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ARTICLES

A Legal Study on Fatwa regarding Hilla Marriage in Bangladesh

Transnational State Responsibility for Violations of Human Rights

The Economic and Social Council and the Specialized Agencies

The Role of NGO'S in Protection and Promotion of Human Rights of Women in Bangladesh

Blasphemy and Criminality: An Islamic Perspective; Special Reference to Bangladesh

Sexual Harassment in Bangladesh: Law and Realities

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বাংলাদেশের বিচার ব্যবস্থায় পদ্ধতিগত জটিলতা: শিশু-কিশোর প্রসঙ্গ

নারীদের উপর এসিড-নিষ্ক্ষেপ: গণমাধ্যমের ভূমিকা ও আইন

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Land Management in Islam: A Legal Study

Mohammad Azharul Islam*

1. Introduction

Land is closely connected with human life. As per scientific calculation everything is generated from land and is transformed into land. It is a valuable continuous wealth. No one can ignore the usefulness of land. Land is being used from the very birth of life. 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.¹ Islam as the complete code of life has laid down general principles for regulating every aspect of human life. In order to build up a prosperous society it embraces in its sovereign domain detailed rules regarding land management system. Islamic property rights framework conceives of land as a sacred trust but promotes individual ownership with a redistributive ethos.² Under Islamic theory, the state's role in land management is seen as supervising, land ultimately belonging to God.³ Thus, the state is mandated to administer land efficiently and fairly in accordance with God's laws and ethical and moral principles.⁴ In this paper, an endeavour is made to find out the very issue that Islam can provide an appropriate system of land management. For this purpose, the various provisions of the Holy Qur'an, the Sunnah of the Prophet (PBUH), the practices of His Companions especially the rightly guided Caliphs and the juristic principles have been focused on.

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¹ Sait, Siraj, and Lim, Hilary *Land, Law and Islam Property and Human Rights in the Muslim World*, Zed Books Limited, 1st edition, 7 Cynthia Street London, 2006, p.1

² Ibid, p.8.

³ Ibid.

⁴ Ibid.

2. Definition of Land

Land is real property, the improvements made to the land and the rights to use them. Often one thinks of land as only the surface of the earth. But it is substantially more than that. Land starts at the centre of the earth passes through the earth's surface and continues on into space. Black's Law Dictionary defined land as "an immovable and indestructible three dimensional area consisting of a portion of the earth's surface, the space above and below the surface and everything growing on or permanently affixed to it". It also says that land means an estate or interest in real property⁵. According to Osborn's Concise Law Dictionary, land means any ground, soil or earth whatsoever. It legally includes also all castles, houses and other buildings; also water. It includes land of any tenure, mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson and a rent and other incorporeal hereditaments and an easement, right, privilege or benefit in, or over or derived from land; but not an undivided share in land.⁶ To one author this definition is extensive and has included anything, which is connected with land.⁷

3. Definition of Land in the Light of Islam

Islam provides no distinct definition of land. Rather land is seen as a sacred trust for human beings and should be put to continuous productive use.⁸

⁵ Garner, Bryan A. (as editor in chief) *Black's Law Dictionary*, Thomson West, eighth edition, USA, 1990, p. 892.

⁶ Bird, Roger, *Osborn's Concise Law Dictionary*, (ed.), Universal Law Publishing Co. Pvt. Ltd, Seventh Edition, Delhi, 1983, p.195 mentioned in Islam, Mohammad Towhidul, The Development of Land Laws and Land Administration in Bangladesh: Ancient Period to Modern Times, *The Dhaka University Studies, Part-F Vol. XVI(2)(2005)* p.205.

⁷ Islam, Mohammad Towhidul, The Development of Land Laws and Land Administration in Bangladesh: Ancient Period to Modern Times, *The Dhaka University Studies, Part-F Vol. XVI(2) (2005)* p.205.

⁸ See n. 1 p. 11.

However, excessive exploitation and hoarding of land are prohibited.⁹ 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.¹⁰ Islam is against those who accumulate property for the purpose of greed or oppression as well as those who gain through unlawful business practices.¹¹ 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.¹²

The Holy Qur'an has mentioned the words '*al ard*' i.e. the earth in many places. Allah has ordained:

"Ye assembly of Jinns and men! If it be ye can pass beyond the zones of the heavens and the earth, pass ye! Not without authority shall ye able to pass".¹³

In another place He has proclaimed:

"Who has made the earth your couch and the heavens your canopy: And sent down rain from the heavens; And brought forth therewith fruits for your sustenance; Then set not up rivals unto God when ye know (the truth).¹⁴

In another verse He proclaimed:

"And remember ye said: "O Moses! We cannot endure one kind of food (always); So beseech thy Lord for us to produce for us of what the earth groweth,-its pot-herbs, and cucumbers".¹⁵

He also commanded:

⁹ Ibid.

¹⁰ Ibid.

¹¹ Guner, O. '*Poverty in Traditional Islamic Thought: Is it Virtue or Captivity?*', Studies in Islam and the Middle East, Vol 2 (1) 2005, p.4.

¹² See n. 1 p.11.

¹³ Ar-Rahman 55:33. The translation of all the verses of the Holy Qur'an contained in this article are taken from the 'Holy Qur'an Text, Translation and Commentary by A.Yusuf Ali, published by Amana Corp. 4411 41st St., Brenwood, Maryland 20722, 1st edition 1938.

¹⁴ Al-Baqara 2: 22.

¹⁵ Al-Baqara 2:61.

"From the (earth) did we create you, and into it shall we return you, and from it shall we bring you out once again".¹⁶

4. Classification of land

After conquering a state its lands are divided into two classes¹⁷

1. Ownerless Land &
2. Lands, which have owners.¹⁸

1. Ownerless Land

In the terminology of Islamic jurisprudence, this type of land is called '*Arje Mobaha*' i.e. nobody has ownership on such type of land.¹⁹

2. Lands, which have owners

The lands upon which people have ownership fall in this category. The owners of such lands are at discretion to use them in lawful manner.²⁰

As per Islamic principles concerned a country may be conquered in two ways namely:

- a) Defeating the enemy through warfare and
- b) Entering into a specific contract with the enemy without waging a war.²¹

Rules relating to the ownerless lands are always one the modes of conquering a state are irrelevant here.²² But in case of lands of the second category the rules differ on the basis of methods for conquering.²³

¹⁶ At-Toha 20: 55.

¹⁷ Shafi, Mufti Mohammad, *Islamey Bhumi Babostha* (The Law of Land in Islam): in Urdu and translated by Nijamee, Maulana Karamat Ali into Bengali, Islamic Foundation Bangladesh, 2nd edition, Dhaka June 1995, p.1. He extracted this classification from '*Badai*' Vol. 6, p. 192 and from '*Kitab-al-Amwal*', p.272-304

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid.

Ownerless Land

This type of land is sub-divided into three groups:

- i) The first category includes those lands, which are used for the common and collective interest of the inhabitants in the village and towns.²⁴ Private ownership of such lands are absolutely illegal. However, the Muslims rulers do not have authority to be its owners or to vest its ownership to any other person.²⁵ Nobody has any right to the mines of such lands.²⁶ Under the supervision of the Government, this type of lands will always be used for the benefit of the public.²⁷ The Prophet (PBUH) himself gifted the land of 'Marib'²⁸ to Hazrat Abiaz Ibn Hammal. But when He came to know that there was salt mine under this land and public needs are concerned with it, He revoked his gift.²⁹
- ii) The second category includes those abandoned lands which do not belong to any particular person and are not used for fulfilling the needs of the public residing in villages and towns e.g. forests, deserts, uncultivated hilly lands etc.³⁰ In Islamic Shari'ah this type of land is known as 'Arje Mauat'.³¹ With the consent of Muslim ruler, if any person cultivates such land he shall be the owner of such land. The cultivator may be a Muslim or a non-Muslim.³² Imam Abu Hanifa and Abu Yusuf opine that the cultivator can only become the owner if he takes permission of the ruler beforehand. However, to Imam

²⁴ See n. 17, p. 2.

²⁵ 'Badai' Vol. 6 p. 194, mentioned in Shafi, Mufti Mohammad, *Islamey Bhumi Babostha*(The Law of Land in Islam):in Urdu and translated by Nijamee, Maulana Karamat Ali into Bengali, Islamic Foundation Bangladesh, 2nd edition, Dhaka, June 1995, p. 2.

²⁶ Ibid, pp. 2-3.

²⁷ See n. 17, p.3.

²⁸ The name of a place.

²⁹ Kitab-al-Amwal p.276,mentioned in Shafi, Mufti Mohammad, *Islamey Bhumi Babostha*(The Law of Land in Islam):in Urdu and translated by Nijamee, Maulana Karamat Ali into Bengali, Islamic Foundation Bangladesh, 2nd edition, Dhaka,June 1995, p. 3.

³⁰ See n. 17, p.2.

³¹ Ibid.

³² See n. 17, p. 3.

Muhammad attachment of ownership is not dependent on the consent of the ruler rather on the cultivation merely.³³

- iii) The third category includes such lands, which are not owned by any person³⁴ and are not used for rendering any benefit to the villagers and the inmates of the towns but such lands are cultivable³⁵. This type of land is called '*Arje Baitul Mala*'³⁶. The ruler has different types of authority on such land. The benefits derived from such lands shall be used for the benefits of such people who have rights on the properties of *Baitul Mal*.³⁷

On the basis of special circumstance and quality the land is divided into two groups:

- i) Ushri Land and

- ii) Khiraji Land.³⁸

- i) **Ushri Land**

Ushr land is defined as "land belonging to a Muslim at the time of his conversion or distributed to a Muslim soldier as his share of the spoils of war. All land in Arabia proper was considered as '*ushri*', since the inhabitants were converted in the first stages of Islamic history"³⁹

- ii) **Khiraji Land**

When any country is conquered without waging a war but through a covenant all the matters relating to the lands of that country shall be determined in accordance with the terms of the treaty.⁴⁰ If the treaty provides that, the ownership of such lands will remain in the hands of

³³ Ibid.

³⁴ See n. 17, p. 5.

³⁵ See n. 17, p. 2.

³⁶ The state treasury for welfare, also the means for managing *zakat* funds.

³⁷ See n. 17 p. 5.

³⁸ See n. 17, p. 167.

³⁹ Ziadeh, F.J. 'Land Law and Economic Development in Arab Countries in Arab Countries', *The American Journal of Comparative Law*, Vol. 33 1985, p.94.

⁴⁰ See n 17, p.168.

previous owners *Khiraj* (tax) will be charged on these lands and the lands will be *Khiraji* forever.⁴¹ The use of violence and coercive methods in the realisation of... *Kharaj*⁴² is prohibited and kindness and benevolence are enjoined in this respect.⁴³ Most of the scholars including Imam Malik, Shafii, and Ahmad unanimously held that *khiraji* land could not be purchased or sold.⁴⁴

To Siraj Sait and Hilary Lim there are widely thought to be three broad types of land and land tenure in Islamic theory, which continue as categories into modern Muslim societies.⁴⁵ These are

- i) *Mulk* or land in full ownership
- ii) State-owned land and
- iii) *waqf*⁴⁶ land.⁴⁷

i) Mulk or land in full ownership

Mulk or milk land, which is sometimes translated in Western terminology as freehold, was essentially that on which '*ushr*' (a tenth), a religious land tithe, was collected.⁴⁸ This is similar to *ushri* land.

ii) State land

To Jorgens, "it consisted initially of land where the inhabitants after Islamic invasion were, under Islamic legal principles adapted around existing systems, as agreed upon by early Muslim jurists, permitted to

⁴¹ Ibid.

⁴² Land under state control upon which a tax is paid by those in possession; it describes both the land itself and the tax.

⁴³ Maududi, Sayyid Abul A'la "*The Islamic Law and Constitution*" Translated by Ahmad, Khurshid, the Islamic Publications (Pvt.) Limited, 13-E Shahlam Market, 11th edition, Lahore, Pakistan, October 1992 p.288.

⁴⁴ Qaradawi, Dr. Yusuf Al, *Fiqh-uz-Zakat*, translated into Bengali by Rahim, Maulana Abdur, as *Islamer Zakat Bidhan*, Khairun Prokashani, 6th edition, Dhaka, 2003 Vol. I, p.365.

⁴⁵ See n. 1, p. 60.

⁴⁶ It is a general term for charitable endowment.

⁴⁷ See n. 1, p.60.

⁴⁸ Ibid.

retain possession of their lands in return for paying *Kharaj* (tax)⁴⁹. This is basically *Khiraji* land.

iii) *Waqf* Land

This includes those lands, which are given as *waqf*. Some jurists did not strictly conceive of it as a type of landholding.⁵⁰

5. Ownership of Land

In the Holy *Qur'an*, Allah clearly ordained:

"For the earth is God's. To give as a heritage to such of His servants as He pleaseth"⁵¹. He also declared:

"To God belongeth all that is in the heavens and on earth. Whether ye know what is in your minds or conceal it, God calleth you to account for it. He forgiveth whom He pleaseth, and punisheth whom He pleaseth. For God hath power over all things."⁵²

In another verse He ordained:

"Of God, to whom do belong all things in the heavens and on earth! But alas for the unbelievers for a terrible penalty (Their unfaith will bring them)"⁵³

However, this has not precluded either the individual ownership of land or the legal protection of individual property rights, *albeit* subject to an overall social responsibility.⁵⁴

The *Qur'an* does not mention anywhere man's ownership of land as being part of one's wealth.⁵⁵ However, the *Qur'an* does not prohibit the individual

⁴⁹ Jorgens, D, 'A Comparative Examination of the Provisions of the Ottoman Land Code and Khedive Said's Law of 1858' in R. Owen(ed.) *New Perspective on Property and Land in the Middle East*, Cambridge, MA : Harvard University Press, 2000 p.111.

⁵⁰ See n.1 p. 39.

⁵¹ Al- A'raf 7:128.

⁵² Al-Baqara 2:284.

⁵³ Al-Ibrahim 14:2.

⁵⁴ See n. 1, pp. 61-62.

⁵⁵ Haq, Irfan Ul, *Economic Doctrines of Islam, A Study in the Doctrines of Islam and Their Implications for Poverty, Employment and Economic Growth*, published by the

ownership of land which was subsisting from the time immemorial and it does not promulgate any particular ruling regarding this matter specifically even not with any single implication.⁵⁶ However, the Holy Qur'an supports individual ownership of human being under the sovereign ownership of Allah and His determined limitations.⁵⁷ Thus, in certain verses from the Holy Qur'an in this regard, Allah ordains:

"O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you traffic and trade by mutual good-will..."⁵⁸

In another verse it is mentioned:

"If you are on a journey and cannot find a scribe, a pledge with possession (may serve the purpose)....."⁵⁹

Allah has also promulgated the following verses:

"From what is left by parents and those nearest related there is a share for men and a share for women, whether the property be small or large,-a determinate share."⁶⁰

"....render the dues that are proper on the day that the harvest is gathered..."⁶¹

"To orphans restore their property (when they reach their age), nor substitute (your) worthless things for (their) good ones; and devour not their substance (by mixing it up)."⁶²

International Institute of Islamic Thought, Herndon, Virginia, USA, First Edition 1996, p. 162.

⁵⁶ Maududi, Sayyed Abul A'la, *Bhomer Malikana Bedhan*, Adhunik Prokashani, 2nd edition, Dhaka, 1996, p. 19.

⁵⁷ Maududi, Sayyed Abul A'la, *Al Quraner Orthonaitic Nitimala* (Fundamentals of Economics in the Qur'an) translated by Abdus Shaheed Naseem, published by Shotabdi Prokashoni, sponsored by Sayyed Abul A'la Maudoodi Research Academy, Dhaka, 1st edition Oct. 2000, p.8.

⁵⁸ An-Nisaa 4: 29.

⁵⁹ Al-Baqara 2:283.

⁶⁰ An-Nisaa 4:7.

⁶¹ Al-Anam 6:141.

⁶² An-Nisaa 4:2.

"The parable of those who spend their substance in the way of God is that of a grain of corn: it groweth seven ears, and each ear hath a hundred grains..."⁶³

"And in their wealth and possessions (was remembered) the right of the (needy,) him who asked, and him who (for some reason) was prevented (from asking)."⁶⁴

"See they not that it is We who have created for them-among the things which Our hands have fashioned-cattle, which are under their dominion?"⁶⁵

In the Holy Qur'an there are many other similar verses.⁶⁶

Islam didn't modify the existing *urf*⁶⁷ regarding ownership i.e. the individual ownership was in vogue from time immemorial⁶⁸ on the principle that tacit approval in favour of a custom establishes its continual validity.⁶⁹ It is one of the well established rules of '*usul al-fiqh*'⁷⁰ that custom which is not contrary to

⁶³ Al-Baqara 2:261.

⁶⁴ Al-Zariyat 51:19.

⁶⁵ Ya-Sin 36:71.

⁶⁶ See Al-Baqara 2:275, 282, An-Nisaa 4:20,24,27, Al-Maida 5:38, At-Tauba 9:103, As-Saff 61:11.

⁶⁷ The very Arabic word '*urf*' has been derived from the root word '*arafa*' which means to know. In literal sense '*urf*' means 'that which is known'. In its primary sense, it is the known as opposed to the unknown, the familiar and customary as opposed to the unfamiliar and strange. To the majority scholars, usually the words '*urf*' and '*adah*' are synonymous though some draws distinction between them. Dr. Mohammad Hashim Kamali defined '*urf*' as 'recurring practices which are acceptable to people of sound nature.' For details see Kamali, Mohammad Hashim *Principles of Islamic Jurisprudence*, Published by the Islamic Text Society, Cambridge, Revised edition, 1991, p.283-296.

⁶⁸ See n. 56.

⁶⁹ See n.56, p.18.

⁷⁰ '*Usul al-fiqh*' ('*Asl*' is singular whereas '*usul*' is plural; it denotes origin, source, foundations, basis, fundamental, or principle) or the bases or the roots of Islamic law, expound the indications and methods by which the rules of *fiqh* (the detailed Islamic Law) are derived or deduced from their sources. Thus, in this sense *usul* is the methodology and *fiqh* is the product. For details see Hannan, Shah Abdul, *Law, Economics and History*, Published by Ahmed Hossain Manik, The Printmaster, 60/C Naya Paltan, Dhaka-1000, Bangladesh, First edition June, 2003, p. 10. See also see Kamali, Mohammad Hashim *Principles of Islamic Jurisprudence*, Published by the Islamic Text Society, Cambridge, Revised edition, 1991, p. 1.

the principles of *Shariah* is valid and authoritative; it must be observed and upheld by a court of law.⁷¹ Al-Suyuti, the eminent Shafii jurist mentioned a legal maxim in his reputed work *al-Ashbah wa al-Nazair*, in the following way:

‘What is proven by *urf* is like that which is proven by a *shari* proof.’⁷² The prominent Hanafi jurist al-Sarakhsi also recorded this and subsequently this ruling was adopted in the Ottoman *Majallah*⁷³ which provides that custom, whether general or specific, is enforceable and constitutes a basis of judicial decisions.⁷⁴

Some authors in a recent publication express the same thing in the following manner:

“Since the Quran is silent on the ownership of land *per se* (as opposed to *amwal*⁷⁵ which man owns) it can be argued that the matter has been left to the historical tradition of legality of owning, buying and selling land as well as to the discretion of society and its government. At the time the Prophet came to Madinah, land was held individually as well as communally. For instance, pastures for grazing livestock were generally considered community property.”⁷⁶

It goes on saying that as head of the State, the Prophet did not interfere with the existing land holding structure because there was no reason to do so.⁷⁷ Nonetheless, he declared goods like inland water resources, forests and soil

⁷¹ Kamali, Mohammad Hashim *Principles of Islamic Jurisprudence*, Published by the Islamic Text Society, Cambridge, Revised edition, 1991, p. 284.

⁷² Ibid.

⁷³ Al Majallah, the Ottoman Civil Code was prepared between 1868 and 1876. It was prepared on the perspective of the Hanafi School of Jurisprudence but it followed a Napoleonic form. Its full title is *Majallat-I Ahkami Adliye*, the Book of Rules of Justice. It is treated as the first and last Civil Code of the Islamic Legal History. It had been enforced until the destruction of the Ottoman Caliphate. See Sait, Siraj, and Lim, Hilary *Land, Law and Islam Property and Human Rights in the Muslim World*, Zed Books Limited, 1st edition, 7 Cynthia Street London, 2006, p. 229.

⁷⁴ See n.71.

⁷⁵ This Arabic word implies wealth, property or possession.

⁷⁶ See n. 55.

⁷⁷ Ibid.

resources, wildlife, and sub-soil resources like mines minerals and fossil fuels as public property and prescribed rules for their proper administration and management.⁷⁸ He also promulgated the principle that the first right of ownership of land was to lie with the Islamic State and then with the individual.⁷⁹ For this reason, the book concluded that the Islamic State has overall proprietary rights in land and can grant ownership rights as well as prescribe the highest tenure in the greatest interests of the society.⁸⁰ It is evident from the practices of the Prophet (PBUH) and His rightly guided Caliphs.⁸¹

Another author, after posing the question as to whom does Islam recognise as the owner of land, has critically analysed different verses of the Qur'an, Hadith, specifically those upon which the claim of the proponents of private ownership and ownership of Allah is erected, the concept of ownership right in the light of western jurisprudence and Islam and at last made an effort to illuminate the concept of '*amanatdari*'⁸² to reach into an amicable solution regarding the above-mentioned most debatable question.⁸³

He concluded in the following way:

".....it becomes clear that Allah alone is the owner; ownership of all resources is vested in Him. In His infinite mercy, He has made mere *Amanatdar/Wasi* of His resources. What Islam recognizes is the *Amanat/Wasiat* of the resources rather than ownership. Man does not have the right to become sharer with Allah in the ownership of the resources".⁸⁴

⁷⁸ See n. 55, pp.135 & 162.

⁷⁹ See n. 55 p.162.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² The word *amanatdari* implies trusteeship.

⁸³ Alam, Shamsul *Islamic Thoughts*, Published by Islamic Foundation Bangladesh, Baitul Mukarram, Dhaka, First Edition, August, 1986, pp. 781- 810.

⁸⁴ Ibid, pp. 809-810.

Another renowned scholar has commented:

“Islam has wound up this problem by one word ‘Caliphate’. Not only agriculture but everything on earth and in the heavens is the property of Allah. All these things are given to the Trust of Human beings to use and benefit from. Every trustee has a right to use them as long as he does not disturb the order of general sustenance. Otherwise, the caliphate has every right to exercise its discretion to set things right without, of course, depriving anyone of his fundamental rights”.⁸⁵

After quoting certain verses from the Holy Qur’an⁸⁶ he concludes:

“There is no harm if this right of utilizing and benefiting is named as right of ownership or property.”⁸⁷

He further explicates that this would not injure any of the fundamental principles.⁸⁸ In order to clarify the exact position of Islam regarding ownership he reiterates in a lucid manner:

“In the Islamic terminology, wherever the individual or personal property occurs it only means the above mentioned type of ownership or possession, i.e. trusteeship”.⁸⁹

It is widely held amongst Islamic scholars that plain land (in its natural state) is under State ownership.⁹⁰ Here, the State, representing the will of God, holds the land in trust for the *umma*,⁹¹ with powers to alienate use of the land to deserving grantees.⁹² But rights of possession are conditional upon the

⁸⁵ Amini, Prof. Maulana Mohd. Taqi, *The Agrarian System of Islam*, Translated by Syed Ahmad Ali, Published by Mohammad Ahmad for Idarah-i-Adabiyat-I Delhi, 2009, Qasimjan Street, Delhi-110006, 1st edition, p. 11.

⁸⁶ See Al-Jathiya 45: 13, Al-Yunus 10: 14, Al-Hadid 57: 7.

⁸⁷ See n. 85.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ See n. 1, p. 62.

⁹¹ Universal Muslim community, which defies national boundaries.

⁹² See n. 1, p. 62.

continued use of land and the proscription of hoarding.⁹³ A landowner who neglects to use land and leaves it uncultivated will lose the right to retain it, as in the *hadith* that: 'Land belongs to God, whoever leaves it uncultivated for three consecutive years will have it taken away and given to someone else'.⁹⁴ There is an example of the Prophet (PBUH) taking away land from some of his companions when they ceased to cultivate it.⁹⁵

Private ownership may be obtained through either transaction, such as *buy* (sale), or *hiba* (gift), including the revival of *mewat* land and inheritance.⁹⁶ Islam recognizes contractual rights and the Holy *Qur'an* commands followers to fulfil their contractual promises⁹⁷ and obligations when dealing with each other⁹⁸. It is stated: 'Keep your promises; you are accountable for all that you promise'.⁹⁹ This command is relevant to the modern debate about the extent to which the State may intervene in contracts, for instance in order to control rent.¹⁰⁰ Some scholars would suggest that the high esteem given to sanctity of contracts and the promises within them preclude such intervention other than in limited circumstances.¹⁰¹ However, at a recent meeting of scholars at the Sixteenth Session of the Islamic Jurisprudence Council in Dubai, there was broad agreement that government could intervene in order to prevent

⁹³ Ibid.

⁹⁴ Weeramantry, C.G., 'Islam and Human Rights', in *Islamic Jurisprudence*, Mcmillan, London, 1998.

⁹⁵ See n. 1, p. 62.

⁹⁶ Hamza, Manaf, 'Land Registration in Bahrain: Its Past, Present and Future within an Integrated GIS Environment', unpublished PhD thesis, University of London, 2002, p.33.

⁹⁷ An-Nisa 4: 33; An-Nahl 16: 91-2.

⁹⁸ Al-Maeda 5: 1.

⁹⁹ Al-Isra 17: 34.

¹⁰⁰ See n. 1, p. 62.

¹⁰¹ Ibid.

exploitation: it should set a rent affordable by the tenant while also permitting the landlord a reasonable profit.¹⁰²

6.1 Pre-emption

Islamic Law also recognizes in connection with immovable property a certain right in restraint of the power of alienation of the owner called the right of *shufa'* which is usually translated as pre-emption.¹⁰³ Under this right owner of an immovable property is entitled to repurchase an adjacent property which has been sold to some one else.

6.2 Waqf

The *waqf* is a highly significant legal mechanism and a key Islamic institution. It has been recognized and developed under the Shari'a for more than a millennium.¹⁰⁴ The Holy *Qur'an* contains no specific reference to the *waqf*, and its legal parameters have been developed through centuries by jurists. It is inspired by the repeated emphasis on charity as an act of devotion to God (for example *Qur'an* 51:19; 21:215; 3:92; 2:177).¹⁰⁵

6.3 Abandoned Property

Abandoned property means any property movable or immovable owned by any non-muslim who is not present in the Islamic State or whose whereabouts are not known or who has ceased to occupy, supervise or management in person his property.

6.4 Settlement of Khas Land

In order to discuss the above issue we have to focus on the 'ownerless land'.

To Maududi this type of land was divided into two groups:

¹⁰² Za'za , B.(2005) Gulf News, 4 June. Mentioned in ¹⁰² Sait, Siraj, and Lim, Hilary *Land, Law and Islam Property and Human Rights in the Muslim World*, Zed Books Limited, 1st edition, 7 Cynthia Street London, 2006, p. 62.

¹⁰³ Rahim, Abdur, *The Principles of Muhammadan Jurisprudence*, P.L.D.Publishers, (undated) p. 272.

¹⁰⁴ See n. 1, p. 147.

¹⁰⁵ See n. 1, p. 148.

- i) *Mewat*-dead or empty land, which can be reclaimed or revived.
- ii) *Khalisa-khas* land.¹⁰⁶ Govt. ownership was declared on such lands. The following types of land were included in this category.
 - a. Abandonment of land by its owner in favour of the state;
 - b. Declaring certain lands *khas* by dispossessing their owners;
 - c. Lands of the conquered territory, which was declared *khas*.¹⁰⁷

The Prophet (PBUH) gifted many *mewat* & *khas* lands to people¹⁰⁸.

Alcama in Wael described from his father Hazrat Wael bin Huzar (R) that the Prophet (PBUH) gifted a piece of land in Hadarmouth.¹⁰⁹

6.5 Ushr

Literally, it means one-tenth.¹¹⁰ It is defined as "land on which a tithe is paid, belonging to a Muslim at the time of his conversion or distributed to a Muslim soldier as his share of the spoils of war; ushr describes both the land itself and the tithe. It is an obligatory charge"¹¹¹. It is also known as '*Zakat-ul-Ard*' or the Zakat of land.¹¹²

6.6 Khiraj

It is defined as "land under state control upon which a tax is paid by those in possession; it describes both the land itself and the tax"¹¹³. This is charged on the land of non-muslims.¹¹⁴

¹⁰⁶ See n. 56 p. 31.

¹⁰⁷ Ibid.

¹⁰⁸ See n. 56, p. 36

¹⁰⁹ Reported by Abu Dawud & Tirmidhi; mentioned in n.56, p.36.

¹¹⁰ See n. 17, p. 166.

¹¹¹ See n. 1, p. 233.

¹¹² See n. 17, p. 165.

¹¹³ See n. 1, p. 229.

¹¹⁴ Qaradawi, Dr. Yusuf al "*Ghayr al-Muslimeen fil-Mujtama' al-Islami*" , "*Generosity Towards Non-Muslims In Islam*" originally written in Arabic, translated into Bengali by

It is of two kinds:

- a. *Khiraj-e-Mukasima*- determination of half or one-third yield as *khiraj*¹¹⁵
- b. *Khiraj-e-Mauzifa*- cash money as *Khiraj*.¹¹⁶

The will determine the amount of *Khiraj*.

6.7 Barga (Muzara'a)

The very word *muzara'a* has been derived from the root word '*zar*' meaning to cultivate land, to sow seeds.¹¹⁷

Muzara'a may be defined as "agricultural contract, a form of sharecropping in which the landowner provides both land and seed for the crop, the worker provides the labour"¹¹⁸.

In another way, sharecropping may be defined as a system of agriculture or agricultural production in which a landowner allows the agricultural labour to utilize the land in return for a share of the produce produced on the land. In *muzara'a* owner of the land provides his land and the agricultural labour (*ajir* or *aamil* or tenant or cultivator) worked on it and the agricultural production is divided between them in a pre decided ratio.¹¹⁹ This partnership agreement may be in different forms, depending upon the terms and conditions set by *Fuqahas*^{120 121}. The common point in all of its form is that, landlord must have a

Hasan, Mahmudul as "O-Muslimer Proti Islamer Udarata published by Sarwar Kamal, Potia, Chittagong, p.45.

¹¹⁵ See n. 17, p. 201.

¹¹⁶ Ibid.

¹¹⁷ Islamic Bishwakosh, The Encyclopaedia of Islam in Bengali, compiled and edited by the Board of editors and published by A.S.M. Omar Ali on behalf of the Islamic Foundation Bangladesh under the Encyclopedia Project, 20th vol. p. 210.

¹¹⁸ See n. 1, pp. 230-231.

¹¹⁹ Malik, B. Uns, *Al Mudavanant-ul-Kubra*, Khairia, Egypt, 1935, p. 26.

¹²⁰ The very word *Fuqaha* is the plural form of the word *Faqih*. The person who is well versed in *Fiqh* or Islamic Jurisprudence is termed as *Faqih*. In English, it can be translated as jurist. The *Faqih* or *Mujtahid* must be a Muslim and a competent person of sound mind who has attained a level of intellectual competence which enables him to form an independent judgment or *ijtihad*. The earliest complete account of the qualifications of a

share in agricultural production. This share may be different in different types of agreements.¹²²

6.8 Inheritance

Inheritance is often treated as marginal to general debates and policy formation concerning land rights, security of tenure and land reform. However, inheritance is one of the commonest ways of acquiring land or access to land, particularly in the Muslim world.¹²³

6.9 Enemy Property

There are divergent views regarding lands, which are conquered during war. Some jurists opined that the conquered land shall be divided into five shares.¹²⁴ Four shares shall be distributed among those who conquered them. The remaining one share shall be distributed among those about whom Allah has ordained

mujtahid is given in Abul-Husayn al-Basri's *al-Mutamad fi Usulal-Fiqh* which was accepted by al-Shirazi (d. 467/1083), al-Ghazali (d. 505/1111) and al-Amidi (d. 632/1234). These requirements are:

- a) He must have a good knowledge of the Arabic language.
- b) He must be knowledgeable of the Qur'an and the Sunnah and related subjects.
- c) He must be generally knowledgeable of the *Ijtihad* carried out by previous scholars.
- d) He must know the *Maqasid* of Shariah.
- e) He must be an upright person and capable of distinguishing between a strong and a weak evidence.

We think it will be exaggeration to classify jurists here. For details see, Kamali, Mohammad Hashim *Principles of Islamic Jurisprudence*, Published by the Islamic Text Society, Cambridge, Revised edition, 1991, pp. 374-377. Also see, Hannan, Shah Abdul, *Law, Economics and History*, Published by Ahmed Hossain Manik, The Printmaster, 60/C Naya Paltan, Dhaka-1000, Bangladesh, First edition June, 2003, p. 68.

¹²¹ Siddiqi, M.N. *Islam Ka Nazria-e-Milkiat*, Islamic publications Ltd. Lahore, 1968, Vol. 1, pp.185-186.

¹²² Haque, Zia-Ul *Landlord and Peasant in Early Islam*, Islamic Research Institute, 1977, p.9.

¹²³ See n. 1, p. 107.

¹²⁴ Sallam (Rh), Imam Abu Obaid Al Kasim Ibn, *Kitabul Amwal* in Arabic, translated by Farid Uddin Masoud into Bengali, Published by Director, Translation and Compilation Dept., Islamic Foundation Bangladesh, 1st edition, Vol. I, Dhaka, 1997, p. 63.

"And know that out of all the booty that ye may acquire (in war), a fifth share is assigned to God,-and to the Apostle, and to near relatives, orphans, the needy, and the wayfarer"¹²⁵

The Prophet (PBUH) had done this at Khaybar after it was taken from disbelievers.¹²⁶

Some other jurists held that the govt. of the Islamic state has the absolute discretion to adopt any measures regarding this type of land. He may treat as booty and distribute it in the above-mentioned way. He may treat it as *fai* and left it as an endowment. Hazrat Umar (R) did so in the area of Sawad in Iraq.¹²⁷ Later Caliphs followed the same practice.¹²⁸

Thus, the govt. can utilize this type of land in any manner but after taking into consideration the interests of the community.¹²⁹

6.10 Concluding Remarks

From the above discussion, it is obvious that Islam provides an appropriate system of land management. It contains explicit provisions regarding private and national ownership of land and proper classification of land from different dimensions. It lays emphasis on the proper disposal of land through the institution of waqf, pre-emption and inheritance, which not only serves spiritual interest but also establishes a proper land tenure system. In order to eradicate grievances of people and to facilitate proper utilization of land it also supports the system of barga. In order to ensure social and economic justice it prescribes a proper settlement of khas land. It encompasses in its orbit appropriate principles for smooth dealings of abandoned and enemy property. The imposition of land tax and zakat on the produce of land plays a vital role in

¹²⁵ Al-Anfal 8: 41 mentioned in n, 275.

¹²⁶ Qaradawi, Dr. Yusuf Al, *Islamic Law in the Modern World*, translated by Al-Hadi A. Khalifa, Wamy House International, 1st edition, Riyadh, 2000, p.112.

¹²⁷ See n. 275, p. 64.

¹²⁸ See n.277, p.112.

¹²⁹ Ibid.

shaping an efficient economy of the state. In order to face intricate problems of modern times regarding land management we can exploit the tool of Ijtihad as evidences for the change of rulings according to the circumstances are also evident from the Holy Qur'an and the Sunnah. Omar's decision not to distribute the newly acquired land in Sawad was based on his understanding of the aims of the Sharia. He did not feel obliged to do what the Prophet (PBUH) had done, simply because the situation was similar.¹³⁰ This type of precedent encourages the scholars to solve the modern problems of land management through the skilful exploitation of Ijtihad with due regard to the general objectives of Sharia and public interest. Thus, it can be tartly remarked that Islam provides an appropriate scheme of land management. As per Islamic law, land and other wealth on earth actually belong to Almighty Allah and it's individual ownership is also granted if it is enjoyed and used under the directions of the Holy Qur'an and Sunnah.

¹³⁰ See n.277, p. 59.