muslim societies have been largely urban: the city of Al-Medina, where the first Muslim community was formed and which was first developed through the planning activities of the Prophet's generation, is often cited as the Islamic urban model. Much Western scholarship on Islamic urban space and socio-religious identity has been concerned with the mosque and the market as focal points, in analogy with the Hellenic city prototype (von Grunebaum 1955: 145). However, the *waqf* played a significant role in the characterization of public space (Ehlers 1992, Bonine 1987). Lapidus underscores the complexities of Islamic urbanization, noting how kinship, community ties (based on the unifying concept of the *umma* or community) and religious consciousness determined the historical evolution of Islamic cities (1973: 33–6). These studies are relevant, for example, in explaining the importance of privacy through courtyards or male communal spaces through *hammams* (public baths). As Al-Asad (1997: 63) points out, planners seeking to alleviate contemporary problems in modern cities should 'approach the city as an entity that fosters the preservation of memories and the creation of a sense of place [and] with sensitivity to psychological, historical and overall cultural issues'.

Given Islamic architectural splendour, it is easy to romanticize the Islamic city of tree-lined broad roads, fountains, exotic bazaars and clear public and private spaces. It has been argued that present-day architects and town planners are implicated in this idealization of an Arab-Islamic model, with the consequence that regional and local differences which are themselves shaped by Islamic history are sidelined (Fuccaro 2001). Bonine (1979: 223–4), writing in the context of Iranian cities, cautions against the single 'Islamic city model' as there are many variations. Abu-Lughod (1987) lists a number of variables that have an impact on Islamic urban space, including territoriality, gender segregation and neighbourhood. However, she debunks the generalizations regarding Islamic cities from patchy case studies as an 'orientalist' misreading. She asks 'Why would one expect Islamic cities to be similar and in what ways?' (1987: 160).

Characteristics of traditional Islamic cities, themselves diverse owing to varied socio-cultural factors, have been modified over time particularly during the modern period. Abu-Dayyeh (2006) argues that where traditional neighbourhoods have survived the onslaught of modernization, the *waqf* and the processes of land succession have stimulated some development, although it is slow and uneven. Therefore, the renewed interest in Islamic planning systems may or may not provide a wholesome alternative paradigm – but does warrant further attention. Traditional Islamic principles relating to land could not have foreseen the challenges of urbanization, land conflicts or newer forms of land use, as well as the difficulties in access to land and security of tenure. These are at a jurisprudential level matters for *ijtihad* (personal reasoning), but at a policy level, a state following Islamic principles has considerable leeway also in orienting its land policy towards the benefit of the community through *maslaha* or public interest. In particular, the rights of landless poor, slum dwellers and/or squatters could be addressed through this policy mechanism and the potential of both *ijtihad* and *maslaha* are addressed in the following chapter, which is concerned in part to discover how the processes of Islamic reasoning and interpretation can enable the emergence of innovative land management tools. This search is also relevant in approaches to contemporary environmental problems.

Islam, Environment and Water

Land management and use have to be integrated within a sound and responsible environmental policy. The *Qur'anic* view holds that everything on the earth was created for humankind. It was *ni'amah* (God's bounty) to humankind, but has to be exercised with care as a trusteeship. Land is a part of that holistic, moral and ethical dimension of *imaan* (religious faith), living in a way that is pleasing to Allah, striving in everything to maintain the harmony of both inner and outer environments (Khalid 2002). Engelmann (2001) points out that over 6,000 verses in the *Qur'an* urge believers to respect the environment and seek intergenerational equity in the use of the natural resources of the earth, which are a gift from God. There are environmental safeguards during peacetime and war. The Prophet not only encouraged the sustainable use of fertile lands; he also told his followers of the benefits of making unused land productive: planting a tree, sowing a seed and irrigating dry land were all regarded as charitable deeds and would lead to ownership of that land. Extrapolating laws from such *Qur'anic* teachings is the challenge in addressing environmental issues in the modern context. These issues range from deforestation and soil erosion to drought and flood, from the application of technology to the preservation of community and culture, from the greenhouse effect to acid rain, from nuclear power to genetic engineering, from population and poverty to North–South equity and from

stewardship to sustainable development (Rahim 2001). However, beyond the theory, Khalid (2002) points out that there a large number of institutions and mechanisms to foster environmental protection, including the reclamation of *mewat* land or the establishment of conservation zones in the form of a *waqf* or a *hima*, which is an area designated as a special reserve by the state. The state can also establish *al-haramain*, inviolable sanctuaries where the use of land is severely restricted, or where trees and animals are protected.

Environmental challenges arising out of water shortages and disputes are particularly critical in the Middle East and other parts of the Muslim world (Swain 1998). The *Qur'an* mentions water (*ma*) some 63 times. Water is extensively discussed in the documented sayings and actions of the Prophet (Faruqi *et al.* 2001). Not only did water play a prominent role in Islamic architectural designs and in its settlements, it has a significant role in rituals, particularly *wudu* (obligatory ablution) which precedes the *salah* (five times daily prayer). The Makkan *zam zam* (aquifer) has a *Qur'anic* status. Water is constructed as a gift from God and belongs to the community with the right to drink (*shafa*) and other uses. However, the question of individual ownership over water, in contrast to usufruct or access rights, is still a matter of Islamic debate. In classical Islamic theory all land is held in trust for the benefit of the community, but water rights over individual lands were bought and sold during the Ottoman period (Lambton 1953). Warriner notes that 'water rights are regarded as the personal property of individuals and not annexed to the land which they should naturally pertain' (1948: 73). Thus, land could be sold without water rights and vice versa, leading to confusion and speculative practices (Forni 2005). In most Muslim countries, water is a commodity but the discourse over its use often recalls the religious dimensions of the environmental issue (Caponerea 1973). The Arab Human Development Report 2002 points out that Muslim countries must confront environmental problems as a priority (UNDP 2004: 45–50, Talal 2004).

Conclusions

This chapter's outline of Islamic conceptions of land tenure and land rights demonstrates that there an Islamic dimension to contemporary land debates which is worthy of exploration. Property rights are not only well established under Islamic law, but are indisputably one of the five foundational principles of the Islamic society. As such, land rights must be respected and protected as a matter of priority. Though, in religious terms, all property vests in God, it has never been seriously disputed that human beings as owners assert the usual range of property rights in the land, subject to compliance with the egalitarian provisions of the Shari'a. Moreover, particular Islamic approaches are evident in

the fields of land administration, land registration, urban planning, water policies and environmental protection. Understanding the nature and scope of property rights in Islamic society could further secure tenure as the land rights framework emerges from divine edict and the sayings and examples of the Prophet.

There is repeated Islamic emphasis on obligations regarding philanthropy, fairness and poverty alleviation, which are influential in land rights argumentation. The concept of property rights in Islamic economics has implications far beyond the material domain as it lays stress on responsibility, poverty alleviation and redistribution. In the Islamic welfare state, the *Baytul-Maal* (public treasury) has a specific mandate for support of the landless. In addition to taxes, state funds are also comprised of *zakat* and other donations. The state is expected to fund access to land for the landless poor. The formulation that land is a sacred trust implies that land ownership and enjoyment must be just and responsible. As a result, Islamic doctrines engage with entitlement to land rights for a broad range of beneficiaries, including women, children, landless and minorities. Land ownership in Islam is predicated on productive use of land, as evidenced from the principle of ownership of *mewat* through reclamation. Despite the clear foundational Islamic principles relating to land and the evolution of sophisticated land tenure arrangements in many parts of the Muslim world, their application in Muslim societies does manifest itself in different ways. However, there is the basis upon which Islamic access to land through Islamic arguments can be promoted, with a holistic, authentic, moral, ethical and legal land rights code.

Under Islamic theory, the state in land management is seen as supervising land ultimately belonging to God. Thus, the state is mandated to administer land, efficiently and fairly, in accordance with God's laws and ethical and moral principles. The Ottoman land administration narrative is complex and its legacy often disputed, but it demonstrates clearly that systems such as titling, registration and cadastre have a well-embedded history in the Muslim world. In practical terms, there exist no ideal Islamic states, and Muslim states selectively adopt Islamic principles according to their particular interpretation. Further, it has been argued that there is no distinctive Arab or Muslim model of governance, but the concepts of *shura* and *adl* are nevertheless influential. Potentially, an Islamic framework gives states wide leeway in promoting security of tenure and access to land within a transparent and accountable framework. For instance, an opportunity could arise through the redistribution of *mewat* lands or through optimizing *waqf* lands.

Though traditional Islamic practice may not have foreseen the extent or nature of present-day problems, and purely Islamic solutions may be a utopian model, there are aspects of Islamic principles, mechanisms and processes that can provide legitimate and durable solutions through incorporating or at least considering authentic Islamic contributions. This introduction to Islamic land rights has highlighted some key areas for a deeper exploration of the relationship

between the theorization of Islamic property rights over land and the impact of those rights in Muslim societies which are the focus of later chapters: Islamic land tenure systems, Islamic human rights relating to land, Muslim women's access to property, Islamic inheritance, the *waqf* and Islamic microfinance. By systematically addressing the distinctive features of the Islamic land framework it is intended to contribute to the quest for international land rights. However, before focusing upon these specific issues, it is important to investigate further Islamic legal cultures relating to land and property, including the sources and methods of reasoning and interpretation. It will be argued in the next chapter that probing Islamic legal doctrines and methodology can enable the development of inclusive land tools, raising important possibilities, for instance, through *maslaha* or public interest within the domain of land administration and *ijtihad* or personal reasoning across a range of areas, including women's property rights.