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**RIGHTS AND OBLIGATIONS OF LANDLORD
AND TENANT: A STUDY IN THE LIGHT OF
SHARĪ'AH (ISLAMIC LAW) AND THE SOUTH
AFRICAN RENTAL HOUSING ACT**

Submitted by

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To

All the tenants who are struggling to live an honest life, who inspired me, directed my research, shaped it and in a sense-co-wrote it. Without them, this study would not have been undertaken.

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ABSTRACT

Tenants represent a marginalised group in South Africa, with land and housing, and particularly rental accommodation in great demand. Renting is a viable option for certain tenants but in the absence of the provision of rental housing, tenants are trapped in a “feudal” system of tenant-landlord relationship. The importance of this study stems from the fact that there appears to be violations of tenants’ rights and that the obligations of both tenant and landlord from a *Shari’ah* perspective have either been overlooked or ignored completely thus far.

This study examines the hardships faced by tenants specifically in privately owned residential accommodation in Durban and other major South African cities. It aims to critically examine Islamic perspective on housing and land tenure and guidelines that govern tenant-landlord relationship in respect of residential rental accommodation. It also looks at the South African development of land and housing policy, legislation, the provision of public and rental housing and tenure and tenant-landlord relationship. It examines the historical development of such a relationship in the west and the development of rent legislation in South Africa and the most recent legislation, the Rental Housing Act 50 of 1999.

This study sought responses from recognised, well-established Muslim organisations in South Africa to a questionnaire dealing specifically with residential rental accommodation and general information on a range of tenant-landlord related matters. It is hoped that their response that are analysed and discussed would contribute to a better tenant-landlord “culture”.

The overall findings of this study into the Islamic and South African perspective on tenant-landlord relationship have implications for policy makers, Islamic scholars, NGOs and a whole range of stakeholders, locally as well as internationally.

In the light of this study, suggestions are made to stimulate further research on some of the pertinent issues addressed.

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A study of this nature owes its inspiration to the unsung masses of tenants who live under difficult and strenuous conditions. I therefore owe a great debt of gratitude to tenants who inflicted my thoughts over two decades to search for solutions for a better and just relationship between tenant and landlord. I have to thank *bona fide* landlords who have also directed my search on the basis of equity.

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IMPORTANT NOTE

1. Translation of Qur'anic Verses

I have referred to the following interpretations ("translations") of the Qur'ān in this dissertation: -

The Holy Qur'an, Text translation and commentary by Abdullah Yusuf Ali.

The Message of the Qur'ān, Translated and explained by Muhammad Asad.

Interpretation of the meaning of the Noble Qur'ān by Dr. Muhammad Taqi-ud Din al-Hilali and Dr. Muhammad Muhsin Khan.

The Meaning of the Glorious Koran, an explanatory translation by Mohammed Marmaduke Picktall.

However, most of the citations in this dissertation are from the "translation" of Dr. Muhammad Taqi-ud Din al-Hilali and Dr. Muhammad Muhsin Khan. The words or explanatory notes within brackets are in fact those of the above interpreters. Allāh, Exalted and Mighty is He, uses specific words to denote gender and I had therefore replaced the word "men" used by al-Hilali and Khan in their "translation" where it clearly referred to mankind or humanity (*al-nās*).

The Qur'ānic citations are indicated by the chapter (*sūrah*) followed by the verse or verses, e.g., Qur'ān, 98:2-3 therefore signifies Chapter 98, verses 2-3.

2. Transliteration / Transcription

As far as possible I have followed the transcription system used by Haywood and Nahmad (1976). Reproduced here is a table denoting the 'Arabic alphabet and the relevant transcription.

Names of the letters	Transcription	Names of the letters	Transcription
ألف 'alif	ā	صَادٌ ṣād	ṣ
بَاءٌ bā'	b	ضَادٌ ḍād	ḍ
تَاءٌ tā'	t	طَاءٌ ṭā'	ṭ
ثَاءٌ thā'	th	ظَاءٌ ḏā'	ḏ
جِيمٌ jīm	j	عَيْنٌ ain	'ع
حَاءٌ ḥā'	ḥ	غَيْنٌ ghain	gh
خَاءٌ khā'	kh	فَاءٌ fā'	f
دَالٌ dāl	d	قَافٌ qāf	q
ذَالٌ dhāl	dh	كَافٌ kāf	k
رَاءٌ rā'	r	لَامٌ lām	l
زَايٌ zāy	z	مِيمٌ mīm	m
سِينٌ sīn	s	نُونٌ nūn	n
شِينٌ shīn	sh	هَاءٌ ḥā'	h
		وَاوٌ wāw	w (ū, aw, au)
		يَاءٌ yā'	y (ī, ay, ai)
		هَمْزَةٌ hamza	'

INTRODUCTION

“Every gun that is made, every warship launched, every rocket fired, signifies, in a final sense, a theft from those who hunger and are not fed, from those who are cold and are not clothed.”

President Eisenhower (quoted in *Homes Above All*)

1. BACKGROUND TO THE AREA OF STUDY

About a decade ago I intended to find out what the Islamic guidelines were regarding the relationship between tenant and landlord, specifically in privately owned residential accommodation. I often encountered challenges and formidable situations working with tenants living in tenanted accommodation in Durban and other major South African cities. These challenges demanded immediate as well as short to long term solutions from both an Islamic and South African perspective. This led to engaging the national government in post apartheid to take cognisance of the plight of tenants. This process involved developing a framework for tenant-landlord legislation that eventually culminated in the enactment of the Rental Housing Act 50 of 1999.

2. AIM OF THE STUDY

The aim of this study is to critically examine Islamic guidelines that govern tenant-landlord relationship in respect of residential rental accommodation. Despite the "abundant" theoretical information and practical solutions on tenure and the relationship between tenant and landlord in general, very little

information is available on current tenant-landlord relationship in respect of residential rental accommodation. Thus, this study will: -

- i.) Examine the Islamic literature on land tenure, to determine the Islamic guidelines, principles, administration and development of types of land tenure and ownership patterns as well as the Islamic guidelines regulating the relationship between tenant and landlord.

- ii.) Examine post-apartheid legislation in the context of land and housing policy, tenant-landlord relationship and problems experienced by tenants, with specific reference to aspects of the South African law of property, case studies and the Rental Housing Act 50 of 1999. The Rental Housing Act applies to residential rental accommodation to regulate the relationship between tenant and landlord. It also defines the government's responsibility to ensure that everyone has access to adequate housing and mechanisms needed to ensure the proper functioning of the rental housing market.

- iii.) Seek responses from recognised, well-established Muslim organisations in South Africa to a questionnaire dealing specifically with residential rental accommodation and general information on a range of tenant-landlord related matters.

The importance of this study stems from the fact that there appears to be violations of tenants' rights and that the obligations of both tenant and landlord from a *Shari'ah* perspective have either been overlooked or ignored completely thus far. Hence, this study envisages being of significance both locally and internationally and hopes to stimulate further research on some of the pertinent issues that this study proposes to address.

3. OBJECTIVES

The objectives of the study are to: -

- (i) Identify the Islamic guidelines and principles in respect of land tenure and the relationship between tenant-landlord from the time of Prophet Muḥammad (Allāh bless him and grant him peace).
- (ii) Examine the implications for landlords and tenants in South Africa regarding the change in land and housing policy, legislation and the provision of public and rental housing in South Africa, the Rental

Housing Act 50 of 1999 and the simultaneous repeal of the Rental Control Act 80 of 1976.

- (iii) Seek responses to questionnaires from recognised, well established Muslim organisations, broadly representative of the South African Muslim community which are recognised by the international Muslim community (4-6 organisations), such as the Jami‘atul ‘Ulamā’, Majlisul Ulema of South Africa (Council of Islamic Scholars –“Theologians”) and the Association of Muslim Accountants and Lawyers (AMAL).

- (iv) Examine Islamic guidelines and principles required to govern the relationship between tenant and landlord in the residential rental housing sector. The data source is a questionnaire. The questionnaire deals with residential rental accommodation as well as general information on land tenure, tenant-landlord matters handled from the inception of Islam and the Islamic state. The responses of the Muslim organisations will be critically analysed and discussed in this study.

- (v) Formulate recommendations on the basis of existing Islamic principles and the responses from the questionnaires.

4. OUTLINE OF CHAPTERS

Chapter One looks at the Islamic perspective on housing, land tenure and tenant-landlord relationship. It deals with conceptual aspects, definitions and terminology in the discussion of land tenure; examines very briefly the evolution of ownership and the Islamic approach within a just social order; *al-ijārah* -the contract of lease and the principles thereof; the relationship between tenant-landlord, their rights and obligations.

Chapter Two deals with a critical analysis of land and housing policy, legislation, the provision of public and rental housing in South Africa and tenure and tenant-landlord relationship in South Africa. It provides an overview of the development of property rights and tenant-landlord legislation in the west and in South Africa. It also deals with a brief examination of the historical development of such a relationship in the west and the development of rent legislation in South Africa and the most recent legislation, the Rental Housing Act 50 of 1999. Chapter Three critically examines the responses of the Muslim organisations to questionnaires regarding the Islamic guidelines and principles required to govern the relationship between tenant and landlord in the residential rental housing sector. Chapter Four concludes the study with recommendations.

CHAPTER 1

ISLAMIC PERSPECTIVE ON HOUSING, LAND TENURE AND TENANT-LANDLORD RELATIONSHIP

“It will be admitted by all unprejudiced minds, that Muhammad’s religion, by which prayers and alms were substituted for the blood of human victims, and which, instead of hostility and perpetual feuds, breathed a spirit of benevolence and of the social virtues, and must have had an important influence upon civilisation, was a real blessing to the world. In fact Islamism is one of the most powerful instruments which the hand of Providence has raised up to influence the opinions and doctrines of mankind through a long succession of ages,”

(Davenport, 1973:64).

1. GENERAL OVERVIEW OF THE SHARĪ‘AH

There is abundant Islamic literature especially on the juristic debates and legal edicts or opinions (*fatāwā* pl. of *fatwā*) on land tenure, types of land and lease contracts, e.g., land is leased for cultivation against part of the produce as rent (*muzāra‘ah*); allotment or grant of land e.g., *fai‘* (spoils of war), *ghanīmah* (booty); types of grant or ownership e.g., *iqṭā‘* (administrative grant of land) and *ijārah* (hire or lease contract) such as *al ‘uqūd al ṣaḥīḥah* (valid contracts), *ijārah al-gharār* (dubious hire).

Despite the wealth of accumulated theoretical information and practical solutions, very little study is available on modern tenant-landlord relationship in residential rental accommodation in the light of *Shari'ah*. In the West and especially in the United States of America from the 1960s, various changes began to take place for the betterment of tenants' rights (Blumberg & Grow, 1978:9). Over the decades many housing and tenants as well as landlords' organisations and institutions emerged. There is abundant literature, dealing with theory, paradigms, schools of thought, case studies, legal decisions, government policies and international conferences. Audio-visual media has also produced invaluable information in this regard.

The only relevant major conference in the Muslim world was in 1957/8, the International Islamic Conference on Land Ownership and Tenure¹ that focused on land ownership and tenures. Even at this deliberation, relationship between tenant and landlord in respect of residential rental accommodation and their rights and obligations were not the focal point. Tenants represent a marginalised group with land and housing requiring detailed investigation. Indeed, it is an area urgently in need of *ijtihadī*² solutions and every Muslim who is capable and qualified to give a sound opinion on matters of *Shari'ah*, is required to do so when such interpretation becomes necessary in the absence of an explicit

¹ Papers delivered at the Conference were published as the "*International Islamic Colloquium Papers*", which have been referred to in this study.

² Muslim jurists and scholars exercising discretionary opinions based on the *Qur'an* and *Sunnah*.

command of Allāh or Prophet Muḥammad (Allāh bless him and grant him peace) (Doi, 1984:5). Where the *Qur'ān* and *Sunnah*³ contain clear, unequivocal commands, the *ummah* or Muslim community (including all organs of the Islamic State) have to follow it because it is binding on all. The prohibition of alcohol, for example, is an explicit command in the *Qur'ān* and *Sunnah* and cannot be altered. The *ummah* is under obligation to Allāh to execute the commands.

1.1. The *Sharī'ah*

Islam directs humanity to live in a just society. It condemns the arrogance of any person deeming himself or herself to be superior to another. The *Sharī'ah*'s influence is intertwined into the entire fabric of society. It is based on the *Qur'ān* and *Sunnah*, these are the primary sources. *Qiyās* or analogical reasoning of the *fuqahā'* (Muslim jurists) and *ijtihād* or discretionary opinions based on the *Qur'ān* and *Sunnah* are the secondary sources. The *fuqahā'* can therefore provide solutions to a myriad of problems by interpreting or expanding basic principles laid down in the *Qur'ān* and *Sunnah*. The principles of *takhayyur* (choice of following any of the four classical schools of Islamic Law) and *talfīq* (reconciling diverse juristic opinions) (Doi, 1981:54-57) provide further opportunities of adapting society to justice and equity, thereby providing further impetus to positive changes for the betterment of the *ummah* and world

³ *Sunnah* indicates the action, historical and prophetic elements contained in the *aḥādīth* (narrative relating to deeds, actions and sayings) of Prophet Muḥammad (Allāh bless him and grant him peace).

community. Recent developments in the Muslim world have led to an emergence of Muslim scholars who have used the principle of *ijtihād* without subscribing to any of the classical schools of Islamic Law.

The fundamental principles of Islam and the mechanism such as analogical reasoning and the discretionary opinions of jurists make the Islamic legal system flexible and resilient. It allows changes, challenges and progress in any given society to adapt to the *Shari'ah*. It is considered to be the most important bequest to the civilised world (Schacht & Bosworth, 1974:392), its main function is to control society and not be controlled by it and consequently precedes both society and state (Muslehuddin, 1975:13,15). According to Schacht (1982:1) the whole life of the Muslims, Arabic literature, and the Arabic and Islamic disciplines of learning are deeply imbued with the ideas of Islamic law and therefore impossible to understand Islam without understanding Islamic law.

The *Shari'ah* deals with every facet of human life, it being the totality of Allāh 's commands. According to Qutb (1980:119), Islam established a realistic way of life in which the concept⁴ and the *Shari'ah*, both of which were connected to each other, are represented in a comprehensive form. The commands regulate

⁴ "We cannot comprehend the nature of social justice in Islam until we have first studied the Islamic concept of Divinity, the universe, life and humanity," (Qutb, 1980:117).

the life of Muslims that include, on an equal footing, laws dealing with politics, economics, social interaction, personal hygiene, marriage and divorce, worship, the rights of people of other faiths and creed. In short, it governs the relationship between man and Allāh, between man and man and between man and his environment. The *Sharī'ah's* approach to human nature is therefore realistic, and broadly speaking, deals with human acts that are good and consequently beneficial to society as a whole and bad acts that are harmful to society and its individual members (Zubair, 1992:18,22).

1.1.2. The *Sharī'ah* and Tenant-Landlord Relationship

The *Sharī'ah* is fundamental to the understanding of the relationship between tenant and landlord. In the sphere of economics, it is the *Sharī'ah* which allows people the freedom to use *'urf* (conventions) and *'ādah* (customs) in their daily interactions as long as *ẓulm* (injustice) and transgressions are avoided. Justice is based on *tawhīd*⁵ - the belief in the oneness of Allāh being the basic tenet to which Prophet Muḥammad (Allāh bless him and grant him peace) asked humanity to adhere to (Ahmad, 1980:30) and on which the concept of universal morality is based (Mannan, 1987:60). It is Allāh that ordained rules of law for the guidance of mankind and commanded justice so that relationships between people can be peaceful and loving. According to Iqbal (1977:154), the essence

⁵ "Allāh bears witness that none has the right to be worshipped but He, and the angels, and those having knowledge (also give this witness); (He is always) maintaining His creation in Justice. None has the right to be worshipped but He, the All-Mighty, the All-Wise." (*Qur'ān*, 3: 18).

of *tawhīd* as a working idea is equality, solidarity and freedom. Massignon (1960:175-76) advises the raising of the flag of *tawhīd* for peace among all workers since Islam as a Third Force must remain independent in an atheistic world.

When injustice becomes apparent, the Islamic State can intervene to bring about justice. The Islamic State is not a theocracy where the Head of the State ("priestly class") represents God and can enforce its own laws in the name of God. There is no "priestly class" because the entire *ummah* runs the Islamic State in accordance with the Book of Allāh and the practice of Prophet Muḥammad (Allāh bless him and grant him peace) (Maududi, 1977:133, 209-210). Unlike secular western democracy where sovereignty belongs to the people and who consequently have absolute law-making powers, in an Islamic State, Allāh is the only Sovereign and Lawgiver and the entire *ummah* is His trustee.

The first state in Islam was established in Madīnah because of a new social order brought about by Prophet Muḥammad (Allāh bless him and grant him peace). The Islamic State exercised legislative, judicial and executive powers (El-Awa, 1980:23) and its sphere of activity dealt extensively with the whole of human life, according specific rights and privileges to people of other faiths (Maududi, 1977:140, 237-238). In this way, the *ummah* enjoyed a rule-making power and

not an absolute law-creating prerogative (Doi, 1984:5). It is Allāh who provides guidance and justice and human beings cannot be left to use their own rationale, whims and fancies. Justice is prescribed by Allāh as one of the fundamental aspect of the *Sharī'ah*⁶.

Under Islamic Law, people must conduct their economic activities rationally. The enthusiasm, whims and caprices of man have to be subdued to the rules of law. Divine justice in Islam is considered perfect and it is not arbitrary, it permeates into all spheres of human and non-human life (Zubair, 1992:18). It is not partial e.g., it does not favour the rich over the poor, tenant over landlord or *vice versa*. As such, Allāh has laid down limits (*hudūd Allāh*) so that the needs and welfare of every individual, irrespective of creed or faith are provided for on the basis of equity and justice. In this respect, the *fuqahā'* (jurists) and the '*ulamā'*' (Muslim scholars in the widest sense) have to derive new laws based on the *Sharī'ah* through the system of consultation or *shūrā*. Detailed study in light of the *Sharī'ah* is required about tenant-landlord relationship and the hardship experienced by tenants because of unscrupulous practices.

1.1.3. Contemporary Solutions Required

In the absence of an Islamic government or even where one exists presently, there is a need to define the role of the '*ulamā'*' and the *ummah* in seeking

⁶ *Qur'ān* 5:8 and 7:29.

solutions to protect *bona fide* tenants from unscrupulous landlords and to protect honest landlords from dishonest tenants. *Imām al-Ghazālī* (1058-1111) maintains that *ṣalāh* (obligatory five daily “prayers”) and the acquisition of knowledge preserve one’s religion that can only be achieved through bodily health, survival and availability of a minimum of clothing, housing and other supplies (Siddiqi, 1988:258). The ultimate responsibility, however, rests with the Islamic State. This does not mean that an individual, without a valid reason, can resign himself or herself to idleness and expect society or the Islamic State to provide the basic necessities of life. The *Sharī’ah* has placed major emphases on the need to earn a livelihood. Zubair (1992:20) argues that the *Sharī’ah* does not merely depict every act of human beings as labour but solicits for lawful labour from every person.

1.2 LAND TENURE: CONCEPTS AND DEFINITIONS

This section deals with conceptual aspects, definitions and terminology and shows the *Sharī’ah’s* extensive response to the evolution of land classification and ownership patterns. It provides a brief overview of some of the fundamental principles relating to ownership and tenancy that includes the right to use and enjoyment, relationship between co-owners (compared to modern day sectional title scheme) and the role of an Islamic state in ensuring justice, equity and peaceful co-existence.

1.2.1. Land Ownership Patterns and Administration

During the time of Prophet Muḥammad (Allāh bless him and grant him peace) and the first two *Khalīfah*, Abū Bakr and ‘Umar, the control and management of land was egalitarian. Muslims, irrespective of gender, status, ethnicity or tribal affiliation, were treated equally in their acquisition of wealth and privileges accruing from conquered land. Moral consciousness rather than a specific institution was the underlying policy to provide for the common good of all (Haque, 1985:34, 354-6). Prophet Muḥammad (Allāh bless him and grant him peace) had transformed the hearts and minds of his companions to the extent that their ultimate goal was to please Allāh in this world and the Hereafter. In submitting to the Will of Allāh, it was accepted that all ownership, in principle, belongs to Allāh alone. Ownership rights, Manzoor (1999:35) asserts, is given to man within a “classified code of conduct” where God is the Absolute Owner and man has to perform his economic functioning as His agent.

According to Nadawi (undated:21), Prophet Muḥammad (Allāh bless him and grant him peace) inspired love for one another and civic and social responsibilities that made up a unique "commonwealth". Ownership of all property, those of individuals or the public treasury of the State, which until then was more or less a commodity circling between a privileged few, or a monopoly confined to the greed and whims of the ruling classes, was attributed in principle to the all-embracing ownership of God.

Therefore, all conquered land belonged to the Islamic State, most of these were *kharāj*⁷ land and the Islamic State distributed the land unless there was an agreement with the conquered (*ṣulḥī*) about its disposal. The following land types emerged (Haque, 1985:67, 117-143, 121-126, 195; Qureshi, 1960:150; Yusuf, 1960:177-78;): -

1.2.1.1. *Ghanīmah* - Booty

In the early period of Islam booty was taken during wars from the enemies and divided among the Muslim soldiers. Four-fifths were given to the soldiers and one-fifth belonged to Allāh, Prophet Muḥammad (Allāh bless him and grant him peace), kinsman, orphans, the needy and the wayfarer (*Qur'ān*, 8:41).⁸ This verse was revealed when no land was conquered but the young strong Muslim soldiers carried away whole booty by force, leaving the weak and old companions without any booty (Haque, 1985:121-122).

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However, *Khalīfah* 'Umar (586-644) excluded land from *ghanīmah*, leaving it in the care of its previous owners, (Ahmed, 1988:55; Islahi, 1996:198). The "white" or bare land of Sawad (lower Iraq), for example, was hired to the tillers for a fixed known rent (*kirā' ma'lūm*). Each year he renewed the lease but

⁷ *Kharāj* is tribute (rent) paid on cultivated land utilising land that belongs to the Islamic State.

⁸ "And know that whatever of war booty that you may gain, verily one fifth of it is assigned to Allāh, and to the Messenger, and to the near relatives [of the Messenger Muḥammad], (and also) the orphans, *al masākin* (the poor) and the wayfarer.." (*Qur'ān*, 8:41).

excluded fruit trees from rent or *ujrah* because the land was considered *fai'* (spoils of war) of the Muslims.

1.2.1.2. *Fai'* - Booty Acquired without Fighting

Booty surrendered without fighting by those who were not Muslims was known as *fai'*. Prophet Muḥammad (Allāh bless him and grant him peace) himself administered the *fai'* as State property for the benefit of the *ummah*. The Qur'anic verses dealing with *fai'*⁹ were revealed after the battle of Badr and directed Prophet Muḥammad (Allāh bless him and grant him peace) about the distribution of wealth.

1.2.1.3. Other Land Types

Other land included *contractual land*, i.e. contracts were entered into with other communities; land of people who had just embraced Islam; *State land* - land that was neither occupied nor owned by anyone and *free land* - these were grazing fields, forests, mines.

The *Qur'ān* laid down the principle that all spoils of war (including conquered land) belonged to Allāh and His Apostle Muḥammad (Allāh bless him and grant him peace), thereby precluding any individual warrior from making a claim.

⁹ *Qur'ān*, 59:6-8.

The Qur'anic verses 1 and 41 of chapter 8 were revealed during and just immediately after the first battle against the Muslims to exterminate the Islamic State, the Battle of Badr in 624. It laid down one of the fundamental principles of a new social order. At the very least, one fifth of the accessions (from war) was State property to be used in the interest of the general public. The Islamic State could also utilise the four fifths of the accessions or spoils of war for the common good.

Muslims were also encouraged to cultivate wasteland and not to leave it idle, (Bukhāri, 1974). In this way, land was distributed among soldiers and put to productive use. *Khalīfah* 'Umar on the other hand, allowed the owners to retain ownership of their conquered land as long as they paid *kharāj* or land tribute (Al Kader, 1959:9; Islahi, 1996:229). The owners were experienced and knowledgeable farmers. He implemented measures to (i) prevent the inefficient use of large accumulated land and (ii) use the *kharāj* as revenue for defence purposes and for the general welfare of future generations. He allowed the purchase of land and the continuation of ownership of estates in Syria and Egypt, except for estates owned by the officers of the Roman Empire that were distributed among the farmers (Khan, 1982:112-3).

There was no administration in Arabia until *Khalīfah* 'Umar introduced a full administration system based on the *Shari'ah*. When Iraq was conquered he did

not allow the conquered land to be distributed as estate among the warriors but granted it to the people as State property. Through the process of consultation or *shūrā*, *Khalīfah* ‘Umar ordered a survey of the conquered land in Iraq. Land tribute was assessed according to the income of the farmers. No tribute was levied on lands which were endowments for places of worship or which were owned by orphans. Forests were considered State property. Big estates owned individually by people were not taken away from them (Faḡih, 1974:61; Khan, 1982:112-3, 250).

1.2.2. Land Classification¹⁰

The following land classification emerged -

1.2.2.1. *Kharāj* Land

Initially, *kharāj* was tribute on land paid by people who were not Muslims for the use of the land that belonged to the Islamic State. There were tribute on fruit trees (*kharāj al basātīn*) and tribute on agriculture (*kharāj al zirā‘ah*). There were two categories of *kharāj* land: -

- (i) Land with full ownership right - these were land that were brought under Islamic rule without war and through treaties or agreements between the Islamic State and the indigenous inhabitants. The owners were not

¹⁰ Al-Mawardi, 1996:207, 213-226; Haque, 1985:117-33, 139-40, 194-218, 245-8, 254-67, 285-302; Islahi, 1996: 162, 200, 214, 229; Qureshi, 1960:150-1; Rashad, 1960:163-65; Yusuf, 1960:177-78.

Muslims and were required to pay *kharāj* to the Islamic State under whose sovereignty and protection they lived.

- (ii) People who were not Muslims were allowed to possess land even though the land was conquered during war.

Khalīfah ‘Umar prohibited the purchase of *kharāj* land since it was considered the *fai*’ of the Muslims and an important source of revenue for the Islamic State. However, with the complex changes in the socio-economic conditions and relations during the subsequent generations, the *fuqahā*’ modified this prohibition through the principle of *rukḥṣah* (exception to a general law on prohibition). The Ḥanafī School considered all *kharāj* land ownership to be *milk* land- that is, having full ownership rights. The Mālīkī and Shāfi‘ī Schools held the view that people who were not Muslims were allowed to possess land even though the land was conquered during war.

The Islamic State acted as a trustee for the *ummah* by owning the land on its behalf. The Islamic State’s relationship with the *kharāj* holder who had a leasehold or usufructory interest was governed by the rules of the *Sharī’ah*. *Kharāj* lands were lands that the *mushrikūn* (polytheists) had abandoned to the Muslims without fighting. These lands were considered *waqf* lands (i.e. a religious endowment whereby the land was immobilised for the welfare of the public)

with the imposition of *kharāj*. The revenue was held in perpetuity because of the *waqf* status. Other types of *kharāj* land included: -

- (i) Land which the former owners occupied by peace agreement and paid *kharāj* but relinquished all rights of ownership. The land became *waqf* land and the payment of *kharāj* acted as *jizyah* (poll tax) but the payment of *jizyah* became compulsory if the occupiers took up residence as *dhimmi*¹¹.

- (iii) The former owners who were *mushrikūn* retained full rights of ownership in return for *kharāj*, which acted in fact as *jizyah* as long as they remain *mushrikūn*. The full rights of ownership included the right to sell and transfer ownership rights to Muslims or *dhimmi*.

Khalīfah ‘Umar and his immediate successors ‘Uthmān and ‘Alī as well as the *fuqahā*’ (jurists) laid down detailed rules regarding the amount of *kharāj* to be stipulated, its method of collection and use as revenue. This included the tariff charged as *Khalīfah* ‘Umar did, varied according to the capacity of the land to bear tax, type of land and produce and irrigation (watered naturally by streams or rains or mechanically). In addition, the person in charge of imposing *kharāj* had

¹¹ “Protected community” - a contract between the Muslim government and people who were not Muslims who paid *jizyah* to live freely under the protection of the State.

to take into account the circumstances of the owner or holder of the land. He was required to act fairly, taking into consideration the people of the land and those entitled to the *fai*' without imposing any excess which would harm those paying *kharaj*, or tolerating any shortfall which would be to the detriment of the people entitled to the *fai*'. He should examine the interests of both parties.

According to Maududi (1977:275) the use of violence and coercive methods in the realisation of *jizyah* or *kharāj* were prohibited and kindness and benevolence were enjoined in this respect. It was also forbidden to impose amounts which were beyond people's means on the instruction of *Khalīfah* 'Umar. *Kharāj* was considered *ujrah* or rent or lease according to the *fuqahā*' (Haque, 1988:285-7) whether the land was *'anwah* land (conquered during war and without any treaty) or *ṣulḥ* land (land conquered peacefully by treaty). *Ṣulḥ* lands were further classified into *milk* (ownership with full possessory rights) of *dhimmis* and *milk* of the Muslims. The *milk* of the Muslims was inalienable *fai*' land and was hired or leased. The *milk* of the *dhimmis* could be leased or sold to Muslims. *Kharāj* was therefore *ujrah* or rent on the *kirā*' or lease of land and of the land's services.

1.2.2.2. 'Ushr Land

'*Ushr* was a tax imposed on crops on land owned by Muslims at the time of him or her having embraced Islam or as his or her share as a soldier of the spoils of

war. These land were considered *milk* land and could therefore dispose of the property in accordance with the rules of *Sharī'ah*.

'*Ushr* lands are revived by Muslims. Lands whose owners had embraced Islam were also considered '*ushr* by *Imām Shāfi'ī* (767-820). *Imām Abū Ḥanīfah* (699-767) was of the view that the *Imām or Khalīfah* (Islamic ruler) had the option of either treating it as '*ushr* or *kharāj* lands. Lands seized as booty from the *mushrikūn* were treated as '*ushr* lands according to *Imām Shāfi'ī* with *Imām Mālik* (715-795) considering it as *waqf* because of the imposition of *kharāj* on it. *Imām Abū Ḥanīfah* was of the opinion that the *Imām or Khalīfah* had the discretion, choosing either option (Haque, 1988:194-218).

1.2.2.3. State Land (*Arḍ al-khāliṣah*)

State land were land whose ownership vested directly with the Islamic State that could do as it pleased- from exploiting the land, leasing, selling or transferring it gratuitously. *Iqtā'* or grant or concession of land by the Islamic State was the substantial property interest transferred to an individual. *Iqtā' tamlik* were concessions whereby full ownership rights were granted to an individual. *Iqtā' istighlāl* were concessions granted to exploit the land only. The Islamic State granted only certain property rights with ownership vested in the State, being able to impose other conditions as well. *Iqtā' khāṣṣ* were land in the possession of the *Sultān* of the Ottoman period.

1.2.2.4. Public Land and Servitude

Public rights in property for the benefit of the public at large were recognised by the *Sharī'ah*. These included rights in relation to the use of water, pasture lands, roads and mines, to the extent of the Islamic State imposing servitude rights on private property since it was the owner on behalf of the public.

1.2.2.5. *Mawāt* Land

Mawāt or “dead” land was uncultivated wasteland, which constituted much of the total landmass with no private owners. Ownership vested in the Islamic State. An individual acquired ownership by being granted permission by the State or by occupation and cultivation of the land within a specific period (three years for agricultural land according to the Ḥanafī School) subject to certain rules of the *Sharī'ah*. No transfer of rights is required from the Islamic State to an individual. *Mawāt* land became *milk* land if the owner fulfilled all the provisions of the *Sharī'ah*. According to *Imām* Ibn Taymīyah (1263-1328), if a person was granted the land to make it cultivable (*iḥyā' al mawāt*) this grant was *iqṭā' al istighlāl* or a grant by the Islamic State to soldiers who could cultivate the land and hire it but was not allowed to sell it. The *muqṭā'* or grantee was granted land in lieu of salary and used the benefits he derived for the maintenance of weapons, war horses and to support his dependants. The *muqṭā'*, however, was required to regulate his dealings with justice and fairness with his or her tenants who may be required to cultivate the land (Islahi, 1996:35, 164).

1.2.2.6. *Waqf*

Waqf (pl. *awqāf*) is the immobilisation or detention of a property; an endowment for charitable, religious or other good purpose or public use (Doi, 1984:339; Islahi, 1996:116). There were two types of *awqāf* - *waqf al ahlī* or family *waqf* and *waqf al khayr* or charitable or welfare *waqf*. In terms of *waqf*, the grantor disposed of his or her property as a charitable endowment. The *waqf* was for an unlimited period (created in perpetuity), was irrevocable, with the grantor not reserving any rights of revocation in himself or herself in any other party and the *waqf* property was inalienable. The right of ownership is transferred to Allāh and the character of the *waqf* property could not be changed, sold or given as an inheritance or gift (Doi, 1984:340). *Khalīfah* ‘Umar in his interpretation of the Qur’anic verse of *fai’* (59:7) classified *fai’* land as *waqf* for the benefit of the *ummah* (Al-Kader, 1959:9).

The *wāqif* or grantor designated the manager or trustee and beneficiaries. The beneficiaries were orphans and those who were destitute; for maintaining mosques and hospitals and were entitled to the proceeds of the *waqf* (Ibn Taymiya, 1983:25, 42). The Islamic State appointed a *Qāḍī* (judge) to manage *waqf* properties in the interest of the public during the Umayyad and Abbasid periods. A special mechanism was also created that of the *Dīwān al-Naẓr fī al-Maẓālim*, i.e. a bureau to inspect grievances, to scrupulously ensure the rules of *Shari’ah* were observed, investigating violations of rights, ensuring justice, supervising and managing the *awqāf*.

1.2.2.7. *Milk* - Private Property

The owner had full ownership rights including the rights to dispose his or her property, contractual powers, and the right to use and enjoyment. The *Sharī'ah*, however, placed certain restrictions, e.g. public and private servitude limited the right of private ownership. Where several owners owned different sections of a building, the *Sharī'ah* laid down rules to prevent intentional or unwarranted damage to sections belonging to the other owners. The use of water by others or the construction of party walls, are other examples of the *Sharī'ah* limiting the right of a private owner for the benefit of neighbours.

Sāhib al arḍ, *mālik* and *rabb al arḍ* all denoted possessor of land. According to *Imām* Abū Yūsūf (1969:74, 79, 81-3), these land holdings could not be sold even if they were *kharāj*, *'anwah*, *ṣulḥ* or *'ushr* land. The holders could only sell their right of use or usufruct.

1.2.3. *Al-'Aqd* – The Contract¹²

By means of a contract, the *Sharī'ah* allowed the owner full rights to dispose his or her property. The owner could either sell or give the property as a gift or lease it out or pledge it for a loan. The property could be bequeathed to his or her heirs or immobilised in *waqf*.

¹² Doi, 1984:355-356; Haque, 1985:11, 64, 313-4; Islahi, 1996:81, 166-8; Johansen 1988:25-7.

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The Shari'ah laid down rules for the four basic contracts: *al bai'* (sale), *al ijārah* (lease or contract of tenancy), gift and *'āriyah* (loan for use). In the case of *ijārah* and *'āriyah*, full ownership rights were not transferred but these two contracts created an interest of use and enjoyment known as *manfa'ah* (usufruct). The owner or lessor retained his title of ownership or *raqabah* of the property during a contract of lease. In a contract of sale (*bai'*) or gift, both the *raqabah* and *manfa'ah* were transferred to the new owner. In a contract of lease or *'āriyah*, only *manfa'ah* was transferred, with full ownership (*milk tāmm*) vested in the owner.

The Shari'ah also allowed the owner to pledge his property as security for his or her debts, giving the creditor “possessory rights”, with right of usufruct and full ownership vested in the owner. The owner could also sell the property in return for needed funds but also having the option of re-purchasing the property within a stipulated time. The sale (*bai'*), however, transferred full ownership rights to the new owner.

Muzāra'ah was a contract with a partnership arrangement between the landowner and an agriculturist. The contract stipulated the distribution of profits based on the amount of capital and labour.

1.2.4. General Definitions of Private Land

According to Abū 'Ubayd (al Qāsim Ibn Sallām), '*arāḍin al-'ushrīyah* or private land of Muslims fell into four categories (Haque, 1985:245): -

- Land of the indigenous people who embraced Islam and who retained it as private '*uṣhri* estates.
- *Milk aymānihim* or land conquered during war, considered *ghanīmah* by the *Khalīfah* or *Imām*, and distributed as $\frac{4}{5}$ among the conquerors.
- *Al-arḍ al-'ādīyah* or deserted land without ownership or cultivator. The *Khalīfah* or *Imām* granted it (*iqṭā'*) to the *muqṭī'* (grantee) as a private grant.
- *Arḍ mayyitah* or “dead” or barren or uncultivated land that was abandoned which a person cultivated or irrigated to “revive” it.

1.3. ISLAMIC SOCIAL ORDER, OWNERSHIP AND “LANDLORDISM”

This section examines in-depth the concept and definition of ownership, its development and relevance within the context of the *Sharī‘ah* and the concept and development of “landlordism”.

1.3.1. The Concept and Definition of Ownership

The life of every individual, irrespective of colour, religion, creed or gender, is considered sacred in Islam (*Qur’ān*, 17:33) and his or her rights to life, liberty, honour and property are guaranteed by Allāh and Muḥammad (Allāh bless him and grant him peace) (Abe, 1987:54, 56, 93). The interests and needs of the *ummah* (Muslim community) are based on collective ownership and resources and the *ummah* therefore takes precedence over the individual’s right of ownership. This is because the rights of the individual to private ownership operates in relation to the interest of society at large (Abe, 1987:12, 25, 40, 53).

The concept of ownership is very broad and constitutes one aspect of the Islamic socio-economic system. In its widest sense, Allāh is the Real and Absolute Owner of everything on earth and in the entire universe¹³ but human beings are allowed to possess a thing entrusted to them by Allāh Who has subjected

¹³ "And to Allāh belongs the dominion of the heavens and the earth, and Allāh has power over all things" (*Qur’ān*, 3:189).

everything for their use (*Qur'ān*, 2:29;)¹⁴ Allāh made every individual His *khalīfah* or trustee or representative (*Qur'ān*, 2:30) and limited and qualified the right to property (Kahf, 1978:37-8; Ahmad, 1991:33-4, 96) which one can possess under His permission (Abe, 1987:11, 34; Al Kader, 1959:10). Accordingly, no individual has exclusive or absolute right to anything on Allāh's earth (Ansari, 1973:373). Only Allāh can bestow any right of ownership and can limit such rights (Islahi, 1996:110, 112; Islam, 1960:181).

According to Islam (1960:181) the right to ownership of land and property is not to be regarded as being absolute and cannot be used as a licence to the detriment of other members of society. It is subject to certain conditions, the guiding principle being the welfare of the community as a whole. Zaman (1991:29, 30) defines ownership as Islam recognising a person's right to own property for consumption and for production but without giving a person absolute right over the property.

The right to property and wealth are therefore entrusted purposively to enable one to live and earn a livelihood commensurate with the laws and guidance of Allāh. Its purpose is also to enable a person to achieve one's well being in this life and the hereafter and to make accessible to those in need without any

¹⁴ "He it is Who created for you all that is on earth. Then He *Istawā* (rose over) towards the heaven and made them seven heavens and He is the All-Knower of everything," (*Qur'ān*, 2:29).
"See you not that Allāh has subjected for you whatsoever is in the heavens and whatsoever is in the earth, and has completed and perfected His Graces upon you...." (*Qur'ān*, 31:20).

monopoly, oppression, hoarding or squandering. The right of ownership ultimately ceases to exist for its owner once he or she is dead. The *Shari'ah* therefore laid down details regarding the distribution of property and wealth through specific principles and laws. These include the Qur'anic system of Inheritance (*mīrāth*), as well as *fai'*, *zakāh* (compulsory alms) and voluntary charity to ensure that inequality between rich and poor is reduced and that everyone has a means of livelihood (Islahi, 1996:18, 114,).

Voluntary charity and concern for those in need in respect of the basic necessities in life extends to all people and not confined to Muslims. There are many instances where Muslims donated wealth for the benefit of people, regardless of religion or race. Malukmohammed Lappa Sultan, for example, the founder of the ML Sultan Technikon, Durban, KwaZulu Natal, South Africa bequeathed all his wealth for educational purpose at the expense of his family (Padyachee, 2001). He said: "I hear it from my father that once when advised by a friend of limited foresight, to confine his charity to Muslims, he retorted: 'nowhere in the Quran do I find Allah as Rab-ul Muslamin,¹⁵ Allah is Rab-ul-Alameen' (Lord of the Universe)" (Meer, 1988:7).

¹⁵ The "Lord of Muslims".

1.3.2. Comparison between Islamic and Western Developments regarding the Concept and Definition of Ownership¹⁶

In the Muslim world very little change has taken place over the centuries in comparison to the Western world regarding the concept and definition of ownership (Abe, 1987:11). In the West, historically, the definition of ownership changed from the time of Plato down the Middle Ages to the present. In the 17th century, property was defined as the right to use land but not own it. In the 20th Century, it became the right to an income (saleable)¹⁷. It appears that modern scholars were influenced by the legal pattern of the Roman jurists who defined property right as being unrestricted and unlimited for the owner who could consequently use or destroy his object in whatever way he chose to (Islahi, 1996:108, 118). Taken in its strict sense, property according to John Austin (Islahi, 1996:108), denoted a right, definite in point of use, unrestricted in point of disposition and unlimited in point of duration, over a determinate thing.

The definition of property also changed legally and politically. In Civil Law, property meant a distinction between corporeal and incorporeal things, with most Western countries in recent years realising the importance of both individual and communal ownership (Abe, 1987:45-6; Islahi, 1996:108). The Common Law foundation in Capitalist countries was laid in the 20th century,

¹⁶ The western concept and definition of ownership is discussed in detail in chapter 2.

allowing the owner who was vested with absolute rights, to do as he pleased. Communism and Fascism struggled for the total abolition of private ownership forcing capitalist governments to intervene to protect the rights of the exploited class (e.g. tenants). The global introduction of rent control legislation after the two World Wars in the 20th century is one such example.¹⁸

1.3.3. The “*Ummatic*”¹⁹ Approach

The right to own property is protected by Allāh’s decree against anyone who intends to violate it. According to Ahmad (1960:172) the sanctity attached to private property in Islam is equal to that of a person. At the same time, individuals of private property are not allowed to amass wealth and are therefore obliged to distribute their wealth and property among beneficiaries and by bequest to non- beneficiaries²⁰. This does not mean that individuals relinquish all their rights because each individual is entitled to fruits of his or her labour²¹. Ajjola (1977:163) maintains that Islam is not opposed to private ownership in the sense of the article of personal consumption. It gives it an inviolable sanctity, which every sane person will defend. The Prophet himself allowed the

¹⁷ It could be sold.

¹⁸ “Most countries introduced rent control to protect tenants from exploitation during and after the two World Wars. A critical housing shortage, generally due to soldiers returning home and building materials being used for military projects necessitated emergency measures. During peace time, the continued under supply of housing, exorbitant rents, deplorable conditions of buildings, rising inflation and population growth necessitated the control of rentals and security of tenure” (Mohamed, 1994 p. 21-22).

¹⁹ Specifically refers to the collective economic rights of the *umma* (Islamic community) in relation to the rights of individuals. Refer to Abe (1987:25-9, 48, 53, 81) who also uses the word “*ummaism*” vs “individualism” in his discussion of ownership rights in Western and Islamic value systems.

²⁰ *Qur’ān*, 4:7; 4:11-13.

²¹ *Qur’ān*, 53:39; 4:32; 41:10.

practice of private ownership of land and allotted land for housing and farming or gardening when he migrated to Madīnah. He also confirmed ownership to Muslims in Madīnah who had their own agricultural land (Zaman,1991:119, 125).

In Islam, the individual's right to own, enjoy and dispose property was regulated by law, moral principles and exhortations, such right being approved by Allāh. The purpose of Inheritance (*mīrāth*) is to ensure the distribution and circulation of property and wealth in society. It is one of the most important branches of the Islamic family law (Doi, 1984:271). The *wurathah* (heirs and representatives) inherit the right to property, rights connected with property and other rights and obligations²².

Mustafa & Askari (1988:91-129) discussions on economic implications of land ownership and cultivation show that Islam laid the economic foundation that offers a balanced system both in theory and application. In offering a holistic approach (Rashid, 1960), the Law of Inheritance is broadly laid down in the *Qur'ān* with precise details worked out by jurists based on the practice of Prophet Muḥammad (Allāh bless him and grant him peace), *ijmā'* or consensus of the jurists and *qiyās* or analogical deduction. It is aimed at reducing the inequalities of income and wealth by ensuring a wide distribution from

²² *Qur'ān* 4:7-8; 4:33.

generation to generation (Ahmad, 1991:34). The distribution of wealth in Islam is on the basis of equity and on humanitarian grounds²³, being distinct from the concept of equal distribution (Manzoor, 1999:38).

The *ummah* however has first priority to property for the welfare of all people. Allāh has assigned or entrusted (*mu'taman*) to the *ummah* the right to possess property with individuals acting as a custodian or trustee on His behalf. Individuals are therefore obliged to accept restriction imposed by society (Abe, 1987:40, 52-3). Allāh has therefore “delegated” proprietary rights to mankind with certain prescribed responsibilities and their distributional implications.

According to Ali (1934:179) property has not only its right but also its responsibilities. The owner may not do just what he likes absolutely, his right is limited by the good of the community of which he is a member. If he is incapable of understanding it, his control should be removed. This does not mean that he is harshly dealt with. On the contrary, his interests must be protected and he must be treated with special kindness because of his incapacity.

Thus, an individual's obligations are governed by legal precepts with most of the obligations being morally motivated. Since the interest of the *ummah* is crucial,

²³ *Qur'ān*, 59:7; 4:5.

it can limit an individual's rights to private ownership beyond legal precepts when a conflict arises between the rights of an individual and society. An individual is allowed the right to possess, enjoy, derive an income, and transfer property rights. However, such rights have moral obligations to the collective needs of human society as well as animals.

In providing a middle course- a balanced society (*ummataṅ wasaṅān*) Islam allows private ownership but not absentee "landlordism" (Ahmed, 1988:60; Huq, undated:15; Mannan, 1987:103, 105.)²⁴. Absentee landlords are usually concerned about the wealth they can amass regardless of the hardships caused to tenants. Islam on the other hand, sanctions peasant ownership of agricultural land but excludes the industrial barons and the business lords, (Ansari, 1973:376), a balanced society is created for the benefit of all citizens (*Qur'ān*, 2:143).²⁵

In any event, the institution of "landlordism" or the *jāgīdāri* systems was a perpetual systems of serfdom with an owner (*jāgīr*) enjoying economic rights and the tenant-cultivators deprived of their rights. Islam, Qutb states, (1972:56), recognised only two forms of relationship between peasant and landlord, one based on contract and the other on tenancy. Afzal-ur-Rahman (1975:223,225-

²⁴ Date of publication and publisher's details are unknown.

²⁵ "Thus We have made you [true Muslims –real believers of Islamic Monotheism, true followers of Prophet Muḥammad and his *Sunnah* (legal ways), a just (and the best) nation, that you be witnesses over mankind and the Messenger (Muḥammad) be a witness over you..."

226) points out that Islam does not allow “landlordism” that leads to the violation of the fundamental human rights of the tenants. They distinguished between the freedom to own property granted by Islam and the owner contracting with a tenant-cultivator in an oppressive and unjust system.

1.3.4. Types of Ownership

Islam laid down guidelines on land tenure system, with absolute ownership belonging to Allāh alone. It favours peasant-ownership but also allows tenancy. However, leasing of agricultural land on rent was disliked by consensus of opinion with only *Imām* Abū Yūsūf, (the grand *Qāḍī* or judge of the Abbasid *Khilāfah*) approving it (Mannan, 1987:108).

On the question of land ownership, there are two predominant juristic views (Mustafa and Askari, 1988:107-8). The one school recognises: -

- (i) That an individual has *intifā'* or right of priority use of wasteland as long as he or she cultivates it. The individual has no *raqabah* or private ownership right except over any capital improvements.

- (ii) *Raqabah* of land is recognised in the case of an individual becoming a Muslim and through a peaceful agreement with the Islamic State. Also, when an

individual contracted into the State without embracing Islam, provided the contract included this.

The other school holds the view that: -

(i) *Raqabah* of wasteland is possible as long as the individual cultivates it or when the State grants him or her *iqtā' tamlik* (administrative grant of land for private ownership).

1.3.5. Combined or "Multi-Ownership"

Rashad (1960:164), Mustafa and Askari (1988:106-7) and Abe (1987:41-3) in their discussions of ownership are of the view that the *Shari'ah* recognises a combined or multi-ownership system: -

(1.) **Private Property Rights:** an individual is granted the right to own, enjoy and dispose or transfer his or her property. An individual is granted an inviolable right to own property but at the same time his or her freedom to possess and dispose of it are subjected to the principles of the *Shari'ah*.

(2.) **Public:** property owned by the *ummah* for the general welfare of all people:-

(a) **Social ownership:** property historically owned by members of the *ummah* over a period of time e.g. cultivated land conquered in a war. Present and future generations have *raqabah* rights with the State acting as a guardian.

(b) **Human ownership:** e.g. water, herbage, fire, salt, grazing grassland and other similar things which are beneficial to all people. The *raqabah* belongs to all the citizens with the State acting as a guardian to ensure that everyone is an equal partner in sharing its use.

(c) **Public ownership:** property such as streams, bridges, forests and mines under the guardianship of the State is available for the welfare of the general public.

The *Shari'ah* laid down two basic principles (Rashad, 1960:164) in order to regulate and maintain justice and a just social order regarding combined ownership: -

- (1) The Islamic State can intervene for the general good of the public when the need arises. The State has to protect the well being of the society and has to therefore prevent the abuse by private owners because such abuse leads to a capitalistic class of landlords who exploit tenants.

- (2) The Islamic State can introduce rules and regulations and changes in land policy to promote as well as protect the interests of all members of society. For example, the policy of land revenue can be changed to increase the State's revenue in the interest of the public.

Ahmad (1991:34) notes that the jurists are of the view that in ordinary circumstances private property rights are to be treated as inviolable. However, in compelling circumstances, individual ownership of particular kinds of property or productive assets can be subjected to certain limits in the larger public interest. Parwez (1960:172) says that the rights to private property, in particular over land, is not absolute but is subject to the demands of national welfare. He also states that expropriation on payment of compensation is permissible and cites the example of the Prophet acquiring land for the construction of a mosque in Madīnah.

1.3.6. Land Tenure System, Land Reform and Ownership Developments under Muslim Governance

Below, is a very brief look at the some of the principles and types of land and ownership developments that took place during the various Muslim governance after Prophet Muḥammad (Allāh bless him and grant him peace).

1.3.6.1. Land Tenure System and Land Reform under *Khalīfah* ‘Umar’s Administration (634-644)²⁶

William Muir (cited in Faqih, 1974:62) states that *Khalīfah* ‘Umar introduced a pension system probably without parallel in the world. He established the payment of pension to retired officials and soldiers who became disabled, allowances for the needy and built schools and orphanages. He also developed State ownership of land, separated the judiciary from the executive, established the public treasury (*bayt al-māl*) and promoted agriculture by introducing useful land reform.

Khalīfah ‘Umar said that had he realised at the beginning of his *khilāfah* the socio-economic conditions of the *ummah*, he would have re-distributed the access property of the rich among the poor (Rashad, 1960:163). This principle is

²⁶ Ahmed, 1988:54-61; Al Kader, 1959:9-11; Faqih, 1974:61; Husain, 1977; Islahi, 1996:164, 200, 214, 229; Mannan, 1987:107-114, 136-7; Nu‘mani 1975; Rashad, 1960:163-64.

based on Qur'anic injunctions and *ahādīth*, e.g. that wealth should be taken from the rich and distributed among the poor.²⁷

By taking back the land from Bilāl Ibn Rabāh²⁸ that was given to him by Prophet Muḥammad (Allāh bless him and grant him peace), *Khalīfah* 'Umar enforced the principle that land must be used and not kept unused nor must one possess more than one can utilise. After the conquests of Iraq and Egypt, *Khalīfah* 'Umar allowed the distribution of wealth but did not permit the distribution of land and canals. He imposed *kharāj* and *jizyah* on all conquered land. The former owners who were *mushrikūn* retained full rights of ownership in return for *kharāj*, which acted in fact as *jizyah* as long as they remain *mushrikūn*. The full rights of ownership included the right to sell and transfer ownership rights to Muslims or *dhimmīs* (those who were not Muslims living under the protection of the Islamic State).

The following were the different types of land tenure system during 'Umar's *khilāfah*, (Khan, 1982:110; Haque, 1985:187, 191-2; Islahi, 1996:200, 214, 229):-

²⁷ "And in their properties there was the right of the beggar, and the *maḥrūm* (the poor who does not ask the others)." *Qur'ān*, 51:19. Also, *Qur'ān*, 59:7.

The *Anṣār* ("helpers"-Muslims of *Madīnah*) under Prophet Muḥammad's guidance, shared their property and wealth with the *Muhājirūn* (emigrant Muslims of *Makkah*) in 622.

²⁸ Abū Yūsuf (1969:76) and Al Kader (1959:5) refer to Bilāl Ibn al Ḥārith.

- ***Iqta'*** – an administrative grant of a piece of land. An individual was granted ownership or fief by given a piece of land. ***Khalifah*** 'Umar did not favour this system because of the changing socio-economic conditions.
- ***Himā*** - land that was collectively owned by a tribe or several tribes. The land was not tilled but usually used for fodder and water. The tribes stood to lose their right of ownership to the State if they failed to pay '***ushr***.'
- ***Arḍ al-khālīṣah- State owned land*** - State owned property was set aside for public use, these included *fai'*, *diyā'* (landed or country estate) which were private estates of the State and *waqf* property. A tenant paid ***kharāj*** on State owned land.
- ***Peasant ownership*** - owners of arable and fertile land cultivated the land themselves. The non-cultivator owner had someone else to cultivate his land. The non-owner cultivators were the tenants of private landlords.

Kharāj or land tribute imposed on conquered land was divided into :-

- i.) ***muqāsimah*** - proportional ***kharāj***, i.e. land tribute on a portion of a produce due after one single crop;

ii.) *wazīfah* - fixed tribute that was specifically levied on the land in relation to the yield or monetary value and was paid annually.

'*Ushr* (tithe or tribute imposed on the crops of Muslims) was $\frac{1}{10}$ tribute levied on produce. In addition to '*ushr*, *kharāj* was levied on crops when the land was irrigated by canals or wells dug by *dhimmīs*. *Kharāj* was levied only once while '*ushr* was charged on every crop. '*Ushrī* land were those land that belonged to Arabs who became Muslims or new ownerless land that was cultivated by a Muslim. It also included land belonging to a *dhimmī* given to Muslims because the former had died or formally relinquished his or her right or had the land confiscated because of revolt (Husain, 1977).

Khalīfah 'Umar introduced radical changes by abolishing the Roman custom whereby ownership was granted to soldiers, officials, members of the royal family and the Church (Husain, 1977). He re-organised the *bayt al-māl* (public treasury) that was established by Prophet Muḥammad (Allāh bless him and grant him peace) as a common fund for the general public. The main sources of revenue of the treasury were *jizyah* (indemnity, defence tax), *zakāh* (prescribed alms), *kharāj* (land tribute), '*ushr* (tithe, special land tribute), *ghanīmah* (income from booty), tribute levied on traders who were not Muslims and were exempt from paying *zakāh* and duty on imported goods (Khan, 1982:110-3).

As for *ghanimah*, *Khalifah* 'Umar left the land in the hands of the conquered (the original owners) who had to pay *jizyah* and *kharāj*. This was a change from the practice of Prophet Muḥammad (Allāh bless him and grant him peace) who treated land like the movable possessions taken during the war and was distributed among those who fought. *Khalifah* 'Umar excluded land from *ghanimah*.

Fai' (booty or property surrendered or acquired peacefully) was given over to the State for the benefit of the *ummah* without distribution among the conquerors. *Fai'* was managed by *Khalifah* 'Umar as State property and like the fifth of *ghanimah* during the time of Prophet Muḥammad (Allāh bless him and grant him peace), its proceeds were used for the benefit of the *ummah* (Islahi, 1996:198, 214).

When Iraq, Egypt and Sawad were conquered, *Khalifah* 'Umar made the lands *fai' al-Muslimīn* or the conquered land of the Muslims. He did not allow the distribution of the lands or the *'ulūj* (serf tenants) except for the distribution of moveable goods that were captured by the Muslim soldiers. Such distribution was done only after the deduction of *khums* ($\frac{1}{5}$ of the booty). *Khalifah* 'Umar consulted with representatives from the *dhimmi*s who had knowledge of taxes to assess their suggestions or objections in dealing with them to ensure equity and justice. When the Romans conquered Syria and Egypt, they deprived the

original owners of their property rights and reduced them to cultivators or serfs. Land that was confiscated and divided into estates by them for their army commanders and court officials were returned to the original owners by *Khalīfah* ‘Umar.

1.3.6.2. Land and Ownership Developments under Umayyad Rule (661-750)²⁹

During the time of Prophet Muḥammad (Allāh bless him and grant him peace), resources and wealth were morally and ethically considered the collective property of the *ummah*. Certain economic transactions were not allowed such as *ribā* (usury) and *gharar* sales (risk, uncertainty) like *muzabanah* (exchange of dry dates, raisins, etc. for dates or grapes still in growth, without specifying weight, measure or number, against an object which is specified), *muhāqalah* (lease of land for food), *mukhābarah* (a lease of land against a certain part of a produce) and *muzāra‘ah*, for these tended to uproot the collective principle of solidarity (Haque, 1985:26-7, 68-71).

However, under Umayyad rule the Islamic expansion reached its peak (Mansfield, 1976) and conquered land and territories that were made collective *fai*’ by *Khalīfah* ‘Umar became the private property and estates of the ruling

²⁹ Haque, 1985:33, 35, 134-5, 237-8, 293, 299

class. The *fai'* land which the *ummah* took either by force (*'anwah*) or through a peace treaty (*sulh*) and which was not divided, was a permanent source of revenue for all Muslims but this changed under the Umayyad administration. The conflict regarding *fai'* land started during the *khilāfah* of 'Uthmān (644-656) with one group expressing its belief in ownership to be common *fai'* land and the other advocating individual interests. The Umayyad rulers entrenched the idea of individual interests and consequently made common *fai'* land the private estates of the aristocrats and the (Umayyad) State.

During *Khalīfah* 'Umar's administration, revenue from common *fai'* land was for the benefit of all Muslims with the undivided land being possessed and tilled by the former *dhimmi*s, owners or cultivators. The Umayyad rulers reintroduced and reformulated the old practices of land tenure of the pre-Islamic period. "There is also much evidence in the Muslim historical sources which suggest that members of the Umayyad (and later Abbasid) rulers' families appropriated large areas of land for their personal use" (Haque, 1985:240). The autocratic rule of the Umayyad dynasty continued when the Abbasid dynasty came into power.

1.3.6.3. Land and Ownership Developments Under Abbasid Rule (750-1258)³⁰

During the Abbasid period two types of *kharāj* land existed: -

- (a) '*Arḍ Al-Mamlakāt*: The state abolished ownership that vested with the conquered. The land became the property of the state while the cultivator was the tenant without title to property rights.

- (b) The State allowed the undisturbed right of ownership to the conquered people. The cultivator had the right to sell or alienate his or her holding. The person who paid *kharāj* or '*uṣhr*' on cultivated land was the recognised owner.

During the Abbasid administration, the ruling families' estates continued to develop. The *ṣawāfī* land (land that were ownerless or abandoned) which were made common *fai*' by *Khalīfah* 'Umar also became part of the large and growing estates of the Abbasid dynasty. These land were scattered all over Sawad which was conquered during the *khilāfah* of 'Umar. He declared these lands to be *fai*' for the benefit of all Muslims and imposed *kharāj* and *jizyah* on the *dhimmīs* (Haque, 1985:202). The Abbasid through *talji'ah* converted lands into private estates. *Talji'ah* meant that smaller land owners sought protection from the

³⁰ Haque, 1985:238-244, 299-300

burden of excessive taxation of tax farmers, pressures from labourers and landless serf-tenants by entrusting their property in favour of a strong (big) landlord (Haque, 1985:240-2). Through this method, the Abbasid rulers were able to convert landholdings of small and weak owners into large estates in keeping with the practise introduced by the Umayyad dynasty.

1.3.6.4. The Mamlūk Dynasty (1250-1517)³¹

The Mamlūk who were Turkish and Kipchak slaves and who were settled on an island in the Nile by the Ayyubid sultāns, seized political power in Egypt in 1250. The Mamlūks inherited the social stratification that existed during the periods of the Umayyad dynasties (661-750), the Abbasid (750-1258) and the Fatimid dynasty (909-1171). The majority of the people under Mamlūk rule were poor, the *fallāḥīn* (the farmers and land tillers) who were subjected to the payment of many types of taxes. Ibn Taymīyah³² who lived during this period referred to the multiple taxes imposed on the villagers irrespective of their level of income as *al-maḏālīm al-muḥtaraka* (joint or common injustice).

The Mamlūk inherited the *iqtā'* system of the Fatimid (909-1171) and Ayyubid rulers (1169-1250) but introduced certain land distribution and tax reforms. Land was divided in accordance with the measurement of land into parts (*rawk*)

³¹ Gibb, 1975:11-2; Hitti, 1974:671-682; Islahi, 1996:23-49; Johansen, 1988:69, 84-5, 103.

³² Ibn Taymīyah (1263-1328) lived during a period of social and political turmoil which brought with it massive social changes in commerce, agriculture and industry (Islahi, 1996:23).

with high ranking officials and heads of department receiving *iqṭā'* in lieu of salaries. The *muqṭā'* was exempt from military service but had to pay '*ushr*' (tithe) on his *iqṭā'* and did not have the right to sell or transfer his *iqṭā'*. Upon the death of a *muqṭā'* the *iqṭā'* reverted to the Sulṭān who could reassign it. The Mamlūk imposed various tributes on land, agriculture and industry. Tax on agriculture was divided into *kharāj al-zirā'ah* (tribute on cultivated land) and *kharāj al-basātīn* (tribute on orchards). Muslims paid '*ushr*' after payment of *kharāj* while *dhimmīs* were exempt from '*ushr*'. The Mamlūk also introduced a European type of fief imposing a fixed amount on the "fief-holder"

1.3.6.5. Ottoman ('Uthmānīyah) Empire (1299-1922)³³: -

The Ottoman Empire became the most powerful sovereignty in the world during the 16th and 17th centuries (World Book Encyclopedia, 1992) having its origins in Anatolia. People were mainly divided into two main classes, the ruling elite or the wealthy class, which included the imperial family, owners of large estates, military and religious leaders who lived in stone mansions. The *rayah* class were the rest of the people, which included the peasants and cultivators who lived in homes built from mud and bricks.

³³ Taylor, 1976:48; Encyclopaedia Britannica, 1982; Johansen, 1988:69, 81-2, 91-2, 102; World Book Encyclopedia, 1992.

All religious groups were constituted into their respective group or *millet* (nation) and were represented by their leaders before the government. Corrupt administration, decadent court life, shortage of money and the devaluation of the currency because of the influx of silver from America and the absence of land to pay soldiers, were some of the factors that led to the eventual collapse of the Empire during the first World War (1914-18) (Taylor, 1976:48).

During the Ottoman rule, land tenure, tax and rent underwent significant changes. The *fuqahā'* reformulated Ḥanafī laws, such changes having started during the 10th century. During the Ottoman and Mamlūk (1250-1517) administration, the *kharāj* payer who was the owner of private landed property hardly existed (Johansen, 1988:80-2). Army officers were assigned districts from which they collected taxes from peasant owners in lieu of salaries they previously received from the public treasury. They were therefore landlords whose remuneration as employees of the Islamic State came from small peasant holdings. Thus, the difference between tax and rent ceased to exist. This was also the case in Iraq under the rule of the Buwayhids or Būyids (945-1055) and in Egypt under the Mamlūks.

The rulers attempted to confiscate the *waqf* property and to make it State property. All arable land were considered State property and private ownership rights and *waqf* property were only recognised if a person could produce

sufficient proof by means of title deeds that were held by the public treasury. This system of land tenure operated up to the second half of the 16th century. The *fuqahā'* (jurists) supported and defended the people's resistance against the Ottoman's land tenure system. Among the leading jurist was Ibn Nujaym (d.1563), the Egyptian jurist whose pragmatism led to land being reverted to *milk* (private property) and *waqf*. He synthesised the debate and reformulation of the Ḥanafī legal tradition on land tenure, rent and tax that had started from the 10th century and during the Mamlūk period. He subsequently influenced other jurists to integrate new notions and legal ordinances in the interest of the rentier class (persons who had a fixed income from property) (Johansen, 1988:86-93).

Ibn Nujaym, in his treatise on land tenure (1552) defended the fiscal and legal privileges of *waqf* and private landed property against the Ottoman State, which attempted to transform these into State property. He argued the importance of the ruler as the seller of arable land of the deceased *kharāj* payer. The ruler could exempt certain categories of buyers from *kharāj* in the instance where the ruler had inherited land from owners who had died without leaving heirs. The ruler could impose tax on buyers who were sold property the ruler had acquired through sequestration of the bankrupt peasant owner.

The ruler and the Public Treasury were therefore the main sources of property rights and privileges. Property were to be sold with tax exemption to the elite

who had to pay a high price for the property. The private property of the religious scholars and army officers were also exempt from tax. Property of the peasant and others were taxable landed property. *Waqf* could only be created for a mosque by the State but all other *awqāf* were to be constituted from private property. In this case, the private property of the power elite and the religious and army officers, as the two most important categories of private property, were most favoured for the purposes of *waqf*. The administrators of the *waqf* did not have to pay *kharāj* but a much lower rate of '*ushr*' and also derived income from rentals paid by the tenants.

Two other categories of owners who bought their land from the ruler or the public treasury and which were taxable, could also have their property transformed into *waqf*. These owners were the *muqtā'* and the *kharāj* property of the peasants and others. However, *kharāj* had to be paid by the above two categories of owners even when their property were transformed into *waqf* because their property were bought at a low price and therefore taxable.

The changes in taxation and the system of land tenure were the results of changes in the doctrines of the juristic schools of law, particularly the Ḥanafī school. The changes in Ḥanafī doctrine on property, rent and taxation of arable land took place between the 10th and 15th centuries leading to the redefinition in the concept of landed property. The *fatāwāh* (juristic decisions) were well

documented from the 16th to the 19th centuries by Egyptian and Syrian jurists (Johansen, 1988:98).

The early Ḥanafī position was that the payment of land taxes proved ownership rights. Regarding the productive use of land, the contract of tenancy or crop-sharing meant that the productive use of land was transformed into a commodity and the contract therefore led to a differentiation between tax and rent. After the 10th century, the Ḥanafī system of legal ordinances that applied equally to all forms of landed property changed. The new concepts of rent and tax as applied during the Ottoman period differentiated between peasant holdings and the property of the wealthy and the powerful rentiers. During the Mamlūk and Ottoman rule, peasants were eventually excluded from land tax. The contractual obligation to pay rent continued to apply to the landed property owned by the peasants. The levies they paid to the rentiers were rent and not taxes. The rentiers were the privileged class whose property rights were proved by the payment of *kharāj*. The assimilation of the rent on rent yielding landed property to *kharāj* gave the private owners the rights of priority over the State to collect rents from their peasant-tenants. The State's claim to tax was enforceable against the private owners of the rent-yielding landed property and not the peasants. The rent paid by the peasant-tenants included the *kharāj* and it was therefore the private owner who after deducting his rent, paid over to the State the taxable amount. The contract was not considered a necessary condition for

the obligation to pay rent in respect of *waqf* and State lands, private property reserved for profitable use and land administered on behalf of orphans

As mentioned previously, laws were reformed or reformulated during the Ottoman rule that started in the 10th century and by 1850 the Penal Code and in 1861 the Commercial Code, based on European Laws, were introduced³⁴. The *fuqahā'* codified the Ḥanafī laws relating to *mu'āmalāt* or transactions between people as part of the changes in the legislative process of the *Tanzimāt*. The *Mejelle Ahkame Adliye* (Tyser et al, 1980) or Civil Code on Islamic Law of 1869 and 1876 was the codification of the Ḥanafī laws intended for judges of secularised Tribunals. The judges had to refer to the *Mejelle* but were free to exercise their discretion in deciding matters (Rahman in Tyser et al, 1980:ii). Matters relating to *ijārah* detailed in the *Mejelle* are discussed below under 1.4.4.2. Basic Rules of Leasing.

1.3.6.6. Mughal Rule In India (1526-1857)

During Auranzeb's³⁵ Governance ('Ālamghīr I, 1658-1707), the peasant's property rights and ownership of his or her holding was not only recognised but in the circumstances of a destitute cultivator, the State established methods of

³⁴ According to Doi (1981:9-11), the *Tanzimāt* was introduced between 1839 and 1850 as part of the Ottoman's so-called reforms under European influence.

³⁵ Muḥī ad-dīn Muḥammad, 'Ālamghīr was his royal title

sustaining productivity of the holding. This ensured that the poor cultivator was given the opportunity of getting an income through State intervention. However, the State did not interfere with the owner's rights but merely used intervening methods to protect the right to private ownership by making it possible for poor owners to survive.

1.3.7. Islamic Social Order and Landlords

According to Muslim scholars, the Islamic social order regulates the relationship between people based on the *Shari'ah*. Just as law and order exist in the universe as a result of Allāh's perfect code, man's socio-economic life can be orderly, successful, beneficial and balanced when the social structure is based on the *Shari'ah*. The Islamic social order guarantees every individual, men, women and children, the basic necessities of life, food, clothing and shelter. It lays down principles for the realisation of a just and prosperous society³⁶.

According to Ibn Ḥazm (994-1064) (cited in Siddiqi, 1988:259) it is the duty of the rich in every country to support the poor. If the *zakāh* revenue and *fai'* does not suffice for this purpose, the ruler will oblige them to fulfil their responsibility. Enough funds will be mobilised for the needy people to

³⁶ According to Parwez (1960:159-60) the *Qur'an* has provided five principles for a Qur'anic Social Order. This is to ensure for an individual the provision of the basic necessities of life and in this way to enable the individual the time to develop his or her personality in that Social Order. Also Ajjola (1977:227).

provide them with food, clothing for summer and winter, and a house that protects them from rain, heat and sun and to provide privacy.

Under the dynastic governments of the Umayyad, Abbasid, Ottoman and Mughal empires, owners of holdings began employing labourers to cultivate their lands because of the growing landless labour class. During the Mughal rule, the growing land shortage together with Western Industrial Revolution and technological advancement led to a growing tenant class. In some countries, land was sold because of the economic conditions. Those who had money, bought agricultural land as an alternate source of investment. This led to a tenant class with land concentrated into the hands of few individuals.

The Muslim state in India was bureaucratic and when it employed public servants and assigned them to collect revenues, be it from agricultural land or other sources, it did not alienate to the assignees either its temporary or permanent rights. The public servant represented the State, which often transferred the assignees from one area to another or from one assignment to another.

The British on the other hand introduced feudal nobles and landlords when they took over Bengal, by granting rights of permanent ownership. Secondly, during

the Medieval period, Muslim rulers either gradually abolished control over land held by petty chieftains or in some instances had to allow chieftanship of land in terms of an agreement to certain chiefs who held local jurisdiction before Muslim conquest. Hence, there was either total abolition or in some instances, recognition of chieftanship with limited autonomy. The decline of central authority in the 18th century, however, resulted in chiefs reviving various practices including exploitation of the cultivators which was not permitted under Muslim authority.

Qureshi (1960:153) records that Islam does not envisage a system of tenants depending for their livelihood upon the sweet will of exacting landlords who deny them in certain instances, even elementary rights of citizenship. Thus, with the decline in socio-economic conditions and the weakening of central authority in Muslim countries, the landlord class began to emerge, exploiting tenants and frustrating agrarian reforms. This led to the rich becoming richer at the expense of the poor, thereby causing corruption and untold misery.

According to Mannan (1987:103-5), proof exists from the traditions of Prophet Muḥammad (Allāh bless him and grant him peace) and writings of many celebrated scholars of Muslim jurisprudence that Islam disfavoured the

*zamīndārī*³⁷ system or landlords or feudalism. Firstly, because this land tenure system is the negation of the principle of equitable distribution of wealth and, secondly, because it may stand in the way of proper utilisation of land, as non-use land is wasteful and impoverishes the owner as well as the community as a whole. Even though Prophet Muḥammad (Allāh bless him and grant him peace) himself distributed land among his followers, it never implied that modern landlords were present either in pre-Islamic or post-Islamic periods. Islam was never confronted with the problem of landlords as it exists with all its evil in its modern form.

Throughout the various periods of Muslim governance, the jurists constantly deliberated on solutions to meet the needs of people due to the changing circumstances. They established principles regarding types of tenancy systems, the right to use land and ownership. In this way, they laid down the bases for a well-proportioned and just society (Islahi, 1996:225).

1.3.8. Tenancy System

Share tenancy and cash tenancy were two types of tenancy that developed in respect of *muzāra'ah* transactions (Huq, undated:12-16). The *fuqahā'* or jurists have argued for and against within these two broad categories. Share tenancy,

³⁷ *Zamīndār* means a landholder, landlord, a big cultivator of land in Urdu. *Zamīndārī* refers to landed property. Various authors have used the word *zamīndārī* or the *zamīndārī* system to mean absentee landlord, e.g. Mannan (1987:103-4).

i.e., sharing half the produce between the landlord (sleeping partner) and tenant was advantageous to those unable to work because of physical or mental disability or engaged in war.

According to Ibn Taymīyah (1983:41), *ijārah* or hire of land for cash payment (rent) or kind was permissible as long as the owner did not reserve a specific part of the produce for himself. Prophet Muḥammad (Allāh bless him and grant him peace) ruled against this type of abuse and exploitative situation but did not prohibit the hiring of land in return for cash rental. Different solutions were also implemented even during the period of *al Khulafā' al-Rāshidūn* [titular leaders; the four rightly guided political successors to the Prophet Muḥammad, (Allāh bless him and grant him peace)] to suit the changing circumstances of the rapidly expanding *ummah*.

1.3.8.1. The Disadvantages of Share Tenancy³⁸

- It is not possible to implement Prophet Muḥammad's (Allāh bless him and grant him peace) directive and encouragement to distribute land *gratis*.
- Landlords become powerful, divesting any bargaining capacity of tenants to the extent of compelling tenants to pay more than the agreed upon rental.

³⁸ Huq (undated:13-15)

- Amassing wealth in the hands of the rich goes against the principles of Islam and causes imbalances in the socio-economic system. Landlords wield power and thereby direct society.
- Fosters confrontation instead of *iḥsān* (benevolence, doing good in order to foster harmonious relationship).
- Idle persons and the rich thrive on the labour of the poor.
- Tenants are demoralised and feel insecure and tend to neglect necessary improvements on the borrowed land, nor are they motivated to improve the yields.
- Money lending (absentee landlords) was encouraged which became another form of exploitation.

1.3.8.2. The Advantages of Cash Tenancy³⁹

- Many *fuqaha*' supported the hiring of land in return for cash. Rental is fixed, it is pre-determined cash rental as a contract for hire and without risks and uncertainties (*gharar*). The fixed rental was the value of the land for cultivation

³⁹ Haque, 1985; Huq (undated:15-16)

and was a small amount. In the case of crop failure, the fixed rental for the period was either returned to the tenant or the tenant did not pay if this was agreed upon. If the tenant did pay, the amount was so negligible that he was not inconvenienced.

- The tenant is encouraged to increase the yield.
- Created incentives for tenants to make permanent improvements to the land.

1.3.9. Eight Basic *Shari'ah* Rules regarding Private Ownership⁴⁰: -

- 1) Property must be used continuously.
- 2) *Zakāh* is payable (including *zakāh* on rentals) in proportion to the property owned.
- 3) The property must be used beneficially- cannot be concentrated in the hands of a privileged few. It must benefit the individual as well as society.⁴¹
- 4) The property must be used without causing any harm to others.
- 5) Property must be lawfully possessed.

⁴⁰ Mannan, 1987:89-98; Abe, 1987:36-7

⁴¹ *Qur'an* 2: 261-262, 272-5.

- 6) Property must be used in a balanced way, neither wastefully, nor miserly.⁴²
- 7) The owner must be able to secure due benefits for himself or herself. The owner is not, however, allowed to use the property to gain special favours from the government.
- 8) Property must be strictly subjected to the Islamic law of Inheritance.

In Summary, in an Islamic State, the rights of a private owner can be restricted by the *ummah* to maintain social justice. Prophet Muḥammad (Allāh bless him and grant him peace) started with persuasion and recommendation leading to obligations and duties, enforced by the power of the Islamic State. Ahmad (1991:21) states that by showing utmost concern for the welfare of the poor through eradication of absolute poverty and by keeping income and wealth inequalities within acceptable limits, the early Islamic period gave a practical demonstration of the implementation of the Islamic vision of a just socio-economic order.

The principles of *Al-Ijārah* or Contract for Hire developed within the context of a just socio-economic order, regulating the relationship between tenant and landlord.

⁴² *Qur'an*, 4:36-37; 17:29.

1.4. AL-IJĀRAH - HIRE OR LEASE CONTRACT

Al-ijārah refers to the contract of hire in Islamic Law. Johansen (1988:25, 27) defines it as a contract of tenancy, which is the most important legal institution that contributes towards transforming the possession (*tamlīk*) of arable lands into rent-yielding property. It is a contract used for various economic purposes, being a combination of formerly three separate transactions that was effected in the first century of Islam: the renting of real property (*kirā'*), the hiring of salaried labour (*ijārah*) and the reward for bringing back a fugitive slave from a distance of more than three days' journey⁴³ (*ju'l*).

The word *ijārah* is derived from the word *ajr* which means reward or remuneration (Doi, 1984:369); *ajr* or *ujrah*, means rental or salary (Johansen, 1988:25-6). The contract of *ijārah* is a bilateral contract and is an exchange of one commodity (temporary use of the *manfa'ah* or usufruct) for another (value, money, rental) that fits into the monetary economy of a market system (Johansen, 1988:26-7).

Hassan (1997) provides the following definition: *al-ijārah* is derived from *al-ajar* which means substitute, compensation, consideration, return or counter-value. *Al-ijārah* in Islamic Law means a contract of proposed and known

⁴³ Schacht (1982:159)

usufruct with a specified and lawful return or compensation for the effort or work that has been expended.

According to Usmani (2000:157), *ijārah* in Islamic Law is used in two different situations, labour and usufructs of assets and properties. In the case of labour, it refers to the employment of the services of a person. The employer (*mu'jir*, *mukārī*, *muktarī*) pays a salary (*ujrah*) to the employee (*ajīr*). The *ijārah* relating to leasing is the transfer of the usufruct by the lessor (*mu'jir*) of a particular property to a tenant (*musta'jir*) in exchange for rental (*ujrah*). The property or service hired is called *ma'jūr* (also *mu'jar*, *musta'jar*). Islamic scholars discuss both types of *ijārah*, labour and property, in detail and the set of rules for each one.

Nadwi (undated:5) defines *ijārah* as a basic necessity of human life in which there is an exchange of some benefits in return for payment. A person to a contract must be an adult (*bāligh*) and mentally competent being able to distinguish good from bad and benefit from harm ('*āqil*). If the property to be leased does not have a rental agreement or the period of lease is not fixed on the basis that the tenant will occupy the premises by effecting repairs, the parties will have to enter into an agreement of '*āriyah* (borrowed property; loan for use) and not *ijārah*.

Usufruct affords a temporary benefit and its specification includes rental, its nature and amount and the lessor must have full legal possessive ownership of the property to be rented out (Manzoor, 1999:53-4).

1.4.1. *Al-'Aqd* or Contract

Al-'aqd is a legally enforceable contract with mutual obligations (*'uqūd*). Its essential features are *ījāb* (offer), *qabūl* (acceptance), *'uqūd* (obligations) and consideration. Once an offer is accepted, a contract is concluded. The offer and acceptance as well rights and obligations must be agreed mutually and freely. An offer could be verbal (*bi-l-kalām*) or in writing (*bi-l-kitāb*) and could be communicated through a messenger (*rasūl*) or by conduct.

Regarding its withdrawal (*rujū'*), an offer can be withdrawn according to the Ḥanafī and Ḥanbalī jurists before it is accepted, during *majālis al-'aqd*, i.e. the period between the offer and its acceptance. They argue that based on equity the “offerer” should also have the option that the recipient has to either accept or reject. The Mālikī jurists hold the view that the person making the offer cannot withdraw his or her offer once it is communicated to the recipient because the offerer had the time and option before making the offer (Doi, 1984:357).

Any consideration which is *ḥarām* (forbidden by the *Sharī'ah*) or not possible to attain, renders a contract invalid. *Faḍl māl bilā 'iwād* (unjustified enrichment)

or receiving a monetary advantage without giving a counter-value is forbidden, based on a number of passages in the *Qur'ān* (Schacht, 1982:145), e.g., *ribā* (interest or usury)⁴⁴.

Ibn Taymīyah (1983:31-2, 144) said that Allāh prohibited the acquisition of property by wrongful means. Therefore, any contract that includes *ribā* (interest) or *maysir* (speculation or gambling, which is regulated by injustice, enmity and jealousy), is not permissible.

'*Uqūd* or obligations is an essential principle having a wider meaning than the common law term⁴⁵ and involve one's relationship with Allāh for His countless blessings. In the social context that is inseparably linked to one's spiritual nature, obligations include contracts (implied or explicit) of commerce, marriage, family life, the state, civil society and every public or private interaction. (Ali, 1946).

1.4.1.1. *Al-Māl* or the Legal Contract of Property

Māl or property is defined as something that can be held in use and beneficial at the time of need and includes its usufruct or *manfa'ah* such as rental from a

⁴⁴ "Those who eat *Ribā* (usury) will not stand (on the day of Resurrection) except like the standing of a person beaten by *Shaytān* (Satan) leading him to insanity. That is because they say : "Trading is only like *Ribā* (usury)," whereas Allāh has permitted trading and forbidden *Ribā* (usury)..." (*Qur'ān*, 2:275).

⁴⁵ "O you who believe! Fulfil (your) obligations.('*uqūd*)..." (*Qur'ān*, 5:1).

tenant (Doi, 1984:356). The usufruct is regarded as a thing, its use being a property of usufruct (Schacht, 1982:134).

1.4.1.2. Property Rights and Obligations

Property rights and the rights and obligations of tenants and landlords have always challenged and shaped the destiny of societies. Theorists, economists and politicians have provided postulates and directives. The *fuqahā'* or Muslim jurists played a pivotal role in directing the *ummah*. As specialists in *fiqh* or the science of Islamic jurisprudence, they provided in-depth analysis, debate and solutions in their quest to ensure justice and a just socio-economic and political order.

In the sphere of housing, the *fuqahā'* were equally meticulous and painstaking in bringing about a cohesive, realistic system of land tenure. The vibrant, expanding socio-economic conditions under Islamic rule and the jurists' systematic analysis, interpretation and juristic speculation brought about a synthesis between pre-Islamic and customary forms of tenancy. This resulted in dynamic, substantive land laws (Haque, 1985:3, 39, 52, 310-1).

1.4.2.1. Obligations or 'Uqūd⁴⁶

Obligations can be summarised as follows: -

1. The property must be acquired through *ḥalāl* means (permissible by the *Sharī'ah*)⁴⁷.
2. The property should be put to proper use. It should not be used wrongfully or wastefully. Allāh does not like those who are wasteful and extravagant, *al-musrifūn*⁴⁸.
3. Property under one's care must be administered with honesty, justice and care. It must be returned to its lawful owners when required to do so.⁴⁹
4. The sharing of one's wealth (e.g. derived from the income of the property) with those in need.⁵⁰

⁴⁶ Muslehuddin, 1975; Taymiya, 1983:93, 128, 145; Haque, 1985:11, 64; Islahi, 1996:81, 166-8.

⁴⁷ "O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent...." (*Qur'ān*, 4:29). Also *Qur'ān*, 2:188.

⁴⁸ *Qur'ān* 6:141.

⁴⁹ "And give not unto the foolish your property which Allāh has made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice. And try orphans (as regards their intelligence) until they reach the age of marriage; if then you find sound judgement in them, release their property to them, but consume it not wastefully, and hastily fearing that they should grow up, and whoever amongst guardians is rich, he should take no wages, but if he is poor, let him have for himself what is just and reasonable (according to his work). And when you release their property to them, take witness in their presence; and Allāh is All-sufficient in taking account." (*Qur'ān*, 4:5-6).

⁵⁰ "And in their properties there was the right of the beggar, and the *mahrūm* (the poor who does not ask the others)" (*Qur'ān*, 51:19). "And those in whose wealth there is a known right, For the beggar who asks, and for the unlucky who has lost his property and wealth (and his means of living has been straitened)" (*Qur'ān*, 70: 24 -5).

The State has the right to intervene when the need of the public demands urgent redress. The *Sharī'ah* recognises *milk* or ownership to be inviolable. An exclusive relationship between the owner and his or her property exists. The principle of *ḍārūrah* or social necessity, however, allows the State to place certain limits, provided the owner is justly compensated. All prohibited things become permissible due to necessity according to *Imām al-Ghazālī* (Muslehuddin, 1975:61).

Before discussing the principles of *ijārah* a brief reference to *muzāra'ah* transactions (lease of land for cultivation with produce as rental or crop-sharing) will provide a glimpse of how the *fuqahā'* dealt with issues. On the face of it there appeared to be conflicting interpretation regarding *muzāra'ah*, but different periods of socio-economic development led to different interpretations.

Imāms Abū Ḥanīfa, Awzā'ī and Ibn Ḥazm, for example, refused the use of *qiyās* or analogical interpretation regarding *aḥādīth* relating to *muzāra'ah*, while *Imāms* Abū Yūsuf, Aḥmad Ibn Ḥanbal, Ibn Abī Laylā and *Shaybānī* used it liberally. *Imām* Abū Ḥanīfa's rejection is based on the grounds that *muzāra'ah* and *musāqāt* are primitive forms of tenure and not a partnership. There is total consensus that hiring of a labourer (*ijārah*) is against a fixed and known

commodity which these two types of transactions are not (Haque, 1985:312-313).

As for *musāqāt* (crop-sharing contract over the lease of a plantation; lease of fruit tree or orchard for irrigating for a certain share of the fruit), *Imām Mālik* considered it permissible. He based his theory on the customary practice of Madīnah, the *Sunnah* (practice) of Prophet Muḥammad (Allāh bless him and grant him peace) the principles of *ḍārūrah* (reasonable social necessity), *qiyās* (analogy) and *ijmā‘* (consensus). He rejects *muzāra‘ah* of the bare land because a tenant cannot associate his or her labour in a definite and certain manner (*thābit*) and it is therefore considered *gharar* or risk-transaction. *Imām Abū Ḥanīfa* also rejects *musāqāt* on similar grounds. However, *Imām Mālik* allows *musāqāt* lease of date palms, vineyards, olives and similar fruit trees, the substances of which are already existing and of grains that have already sprouted and have grown strong before the contract; the landlord is unable to irrigate and work the land. If the fruit trees with the fruits were given to a person, it would not be *musāqāt* but *ijārah* or the hiring of a person for wages. (Haque, 1985:314-22, 323-24).

According to *Imām Mālik*, *ijārah* was therefore valid only in respect of an exchange of a commodity (*mubādalah*) that was certain, specified in clear terms before the actual transaction and mutually agreed by the contracting parties.

ijārah was a sale (*bai'*) whereby the labourer (*'āmil*) exchanged his labour for *ujrah* (hire price) provided the *ujrah* is known precisely and fixed definitely. *Imām Shāfi'ī* also rejects *muzāra'ah* contract but considers *musāqāt* valid in two instances: date palms and vineyards. He is of the view that Prophet Muḥammad (Allāh bless him and grant him peace) contracted only in these two types of species. *Imāms* Abū Yūsuf and Shaybānī hold the view that the principles of *muḍārabah* or partnership provided the basis for allowing *muzāra'ah*, *musāqāt* and *kirā' al-'arḍ* (lease of land). In *muḍārabah*, one party provides the capital and the other party (employee) shares the profit. The loss is borne by the capital owner or investing party (Haque, 1985:14, 314, 331-34).

Ibn Taymīyah (1983:40) considered *muzāra'ah* to be permissible and argued that the *aḥādīth* prohibiting it were not meant to be absolute. In fact, Prophet Muḥammad (Allāh bless him and grant him peace) himself entered into a contract of *muzāra'ah*. *Muzāra'ah*, *muḍārabah* and *musāqāt* were based on equity and not on risk or gambling (*maysir*). For example, Rāfi' Ibn Khadij narrated that they worked on farms more than anybody else in Madīnah. They used to rent the land at the yield of specific delimited portion of it to be given to the landlord. Sometimes, the vegetation of that portion was affected by blights, etc., while the rest remained safe and vice versa, so Prophet Muḥammad (Allāh bless him and grant him peace) forbade this practice. At that time gold and silver were not used (for renting the land) (Bukhari, Vol. III, 37:7:520).

The prohibition therefore related to when one party to the contract of crop-sharing rented land on condition that he or she was entitled to a specific quantity of produce plus a fixed quantity grown in certain specific areas. Prophet Muḥammad's (Allāh bless him and grant him peace) disapproval of this practice was to prevent injustice against the tenant or labourer. *Imām* Ibn Taymīyah (1983:40) is of the view that Prophet Muḥammad (Allāh bless him and grant him peace) prohibited this type of transaction (*mukhābarah*, i.e. a lease of land against a certain part of a produce) and such stipulations were void because this would not be based on equity.

Thus, the early *fuqahā'* considered *dhimmī* serf-tenants and sharecroppers who represented the majority of the population and paid revenue to the Islamic state, as individuals in their own rights. These tenants entered into legal contracts (*'aqd*) resulting in reciprocal rights and obligations between tenant and landlord. Various categories of tenants (e.g. serfs, tillers) were recognised as free tenants with full rights and obligations. According to Mustafa & Askari (1988:121), the majority of opinion outlaws certain forms of *muzāra'ah* (lease of "white" or bare land for cultivation with produce as rent; crop-sharing) and *musāqāt* (lease of fruit tree or orchard for irrigating, fecundating and protecting fruit tress for a certain share of the fruit) even among those who approve of crop-sharing in general. It is unlawful when the landlord reserves for himself the output of a more fertile area to be included in his share. It is also unlawful when the landlord specifies that he

should first receive a certain amount and then share the rest of the output with the cultivator on a percentage basis.

1.4.2.2. Essential Aspects of a Contract⁵¹

The following are essential elements of a contract according to Ḥanafī literature of the Mumlūk and Ottoman periods regarding tax and rental, valid and void contracts and subleases:

1.4.2.2.1. Tax and Rental

- *Musammā* (named, specified) or contractual fixed rental: partners to a contract agree or consent to a fixed rental.

- *Ajr al-mithl* (also, *ujrah al-mithl*): or “fair or market rental” determined by a judge. The *fuqahā’* or jurists developed this concept independent of the intention of the contracting parties. The “fair rental” was market-related, i.e. the average market level of rentals that would compare with similar quality and size. Regarding *waqf* land, the *Qādī* (judge) or the owner could dissolve the *ijārah* contract when it fell below the “fair rental” to the extent that it affected the interest of the *waqf* property. The property can be re-hired at a “fair rental”.

⁵¹ Johansen, 1988:25-43

- Ḥanafi jurists also attempted to restrict the period of tenancy in respect of *waqf* and big estates.

1.4.2.2.2. Valid Contracts

For a contract to be valid it must contain the following elements:-

- The size, quality and the quantity of the rented fields.
- Specifying the actual use of the arable lands.
- Duration of the tenancy.
- Amount of rental.
- Charges must not favour either the landlord or the tenant.

1.4.2.2.3. Voidable Contract

A voidable contract (*ijārah fāsīdah*) becomes validated if the tenant puts the land to actual use. The tenant is obliged to pay the rental that was contractually fixed.

If the rental was not stipulated, then the tenant pays a “fair rental” that is ascertained from the general market level of rentals. In this way, the economic interest of the tenant is protected.

1.4.2.2.4. Unauthorised Use

If a person uses a landed property without authorisation (*ghasb*), he or she is not obliged to pay rental. However, the tenant has to compensate the owner for the harm (*nuqsān*) or diminution of the land value and has to return the wrongfully appropriated property. The compensation for the harm inflicted on the land could be higher than *kharāj*.

1.4.2.2.5. Subleasing

A tenant may sublease, and there may be several subtenants, as long as the first or principal tenant clearly differentiates his or her rental paid to the landlord from the amount of the subtenant’s rental. The subtenant enjoys the same rights as the first or principal tenant. Through this process of social and economic integration, tenants and landlords realise profits in different proportion from the same land.

From the 11th century, there was a shift in the legal doctrines regarding rental and tenancy relationships with the contractual elements becoming less important. Johansen (1988:32, 36) states that one of the main sources for the obligation to

pay rental becomes the 'unauthorised use' of landed property, and the tenancy relationship of the peasants is described more and more in terms of the unequal and hierarchical relationship between tenant and lessor that, in Ḥanafite law, characterises the *muzāra'ah*, the contract of crop-sharing.

1.4.3. Collective *Fai'* and the Contract of Khaybar

Prophet Muḥammad (Allāh bless him and grant him peace) entered into various contracts including economic contracts. At the time of Prophet Muḥammad (Allāh bless him and grant him peace) and *Khalīfah* 'Umar, all conquered agricultural land belonged to the *ummah*. Individual Muslims had usufructory rights only. The general land tenure policy was a collective ownership vested with the *ummah* for the benefit of all under Prophet Muḥammad's (Allāh bless him and grant him peace) administration (Haque, 1985:34-5). However, Prophet Muḥammad (Allāh bless him and grant him peace) also demonstrated *ad hoc* economic solutions in response to social necessity. The conquest of *Khaybar* is a case in point that led to the following developments (Abū Yūsuf, 1969:15-6, 56-8, 115-7; Haque, 1985:19, 52, 55-6, 137-8, 287; Ibn Taymiya, 1983:40, 44.):-

The *Khaybarite* Jews entered into an agreement (*'ahd*) and were granted usufructory rights. Those Muslims who helped themselves to the fruits and vegetables without the permission of the *mu'āhadīn* (those Jews who entered into an agreement) had violated their rights according to Prophet Muḥammad

(Allāh bless him and grant him peace). The Jews as semi-serf tenants were granted inviolable rights to their property.

Ibn ‘Umar narrated that *Khalīfah* ‘Umar expelled the Jews and the Christians from Ḥijāz. When Prophet Muḥammad (Allāh bless him and grant him peace) had conquered Khaybar, he wanted to expel the Jews from it, as its land became the property of Allāh, His Apostle and the Muslims. The Jews requested Prophet Muḥammad (Allāh bless him and grant him peace) to let them stay there on the condition that they would do the labour and get half of the fruits. Prophet Muḥammad (Allāh bless him and grant him peace) allowed them to stay as long as he (and the Islamic State) wished. So the Jews continued living there until *Khalīfah* ‘Umar forced them to go towards Talma and Arih (Bukhāri, Vol. III, 37:17:531).

Abū Yūsuf (1969:103) quotes a ḥadīth from Muḥammad b. ‘Abd al-Raḥmān b. Abī Laylā-al-Ḥakm b. Uṭayba-Miqsam-‘Abd Allāh b. al-‘Abbās that when Prophet Muḥammad (Allāh bless him and grant him peace) captured Khaybar, its owners asked him to leave their lands in their hands because they were more experienced in its cultivation. He agreed on condition that they give him half of its crops. When he sent ‘Abd Allāh b. Rawāḥa to collect it they presented him with gifts which he refused, saying that the Prophet did not send him to take away all the crops but only to divide them between them and the Prophet. He

proposed that he should deal with all the crops and then weigh for them their half or that they should do it and give him the share of the Prophet. Thereupon they said that on such just treatment Heaven and Earth were based.

1.4.4. *Al-ijārah or Hiring or Leasing*

Al-ijārah or leasing in Islam differed from customary and primitive systems. For instance, there must be consent between the contracting parties (*Qur'ān*, 4:29) and absolute knowledge of the contracted usufruct (*Qur'ān*, 28:26). The pre-Islamic tenancy was arbitrary, tenants had no rights and obligations, there was no legal contract (*'aqd*), no offer (*ijāb*) and acceptance (*qabūl*). Risk (*gharar*) injustice (*ẓulm*) and exploitation were common features (Haque, 1985:69.)

In Islam, Allāh, in principle, is the absolute owner and He entrusts man, society and state with certain obligations. Rights are therefore assigned to each obligation, enabling the individual, society and state to discharge its obligations. Islahi (1996:111) explains the inter-connection of society, individual and the State. Society in the Islamic view, he states, is there for the sake of the individuals in it. It emerges out of the natural needs of the individuals, and it grows on their initiative. Society performs its functions through the state and other social institutions. Thus, the individual, the society and the state each have a claim on property rights in respect of the roles assigned to them. The property

rights of these three agents should not come into conflict with one another, nor should the exercise of those rights by any one of these agents, jeopardise the exercise of their rights by others. The Islamic State has a jurisdiction over the rights of individuals. As it is the embodiment of Allāh's vicegerency on earth and representative of the people, the individuals should not begrudge the state reasonable intervention necessitated by Islamic considerations and directed towards the realisation of the collective goals laid down by the *Shari'ah*.

In the case of *ijārah* anything that is *fāsid* (corrupt) or forbidden by the *Shari'ah*, is not allowed. The property must be owned without violating the *Shari'ah* -it must be owned by Islamic permissible means and put to proper use (Ahmed, 1991).

1.4.4.1. Cash and Economic Rental

Economic rental of land is defined by Afzal-ur-Rahman (1975:106-113) as the surplus (of a piece of land left) over (after deducting) the cost of cultivation. The rental paid by the tenant to the landowner though, is the amount of produce or cash. The principles in determining such a rental by an Islamic State includes three Qur'anic injunctions: justice, benevolence and equity. The rental levied on the tenant-cultivators should be in accordance to their ability to pay (justice). Rentals should be collected when the tenants have produced the crops over and above their needs (benevolence). The rental amount should be fixed without

harming the interest of either the tenant or the landowner (equity). The Islamic State has to consider the following factors in determining the rental: (i) production of the land, (ii) the tenant and his or her welfare, and (iii) cost of cultivation before determining the rental of the land.

Two opposing views regarding the hiring property for cash rental dominated the Muslim world from the time of *Imām* Abū Ḥanīfa and other classical jurists. Both views regarding *ijārah* or lease of land for cash or kind were presented with convincing arguments based on *aḥādīth*. *Imām* Ibn Taymīyah (1983:40) reconciled these two views, arguing that Prophet Muḥammad (Allāh bless him and grant him peace) prohibited *ijārah* that were based on primitive tenure systems which resulted in the exploitation of the tenant and the poor. The landlords' conduct was not based on the principle of equity or justice and they therefore deprived the poor sharecroppers of richer crops, which they reserved for themselves. Prophet Muḥammad (Allāh bless him and grant him peace) prohibited the hiring of land in return for the produce of some particular part of the land that was the primitive customs of unscrupulous landlords. On the other hand, *ijārah* was permitted in exchange for cash. There are several references in the *Qur'ān*⁵² and *aḥādīth* that *ijārah* was practised during the pre-Islamic period as well during the time of the Prophet (Hassan, 1997).

⁵² *Qur'ān*, 2:233; 28:26-27; 18:77; 43:32

During the *Khilāfah* of Abū Bakr, ‘Umar, ‘Alī and ‘Umar Ibn ‘Abdūl ‘Azīz the principles of rent determination was based on the practice of Prophet Muḥammad (Allāh bless him and grant him peace). Different rates of rental were levied on different land in accordance with the conditions and requirements of the region. Islam therefore introduced an improved system of rent collection and abolished the Roman and Persian rent regulations. These regulations very extremely oppressive that fixed rentals and land revenue the tenant was also expected to pay, at very high levels. The capital costs and costs required for labour and improvement on land was passed onto the tenant. Tenants who defaulted were punished severely (Afzal-ur-Rahman, 1975).

1.4.4.2. Basic Rules of Leasing

Some of the basic rules of leasing include the following (Usmani, 2000:157-181; Tyser et al, 1980:65-6; Nadwi (undated:13-7): -

- (1) The owner, who retains ownership rights in his or her property, transfers the *manfa'ah* or usufruct to a tenant for an agreed period, at an agreed rental.

- (2) Like sale (*bai'*) a proposal and acceptance leads to a conclusion of a contract of hire (Tyser et al, 1980:63). Words are used in the past or present tense because a contract cannot be concluded in the

future tense, e.g., the landlord states: “I have let or given for rent” or the tenant states: “I have accepted or taken for rent”.

- (3) For the lease to be valid, the lease period must be explicit and the rental must be determined at the time of the contract.
- (4) No unilateral rental increase is permissible, this would render the agreement void (Usmani, 2000:162).
- (5) If the landlord attempts to increase the rental unilaterally at the expiry of the lease, silence is regarded as consent. The landlord may state that the rental is to be increased by a certain amount and if the tenant consents to pay the increase, he or she could continue to occupy the property at the new rental. If the tenant does not consent to the increase, he or she should vacate the property.

It is necessary for the tenant who does not consent to the increase to decline or refuse the increase expressly. In this instance, the tenant must continue to pay the old rental. Where the tenant makes a counter offer and the landlord is silent, the tenant is obliged to pay the new rental he or she proposed (Tyser et al, 1980:64).

- (6) The rental must be determined for the entire period of the lease, with different amounts for different phases of the lease period to be stipulated at the time of effecting a lease. Nadwi (undated:8) says that the rental is payable once the tenant has taken delivery of the asset. The tenant is not liable for rental during the period of delay on the part of the owner in delivering the asset. He also states that a tenant who does not use the property leased to him or her, is obliged to pay the rental.
- (7) Liabilities relating to ownership vests with the lessor while his or her tenant is required to bear the liabilities in respect of the use of the property.
- (8) If an express condition exists, the tenant is obliged to use the leased property for the purpose specified in the lease agreement or for any normal purpose in the absence of a specified condition. The tenant cannot use the property for any abnormal purpose unless the lessor agrees in express terms for such abnormal use. Mufti Muhammad Madani says that it is permissible for a tenant to use a residential property as he or she pleases, as long as it is not use for business activities that would cause harm to the property or a nuisance to the neighbourhood (Elias, 2001:49). In the absence of a declaration for

what purpose the property is to be used, the tenant can use it according to the custom or use.

- (9) During the currency of the lease, the owner bears the risk for any damage caused to the property or any loss suffered through factors beyond the control of the tenant. The tenant is liable for damage caused to the property or any loss caused as a result of his or her negligence or misuse. Nadwi (undated:15) is of the view that the landlord has the option to cancel the lease when a tenant has caused damage to the property or caused it to become unkempt and to institute ejectment proceedings should the tenant fail to vacate the property in such an instance.
- (10) The owner is responsible for the payment of property rates. The tenant is responsible for the payment of costs of water and electricity consumption.
- (11) In the case of joint ownership, the rental income from the whole property has to be distributed proportionately between the co-owners. However, a joint owner can lease his or her proportionate share of the property to a co-owner only. The *Mejelle* states that leasing to a third person by two owners is permissible provided that

there is agreement between the owners to do so (Tyser et al, 1980:63).

(12) Regarding the notice to vacate, Nadwi (undated:9) says that this must be specified in the lease contract. In the absence of such a stipulation, the agreement is for the period for which the rental is paid. In the case where the rental was agreed for one month, the tenancy period is assumed to be for one month. According to the *Mejelle* rental is paid at the end of (each phase) of a fixed lease, i.e. in the case of a monthly lease, rental is to be paid at the end of each month and at the end of the year if it is a yearly lease (Tyser et al, 1980:69).

(13) Regarding “goodwill” or “key money” (“*pagri*”) is not permissible. In fact, both the tenant and landlord are guilty of a forbidden act (*ḥarām*). The tenant is guilty of bribery and the landlord of oppression. “Goodwill” is blatant extortion and this is forbidden by the Qur’anic principle that a person is not to oppress or be oppressed and Prophet Muḥammad’s (Allāh bless him and grant him peace) directive that a harm is neither to be accepted nor caused.

- (14) Where the tenant is required to vacate the premises but unable to do so because of a particular situation, e.g. the tenant is unable to find alternate accommodation or finds one at a higher rental, Nadwi (undated:13) states that the landlord should allow the tenant respite because Allāh is pleased with a person who grants respite.
- (15) The landlord is responsible for repairs and maintenance because he is required to ensure that the tenant occupies the property that is habitable and has undisturbed use of it. Should the landlord fail to effect the necessary repairs then the tenant has the right to institute legal action. However, the tenant has no claim, according to Nadwi (undated:15) against the landlord if the property was accepted in a bad condition nor can the tenant in such an instance compel the landlord to carry out the repairs. Mufti Muhammad Madani states that the tenant has the right to cancel a lease should a problem occur that hampers the living conditions (Elias, 2001:50). Nawawi gives a similar ruling from the Shāfi'ī school that the landlord's failure to urgently carry out the repairs to restore habitability, allows the tenant to cancel the agreement (van den Berg & Howard, 1977:221).

- (16) According to Nadwi (undated:14) a tenant can allow others to occupy the property with him, unless the landlord specifically states that only the tenant can occupy the property.
- (17) In urban tenancy, a tenant requires the landlord's permission to keep animals on the property (Nadwi, undated:14).
- (18) On the question of subleasing, Nadwi (undated:16) maintains a tenant who hired the property for his or her own use cannot rent it out to someone else. Usmani (2000:176) on the other hand considers subleasing permissible with the express permission of the landlord where the property is used differently by different users. Opinions among classical jurists differ whether the tenant can charge the subtenant a higher rental than the one paid to the principal landlord.

Usmani (2000:177) considers *Imām* Abū Ḥanīfa's prohibition as a precautionary directive. While other jurists such as *Imām* Shāfi'ī and Ḥanbalī allow the sublessor to enjoy the surplus received from the sublessee. Usmani is of the view that in the case of need (on the part of the tenant) a higher rental is permissible since there is no express prohibition in the *Qur'ān* or *Sunnah*.

The Shāfi'ī ruling according to Nawawi is that the tenant can sublease, provided the subtenant does not use the property differently than the manner of use by principal tenant (van den Berg & Howard, 1977:222).

- (19) The change of ownership to a third party places the new owner into the same relationship with the tenant that existed with the previous owner (Usmani, 2000:177).

1.4.4.2. Valid Conditions of a Contract

The following are necessary conditions for the validity of a contract of lease or hire according to *Hedaya* (1957:490-1, 495,497-8), Johansen (1988:25, 26, 30, 38-9) and Doi (1984:357-358): -

- (i) The tenant and landlord as contracting parties must be legally capable to contract.
- (ii) The premises to be rented must be identified. There must be specific reference and knowledge of both the usufruct and the hire.
- (iii) The rental must be determined and specified.

- (iv) The period of hire must be known - short or long term. Long term hire signifies a period more than three years.
- (v) The rental is payable by a tenant upon taking possession of the property even if he or she does not take occupation.
- (vi) If the contract does not specify when rental is to be tendered then rental is payable on a daily basis if so demanded by the landlord.
- (vii) The purpose of hire or residential premises signifies that the tenant would use the premises for residential purpose. The tenant may also conduct business except if the nature of business may cause damage to the premises or if the landlord specifically prohibits business or stipulates the type of business permitted.
- (viii) In the case of lease of land, the tenant must restore the land to its original state at the expiration of the lease. The tenant is also obliged to remove all trees and fixtures (e.g. buildings) to ensure the land is restored to its original state so that the landlord has no claim.

1.4.4.3. Invalid Conditions

Invalid conditions render a contract of lease invalid. A lease is invalid if, for example, the lease does not specify to what purpose the tenant is to use the land or the type of cultivation. The contract ceases if the tenant is evicted. The contract is invalidated if the tenant or landlord deviates from the restrictive conditions.

1.4.4.4. Rights and Obligations

The landlord is obliged to ensure that the premises is habitable, fit for human habitation. The tenant can cancel the lease if the premises is found to be uninhabitable. However, if the tenant continues to occupy the premises in spite of the apparent defects, the tenant becomes liable for full rental because he or she assented to the defects.

1.4.4.5. Verbal Agreement

Should there be a dispute regarding the terms and conditions of a verbal agreement and such disputes cannot be resolved, both the tenant and landlord will make an oath to annul the *ijārah* contract.

1.4.4.6. *Taḥkim*-Arbitration⁵³

In pre-Islamic Arabia, there was no organised political and judicial system. It was known as the Age of Ignorance (*al-Ayyām al-Jāhilīyah*). However, some

⁵³ Also known as an Arbitration Contract. It is a form of contract in which the parties agree to settle any dispute through Arbitration (Doi, 1984:371).

semblance of authority, protection and tribal affiliation existed. In the case of disputes regarding property rights or other matters, except homicide, people resorted to arbitration (Schacht, 1982:7). The *ḥakam* or arbitrator was unbiased, from an influential family noted for its competency in arbitration and personal qualities.

The ground rules between the parties allowed them to appoint a *ḥakam* of their choice, agree on the cause of action and the questions to be put for arbitration. The decision of the *ḥakam* was binding although not “legally” enforceable. To ensure that his decision would be accepted, the *ḥakam*’s pre-condition was a security before arbitration either of property or of hostage. Islam incorporated arbitration but gave it the force of law under the *Shari’ah*. Parties to a contract therefore could agree to submit themselves to arbitration in the event of a dispute or disagreement. An arbitrator or a *ḥakam* was appointed to arbitrate between the parties in order to reach settlement.

1.4.4.7. Termination of Contract

Parties can mutually agree on the terms in the contract to terminate it or a contract terminates because of its nature. According to Usmani (2000:173), the landlord cannot unilaterally terminate a lease unless the tenant contravenes any term of the agreement. The tenant is obliged to pay rental up to the date of termination and the landlord can also ask for compensation in the event of loss

caused by the tenant's misuse or negligence. The *Mejelle* records that a lease is terminated when its continuation is impossible due to a valid impediment (Tyser et al, 1980:65).

Bukhari (Vol. III, 37:17) records that if the owner of a land says to the tenant that he will let the tenant utilise the land as long as Allāh permits and does not mention a specific time for the expiration of the lease, then the lease can be continued according to the approval of both the parties.

In Summary, the *fuqahā'* (jurists) were meticulous about ensuring justice and equity regarding the rights and obligations of tenants and landlords. Even though they held differing views, their main objective was to ensure that the rules of law, guidelines and precepts conformed to the fundamental principles of the *Qur'ān* and *Sunnah* (practice) of Prophet Muḥammad (Allāh bless him and grant him peace). The differences of opinions themselves were indicative of the flexibility allowed by the *Sharī'ah*. Throughout the periods of Islamic governance, there were interpretations by the jurists to contextualise the *Sharī'ah* principles to adapt the changing needs of society.

CHAPTER 2:

HOUSING, LAND TENURE AND TENANT-LANDLORD RELATIONSHIP IN SOUTH AFRICA

“In a situation where accommodation itself is scarce, and the person providing it makes all the decisions, choice is a theoretical luxury only, and many people are forced to accept crumbling accommodation, insanitary conditions, overcrowding and high rents. Even such legal restrictions on the landlord as minimum building standards, overcrowding regulations, public health legislation and the Rents Acts do not alter this situation...”

Bailey, R (1973:92)

2.1. A CRITICAL ANALYSIS OF LAND AND HOUSING POLICY, LEGISLATION AND THE PROVISION OF PUBLIC AND RENTAL HOUSING IN SOUTH AFRICA

This section examines the government’s land tenure and rental housing policy within the context of its new legislative and administrative framework. The government’s capacity to deliver housing, the speed of delivery and partnership with a range of relevant role-players in providing housing would impact on landlord-tenant relationship in respect of increasing home ownership and reducing the number of tenants. On the other hand, renting is a viable option for certain tenants and the provision of public rental housing or through public-private partnership is another aspect the government ought to explore.

2.1.1. Housing Policy, Legislation and Transformation

The first democratic elections in South Africa and the new constitution ushered in a surge of change in all spheres of South African society, including government organisations. The National Ministry of Housing was faced with the enormous challenge of transforming and democratising housing legislation, policy and administrative framework. It had to develop a new housing subsidy policy to replace six disparate, different subsidy schemes that was racist, divisive and inequitable. It had to replace twelve racially based housing departments and a myriad of legislation. The previous subsidy scheme resulted in blacks being prejudiced and forced to overcrowd while white residential areas were inappropriately subsidised, with so-called Indian and coloured areas enjoying fiscal over-commitment (Adler & Oelofse, 1996:109).

The aim of the National Ministry of Housing was to speed up delivery by addressing the housing backlog, ensuring a “reasonable” standard for infrastructure, quality and size of housing and making subsidy available to the poor and the poorest of the poor. The Ministry therefore introduced a single housing legislation, the Housing Act, No. 107 of 1999, which was promulgated in April 1998. The Ministry also phased out the housing subsidy granted under the previous housing legislation and replaced it with a new subsidy scheme, introduced the National Housing Code and consumer protection measures, among other fundamental changes.

Together with the Ministry of Land Affairs a plethora of land and property laws and amendments took place, e.g. the Restitution of Land Rights Act 22 of 1994, Land Reform (Labour Tenants) Act 3 of 1996, the Extension of Security Tenure Act 62 of 1997, Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998, Communal Property Associations Act 28 of 1996 and Interim Protection of Informal Land Rights Act 31 of 1996.

2.1.1.1. General positive aspects of transformation

Some of the general positive aspects from the Housing Ministry's assessment include the following: -

- The Housing Act laid down human rights principles relating to housing, *inter alia*,
 - access to adequate, affordable housing
 - integrated housing development

- A focused approach to developing strategies and an equitable allocation of funds.

- Established the foundation for facilitating a sustainable housing development process by defining the roles and responsibilities of all spheres of government, private sector and citizens.

- In its review of its performance (Annual Report 1998) the Ministry of Housing recorded: -
 - Reasonable successes in improving the rate of delivery and expenditure. In 1998 the monthly housing average expenditure was R266, 1 million in comparison to R84, 9 million for 1994 / 1995.
 - Provincial fund allocations were more responsive and an efficient financial management system was in place.
 - Roll over reduction was unprecedented.
 - Streamlining institutional framework for policy making and implementation.
 - Improved co-ordination of housing development in all levels of government.

2.1.1.2. Negative aspects of transformation

Some of the negative aspects (Housing Ministry's assessment) include the following:-

- Need to be more responsive to the varied needs of the highly mobile job seeking populace

- Need to improve quality and size of housing
- Eliminate inefficiency in the administrative systems
- Housing delivery need to be sensitive to cultural diversity, requirements and lifestyles of the beneficiaries
- Widen tenure options
- Eliminate disputes between civil society and local government by defining their roles
- Government is still the sole key player in the provision of low cost housing (only 16% was credit linked; 84% subsidy-only funded)

2.1.1.3. Critical Assessment

According to Husy (2000:2-3), Mngxitama, (2001:1, 4) and critiques from non-governmental and community organisations, the government made very little progress in the sphere of housing. Providing housing will take much longer than the government's ambitious 10 year "housing the nation" programme. Housing is required for at least 7,5 million people according to government estimates with the pace of delivery declining from 300 000 units in 1997 to 200 000 in

1998 (Streek, 2001). According to the National Housing Finance Corporation, 3 million people are homeless and 8 million live in shacks.

If one were to categorise the changes in the housing sphere, the first “integrated” phase started just prior to the first democratic elections (1994) going through a learning curve into the next elections (1999). The period 1999 onwards could be considered the introduction of the second phase, “the rethink on housing policy” (Paton, 1999). The people’s housing process was to receive vigorous support to speed up access to housing, especially for the poorest of the poor (Department of Housing, 1998). In addition, rural and rental housing policy was to receive focussed attention (Paton, 1999; Annual Report, 1998).

However, the National Housing Ministry ignored the need for rental accommodation even though there is a large number of low-income households with two different sets of housing needs – permanent and temporary. There are those who prefer ownership in rural areas but prefer to rent in urban areas because of the large scale circulatory migration in respect of employment (Dewar, 1997: 83-91). While the Rental Housing Act 50 of 1999 was enacted to regulate the relationship between landlord and tenant, large low-income households need affordable rental accommodation that could be made available though the creation of more public rental stock.

Private sector and NGOs (non-governmental organisations) could play a more meaningful role in housing delivery. There is therefore a need to provide a “soft” loan, with low interest (ideally, with no interest at all) to first time homeowners in addition to the one-off capital subsidy. This loan can be used to build a first additional room that could be let out to generate income for the first time homeowner (Dewar, 1997: 83-91).

The government should also look at NGO’s playing an active role in housing delivery by providing: -

- (a) Intensive training to NGO’s to manage the housing stock.

- (b) Long-term low interest loans or interest-free loans. Local authorities can also through partnership with NGO’s cede part of their housing stock. In this way the Government would provide subsidy to a limited number of housing associations rather than a large number of individual households.

Rural housing policy is long overdue to intervene in the lives of people in rural areas. The majority of the poorest of the poor live in rural areas and housing is the single biggest lifetime investment made by rural families (Rubenstein, Otten & Dolny, 1996:249). NGOs have played a positive role in upgrading informal settlements and providing labour. They could continue to play a pivotal role in upgrading of informal settlements since conventional homes is socially and

technically impossible to provide in the short to medium term and not sustainable financially in the long term (McCarthy, Hindson and Oelofse, 1995).

The housing policy marginalised rural housing because it was underpinned by urban considerations. This, in spite of identifying and isolating rural housing needs, conditions and differences. Also, one cannot look at housing policy within an urban vs. rural context because of a number of factors that defy such a universal definition. The dynamics of rural areas include rural tenurial problems and institutional arrangements, among others, and therefore require urgent mechanisms to address the housing needs of rural communities.

Housing does not exist in isolation, its policy and delivery programme co-exists with other socio-economic factors. Economic growth, income distribution and employment being an integral part of the macro-economy are some of the factors that impact on housing and *vice-versa* (Kentridge, 1996:151-2). Housing delivery programmes must create employment opportunities, yet no solutions to job losses have emerged and job creation therefore remains elusive (Paton, 1999).

As for income distribution, this is still racially skewed (Kentridge, 1996:154) and therefore needs to be redistributed to lower income groups. This would significantly change the latent demand for housing into an effective demand. The rethink on housing policy (Paton, 1999) especially regarding incentives to

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get people to build their own homes, which in comparison to those built by contractors, would be bigger and better, may help in redressing inequality of: -

- the distribution of formal housing stock, and
- floor area per person.

People building their own homes would assist the delivery process and reduce the unequal distribution of housing which is racially skewed: “Whites” (20.8% of the population) hold 47.8% of housing stock while Africans (63% of the population) hold 33% (Kentridge, 1996:154). Bigger and better homes would also lead to increasing the floor area per person. If one were to use the PWV¹ region as a comparison to the international mean of 18m² of floor area per person, then the average mean for Africans is 9m² (formal housing) and 4m² (informal housing) compared to whites who enjoy 33m².

The need for rental accommodation in public and private sector housing is crucial to South Africa. Renting is an option that cannot be “wished away.” In this regard, the Rental Housing Act, 1999, it is envisaged, would not only regulate the relationship between landlord and tenant but also stimulate the rental market. The rental housing policy with option to buy in the public sector would be another catalyst (Paton, 1999).

¹ Pretoria, Witwatersrand, Vereneging areas in Gauteng

2.2. TENURE AND TENANT-LANDLORD RELATIONSHIP IN SOUTH AFRICA

The government's housing programme initially excluded tenants who comprise 8,6 million people and who occupy about a third of the total housing stock. The number of ownership housing, which includes informal settlements, stood at approximately 6,9 million dwellings occupied by about 30 million people. It is estimated that 8 million people live in informal settlements.

2.2.1. Tenure in South Africa

Most tenants live in urban areas and according to the Central Statistical Services (1991) ninety six percent "Indians" were urbanised, 91% "whites", 83% "coloureds" and 42.7% Africans. According to the 1998 statistical information² the total households size was 4.4. Twenty two percent were tenants (rented), 74% owned their properties and 1.6% either did not specify whether they owned or rented the properties they occupied (see Table 2.1 below). However, of the 74% of the population who owned dwellings, these included 8 million people (20%) living in informal settlements.

² Statistics were specifically generated by the South African Central Statistical Services (CSS) upon request by the Organisation of Civic rights for a breakdown on types of dwelling and tenurial relationship (1998).

Table 2.1.

<i>Type of Tenure</i>		<i>No of dwellings</i>	<i>Approximate occupants</i>
Owned	formal	4,9 m	22 m
	informal settlement	1,8 m	8 m
Rented		1,9 m	8,6 m
Not specified		150 801	660 000

m = million

The total rental stock was approximately 1,9 million and ownership units, excluding informal residents totalled approximately 4,9 million.

The private sector landlords, local and provincial Governments provide rented accommodation. Private landlords include individual, shack and backyard landlords, single-headed household landlords and landladies; a single landlord owning several high rise buildings in more than one city and groups such as companies, close corporations and consortiums. Local and provincial governments provided the least number of rented accommodations.

The government's housing programme initially focussed on increasing ownership and did not look at renting as a viable option. To compound the hardships faced by tenants and the homeless, existing habitable housing stock is

being further reduced by property owners who are granted permission by local municipalities and even national government to demolish habitable dwellings or to convert them for non-residential use (offices, business premises). According to Battersby, managing director of Maxprop property agents in KwaZulu Natal there are plenty of willing tenants but estate agents are unable to meet the demand for rental housing and do not see the letting situation improving in the near future (Brennan, 2001).

Towards the end of 1996, local governments (especially in the Durban Metropolitan Area) introduced a policy to sell all its rented accommodation to long-standing tenants. This policy was to decentralise housing delivery and to speed up delivery where local authorities had the capacity to do so. This policy augured well for those who needed security of tenure by way of ownership but scrapping the waiting list meant depriving many, who are living in overcrowded conditions or are homeless, of the opportunity of renting public accommodation. For the millions of tenants, the present scenario is a bleak one since the new government has inherited the “sins” of apartheid regarding land and housing and a tenant-landlord law that was fundamentally feudalistic.

A large number of landlords in the inner cities are Muslims, owners of many high rise buildings. Property in several cities (e.g. Durban, Pietermaritzburg, Port Elizabeth, Cape Town and Johannesburg) belong to single landlords whose tenanted accommodation are neglected and who show little or no concern about

the conditions of their property, less still about their tenants. This study hopes to provide Islamic guidelines to tenants and landlords to improve their relationship.

2.2.2. Categories of Tenants

Most tenants in inner cities live in high-rise buildings and others rent houses, garages and outbuildings in suburbs, townships and rural areas. Private landlords therefore constitute the most “powerful bloc” and determine the “rental market” in the presence of a critical housing shortage. Tenants are “fleeced” by exorbitant rentals, are charged key-money (premium) of up to R10 000.00, which is not receipted and is non-refundable). “Smaller” landlords who rent out their individual dwellings, e.g. flats owned through sectional title are a small group that are exceptions to the norm. The culture of non-payment used as a political weapon against the previous apartheid government has recently affected the private rental accommodation, particularly “small” landlords. Tenants refuse to pay rentals, this in turn has prevented “small” landlords from paying levies. Consequently, several buildings are deteriorating because essential services are disconnected. This in turn has contributed to the rapid decay of inner cities (Mohamed, 2000b).

The official statistics on the number of rental accommodation excludes information of tenants living in backyards, shack settlements and those sharing with other tenants. The shack settlement is home to about 8 million “squatters”. These are people, most of whom are economically active, have built shacks

(usually a small structure made of cardboard and plastic and / or wood. Durban has the largest shack settlements, estimated to be the second largest after Mexico City. There is insufficient information about tenants renting either shacks or land from owners or other tenants (Gilbert et al, 1997:136).

Tenants also share accommodation, sometimes occupying one section of the same dwelling with other tenants or even the owner. Outbuildings and garages provide backyard accommodation to tenants in townships and suburbs. The demand for accommodation in cities and close to cities are growing rapidly and landlords are renting out accommodation at extremely high rentals with sometimes as many as 15 families forced to live in rooms of a single house. There are also tenants who sublet and thereby act as the lessor (landlord) charging higher rentals than the one paid to the principal landlord.

All categories of tenants are vulnerable to some form of exploitation because of the critical housing shortage and the huge demand to live in the cities. Security of tenure is therefore a fundamental problem. These issues have been taken up quite vociferously by one civic organisation, highlighting the plight of tenants and lobbying for their rights.

2.2.3. Civic Organisations

Tenants are only now beginning to realise the power they wield and the emerging groups of tenants' committees have made small but significant progress in ensuring their rights. The democratisation and transformation of South Africa has however created a vacuum especially for tenants' movements. Civics and community-based NGOs have "disappeared", its leadership and members opting to serve on government structures and the private sector. The once powerful voice of the oppressed, championing the cause for human rights in the townships and cities no longer exist at grassroots level or if they do exist they need to change from protest and opposition mindset to creative engagement (Maharaj, 1996).

There are thousands of civic and NGO structures presently operating in the country but the focus is on education, ownership housing, developmental projects and various other issues but very few focus on tenants' issues. Human rights legal groups do not consider tenants rights as a human rights issue. On the other hand, the homeless organisations are very active in attempting to get the government to redress the high poverty level and provide basic needs including housing. The Organisation of Civic Rights (OCR) is perhaps the only tenants' rights "specialist" and was in the forefront for changes in landlord-tenant legislation.

2.2.4. Background to the OCR

The Durban Central Resident's Association changed its name to the Organisation of Civic Rights (OCR) in December 1993. It is a non-aligned, community based NGO and civic body. It is involved at grassroots level, primarily in tenants and housing rights matters and also runs a paralegal service. It was established by the people of Durban to redress conditions affecting the disadvantaged, the elderly, urban poor and those suffering as a result of unjust socio-economic conditions, laws and regulations.

2.2.4.1. Brief History

OCR started in April 1984, in the Warwick Avenue Triangle to oppose racists (Group Areas) evictions. Its practical response to people's needs led to its rapid growth. The organisation's area of activity includes the Durban central and surrounding areas. OCR is currently involved in tenants' rights, homeless, health and welfare, anti-crime programmes, the informal sector, research, neighbourhood self-help and general civic issues. OCR also provides a nation-wide advice service to tenants.

2.2.4.2. Aims and Objectives

The OCR was formed as a non-racial body and was mandated at its inception in April 1984 to:

- ◆ Oppose the forced removal of residents (formal and informal).
- ◆ Take up the rent issue on behalf of tenants experiencing hardships.
- ◆ Work generally in the interest of the community irrespective of race, religion, colour, gender or creed.
- ◆ Engage in civic, social and other related activities in the interest of the community.
- ◆ Inculcate a spirit of unity and solidarity among members of the community.
- ◆ Co-operate with any community-based organisation / group with similar aims and objectives.

2.2.4.3. Some of OCR's Achievements

In its 17-year history, the OCR has conducted many campaigns and has vigorously defended tenants' rights. Its achievements can be summarised as follows: -

- Successful representation at the rent board hearings.
- Organising, educating and empowering tenants, the homeless and residents.
- Stopped racist evictions.

- Various Supreme Court actions resulting in the reintroduction of rent boards nationally in 1986, interdicts against possible violent action against tenants; the reinstatement of disabled tenants; conversion of dwellings for non-residential use being stopped.
- Reintroduction of rent control in Warwick Avenue in 1993; demolition being stopped; arbitration between landlords and tenants.
- On-going discussions on tenants matters with the three tiers of government, civics and other relevant groups.
- Lobbying for a comprehensive legislation for tenants and landlords.

2.2.4.4. Tenants' Rights Strategies

Among its strategies, the OCR has used education, empowerment and mobilisation as means to improving the level of awareness of tenants' rights. Through research and publications, workshops, networking locally and internationally it has brought the problems and solutions facing tenants and landlords to the public domain.

2.2.4.5. Submissions to the Government

As mentioned previously, the government, particularly the National Ministry of Housing ignored the rights of tenants and the need for landlords to fulfil their obligations to maintain decent, safe, habitable dwellings. The OCR continued its

process of “dialogue” with the newly elected democratic Government. A major part of this process necessitated detailed submissions to inform the government that tenants urgently required legislation to ensure the right to fair treatment and improved bargaining power for themselves.

This resulted in four submissions to the governments between 1994 to 1996:

1. The Grassroots Perspective of Tenants’ Rights in South Africa.
2. Submission to the Constitutional Committee.
3. Preliminary Discussion Document on the Rights and Obligations of Tenants and Landlords.
4. Submission to the Ministry for Safety and Security and the South African Law Commission.

These documents aimed at securing basic rights for tenants at a time the government was concentrating on the need to protect the rights of property owners and providing housing for all. The government did not investigate the possibility that tenants may choose to rent or have no choice *but* to rent.

The “Grassroots Perspective” surveyed existing studies and trends in South Africa as well as “First World” countries such as the USA. Its critical analysis of an apartheid era revealed how the previous regime pandered to the demands

of landlords, shaping its rental housing policy to satisfy the privileged elite. This gave rise to “de-control” legislation whereby the government phased-out rent controlled dwellings in respect of certain age categories of dwellings to stimulate development in the private sector. Approximately twenty years later, no development took place in the private sector rental market. This document made recommendations to deal with specific instances of tenant abuse by unscrupulous landlords, rent control and the need for landlord-tenants’ courts.

The “Preliminary Discussion Document” was a follow up to the “Grassroots Perspective”. This document led to two meetings with the Director General of the department of National Housing and his deputy. During this period (towards the end of 1996) the department established a team of experts, which included international consultants to investigate tenant-landlord relationships. This team as well as the director general of national housing consulted extensively with the OCR and other stakeholders and undertook to provide a report to the OCR for its comment.

The “Preliminary Discussion Document” (September 1996) discussed strategies to overcome the many problems encountered daily by *bona fide* tenants and landlords. It argued the need for a comprehensive legislation that was urgently needed to regulate the rights and obligations of tenants and landlords; that would be sensitive and would contribute to the delicate human rights fabric in post apartheid era.

It recommended the need to reform the rent control legislation, rent boards and the rent control board by introducing at neighbourhood or municipal levels local forums to resolve complaints of owners and tenants of dwellings. These forums would use various options for settling a dispute by resorting to processes such as mediation, facilitation, arbitration, commissions of enquiry, fact-finding and conciliation.

The South African government on the other hand did not have a rental housing policy. The government had no tenure policy beyond the implicit goal of turning every tenant into an owner-occupier (Gilbert et al, 1997:144). The “Great” Botshabelo Housing Conference (1994) unveiled the most ambitious housing policy by the late Minister of National Housing, Joe Slovo, however, tenants were not even mentioned in this historic document (Mohamed, 1997).

The major emphasis by the National Housing Ministry was on owner-occupation at the exclusion of recognising or having an understanding of the reality of tenanted accommodation. Very little is known about rental accommodation, ironically in the presence of abundant housing literature. Landlords therefore seem to have “absolute” power and the “market” (“market rental”, “market forces”) is superficial and arbitrary, resulting in exorbitant rentals for dwellings that are in an abject state of disrepair or situated in dowdy neighbourhoods.

Leading estate agents will not admit to “price-fixing” but have admitted to the “rental market” being arbitrary and fictitious. Major estate agents surveyed were vague and evasive in their responses that showed how flawed the approaches to rented accommodation were. The very institutions and advocates of market-related rentals use speculative techniques (Mohamed, 1994). Within the context of a superficial market, unscrupulous landlords exploit tenants that are faced with various challenges, legal and socio-economic.

2.2.5. Some of the Problems Experienced by Tenants

2.2.5.1. Specific Performance

Tenants are subjected to sub-standard accommodation on a take-it or leave-it basis in the face of an acute land and housing shortage. There are no laws compelling slumlords to upgrade their properties. “Although three of the old writers say a lessee may compel a lessor to maintain the premises let in good condition, South African courts (under the influence of English law) hold that as a general rule an order of specific performance will not be granted against a lessor to effect repairs so as to place or maintain the premises in a condition reasonably fit for the purpose for which they were let. Thus, although the lessor had expressly undertaken to whitewash and clean a house, replace all broken windows with new ones and place all the windmills on the farm in good working order, the court refused to order specific performance” (Cooper, 1994:89).

2.2.5.2. Non-payment and Remission of Rental

A tenant cannot withhold rental to force the landlord to effect necessary repairs. This would provide the basis for eviction because non-payment entitles the landlord to cancel a lease (Cooper, 1994:167-70). There are several instances where tenants have succeeded legally but these cases are notable exceptions. A case in point is that of a business tenant who was taken to Court by his landlord for withholding one month's rental³. The landlord applied to the Court for an eviction order, invoking the provisions of clause 16 of the written lease agreement that entitled the landlord to forthwith cancel the lease and re-take possession of the premises in the event the tenant fails to pay the rental due.

The Court held that the tenant was justified in withholding his rental because of the failure on the part of the landlord to ensure full use and enjoyment. The tenant was entitled to a remission of rental since the lease did not contain a provision prohibiting the tenant from non-payment. The landlord therefore had to fulfil his common law duty of placing and maintaining the leased premises in a condition reasonably fit for the purposes for which they were let. The landlord's appeal against the decision of the Trial Court was dismissed and the Trial Court's decision confirmed⁴.

³ Ntshiqqa v Andreas Supermarket (Pty) Ltd, 1997 (1) SA 184 (Tk)

⁴ Ntshiqqa v Andreas Supermarket (Pty) Ltd, 1997 (3) SA 60 (Tk)

If the lease contained a provision preventing the tenant from withholding rental, the tenant in this instance would not be able to use non-payment of rental as a means to compel the landlord to comply with his obligation to ensure full use and enjoyment. The tenant would be obliged to pay the full rental and will only have a claim for damages against the landlord for the loss of beneficial occupation. In the case of a major breach a tenant could rely on the normal remedy of cancellation (Kerr, 1996:448).

Theoretically, cancellation is perhaps the first remedy available to a tenant but often, relocating presents financial considerations and other complications, especially for a family. Instituting legal action for damages suffered due to loss (that was foreseeable) is another remedy but this is usually costly and time consuming for a tenant. The other remedies available to a tenant would be to sue for an order that the landlord shall carry out the repairs that he declined or neglected to do despite demand; or resort to “repair and deduct”⁵ whereby the tenant carries out the repairs and deduct the cost of repairs from the rent (Cooper, 1994:107; Kerr, 1996:282-3) or set them off against the rent or claim a reduction of the rent (Gibson, 1977:419). Grotius is of the view (in *Poynton v Gran*) that the tenant’s cost of repairs can be placed “to the account of the rent”.

⁵ *Poynton v Gran*, 1910 AD 227; *Bowen v Daverin*, 1914, AD 632

Health regulations and other byelaws (such as fire regulations) are almost unenforceable. Officials are allegedly nonchalant or at best may succeed in getting a defaulting landlord to pay a fine that is “paltry” for serious health related offences, without the problem being redressed.

Lease agreements are long, complicated, verbose and legalistic with the landlord having the upper hand and the tenant not in any position to bargain. Lease agreements in practice are therefore an “oppressive” instrument and do not provide adequate security of tenure (Blumberg and Grow, 1978:15).

2.2.5.3. Displacement of Tenants

Tenants generally have no grounds to prevent displacement. A tenant is displaced if a landlord complies with local authority regulations, which set out the procedure by which he or she must apply for permission to convert the premises. Alternative accommodation is not considered as grounds for refusing a landlord permission to convert by local authority. The premises can therefore be converted for non-residential use or converted to a hotel, student accommodation, sectional title or share block scheme.

Tenants can also be displaced by a landlord who substitutes one “group” of tenants for another “group”. In other words, pensioners, disabled, and recently even middle income tenants have been displaced by students from tertiary

educational institutions who buy city and suburban accommodation for students, thereby displacing sitting tenants.

The Share Blocks Control Act 59 of 1980 and the Sectional Titles Act 95 of 1986 provide “limited protection” to tenants regarding conversion to share block or sectional title scheme of the premises they occupy. The provisions are set out in the relevant Acts, which, *inter alia*, give tenants the right of pre-emption or first choice to purchase the premises e.g., provisions of section 10 of the Sectional Titles Act 95 of 1986.

Before selling any unit on the open market, a developer is bound by the provisions of the above relevant Acts to offer it to existing tenant(s). Should the tenant fail or refuse to exercise his or her option within 90 days, (365 days in the case of a rent-controlled premises) the developer may sell the unit to someone else at the same price offered to the tenant. However, the developer cannot sell the unit for a period of at least 180 days at lower price after the tenant has refused the offer or failed to respond within the stipulated time. Unless, the developer again offers the unit at the lower price to the tenant.

In terms of the Rent Control Act 80 of 1976, (repealed on August 1, 2000 but provisions of the said Act would apply for a period of three years) if a tenant is 65 years or older and whose income does not exceed the maximum prescribed limit, is the only category of tenant who enjoys “absolute” protection. In respect

of the Share Blocks Control Act and the Sectional Titles Act the overwhelming majority of tenants living in premises that are not subject to rent control, enjoy no security of tenure. The law requires them to vacate the premises upon the expiry period after the landlord has offered to sell the premises to them (Mohamed, 1996).

2.2.5.4. Key-Money or Goodwill

Key money or goodwill, which is often as high as R5000.00 to R10000.00 is paid by desperate tenants, sometimes in instalments. The tenant is not given a receipt and the amount is non-refundable. Security deposits, usually an amount equivalent to two to three month's rentals, is the norm. Tenants' common law rights are ignored. Further, landlords abuse this aspect of tenancy by not refunding deposits timeously or at all when tenants vacate their dwellings, except in the case of tenants living in dwellings subject to the Rent Control Act. The provisions of section 37 of the Rent Control Act lays down specific conditions which includes limiting the amount of the deposit to "an amount equal to 1 month's rental" (Cooper, 1977:200). However, there is no law to prevent landlords from charging key-money. Hence, the words "Randlords" and "fleecing" are synonymous with unscrupulous landlords and slumlords.

2.2.5.5. Illegal Actions

Where the rights of tenants are protected by common law, case law and rent control legislation, landlords still engage with ease in a host of illegal, punitive,

vindictive and retaliatory actions. These include illegal lockouts, arbitrary evictions, discrimination and shutting-off utilities. In the case of illegal lockouts and utility shut off, landlords either interrupt or disconnect basic services such as electricity and water supply or prevent a tenant access to his or her dwelling. Such actions of the landlords are not considered criminal and the tenant is forced to seek civil remedy which is often costly and the court may not grant the urgent relief needed (Mohamed, 1997).

2.2.5.5.1. Illegal Lockouts and Shutting off Utilities

A lockout is the summary ejection of a tenant by the landlord without following legal procedures. This is a gross violation of tenants' rights because the landlord cannot eject the tenant forcibly by taking the law into his or her own hands, even if the lease contains a clause (which would be void) allowing the landlord to act unlawfully (Gibson, 1977:424).

In general, there is no provision in the South African criminal law making illegal lockout and shutting off utilities such as electricity and water, a punishable offence in terms of criminal legislation. In terms of the Rent Control Act, certain specified conduct by the landlord, including summary eviction, may be punishable in law (Cooper, 1977:198-9; sections 33 and 35 of the Rent Control Act 80 of 1976). However, most tenants affected by illegal lockouts and the illegal disconnection of electricity and water supply do not occupy dwellings that are subject to rent control.

The only practical remedy available to a tenant is a civil remedy, in particular an (urgent) application for a spoliation order. The tenant is required to make an urgent application to court for being despoiled. A court may grant an order to have the utility switched-on or reconnected to the dwelling occupied by a tenant who was deprived of the use and enjoyment of the premises let to him or her. Similarly, a court may order the landlord or agent to restore possession to the affected (“despoiled”) tenant.

Other remedies which a tenant would have in such an event include the cancellation of the lease contract, an interdict restraining the landlord’s conduct, claim for damages and for losses sustained as a result of illegal lockout or utility shut-off. Nevertheless, the remedies available offer little comfort to tenants who have been evicted at a time when the courts are inaccessible for e.g. after hours and over weekends or to a tenant who cannot afford litigation costs. Landlords have also found ways to “prevent” the courts from granting urgent relief to tenants. If a landlord is aware of an urgent application (*ex parte* application) he or she may successfully defend the application, with the tenant not being able to get urgent relief.

An application of the nature discussed above is on an urgent basis and act as an interdict. The court orders the Sheriff to restore possession to the aggrieved tenant or compels the landlord or the offending party to reconnect the water and

electricity.⁶ Where the offending party refuses to comply with an order of court, a tenant is faced with further legal implications such as approaching the courts to bring contempt proceedings.⁷

2.2.5.5.2. Unscrupulous Tenants

Landlords of single units in a sectional title scheme are also faced with serious legal costs and financial difficulties against unscrupulous tenants. These landlords who have to meet bond re-payment as well as pay monthly levies for the administration of the building, maintenance costs and rates suffer severe prejudice when tenants fail or refuse to pay rentals. The consequences for these landlords can be far-reaching, in several instances, entire buildings have been sold in auction by local authorities to recover rates arrears. This has happened in spite of some landlords or owners in a sectional title scheme have paid their levies regularly but the bodies corporate were unable to pay outstanding rates (Mohamed, 2000d).

⁶ Themba Camelius Sibiya & NO v Bagman Investments CC and Godfrey N. Pillay, Case No. 11348/99, High Court, Durban and Coastal Local Division.

⁷ Ebrahim Ismail Moolla & Others v Karim Family Property and Durban Metropolitan Council, Case No. 3911/2000. High Court, Durban and Coastal Local Division.

2.2.5.6. Notices of Rent Increase / Eviction

Tenants are regularly faced with notices of rent increase (sometimes twice or thrice a year). The notice of rent increase often carries with it the threat of eviction, either implied or explicit.

Quite often, on technical grounds tenants have succeeded through the OCR in not paying the rent increase without being evicted. In terms of the South African Law, a landlord must give an unequivocal notice to vacate (refer to example 1 below). The rent increase in terms of the law of contract operates on the basis of an “offer and acceptance”. Landlords cannot unilaterally increase rentals (refer to example 2 below).

Example (1) : an ambiguous notice:

AMBIGUOUS

Dear Tenants

Please note your rent will be increased from R750.00 to R950.00 from the 1st of March 1996. If you continue to occupy the premises after February 1996 it will be assumed that you have agreed to the increase.

We thank you for your co-operation.

Yours faithfully

Landlord

Example (2) : a unilateral rent increase:

UNILATERAL RENT

Dear Tenant

We herewith give you one months notice that your monthly rental for flat no. 409 will escalate from R395 to R695 as from the 1st January 1995.

Should you have any queries please contact the writer on 377-3511.

Yours faithfully

Agent for the landlord

To add to the prevailing vulnerability of tenants is the growing unemployment that is causing untold hardships resulting either in displacement or forcing people to overcrowd to share the rentals and other expenses.

2.2.5.7. Muslim Landlords

As for certain Muslim landlords and their representatives, they are not guided by the *Shari'ah* (Islamic Law) but by capitalistic principles. Attempts to mediate through '*ulamā*' (Muslim scholars) bodies have resulted in very little progress. Often landlords present convincing arguments in their own favour or at the very

least create sufficient doubts about the integrity and honesty of tenants who have *bona fide* defence.

Muslim landlords' representatives often adopt a very hard and uncompromising approach, justifying their clients' rights to exorbitant rentals and refusal to carry out necessary repairs. It is argued that in terms of a free market society, their clients are not obliged to consider the circumstances of tenants. Should the tenant be unable to afford the rental or wants the landlord to fulfil his or her obligations according to the tenancy agreement, such a tenant is often told to vacate the premises because the landlord has a long waiting list of prospective tenants. Besides, the tenant is curtly informed, he or she is not being forced to live in the landlord's property. Widows, pensioners and single parents (especially women) are therefore most vulnerable and subjected to various types of exploitation. Below are three examples of how tenants are treated by unscrupulous landlords⁸

2.2.5.7.1. Case Study 1: "Key-Money" and Related Matters

A Muslim landlord of a building that is *waqf* property (a religious endowment) uses the following procedures with new or prospective tenant (several tenants are single female parent or single female):

- a) Rental has to be paid in advance.

⁸ The three case studies were handled by the Organisation of Civic Rights.

- b) Deposit or advance rental equivalent to two months rentals has to be paid up-front, i.e. before the tenant can take occupation. This amount *may be* refunded to the tenant when he or she vacates.
- c) This particular landlord allows a new tenant to pay the previous tenant's alleged arrears (several thousand rands) in instalment. No receipt is issued for the "arrears" and it is non-refundable. [Other landlords demand the money up-front before the tenant is allowed to take occupation.]
- d) Interest is charged for late payment of rentals.

2.2.5.7.2. Case Study 2: Pensioner – Exorbitant Rent Increase & Humiliation

The same landlord of the *waqf* property (mentioned above) demanded an exorbitant rental from an 85-year-old man. The increase was about 400%. About a year later the landlord's attorney, a pious and very knowledgeable person in *Shari'ah*, based on his client's allegation, insisted that the old man and his wife were rich. When they denied this, the attorney then asked them to take an oath by the Qur'ān, which they did, swearing before Allāh that they did not have more than their pension and survived on the goodwill of their family. Not satisfied, the attorney asked to examine their financial circumstances. It turned

out that they were telling the truth but in spite of this, the matter was taken to High Court.⁹ It was settled out of court because the tenant's attorney provided "evidence" to the landlord's attorney of a section of a legislation that allowed the tenant to continue to pay the low rental.

The landlord's attorney compromised, the main points of the Agreement of Settlement was that the tenant (respondent) and his wife would pay a rental of R200.00 per month for the period of their natural life and shall not be subject to increases or decreases.

In the past, the landlord did not attend to repairs such as leaks and dampness on the walls. After the settlement agreement, this attitude did not change. The tenant died at age 90 and shortly thereafter his wife also died.

2.2.5.7.3. Case Study 3: The Case of "Contractual Liability"

A tenant and landlord verbally agreed to the terms and conditions of tenancy. The landlord charged a deposit that was more than one month's rental and informed the tenant that the rental itself had to be paid before he took occupation. Two weeks before taking occupation, the tenant paid the deposit.

⁹ Lockpa Investments (Pty) Ltd v Ebrahim Mahomed Hansrod, Case No.5757/94 – High Court Application for Ejectment.

The landlord issued a receipt for the deposit and stipulated in writing the amount of rental to be paid and the due date.

He subsequently demanded an additional amount towards the deposit, varied the agreed rental and brought forward the due date. The tenant was also given an ultimatum that should he fail to pay the money within three days of the new and unilateral variation of the agreement, he would forfeit the deposit already paid. The tenant was in a quandary, having given notice to vacate his present residence and now faced with an exploitative situation.

The above case studies are not isolated instances and reflect only a minute aspect of the extreme hardships faced by tenants. In South Africa where millions of people urgently need housing, exploitation of tenants is rife. The government has only recently recognised the existence of approximately 8.6 million people living in tenanted accommodation and would take some time before the new Rental Housing Act 50 of 1999 would make a positive impact on the relationship between tenant and landlord.

In Summary, tenants are a marginalised group, living in hostile rental “market” with existing rented stock being whittled away, subjected to abuse, exploitation and exorbitant rentals.

2.3. AN OVERVIEW OF THE DEVELOPMENT OF PROPERTY RIGHTS AND LANDLORD-TENANT LEGISLATION IN THE WEST AND IN SOUTH AFRICA

To sum up the Islamic concept of ownership (discussed in the previous Chapter), Allāh is the ultimate owner of all things with man being entrusted with or delegated the responsibility of ownership. Since, both private and public ownership in the first instance is rested in Allāh, a person is not considered an absolute owner. However, the *Shari'ah* protects the right to ownership as an inviolable right.

This section critically examines ownership, property rights and relationship between landlord and tenant in the West and developments in South Africa. It must be emphasised that contrary to the view among certain Muslims that everything Western is evil or anti-Islamic, the West has provided invaluable information on education, psychology, technology, landlord-tenant relationship and various other disciplines.

2.3.1. Historical Development of Property Rights and Landlord-Tenant Relationship in the West

2.3.1.1. Definition

According to van der Walt and Pienaar (1997:17-8, 30) property is everything which can form part of a person's patrimony or estate, including corporeal things

(movable and immovable) and incorporeal interests and rights. The law of property deals with real rights to corporeal things, customary property rights as well as other property rights not related to corporeal things. A property right is any legally recognised claim or interest in property and ownership, the latter being one of many rights in property, is recognised as a real right.

Property in law therefore means ownership that is divided into (i) real property that includes land and permanent fixtures such as buildings and trees attached to it, and, (ii) personal property (all other possessions). Ownership grants a person the exclusive right of possession, use, enjoyment and disposition (perfect right) and the right to transfer possession and use to another person (e.g. lease of land) without losing ownership (imperfect right) (Encyclopaedia Britannica, Vol. 15; World Book, Vol. 15).

2.3.1.2. Development of Property Rights in the West

The Western concept of property rights, ownership and landlord-tenant relationship changed throughout the ages. The Greek philosophers, particularly Plato and Aristotle advocated equitarianism regarding the distribution of property. The emphasis was a moral and political paradigm. In their concept of an ideal state, property was to be distributed equally among the ruling class. Aristotle believed in property rights being common but generally to be private (Abe, 1987:8-10; Islahi, 1996:109) for the smooth functioning of a society and its economy. Plato promoted the theory of equal distribution,

any excess or surplus acquired must be given to the state. He however believed in constraints regarding the distribution of private property with individuals' rights to possess property being linked to communal ownership.

Cicero saw all men as being made equal by the law of nature. He made a distinction between what the law of the State and the law of nature allowed a person to possess. The Christian Church saw property as the "fruits" of sin created by the State according to St. Augustine. St. Thomas Aquinas combined the Aristotelian and traditional Christian views, advocating private ownership to be natural. He considered private property and universal freedom to be part of natural law. Although private property according to Aquinas was natural and good, having communal property or no property at all represented the perfect condition.

During the Middle Ages, the peasantry revolted many times to establish their freedom from serfdom. Eventually, feudalism began to wane, giving rise to a free-market oriented society. Fortescue laid the foundation in the Middle Ages for a capitalistic society, linking the idea of contract to dominion (Abe, 1987:14-20; Islahi, 1996:107-10) and formulating a labour theory of property. Feudalism in the strict sense therefore ceased to exist but some perpetual tenures and land reliefs continued to exist in France until the beginning of the Revolution and in Prussia until almost the same time. It was in 1925 that reform legislation

designed to suppress the few remaining vestiges of feudal law was enacted in England (Encyclopaedia Britannica, Vol. 15).

Of the moral-political theorists like Kant, Hegel and Adam Smith it was Smith who dealt with practical morality and propriety. He believed that people who were frugal, God-fearing, industrious and literate displayed some of the qualities important to the functioning of an economy. Like Aristotle, Smith was also concerned about the inequality of wealth and the connection between the acquisition and ownership of property and moral character.

The Industrial Revolution brought with it the *laissez-faire* doctrine of a free-market competition that trade and commerce should function with the least amount of interference from governments. Property distribution in this system was unequal because of the inequalities in society. In the emerging Capitalistic societies, the individual was allowed to do as he or she pleased. The State could not intervene in the individual's right of ownership nor interfere with the control of the means of production and a person's pursuit of wealth at the expense of exploiting the labour of others. (Ahmad, 1991:64, Islahi, 1996:181,107-9).

With the emerging capitalistic market economy, the right to property also took a different meaning. The seventeenth century changed the unsaleable rights in things making possible to sell things, including property. Thus, a person could

not only use property but could now also own it. The growing divide between rich and poor as a result of Capitalism gave rise to Socialism. Different forms of Socialism emerged such as Utopian, Democratic, Fabian and Communism or Marxist Socialism. Karl Marx was the outstanding advocate of Revolutionary Socialism, believing in the necessity to overthrow the Capitalist State in order to achieve the objectives of Socialism. The main principle was to nationalise all means of production and all private income, except wages. Socialism was intended to be an interim phase with Communism as the means to ultimately establishing a communal life, with the State becoming non-existent (Ahmad, 1991:69-70).

Socialism in all its different forms also failed to realise a just society. Marx did not make private property the centrepiece of the critique of capitalism, with very little discussion of this in his monumental work *Capital*. The belief by Karl Marx and other communists failed to materialise that socialism would ultimately give way to communism through the revolutionary overthrow of the capitalists, whereby the state would be replaced by individuals living a communal existence. The democratic socialists who envisaged the democratic will of the people bringing about a socialist state remained a theory (Ajijola, 1977:63-9; Ahmad, 1991:66-7). Instead, these ideologies led to colossal loss of lives through war and repression (Siddiqi, 1978:148-9,177) and economic upheavals as evidenced in recent socio-economic and political turmoil in Russia.

2.3.1.3. Civil Law

Roman law influenced continental Europe during the Middle Ages until the nineteenth century in shaping civil law, particularly the law of property. Property received various meanings, the widest being any asset which formed part of a person's patrimony and having a commercial value. (Abe, 1987:15, 18). Ownership also meant absolute right, the idea of absolute ownership or exclusive ownership was inherited from Roman law. The owner therefore had absolute right to use, enjoyment and disposition of his or her property with few restrictions (Encyclopaedia Britannica, Vol. 15).

2.3.1.4. Common Law

In the nineteenth century, common law principle allowed the owner of a property to do as he or she wished, even if it led to interference of the rights of another person. The owner had absolute ownership and freedom of contract. This absolute freedom changed towards the end of the nineteenth century with governments intervening to bring about social justice (Abe, 1987:46).

Statutes were passed in the 19th century in Western countries that restricted the free will of individuals in the interest of society. The modifications and limitations included trust property, what may be owned, the right of the State regarding certain property and the limitations on the private owner's use of his or her property, which was governed by public and private laws (Abe, 1987:14-5;

Encyclopaedia Britannica, Vol. 15). “It is in light of these restrictions that ownership is ordinarily qualified as an exclusive rather than absolute right” (Encyclopaedia Britannica, Vol. 15, p. 55).

Today, ownership and contract form the basis of economies of western societies with modern writers accepting the importance of both the individual and the community having rights to ownership. Modern development in legislation and judicial practice is to limit the intensity of ownership in the interest of other members of society, at the same time extending ownership to new forms of wealth. Ownership is therefore no longer an absolute right nor does it confer political, social and economic privileges of the feudal period. Ownership in contemporary western systems include social and individual responsibilities (Encyclopaedia Britannica, Vol. 15). According to van der Walt and Peinaar (1997:60-1) an owner cannot do “what he wants” nor he “enforce his rights against the whole world” because of the requirements of objective law and the rights of third parties.

Generally, emphasis in the western world is on “individualism” although there were western scholars such as Hegel, Locke, Goethe and others who have argued for a moral and spiritual bases for social and economic equality. At present, there is a change from the previous emphasis on ownership being absolute and individualistic. Current thinking is focussing on the exercise of entitlements in the interest of the community (van der Walt and Pienaar, 1997:58). In

comparison, the concept of Islamic ownership as a starting point, as discussed in the previous chapter, in its widest sense is that God is the absolute owner of everything with human beings entrusted the responsibility as God's representative to possess and dispose a thing. God has made every individual His trustee or *khalifah* (vicegerent or representative) and limited and qualified the right to property (Kahf, 1978:37-8; Ahmad, 1991:33-4, 96) which one can possess under His permission (Abe, 1987:11, 34; Al Kader, 1959:10).

However, Muslim societies are also experiencing gross inequalities due to the neglect of the Islamic principles and disregard for the *Shari'ah*, both by heads of States as well as the *ummah* as a whole. As long as the *Shari'ah* was applied within a holistic framework and Muslims acted accordingly, a great degree of egalitarianism existed. (Ahmed, 1991:13).

2.3.2. Sources of South African Law of Property

European countries largely influenced the development of the South African legal system over several centuries into a very refined system. Legislation or statute law is made by Parliament or sub-ordinate law-making authorities and is the most powerful aspect of South African law (Warmback, 2000:1). The other major source of law is the common law, which is rooted in the Roman-Dutch law brought by Jan van Riebeeck in 1652. Roman-Dutch law originated in the

Roman Empire and was codified by 534 of the Christian era into four great books, the *Corpus Iuris Civilis*.

The interpretation by Dutch writers like Voet and Grotius of the *Corpus Iuris Civilis* became an inseparable part of the Roman-Dutch law. The common law in South Africa evolved through its interpretation and application by the South African courts in individual cases (precedents), by writers and statutory law (parliamentary amendments and legislation).

The common law, however, is not static or outdated because the South African courts and the legal system as a whole respond continually to the changing needs of society. In *Jajbhay v Cassim*¹⁰ Stratford, CJ said the following:

“Now the Roman-Dutch law, which we must apply, is a living system capable of growth and development to allow adaptation to the increasing complexities and activities of modern civilised life. The instruments of that development are our own courts of law. In saying that of course I do not mean that it is permissible for a court of law to alter the law; its function is to elucidate, expound and apply the law. But it would be idle to deny that in the process of the exercise of those function, rules of law are slowly and

¹⁰ *Jajbhay v Cassim*, 1939 AD 537 at 542

beneficially evolved. The evolution, to be proper, must come from, and be in harmony with, sound first principles which are binding upon us.”

In view of the new Constitution in democratic South Africa the traditional sources of law of things before 1994 like the common law, statutory law and case law have to be re-evaluated and re-interpreted together with customary law and the socio-economic and political developments. The shift from an apartheid society to one based on democratic values means a transition from a predominantly white, privileged minority and its concomitant discriminatory laws, legal and justice systems and sources of law and interpretation thereof. Under apartheid laws an owner could not lease or sell his or her property to any person other than someone from his or her own “race” group (“forced discrimination sanctioned by law”). This was a restriction on the common law tradition, which recognised an owner’s freedom to use and dispose of the property as he or she saw fit and to lease it to a person of his or her choice (“freedom to discriminate”).

“Mixed” couples were harassed and arrested under apartheid legislation for occupying property (either as a tenant or owner)¹¹ in an area designated for a specific “race” group. In respect of the democratic Constitution of South Africa as well legislation like the Rental Housing Act 50 of 1999 a person is not

¹¹ OCR handled numerous cases (during the period 1984-1992) regarding racists evictions and was also asked by the Catholic Church to assist “mixed” couples who were investigated by the apartheid government for violating the law.

permitted to discriminate as they did or were forced to do under apartheid laws (“forced discrimination sanctioned by law”). Nor would they be able to invoke the common law tradition that allowed the “freedom to discriminate”. Customary law and the Constitution are therefore two additional sources of law *post* 1994 that has started to transform the law of property.

The law of property in South Africa is a section of Private Law that deals with the acquisition, protection, the transfer or loss of real rights and the remedies available for the protection or restoration of real rights. Ownership is the most important, comprehensive and complete real right with other real rights seen as limited rights, derived from ownership and more in particular, private ownership (Warmback, 2000:2). Ownership is the most complete right a person can have regarding a thing but is not absolute or unlimited because of legal restrictions. In *Gien v Gien*¹² Spoelstra WN, J said that ownership is a complete right that a person can have to a thing. Regarding an immovable, a person’s unlimited freedom to do with and on his property as he likes is apparently not completely true. The absolute entitlement of an owner exists within the restrictions imposed by law. It is either objective law or the rights of others that give rise to these restrictions. Therefore, no owner has ever had unlimited right to exercise his entitlements in absolute freedom and at his own discretion.

¹² *Gien vs Gien*, 1979 (2) SA 1113 T at 1120

Ownership as a legal sociological concept is also interconnected to communities, societies, history, religion, culture and politics giving rise to complex juridical systems. In South Africa, western colonialism and apartheid followed by democracy influenced property legislation and land policy. Dispossession of land, displacement and relocation started in the 17th century when Jan Van Riebeeck came to South Africa. Sir Theophilus Shepstone in the 1850s introduced land policy in Natal that included the use of force to control Africans. Sir George Grey as governor of the Cape introduced policy from 1854 to “civilise” Africans to accept whites as masters. The Glen Grey Act of 1894 by Cecil John Rhodes limited access of Africans to land and created a wage-labour class. The Glen Grey Act influenced subsequent legislation such as the Black Land Act of 1913, Natives (Urban Areas) Act of 1923, the Group Areas Act of 1954, the Black Prohibition of Interdicts Act, 1956. Together with numerous other legislation it provided the bases for rural and urban laws and byelaws, land and property rights (Mohamed, 2000a).

The Rents legislation was introduced in 1920 and subsequently amended into the 1990s. In the 1970s Sectional Title ownership was perceived as one of the ways to allow (mainly white) South Africans the opportunity for the first time to own individual units, flats or a section in a simplex or duplex and jointly own the common property. The Sectional Title Act was enacted in 1972, similar legislation were passed a decade earlier in Puerto Rico, New South Wales, Canada, Turkey, New Zealand and the United States of America. Brazil in 1928

had such a legislation in place followed by other Latin American countries (Mohamed, 2000b). However, the Sectional Titles Act did not ease the land and housing crises and tenants' exploitation continued in South Africa in spite of the opportunity to own a sectional title unit and in spite of the amendments to the rent control law.

The rents legislation for instance was statutory law passed by Parliament in 1920. The enactment of the rents legislation modelled on English law was also in response to the needs of a changing society brought about by the two World Wars and initially intended as temporary measures. Both "first" and "second" world countries passed laws to protect tenants from unscrupulous landlords who took advantage of the acute housing shortage. War Measure 89 of 1942 was enacted to protect business tenants but was abolished in 1980.

Landlords saw the rent control law as interfering with their common law rights. For instance, at common law a landlord could terminate a month-to-month lease by giving one month's notice. Our courts¹³ clarified the one month's notice period to be a calendar month's notice to be given (in writing) not later than the first day of the month.

¹³ *Fulton v Nunn*, 1904 TS 123; also *Tiopaizi v Bulawayo Municipality* 1923 AD 317

The Rent Control Act 80 of 1976 placed restrictions on the landlord regarding the notice to vacate: three month's notice if the dwelling was required for personal occupation; six month's notice if required for renovation (lease suspended) with the tenant having the first right of re-occupying the dwelling; twelve month's notice if the landlord intended to demolish the dwelling. The landlord also had to satisfy the High court that such demolition or reconstruction was in the public's interest and that the Minister of Housing had granted such permission.

Another truncation of the common law was the restriction on arbitrary rent increase. The landlord had to lodge an application with the rent board once every two years (very recently, annually). Tenants were entitled to oppose the increase and could cross-examine the landlord or his or her representative at a rent board hearing. However, the rent determined by the rent board did not take into consideration a tenant's income and, consequently, a pensioner and a millionaire paid similar rentals. A *bona fide* landlord and the pensioner suffered severe prejudice. Besides, unscrupulous landlords found ways round the Rent Control Act to exploit tenants with ease.

Between 1978 and 1980, a substantial number of dwellings were phased out of rent control because of vigorous campaigns by landlords' representatives who had substantial support in the apartheid parliament. Consequently, rent control applied to dwellings built and first occupied on October 20, 1949 irrespective of

when such a dwelling was occupied or the financial status of the tenant. As for dwellings that were phased out of rent control a tenant also enjoyed the "protection" of the rent control legislation on the proviso that the tenant was in occupation at the time the dwelling was de-controlled and his or her income was within a specific income category that was amended regularly. The income of a tenant however was not considered in determining the rent increase.

Rent control did not apply to any dwelling built after the major phasing out periods (1978-1980). All dwellings in "white" residential areas were eventually phased out of rent control by early 1990s. Rent control as argued by the powerful property lobbyists, supposed to have stifled private rental development. "Extraordinarily", this major change did not bring about development in the private sector rental market.

2.3.3. Landlord-Tenant Relationship

The relationship between landlord and tenant in western societies, including South Africa was fundamentally feudalistic. In feudal England, landlords absolved themselves from all obligations to ensure maintenance and to carry out repairs and renovations. Tenants under the agrarian society were responsible for all maintenance, repairs and renovations, with farmers (landlords) only concerned with the collection of rentals. "Until recently these problems were largely the burden of the tenant, because landlord-tenant law, having remained

substantially unchanged since its origin in feudal England, afforded American tenants few legal rights” (Blumberg and Grow, 1978:9).

The twentieth century, however, witnessed a worldwide burgeoning of grassroots movements involved in issues affecting tenants and the homeless. There is now a growing global awareness of the extent of exploitation of tenants and the homeless community and the need for intervention at various levels. The United Nation has also passed a resolution in this regard (Appendix 1). The South African landlord-tenant relationship, the struggle for security of tenure, for decent, affordable, suitable accommodation and the need for state intervention is part of the global trend.

There was certainly a need to overhaul the legislation dealing with landlord-tenant relationship. The Organisation of Civic Rights (OCR) lobbied the national Ministry of Housing for a comprehensive legislation, proposing the abolition of rent control and submitting detailed proposals for a new legislation. The OCR was subsequently invited by the Minister of Housing (only civic organisation) to sit on the national task team to advise her on a draft Rental Housing Bill.¹⁴

¹⁴ A substantial part of OCR's submission is incorporated in the Rental Housing Act.

2.4. THE RENTAL HOUSING ACT 50 OF 1999

The Bill was signed into law on December 15, 1999 as the Rental Housing Act, (hereinafter referred to as the Act) providing framework legislation. It came into effect on Tuesday, August 1, 2000 in all nine provinces. For the first time tenants living in outbuildings, backyard shacks or renting any type of residential dwelling would be able to challenge unscrupulous landlords. Similarly, landlords' rights are protected by the Act that aims to bring equity for both tenants and landlords and to ensure the rights and obligations of both parties through a speedy process and without incurring legal costs.

The Rental Housing Act defines the government's responsibility in terms of the Constitution to ensure that everyone has access to adequate housing and create mechanisms to ensure the proper functioning of the rental housing market. It provides for conflict resolution, sound relations between tenants and landlords, rental housing tribunals, the repeal of the Rent Control Act 80 of 1976 and lays down general requirements relating to leases.

It is the first time that the government in post-apartheid has undertaken to promote rental housing in South Africa and acknowledged the need for affordable rental housing. This undertaking includes the government's responsibility towards persons historically disadvantaged by unfair discrimination and the poor and to bring about rental housing. Through

partnership with the private sector the government intends to introduce incentives, mechanisms and other measures to:

- (i) improve conditions in the rental housing market;
- (ii) encourage investment in urban and rural areas that are in need of revitalisation and resuscitation; and
- (iii) correct distorted patterns of residential settlement by initiating, promoting and facilitating new development in or the redevelopment of affected areas;

These measures also place responsibilities on local and provincial governments to pursue the above objectives within the national policy framework that would include norms and standards on rental housing.

In order to increase the provision of rental housing property for low-income persons, the Minister may introduce a rental subsidy housing programme, as a national housing programme or other assistance measures.

2.4.1. Essential elements of the Rental Housing Act

Some of the essential features that would govern the relationship between landlord and tenant, include: –

overcrowding, security deposits, arbitrary eviction, exorbitant rentals, invasion of privacy by landlords, discrimination, unacceptable living conditions, illegal lockouts, tenants' committees, review the proceeding of the Rental Housing Tribunal's before a High court and subsidy for tenants who become indigent during their tenancy

2.4.1.1. Unfair Discrimination

Under general provisions [s 4] the Act deals with unfair discrimination, prohibiting a landlord from discriminating on certain grounds against a prospective tenant or a tenant or members of a tenant's household or bona fide visitors of such a tenant. These grounds include race, gender, pregnancy, marital status, sexual orientation, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language and birth.

2.4.1.2. "Privacy Right"

A landlord is not permitted to invade the privacy of a tenant or members of a tenant's household or bona fide visitors of such a tenant by: -

- (a) searching his or her person or home or property; or seizing his or her possessions, except in terms of law of general application and having first obtained an order of court; or
- (b) infringing the privacy of his or her communications.

2.4.1.3. Landlord's Rights

Also under general provisions [s 4(5)] the landlord's rights under common law and provisions of the law of contract in respect of the following are secured.

These rights include: -

- (a) that the tenant pays promptly and regularly rental or any charges that may be payable in terms of a lease;
- (b) that the tenant is liable for unpaid rental or any other amount that is due and payable and the landlord has the right to recover such amount due after a ruling is obtained by a Tribunal or an order of a court of law;
- (c) landlord's right to terminate the lease based on fair practice and specified in the lease;
- (d) the tenant's obligation on termination of a lease to return the rental housing property in a good state of repair, except for fair wear and tear;
- (e) the landlord's right to repossess the rental housing property having first obtained an order of court; and

- (f) The landlord can also claim compensation for damage to the rental housing property or any other improvements the landlord carried out on the land on which the dwelling is situated, if caused by the tenant, a member of the tenant's household or a visitor of the tenant.

2.4.1.4. A Lease Agreement and Related Matters

Provisions of section 5 relate to leases allowing a tenant and a landlord the option of a verbal or written lease. A landlord is obliged to reduce the lease to writing if requested by a tenant. The lease has to include certain provisions such as receipt, deposit, joint inspection and matters related to a contract between landlord and tenant. For the first time a tenant can be assured that his or her security deposit will be refunded within seven days in full with accrued interest. Landlords may no longer "enjoy" the luxury of appropriating security deposits paid by tenants. The general practice by most landlords is to withhold part or the entire amount when the tenant vacates the dwelling. It is extremely difficult and costly for the average tenant to institute legal action to recover his or her deposit. Often, receipts are not issued, placing the burden of proof squarely on the tenant since a receipt is *prima facie* evidence of payment (Gibson, 1977:360).

Subsections of these provisions deals extensively with the issuing of receipts, and the procedure relating to security deposits. Integral to this is the requirement by both tenant and landlord for an inspection of the dwelling before occupation and joint inspection again three days prior to the expiration of the lease.

This would also be the first time landlords would have to invest the deposit in an interest-bearing account. The deposit must be refunded less any reasonable cost of repairing damage to the dwelling and the cost of replacing lost keys. The Act also provides landlords to deal with overcrowding and recalcitrant tenants, demolitions and conversions of dwellings.

2.4.1.5. Regulations

The MEC of Housing of each province is required to promulgate regulations on various tenant-landlord related matters and allowing interested persons to comment or make any representations regarding the proposed regulations [s 15].

The regulations may include: –

- (a) the procedures and manner in which the proceedings of the Tribunal must be conducted; the forms and certificates to be used and the notices to be given by the Tribunal in the performance of its functions, powers and duties;
- (b) the functions, powers and duties of inspectors for the purpose of carrying out the provisions of this Act;
- (c) unfair practices, which, amongst other things may relate to the changing of locks; deposits; damage to property; demolitions and conversions; eviction; forced entry and obstruction of entry; intimidation; issuing of receipts; tenants committees; nuisances;

overcrowding and health matters; tenant activities; maintenance; reconstruction or refurbishment work.

2.4.1.6. Rental Housing Tribunal

A tenant could also challenge exorbitant rental or lodge a complaint regarding the landlord's objection to tenant activities. Similarly a landlord could deal with nuisances and tenants who violate a lease agreement by overcrowding. Any complaint by a tenant or landlord or interest groups has to be lodged with the Rental Housing Tribunal. The Tribunal has far-reaching powers and its decision or ruling is deemed to be an order of a magistrate's court. Members of the Tribunal, between three to five is appointed by the MEC of housing by inviting nominations through the media and by notice in the Gazette. Members are required to have expertise in property management, housing development matters and consumer matters on rental housing. Local authority may also establish Information Offices and employ officials to provide information, educate and advice tenants and landlords.

Unlike the rent boards and the Rent Control Act 80 of 1976 the Rental Housing Act, 1999 will apply to all tenants and landlords who are aggrieved on various aspects of tenancy not previously provided for. The new legislation is indeed a giant step for balancing the rights of tenants and landlords and to protect both against unfair practices and exploitation. It will also contribute significantly to

inner city redevelopment initiatives and provide the long awaited incentive for the provision of additional rental housing.

CHAPTER 3

QUESTIONNAIRES

“The starting point of all research for Islamic work is to relate the Islamic way of life to the status quo, i.e. the situation of today. We have to look at two things: how things are now, and what Islam wants. Of course, the objective is to bring about change from the status quo to the application of Islamic norms and values. We do not do that as mere intellectual play. We apply our knowledge to bring about that change.”

(Denffer, 1983:34.)

“Necessity permits prohibited things.”

(Suyūfī in Muslehuddin, 1975:60)

3.1. Introduction

Questionnaires were sent to Muslim organisations regarding the rights and obligations of tenants and landlords. The main objectives were to explore the *Shari'ah's* position on tenant-landlord matters and to elicit solutions to current problems such as (exorbitant) rent hikes, poor living conditions tenants are subjected to, unfair termination and ejection and to establish rights and obligations of both parties.

3.1.1. Purpose of the Survey

Questionnaires were sent to recognised, well-established Muslim organisations, broadly representative of the South African Muslim community and recognised by the international Muslim community. The main purpose was to investigate what solutions based on the *Shari'ah* were available to tenants experiencing problems in private rental accommodation as well as the rights and obligations of *bona fide* tenants and landlords.

The questionnaire also sought to elicit responses from the organisations regarding matters dealing specifically with residential rental accommodation and general information on a range of tenant-landlord related matters.

3.1.2. Objectives

The objectives of the questionnaire were to: -

- (a) Identify the Islamic guidelines and principles in respect of the relationship between tenant-landlord.
- (b) Determine what solutions tenant and landlord have within an Islamic context.
- (c) Establish the essential features of tenancy.
- (d) Ascertain what practise is considered un-Islamic.

3.1.3. Study Area

Issues relating to tenants and landlords of private rental accommodation in South Africa.

3.1.4. Sampling Frame

The following nine (local) organisations were identified as broadly representing South African Muslims; one international organisation was also identified: -

- 1) Jam'iatul Ulama (KwaZulu-Natal -KZN)
- 2) Mujlisul Ulama of South Africa
- 3) AMAL – Association of Muslim Accountants and Lawyers
- 4) Madrasah In'aamiyyah (Camperdown – KZN)
- 5) Jam'iatul Ulama (Gauteng)
- 6) Islamic Research Organisation (Benoni)
- 7) Islamic Council of South Africa (Cape Town)
- 8) Sunni Jami'atul Ulama (Durban)
- 9) Darul Uloom Aleemia Razvia Society (Chatsworth)
- 10) International Institute of Islamic Thought (U.S.A.)

3.1.5. Data Source

A questionnaire provided the basis for the investigation to obtain the necessary data. The structure and design of the questionnaire was influenced by the principal aims, objectives and research information of the study. Questions were open-ended.

3.1.6. Method and Interview Technique

Questionnaires were sent to the organisations identified and where possible, a follow-up communication took place (via facsimile, e-mail, telephone or mail) to secure a response.

The Muslim organisations were asked to respond to twenty questions. The categories covered in the survey were:

- (i) Rights and obligations of tenants and landlords
- (ii) The position of tenants and landlords from the formative Islamic period to later Muslim governments
- (iii) Essential elements of a lease agreement
- (iv) Important matters relating to tenancy such as eviction, interests, rental increase, collection fees, conflict

- (v) General questions relating to the provision of housing, hardship-tenants, reason for a notice to vacate.

3.2. Results and Analysis

Below, analysis and discussion of the responses to the questionnaires by Jami'atul Ulama through the Darul Uloom, Newcastle, Mujlisul Ulama, AMAL and Madrasah In'aamiyyah.

Overview of Respondents

The Jam'iatul Ulama (Gauteng) and the Islamic Research Organisation (Benoni) listed several books that dealt with specific questions on tenant-landlord relationships raised in the questionnaire. The Institute of Islamic Thought (U.S.A.) provided a detailed bibliographical lists of books on tenant-landlord relationship. This study made extensive reference to the books listed by the above organisations.

AMAL responded to the questionnaire and also attached Justice Taqi Usmani's chapter on leasing (*Ijārah*). The Jam'iatul Ulama (KZN) sent the questionnaire to the Darul Uloom, Newcastle and an extensive response was received. Madrasah In'aamiyyah responded by e-mailing in the form of an article that dealt with major principles of leasing. Mujlisul Ulama gave a detailed response. There were no response from the Islamic Council of South Africa, Sunni Jami'atul Ulama and Darul Uloom Aleemia Razvia Society.

3.2.1. Darul Uloom, Newcastle

Muftī Wahhāb of the Darul Uloom in Newcastle, KwaZulu Natal gave a detailed response on behalf of the Jam‘iatulUlama’s Fatwā Department.

3.2.1.1. Overall View regarding Darul Uloom’s Response

Muftī Wahhāb explained that man as a social being had certain needs and society provided opportunities to satisfy those needs. Since society is stratified, a person who is not rich may not be able to possess a house with renting as an option. Every person is responsible to earn a livelihood irrespective of what one possesses. Allāh directs people to earn their livelihood and Prophet Muḥammad (Allāh bless him and grant him peace) said that a person should seek *ḥalāl* (permissible) livelihood after complying with the *farā'id* (compulsory obligations such as *ṣalāh* or five daily prayers).

A person is therefore required to sustain one’s needs and those of his or her dependants with the income derived from the *ḥalāl* earnings. Depending on the socio-economic status, a person may be able to own a house, or even many properties or may have to rent.

3.2.1.2. Landlord - Tenant Relationship

As for tenant and landlord, their relationship must be based on friendship, sympathy and being mindful of their respective responsibilities to each other. The *Qur’ān* laid down the following principles for mutual interaction:

i.) Muslims are merciful among themselves.

ii.) Muslims constitute a “solid” structure.

Prophet Muḥammad (Allāh bless him and grant him peace) said that the believers in their mutual love, sympathy and kindness are like one body, if one part aches, the entire body experiences pain.

The noble *Anṣār* of Makkah (“Helpers”) shared their resources and gave their houses to the destitute *Muhājirūn* (emigrant Muslims of Madīnah). Muslims therefore have a responsibility to respond to the plight of needy Muslims and to alleviate their hardships in respect of food, clothing and shelter.

Ibn Ḥazm (may Allāh be pleased with him) said that it was the responsibility of the rich to fulfil the needs of food and clothing of the poor in his town, and a house to give him shelter and protection from wind, rain, cold and sun.

If the rich are unable to provide accommodation free of charge (*fī sabīl Allāhi*), then it is permissible to charge a reasonable rental.

3.2.1.3. Eviction and Expiry of a Contract of Lease

Regarding the expiry of a contract of lease the landlord has the right to evict a tenant since he is the owner. However, if there is a housing shortage and a

tenant cannot find alternative accommodation then the landlord's inviolable right to his property is subjected to the *Sharī'ah* principle, "*need makes lawful what is unlawful*". In view of a housing shortage, a landlord is not permitted to evict a needy tenant and his or her family.

Respite by way of sympathy and mercy should be shown to needy tenants. The following *ḥadīth* states: "*he who grants respite to a weak and needy person, Allāh will deliver him from the calamities on the day of Qiyāmah*".¹ The tenant is obliged in the interim to pay the rental and is also obliged to seek alternative accommodation. It is not permissible for a tenant to continue occupation of the premises if alternative accommodation is found. The Prophet (Allāh bless him and grant him peace) said: "*delaying in fulfilling an obligation, in spite of means, is injustice*".

3.2.1.4. Written Lease Agreement

It is necessary to have a written legal document to safeguard the interest of both contracting parties. The cost of drawing up the agreement must be mutually decided.

3.2.1.5. Advance Rental (Security Deposit)

The landlord is within his rights to charge advance rental to protect his interest in the event a tenant vacates the premises prematurely. The landlord would suffer

prejudice if he is unable to let his premises or is unable to locate the tenant to recover arrear rentals. The *Sharī'ah* principle “*need makes lawful what is unlawful*” protects the landlord’s interest as well.

Where a tenant had to vacate before the expiry of the lease, due to a genuine reason, the landlord must return the advance rental.

3.2.1.6. Hardship Tenants

Those who are disabled, pensioners, the old, the destitute, widows and divorcees as well as others in general must be treated with sympathy and goodwill. Several *aḥādīth* were quoted to show that Prophet Muḥammad (Allāh bless him and grant him peace) emphasised the need to act out of kindness and love towards all people, even towards animals: -

Jarīr bin ‘Abdullāh (may Allāh be pleased with him) said: “I agreed on the hands of the Holy Prophet to establish ṣalāh, pay zakāh and be sincere and sympathetic to every Muslim”. (Bukhāri, vol. 1, p 13)

“He is not fit to be called a mu’min (believer) who fills his stomach while his neighbour remains hungry.” (Mishkāt)

¹ Day of Resurrection (Judgement Day)

“Be merciful to those on earth, He who is in heaven will be merciful to you”. (Tirmidhi)

“There is a reward in showing mercy to an animal.”

3.2.1.7. Evaluation

Muftī Wahhāb’s discussion reveals important principles and guidelines for landlords and tenants, supported by *Qur’ān*, *aḥādīth* and *fiqh* (Islamic jurisprudence). These include: -

- a) *Al ḍarūrah* (*ḍarūrah* means need, necessity, plight, distress) - *Al ḍarūrah* refers to the *Shari‘ah* principle of social necessity.²
- b) Unity of the *ummah* based on ‘*adl* (justice), *iḥsān* (benevolence), *infāq* (voluntary spending).
- c) The responsibility of the rich toward the needy through the distribution of wealth to ensure the fulfilment of basic needs.
- d) The human rights principle of *al maslāhat al ‘āmmah* - general good, which includes the rights to food, clothing and shelter.

² Muslehuddin (1975:60-3) cites al-Ghazālī, al-Māwardī Ibn Nujaym and Suyūṭī regarding the Rule of Necessity and Need: *“Necessity permits prohibited things.”*

e) Preference for a written contract

f) Truth in renting

3.2.1.8. General Comments

Muftī Wahhāb set out clearly general *Shari'ah* principles dealing with the rights and obligations of both landlords and tenants. Justice, fairness, compassion, truth, basic human rights to food, clothing and shelter and especially the *Shari'ah* principle “*need makes lawful what is unlawful*” protects the interests of both tenant and landlord.

3.2.2. Mujlisul Ulama of South Africa

The Mujlisul Ulama of South Africa presented a very detailed response.

3.2.2.1. Rights of the Landlord

- (a) According to the Mujlisul Ulama, the landlord is entitled to his rent on due date and can demand payment. Unless a date is specified, the landlord can demand rental on a daily basis.

- (b) He is not legally bound (but morally obliged) to inform the tenant of his intention of not renewing the lease once it has expired.

- (c) He cannot prevent the tenant from normal activities but can restrict certain types of activities that can damage the premises and prevent the conversion of his residential premises to business premises and *vice versa*.
- (d) The landlord is entitled to his rent even if he fails to keep the premises in good state of repair.
- (e) He cannot be compelled to maintain his premises or to carry out repairs. The landlord can enforce the agreement if he has carried out the necessary repairs or rectified the defects prior to the tenant unilaterally resiling from the lease.
- (f) In the case of a *fāsīd* or corrupt stipulation in the lease contract, the landlord is entitled to the lesser sum between market value rental and the rental agreed upon.
- (g) The landlord can demand security or a guarantor for the rent at the time of the contract.

- (h) The landlord can refuse the tenant the right of occupation unless the tenant pays the rent - if the date of payment was not agreed upon.
- (i) He can summarily eject a tenant if the tenant fails to pay the rent on due date.

3.2.2.2. The Rights of the Tenant

- (a) The tenant has the right to occupation once the contract of lease has been concluded.
- (b) The tenant has the right to withhold rental if he or she is deprived of the use and enjoyment of the premises.
- (c) Subletting is permissible and the rental charged must not exceed the amount paid to the principal landlord.
- (d) The tenant has the right to allow his family or any other person to live with him.
- (e) The tenant is not liable for rental if a third party disturbs his or her right of occupation.

- (f) A monthly tenant continues to occupy the premises until the landlord cancels the contract of lease by giving the tenant a clear month's notice.
- (g) The tenant need not give prior notice to vacate although morally he or she is required to do so.
- (h) The tenant has the right to continue to occupy the premises if it is sold due to a valid reason such as overwhelming debt.
- (i) The tenant can cancel the contract of lease if the premises has defects or, if after concluding the contract of lease but upon inspection of the premises the tenant decides to cancel.

3.2.2.3. Obligations of Landlord And Tenant

- (a) The landlord has to hand over the premises in good condition for the beneficial use of the tenant.
- (b) The landlord therefore has to maintain the premises and to effect necessary repairs. However, the landlord cannot be compelled to do so.

- (c) The tenant must pay the rental timeously, not damage the premises in any way and to return it in the same vacant condition delivered to him.

3.2.2.4. Evaluation

It is not clear whether the premises returned by the tenant includes “fair wear and tear” i.e. the tenant is not under obligation to make good the deterioration of the premises due to normal use, age, weather, etc.

3.2.2.5. Lease and Essential Elements

While written leases are preferable in Islam, a verbal lease is also valid. The *Qur’ān*, however, emphasises the need for written contracts with witnesses. The actual lease is the verbal lease, with the essential elements in both a verbal and written leases being:

- Offer (*ījāb*) and acceptance (*qabūl*).
- Mutual agreement of offer and acceptance.
- The period of lease, and
- The rental amount.

- The manner, time and place of payment and the type of activity allowed are additional conditions to be included in the lease by mutual agreement.

3.2.2.6. Rental

The parties should mutually agree to the amount of rental to be charged. The landlord is morally obliged not to exploit the tenant. The rental cannot include other charges such as electricity or water charges. Should this happen, the contract would be *fāsid* (corrupt) and therefore invalid. Similarly the contract would be *fāsid* if the contract imposes an obligation on the tenant to carry out repairs.

The State can intervene if the landlord exploits the tenant. However, the amount of rental to be charged is the landlord's prerogative and there is therefore no minimum or maximum limits.

3.2.2.7. Pensioners and the Poor

It becomes the responsibility of the State Treasury or *Bayt al-Māl* and the *ummah* to assist hardship-tenants if neither the family nor the neighbours are able to help or fail to do so.

3.2.2.8. Repairs

The landlord is under obligation to effect repairs.

3.2.2.9. Rates

According to the *Sharī'ah*, the landlord is responsible for paying rates and cannot pass this onto the tenant.

3.2.2.10. Breach of Contract

Both parties are under moral obligation to accommodate each other and to refrain from causing inconvenience.

3.2.2.11. Refusal to Hire

Legally, the landlord has the right to refuse to let his premises even in the case of a housing shortage.

3.2.2.12. Interest

Interest is *ḥarām* (forbidden), nor is the landlord allowed to charge a (security) deposit.

3.2.2.13. Collection Fee

Fees for the collection of rentals is equivalent to *ribā* or interest if claimed from the tenant. The landlord has to pay collection fees to an agent and is not allowed to recover it from the tenant.

3.2.2.14. Conflict

A *ḥakam* (arbitrator) is required by *Sharī'ah* to resolve a dispute or conflict if it cannot be resolved mutually between the landlord and tenant. The decision of the *ḥakam* is final and binding.

3.2.2.15. Eviction and Period of Notice

The landlord as owner of his premises is not required to give any reason for vacant possession. Both parties are aware of the duration of the lease and the *Shari'ah* does not require the landlord to give a notice.

3.2.2.16. Subletting

Subletting is permissible but the tenant is not allowed to charge his or her sub-tenant a higher rental unless he or she has made additions to the premises. The (principal) tenant in turn will have to pay the rental agreed upon to the (principal) landlord. According to Johansen (1988:39) a tenant has the right to lease it to a second tenant at a higher rental.

3.2.2.17. *Ijārah* or Contract of Lease

Below is a summary of some of the factors that renders a contract of lease null and void: -

- a) the death of either the landlord or tenant
- b) insolvency of either party
- c) the tenant emigrating
- d) any defect that prevents the tenant of the full use and enjoyment of the premises

The lease can be cancelled if either party has an option to cancel it before the date of confirmation. A lease has to be cancelled due to *fāsīd* or corrupt conditions and can be renewed. The following are *fāsīd* conditions :-

- i.) the tenant is required to carry out repairs
- ii.) any service is required of the tenant
- iii.) ambiguity regarding the period of lease
- iv.) ambiguity regarding the amount of rental
- v.) ambiguity that leads to disputes

In the case of a *fāsīd* lease, the tenant is not liable for the agreed rental but only for the market rental (*'ujrat al-mithl*) as long as it is not higher than the agreed rental. If no amount is specified then the tenant has to pay market rental.

3.2.2.18. Evaluation

The following contradictions appear: -

The landlord has the right to demand full rental even if the premises is defective or falls into a state of disrepair. The tenant has the right to withhold rental in such a situation. Withholding rental also implies the tenant's intention to

compel the landlord to carry out repairs. The landlord on the other hand has the right not to be compelled.

It seems unjust to demand rental if the property becomes defective due to the landlord's failure or refusal to maintain or carry out repairs. The tenant enters into a contract of lease for use and enjoyment, with a view to advantage (The Hedaya:1957:509). As for the landlord not being compelled to carry out the necessary repairs, this would be unfair and unjust, thereby subjecting the tenant to inconvenience and disadvantage.

The landlords's failure to maintain the premises or to effect repairs is also in violation of standards of fairness set by '*urf* (conventions) and '*ādah* (custom), resulting in *ẓulm* (injustice). The purpose of renting is to derive benefit according to Ibn Taymīyah (Islahi, 1988:14).

Certain essential principles are stated, that include: -

- (a) Subletting with specific conditions regarding its permissibility and the relationship between the principal tenant and the principal landlord and the principal tenant and his or her subtenant.
- (b) Rates : in terms of the *Shari'ah*, the landlord is responsible for paying rates and not the tenant.

- (c) Conflict resolution through arbitration.
- (d) Mutual partnership: both parties are under moral obligation to accommodate each other and to refrain from causing inconvenience.
- (e) The landlord is not allowed to charge interest which is *ḥarām*.
- (f) The landlord is required to pay collection fees to an agent and is not allowed to recover it from the tenant.

3.2.3. AMAL

3.2.3.1. AMAL responded seriatim to the questions, being brief but concise: -

Question 1 & Question 2

AMAL stated that further details regarding the rights and obligations of landlords and tenants were to be submitted later. In short, landlords and tenants are required to fulfil their rights and obligations arising from the lease, provided no clause is contrary to an absolute text of the *Qur'ān* and *Sunnah*.

Question 3

Research was required to respond to the positions of landlords and tenants during the formative and early Islamic periods.

Question 4

Written lease is preferred in accordance with the Qur'anic injunction to reduce contracts to writing.

Question 5

Essential clauses (elements) of an agreement would entail the following: -

- i.) identity of premises
- ii.) duration of lease, and
- iii.) rental

Question 6

Rentals are to be calculated by reference to market conditions.

Question 7

Rentals, minimum and maximum, are determined by mutual agreement.

Question 8

If the tenant is in financial hardship, the landlord, according to the *Qur'ān*, must give him or her an extension of time.

Question 9

As for repairs to the premises, it is normally the landlord's responsibility but this aspect of tenancy can be negotiated contractually.

Question 10

Rates have to be paid by the landlord.

Question 11

Breach: This is determined by mutual agreement. In the absence of an agreement, a reasonable time, based on the seriousness of the breach should be given to remedy the breach, but failure to pay rental can lead to summary termination of lease.

Question 12.1. & Question 12.2.

The landlord can refuse to rent out his or her premises, unless the State intervenes.

Question 12.3.

Regarding exorbitant rentals, rental itself is based on mutual agreement and market conditions.

Question 13

Interest cannot be used for deposits kept in a trust account, for legal costs and arrear rentals. It is **not** permissible to levy **interest** in any form. This is strictly prohibited by the *Qur'ān*.

Question 14

Interest accrued should be given to charity, without intention of reward.

Question 15

A landlord or his or agent can charge collection fees but this must be based on the market rate or actual work done.

Question 16

Conflicts can be solved through dispute resolution mechanisms including court or arbitration.

Question 17

The State is responsible for providing housing.

Question 18

The landlord is required to give a reason for an eviction notice, e.g., failure to pay rental.

Question 19

A reasonable notice period is based on mutual agreement of parties.

Question 20

Muslim landlord cannot lease his premises for prohibited activity (e.g. gambling)

3.2.3.2. *Shari'ah* Principles

AMAL also provided separately a brief set of principles that provide a very broad and general *Shari'ah* basis for landlord-tenant relationship: -

- a) Justice must be established for all people.
- b) A landlord is not permitted to exploit a housing crisis if a tenant has no alternative accommodation.
- c) A landlord is permitted to raise rentals as the situation warrants. He may waive a "fair" rental if a tenant is unable to pay such a rental. However, this was only a recommended virtue and not an obligation.
- d) If a tenant has the means, he should not oppose a "fair" rental.
- e) Both the tenant and the landlord do not have the right to deceive, misrepresent facts or to be generally dishonest.

3.2.3.3. Evaluation

Although not supported by relevant Qur'anic verses, *ahadith* or *Shari'ah* sources, AMAL's response highlighted certain essential principles and in any event has strong *Shari'ah* foundations. The most significant was the principle

al-'adl or justice which is commanded by Allāh to all mankind³ and is the cornerstone of all human interaction. It is unbiased, impartial, comprehensive, is Allāh's attribute and his command - it is implemented to serve all, without fear or favour (Doi, 1984). Hence, according to El-Awa (1980), justice encompasses all aspects of human life.

The reference to "fair" rental or "market conditions" implies an arbitrary mechanism used by landlords to increase rentals. Market conditions are referred to in respect of determining rentals that appears to be a benchmark by certain classical jurists like Imām Ibn Taymīyah and modern jurists like Taqī Usmani.

Ibn Taymīyah's reference to market rental places the Islamic State with an obligation to intervene (Ibn Taymiya, 1983:36, 54-5) when tenants are exploited. In any event, what may be considered "fair" or "market rental" during economic prosperity may be a crime during recession, what may be "fair" to a rich landlord may be "most unfair" to a poor tenant. In a country like South Africa where millions of people are either inadequately housed, living in tenanted accommodation or homeless or where almost half the world's population are in a

³ "Verily, Allāh enjoins *Al-'Adl* (i.e. justice and worshipping none but Allāh Alone – Islamic Monotheism) and *Al-Ihsān* (i.e. to be patient in performing your duties to Allāh, totally for Allāh's sake and in accordance with the *Sunnah* (legal ways) of the Prophet, and giving (help) to kith and kin (i.e. all that Allāh has ordered you to give them e.g., wealth, visiting, looking after them, or any other kind of help, etc.) and forbids *Al-Fahshā'* (i.e. all evil deeds, e.g., illegal sexual acts, disobedience of parents, polytheism, to tell lies, to give false witness, to kill a life without right, etc.), and *Al-Munkar* (i.e. all that is prohibited by Islamic law: polytheism of every kind, disbelief and every kind of evil deeds, etc.), and *Al-Baghy* (all kinds of oppression), He admonishes you, that you may take heed." (*Qur'ān*, 16:90), (Also 7:29).

similar predicament, the concept of “fair” rental or “market rental” is arbitrary and is usually artificially inflated.

As for honesty, it appears to be an obligation required for landlord-tenant relationship. Together with reference to a “recommended virtue” in the case of a needy tenant, the principle of *al-‘adl wa’l-iḥsān* or justice and benevolence, performance of good works, is alluded to. Right action is ordained by Allāh and is therefore made law by Him (Ibn Taymiya, 1982), which is enjoined by the *Qur’ān* and *Sunnah* (Ahmed, 1991).

3.2.4. Madrasah In‘aamiyyah

Muftī Ebrahim Desai e-mailed an article he had prepared for publication in response to the questionnaire. The following are salient features relevant to this study which are supported with several *Shari‘ah* sources: -

3.2.4.1. Permissibility of *Ijārah*

He identified two groups of people in society, the rich who are dependant on others to conduct their affairs, and the poor who are dependent on the rich for an income in return for services rendered to them. This is supported by the *Qur’ān*, (43:32). The permissibility of *ijārah* is based on this Qur’anic verse according to Sarakhsi and from the *Sunnah*, e.g., *Thābit* Ibn Dhahhāk reports from Prophet Muḥammad (Allāh bless him and grant him peace) that there is nothing wrong in hiring (*Mishkāt*).

3.2.4.2. Definition of *Ijārah*

It is to take possession of an item in lieu of a fee.

3.2.4.3. Prerequisites

The proposal or *ijāb* and acceptance *qabūl* in past tense and in one sitting establishes a contractual agreement between two parties.

3.2.4.4. Conditions / Essential Elements of a Contract

- (a) Both parties must be sane
- (b) An agreement entered into by a person who is temporary or permanently insane is invalid
- (c) Parties to an agreement need not be adults (attained maturity or at least 15 years old). Either one or both parties could be a minor provided the guardian consents to the agreement. Where a minor entered into an agreement, the contract will be subject to the guardian's approval.
- (d) In order to avoid dispute or an element of a potential dispute, the contractual agreement must be specific and without ambiguity.

- (e) An ambiguity renders an agreement invalid.
- (f) A written agreement is emphasised since verbal agreements may lead to misunderstandings and disputes.
- (g) After the conclusion of an agreement, the landlord is obliged to hand over the property to the tenant. Inability to hand over the property for whatever reason invalidates the agreement.
- (h) An agreement will also be considered invalid if the tenant is not able to derive benefit from the property leased.
- (i) The hired item must not be *ḥarām* (forbidden)
- (j) The tenant has the right to see the hired property even after having concluded the agreement. The tenant has the right to cancel the agreement if he or she disapproves of the property let.

3.2.4.5. Some of the Tenant's Responsibilities

- (a) The tenant is responsible for the daily maintenance of the property, sweeping, refuse removal, etc.

- (b) The tenant cannot do anything that will damage the property. The landlord can cancel the lease agreement in the event the tenant causes damage.
- (c) The tenant is entitled to claim compensation (expenses) from the landlord for any extension or renovations done to the property, provided the landlord's consent was sought. The tenant has no claim where the landlord did not consent.
- (d) Subletting is permissible.

3.2.4.6. Some of the Landlord's Responsibilities

- (a) The landlord is responsible for repairs that deprive the tenant of beneficial use of the property ("use and enjoyment") such as the interruption of electricity supply.
- (b) The landlord must provide all things necessary for the tenant to have beneficial use of the property, e.g. keys for security gate.

3.2.4.7. Disputes

The *fuqahā'* or jurists subject all disputes by the principle established by Prophet Muḥammad (Allāh bless him and grant him peace) that to substantiate a claim is upon the plaintiff and to take an oath is upon the defendant. Competent '*ulamā'*

can adjudicate disputes based on the criteria laid down by the jurists on matters of disputes.

3.2.4.8. Termination of a Contract

A Contract terminates on the following grounds: -

- (a) The death of one of the contracting parties.
- (b) Both parties agree to dissolve the agreement.
- (c) The destruction of the hired property, e.g. through fire.
- (d) The expiration of the leased period.

3.2.4.9. Evaluation and General Comments

Mufti Desai provided a very incisive view of *ijārah*, the rights and responsibilities of tenant and landlord and essential features of a lease agreement. He covered aspects relating to subletting and dispute resolution.

Some of the significant points include the need to hand over a property to the tenant in a habitable condition that would allow the tenant use and enjoyment. The handing over includes keys to a security gate where this applies. In other words, in addition to the property being habitable, the landlord has to also ensure the undisturbed use and enjoyment.

The tenant is to carry out maintenance that is “normally” required such as keeping the property in good condition and to ensure no harm or damage is caused to the property. The tenant cannot burden his or her landlord with expense for renovations or extensions without consent from the landlord. However, what is not clear is the remedy available to a tenant where the property has fallen into a state of disrepair or urgent repairs are needed, notwithstanding the landlord’s responsibility to effect repairs.

Would the ‘*ulamā*’ be able to grant an award in a case of a dispute brought before them and would the award be legally enforceable?

3.2.5. Concluding Remarks

Interesting aspects of the contract of lease have emerged, e.g. factors that are *fāsid* or corrupt. It is the usual practice among landlords to include rates into the rental alongside water and electricity charges. Over the years the landlord’s responsibility seems to have been diminishing. Even rates are being borne by some tenants now. Rates are for environmental upkeep, roads, street lights, cleaning, etc. “But it may be asked: Doesn’t this service indirectly enhance the value of the property of which the tenant will have no returns?” (Jaame Journal, 1985:5).

Often, the landlord's obligation to carry out repairs and to maintain the premises are specifically excluded and the onus then rests with the tenant. This is permissible under Western legal system, the landlord having the right to relieve himself of his common law obligations. The tenant then undertakes to carry out maintenance and repairs (Cooper, 1994:112-18). In terms of the *Shari'ah* in addition to the property being delivered to the tenant in a habitable condition, the landlord has to also ensure the undisturbed use and enjoyment. The tenant has the right to cancel the agreement if he or she disapproves of the property let even after the concluding of the agreement. A kind of a "cooling off" period recently introduced in South Africa regarding the purchase and sale of property that led to much controversy.

As for the landlord refusing to hire his premises especially when there is a housing shortage, this would seem a matter for state intervention. This has been discussed in Chapter one in respect of the conditions under Islamic governance. In South Africa as in most countries, alternative housing does not exist. In fact, the housing backlog *vis-à-vis* the homeless population, forced overcrowding and removal of dwellings from the housing stock (for business or other use), requires serious and well-planned State intervention. The Rental Housing Act 50 of 1999 may be one such mechanism to alleviate the problems faced by tenants and the crisis in the rental-housing sector.

While the State is responsible for housing and the landlord as the owner, who has an inviolable right to his property, can evict a tenant, the *Shari'ah* can intervene in special circumstance. In the case of severe housing shortage or where the financial situation of the tenant changed for the worse, an eviction may lead the family onto the streets. The practical examples of early Muslims sharing their resources like the noble *Anṣār* of Makkah who, among other things, gave their houses to the destitute *Muhājirūn* (emigrant Muslims of Madīnah), emphasised the responsibility to respond to the plight of the needy.

Also unanimous among the respondents is the prohibition of taking *ribā* or interest. Rental is not equivalent to *ribā* because a property leased out to a lessee carries with it a risk for the owner who has to bear the loss should his or her property be destroyed. Unlike money which carries no risk for the creditor once delivery thereof is taken by the debtor, property is also subject to depreciation and levying a rental is therefore allowed in Islam (Usmani, 1999:162, 165, 167).

To prevent dispute and acrimony, the Qur'anic injunction is to have contracts reduced to writing. A written legal document would therefore safeguard the interest of both contracting parties.

A tenant cannot deliberately “defraud” the landlord by choosing to live a beggarly life or abusing the leased property. The tenant is required to treat the property as his or her own during the period of the lease and as an *amānah* or trust. A thing entrusted in Islam carries with it a very serious responsibility and a tenant has to take cognisance of his or her obligations. Similarly, a landlord’s ownership of a property is an *amānah* because the property’s ownership in principle is ultimately vested with Allāh. The landlord should therefore exercise compassion, good attitude, justice, benevolence and voluntary spending toward his or her tenant. The landlord is also obliged to attend to the rights of the tenant because rights and obligations co-exist for both parties to realise a just and honest relationship.

CHAPTER 4

CONCLUSION

“Ninety percent of all millionaires became so through owning real estate”

Andrew Carnegie

4.1. Local Muslim Organisations

The responses from the local Islamic organisations highlight the fact that the *Shari‘ah* has addressed fundamental issues relating to tenancy. What is required is the development of specific guidelines based on the *Shari‘ah* to regulate this relationship within the dynamics of the present socio-economic and political conditions. The *Shari‘ah* guidelines will differ from country to country to meet the demands of the ever-changing and unprecedented challenges facing Muslims. There is an urgent need for a concerted effort locally as well as internationally for researching the *Shari‘ah* on landlord-tenant relationship in detail. There is a need for *ijtihād* by competent ‘*ulamā*’ (Islamic scholars in the widest sense) to bring about a just society. The *Shari‘ah* can contribute to the establishment of a spirit of co-operation between landlords and tenants because of its relevance as a system of life and its usefulness for mankind (Qutb, 1975:257).

The challenge is to choose the best solution, for as Allāh says that believers listen intently to all that is said and through critical examination choose that which appears to be the best (*Qur'ān*, 39:18). The alternative is to refer matters to the decisions of classical *fuqahā'* (jurists) which were generally formulated to suit the needs of a particular time and region. This would mean adhering to interpretations and legal principles that are in some instances outdated, static and even retrogressive. New solutions are needed based on *ijtihād*, *qiyās* and *istihsān* within the demands of the present milieu.

The Islamic government has to ensure a balanced society by enabling all its citizens to equal right to the means of sustenance, since every human being is dignified, honoured creation of Allāh, the exalted, the mighty, (*Qur'ān*, 17:70). It is the duty of the Islamic State, as God's vicegerent, to organise, ensure and promote honourable living and livelihood for all its citizens (Ansari, 1973:380). Where Muslims are living as minorities, it is the duty of all Muslim individuals, in a spirit of co-operation, to protect each individual who is in need of the means to fulfil his or her necessities, including people of other faiths and creed. The very young and the very old, the unemployed, single parents in dire need are examples of individuals whose rights are guaranteed by the *Shari'ah*. Past and present *fuqahā'* are unanimous that it is *farḍ kifāyah* or the collective social responsibility to ensure the protection of life, which includes a minimum subsistence level regarding food, clothing and housing.

Human exploitation at any level in any shape under any circumstances is anti-Islamic and must be ended (Ahmed, 1991:16, 96). To redress the gross imbalance, intervention is necessary. It is *farḍ kifāyah* to endeavour in this direction in the same way the study of the divine law is a collective duty, except where it is incumbent on the individual (Ibn Taymiya, 1983:23, 38).

The principles discussed in this study, and particularly the responses from Muslim organisations to the questionnaire are not narrowed down in its applicability to Muslims only,¹ but in keeping with Qur'anic injunctions and *Sunnah*, include all members of society (the children of Adam). Allāh made earth a temporary dwelling place (*Qur'ān*, 2:36 and 7:24) and people are therefore social beings, interacting with each other. The *Qur'ān* provides guidance to people to live a virtuous social life with the entire human race concerned with the welfare of one another (Ajetunmobi, 1985:215).

¹ "One of the most noteworthy attributes of Ottoman Turkish rule was Ottoman toleration of different religious beliefs. The Turks of the Ottoman Empire were Muslims, but they did not force their religion on others. Christians and Jews in the Empire prayed in their own churches and synagogues, taught their religion in their own schools and seminaries, and went about their business, sometimes amassing great fortunes. At that time, Ottoman toleration was unique...The success of Ottoman tolerance can most easily be seen in the fact that large Christian and Jewish communities existed in the Ottoman lands until the end of the Empire. Then it was European intervention and European-style nationalism, not internal failure of the system, that destroyed the centuries-long peace between religions that had characterized the Ottoman system." Turkish Toleration, Internet.

"Allegations of Muslim fanaticism were belied by the facts, not only of social relations but also of official practice." Clark, (1986:25-6: Pickthall and Turkey).

4.2. Arbitration

Tahkim (Arbitration)² existed in pre-Islamic Arabia, and Islam incorporated it but gave it the force of law under the *Shari'ah*. Parties to a contract therefore could agree to submit themselves to arbitration in the event of a dispute or disagreement. An arbitrator or a *hakam* was appointed to arbitrate between the parties in order to reach settlement. In recent years, Muslims have established various Arbitration or Dispute Resolution mechanisms. In Canada, Muslim Arbitration Tribunals resolve disputes in matters of family law through arbitration. Through alternative methods of resolving disputes (A.D.R.) in matters of family and personal law, Muslims are able to address issues that reflects fundamental aspects of their sense of justice. In 1983 the Saudi government issued a Royal decree approving Arbitration regulations that set out Arbitration rules and codes and deleting certain provisions relating to Arbitration that were contained in the Commercial Court Regulations of the 1930s. Muslim scholars and organisations are in the process of establishing Mediation and Arbitration forums in South Africa.

Mediation is a non-binding settlement process while in an arbitration, the parties submit their dispute to a third party for a binding determination. Conflicts and disputes between tenant and landlord can be settled through arbitration with the award (settlements) being binding and legally enforceable. For Muslim tenant and landlord, the terms of reference can include the *Shari'ah* basis on which

² Also Arbitration Contract, as explained in 1.4.4.6. and footnote.

ground they would like the dispute to be resolved. In the case of Muslim Arbitration Tribunal, it could deal with the different schools of Islamic jurisprudence and apply the laws designated by the parties. The Rental Housing Tribunals in South Africa (refer to 2.4.1.5.) in a mechanism specifically created for tenant-landlord disputes. The Tribunal has far-reaching powers and its decision or ruling is deemed to be an order of a magistrate's court.

4.3. Land Tenure

The *fuqahā'* or Muslim jurists differed regarding land tenure, their decisions being based on their interpretations of differing *aḥādīth* to provide practical solutions to the economic challenges of their time. *Imām* Abū Yūsuf, for example, undertook extensive research and established principles of law and practical solutions on land tenure. His outstanding work, *Kitāb al-Kharāj* was a practical guide during the time of Hārūn al-Rashīd's *Khilāfah* (786-809). However, he could not have intended his advice for all times.]

The four *madhhāhib* (sing. *Madhhab*) or juristic schools differed about the system of land tenure. In their efforts to provide practical guidelines, they arrived at points of laws, sometimes in contradiction to each other. One school therefore allowed share-cropping, or the nationalisation of land, “feudal” and absentee landlords or cash rentals, while another forbade share-cropping,

preferred rentals in yield and disapproved of a person owning more land unless he had hired labour to cultivate it (Hakim, 1987:20-1).

4.4. Social Security in Islam

The Prophet established the principle of social security which was developed by *Khalīfah* ‘Umar reaching its climax during the *Khilāfah* of ‘Umar Ibn ‘Abd al ‘Azīz (712-20). No poor person could be found to distribute *zakāh* because *Khalīfah* ‘Umar Ibn ‘Abd al ‘Azīz had ensured a prosperous society. Certain social measures were introduced to ensure social security and justice for all the citizens – Muslims and people of other faiths. These included: -

The family, motherhood and widows: *Khalīfah* ‘Umar Ibn al *Khattāb* provided destitute families and widows from the *Bayt al Māl* or Public Treasury. Old age and sickness: *Khalīfah* ‘Umar gave directives to provide pension which included Jewish and Christian citizens who were either old or disabled. He is reported to have said to his treasurer regarding a blind old Jewish man who was begging, “By God, we would not be fair if we take from him when he is young and disgrace him when he is old. He is one among the poor of the People of the Covenant,” (Yamani, 1979:52).

4.5. Re-asserting and Re-defining the *Shari'ah*

The West, especially through its colonialist policy undermined whatever Islamic systems existed. The Ottoman empire gradually incorporated western laws. The Kano Emirate in West Africa, which became part of the Sokoto *Khilāfah* in 1806 was eventually forced to abandon its Islamic fiscal and land policies under European rule. *Khums, zakāh, kharāj, fai', jizyah, kudin shuke* (tax on crops) and *kudin kasa* (tax paid in cowries by farmers) were all abolished by the British from 1903 which imposed its own fiscal policy (Ubah, 1979:173-4, 177-8). There is a need to go back to the *Shari'ah* in all matters affecting Muslims.

The *Shari'ah* has provided practical solutions to and guidelines for landlord-tenant relationship. Its approach is holistic, regulating the nexus of human beings to Allāh, to society and the State. The *Shari'ah* can be defined as the revealed Will of Allāh being a divinely ordained system that precedes society and State and is not preceded by it (Muslehuddin, 1975:13). Its primary objective is the good of mankind by which it removes harmful, burdensome customs and superstitions and brings benefit to all sections of humanity throughout succeeding generations (Al-Qaradawi, 1984:6).

The *fuqahā'* contributed extensively to the development of substantive Islamic laws of land tenure. The laws regulating landlord-tenant relationship developed gradually and spontaneously (Haque, 1985:1). However, the *ummah* as well as the entire world community is urgently in need of the creative genius and

Shari'ah -oriented approach of the early *fuqahā'* to investigate the modern relationship of landlord and tenant regarding tenanted accommodation, lease and rental agreements and other related matters.

In view of the prevailing conditions between landlords and tenants in a hostile rental market, it is therefore necessary to look at the *Shari'ah* principle, “*needs make lawful what is unlawful*” or “*necessity permits prohibited things*”. There is a need for the regulation of society’s collective responsibility to fulfil *darūriyyāt* (necessities) which takes precedence over *ḥājiyyāt* (conveniences) and *taḥsīniyyāt* (refinements)³. In South Africa and the world at large socio-economic conditions have resulted in an under-supply of housing. The demand for shelter is the highest in the history of mankind and landlords are exploiting the situation by charging exorbitant rentals, subjecting tenants to poor living conditions and other oppressive requirements and pre-conditions. It is hoped that the Rental Housing Act 50 of 1999 will assist in regulating the relationship between tenant and landlord and provide a speedy and cost-efficient mechanism to resolve conflicts.

It was due to landlord’s exploiting tenants after World War I that many governments, including those in South Africa, United States of America, Egypt, Kenya, India, introduced rent control, restricting the rights of landlords to charge

³ Refer to Glossary for further explanations of these terms.

exorbitant rentals (Cooper, 1974:1-8; Mohamed, 1994). The United Nations passed a resolution on Forced Evictions affecting the rights of tenants and the homeless (Appendix 1). The moral dimension is the missing link to ensure a just society and it is the moral order that guaranteed success to Muslims (Pirenne, 1939:150). Equally important are the need to oversee the implementation and enforcement of basic codes of ethics between man and man, man and society, and the State. Thus an enjoiner of the good, a forbiddener of the evil, and a rectifier of morals are indispensable (Jamal ad-Din al-Afghani, 1968:173).

According to Ibn Taymiya if the public need is satisfied by their producing sufficient to be bought at a reasonable price, then there is no necessity for price control. But if the public need cannot be satisfied except by equitable price control, then control must be introduced, striking a just mean between deficiency and excess. (Ibn Taymiya, 1983:58).

4.6. General Recommendations

It is therefore necessary for Muslim scholars, especially those who have thorough knowledge of *fiqh* (the science of Islamic jurisprudence) to apply themselves to matters in respect of landlord and tenant relationship. The International Islamic Conference on Land Ownership and Tenure (December 29, 1957- January 8, 1958)⁴ dealt extensively with landed property and land tenure. The Second

⁴ Papers delivered at the Conference were published as the "*International Islamic Colloquium Papers*", which have been referred to in this study.

International Conference on Islamic Economics (1983) clarified the conceptual framework of the Islamic approach to problems related with income distribution and contemporary solutions and policy regarding a just economic order. Modern jurists like Taqi Usmani (2000) and various other local scholars such as *Mufti* Desai (Camperdown, KwaZulu Natal) have to varying degrees tackled tenant-landlord matters within the framework of *ijārah*.

More local and international conferences, workshops and research are needed with specific focus on landlord and tenant relationship of rental residential accommodation, their rights and obligations and ways to deal with problems.

Areas of foci may include: -

- State intervention to ensure justice and equity.
- Redefining and re-evaluating the principles of *ijārah* and creating new perspectives thereto.
- Tenancy agreement - this should be in writing.
- Mediation, arbitration and enforcement mechanisms.

4.7. Specific Recommendations

It is not possible for governments around the world to provide adequate, affordable, suitable accommodation for their respective citizens in the immediate

future. Besides, tenants may prefer to rent rather than own dwellings for a number of reasons. It is therefore necessary for Muslim scholars to give the tenant-landlord area the priority it urgently deserves by applying themselves to the principles of the *Sharī'ah*.

Islam has provided mechanisms to bring about a just society. The institution of *al-Ḥisbah* is a public order institution to ensure that all citizens conform to the legal and moral injunctions of Islam (Ibn Taimiyah, 1983:19-26, 38-9). In commanding good and forbidding evil, *al-Ḥisbah* concerns itself with the rights of (i) Allāh, (ii) individuals and (iii) Allāh and individuals (Al Māwardī, 1996:341).

The institution of *al-Ḥisbah* was considered a fundamental aspect of the Islamic State and its function was undertaken by the early rulers themselves (Al-Mawardi, 1996:343, 348-50). Prophet Muḥammad (Allāh bless him and grant him peace) is considered the first *Muhtasib* (in charge of *al-Ḥisbah*), later having appointed 'Umar and Sa'īd Ibn-al 'Āṣ Ibn al Umayyah as *Muhtasib* of Madīnah and Makkah respectively (Khan, 1982).

According to Ahmad (1982:85) the function of *al-Ḥisbah* consists in maintaining public law and order and supervising the behaviour of the buyers and sellers in

the market with a view to ensure right conduct and protect people from dishonesty and malpractice. The purpose was to regulate public life in such a way that a high degree of public morality is attained and the society is protected from bad workmanship, fraud, extortion, exploitation and charlatanism. Charging “goodwill” or “key-money” is extortion. The landlord has the upper hand and the contract of lease does not allow the tenant to argue or disagree about oppressive, unjust conditions, but is compelled by sheer necessity to accept.

Some of the areas to be included in their investigation and deliberations are listed below with brief discussions. Also included is a specimen lease agreement.

4.7.1. Eviction

Owners are granted an inviolable right to their property by the *Sharī'ah*. However, many landlords own property for the purpose of letting it in return for rentals. Often, landlords have relegated Islam to a personal status, separated from business and other social interactions. It is therefore a general practice for landlords to refuse to renew a lease or to terminate or evict without cause or reason. Landlords argue that it is their common law right to evict a tenant for a good reason or a bad reason or for no reason at all. The *Sharī'ah* principle “*Necessity makes lawful what is unlawful*” must be one of many guiding principles to ensure a *reason* for an eviction especially when unscrupulous landlords are exploiting the acute housing shortage, forcing tenants into a very

hostile housing “market” and in the presence of growing homelessness of approximately 1 billion world-wide (Olufeni, 1998).

Intervention is therefore necessary to bring about a fair and just relationship between landlord and tenant. Other issues that need investigation are: -

- 4.7.1.1. Does a tenant have a presumptive right of security of tenure? In other words, is it presumed by a prospective tenant that the contract of lease to be entered into would provide security of tenure?
- 4.7.1.2. Does Islam permit arbitrary behaviour of landlords and can this be restricted?
- 4.7.1.3. Is it permissible to ensure a **just cause** and **good faith** bases for eviction?
- 4.7.1.4. Can a landlord arbitrarily evict a tenant for the following reasons: -
 - **Legitimate complaints** by tenants regarding the need for maintenance and repairs;

- **Retaliatory or vindictive action** against tenants (for objecting to the landlord's rent hike or for organising a tenants' committee);
- **Opportunistic reasons** - replacing families with students because the Educational Institutions concerned are willing to pay higher rentals than existing (sitting) tenants;
- **Prospective new tenants** are willing to take occupation in spite of the state of disrepair and exorbitant rentals;
- **Discriminatory reasons** - against pensioners, disabled persons.

4.7.2. Landlord's Just Cause Actions

At the same time, landlords' rights must also be protected and it would be necessary to establish tenants' obligations. For instance, tenants violating the following would provide the basis for **just cause** to evict (by no means an exhaustive list): -

- Failure to pay the rent when due;
- The tenant habitually fails to pay the rent;

- Failure to pay a rent increase, provided such an increase is not unconscionable;
- Disorderly conduct - disturbing the peace and quiet of other tenants or the neighbourhood;
- Damage to the premises resulting from wilful conduct or gross negligence;
- The accommodation is reasonably required for repairs and renovations, reconstruction or rebuilding scheme or demolition;
- The landlord requires the premises for his or her personal use.

Even in the above instances the landlord's approach should take cognisance of the principle of 'adl (justice), *ihsān* (benevolence), *infāq* (voluntary spending).

4.7.3. Illegal Lockouts and Shutting off Utilities

Islam does not allow anyone to resort to self-help remedy, taking the law into one's own hands. Due process of the law must take place and in terms of the *Sharī'ah*. Illegal lockouts and the illegal disconnection of electricity and water supply as a punitive measure would be considered undue hardship and actions prohibited in Islām. There are two categories of prohibited things, *ḥaram* (things absolutely forbidden) and *makrūh* (things disliked). According to Maududi

(1977:49) *makrūh* varies from bordering on *ḥarām* to permissible actions, with explicit measures prescribed by the *Sharī'ah* for its prevention in some cases and in other instances, society or the individual has to use its discretion.

Landlords resorting to illegal actions are acting contrary to the principle of *iḥsān* or doing good. Right action, according to Ibn Taymiya (1983:122) is well-doing (*iḥsān*), which is what God has ordained, and what God has ordained is what God has made Law, and this is in conformity with God's practice and the practice of His Messenger. The United Nation has recently recognised the right of tenants and the homeless community, which includes the right to be protected from landlords' illegal actions. (Leckie, 1994). Such illegal actions lead to extreme hardships and misery.

4.7.3.1. How does Islam view harassment by such landlords and what remedy is available for victimised tenants in such an instance? This is clearly *ẓulm* or oppression interfering with and disturbing the privacy, comfort, peace, or quiet enjoyment of the tenant in his or her occupancy of the rented accommodation.

4.7.4. Rent Increases

The principle of rent increase is entrenched in landlord-tenant relationship. The protection of tenants' rights is concerned with the issue of rent increases as mechanisms used by unscrupulous landlords to exploit and victimise tenants. The principles of *ihsān* (doing good), *'adl* (justice) and *ḍarūrah* (social necessity) among others, are totally ignored by landlords when rents are increased. It would be necessary to investigate what is **affordable rent**, particularly in the case of disadvantaged sectors of society such as the elderly, the disabled and the unemployed.

Rent increases should be carefully regulated in order to eliminate the exploitation of tenants by unscrupulous landlords. Further, with the exception of a month's advance rental as a reasonable security deposit, a tenant should not be required to pay any additional amount or other premium such as goodwill or key money.

4.7.5. Lease Agreement

A contract of lease between a landlord and tenant should be in writing and in plain language. A tenant should have the right to a copy of the agreement (upon signing thereof). The terms of the agreement should be mutually decided and the cost of the agreement should be shared between the parties.

Allāh, Exalted and Glorious is He, directs the *ummah* to have a written agreement to avoid conflicts, confusion and injustice, the contract, whether small or big, to be written and witnessed, with everyone (including witnesses and the scribe) acting freely and justly (Qur’ān 2:282-3).

Where written lease agreements are provided it is common practice for landlords and their agents to provide standard lease agreements overriding or ignoring the rights of tenants. Often, even reputable estate agents do not allow tenants to study the lease or seek advice or legal opinion. Tenants are under tremendous pressure to accept the terms and conditions because of the sheer desperation for accommodation. Often, tenants do not receive a copy of the lease agreements they have signed and paid for. Lease agreements in practice are therefore an “oppressive” instrument and do not provide adequate security of tenure (2.2.5.2; 2.4.1.4). The Rental Housing Act 50 of 1999 provides for a verbal contract of lease to be reduced to writing and will assist to an extent to ameliorate the relationship between tenant and landlord.

4.7.6. *Ijārah Bi-l Kitābah* - Written Lease Agreement

Below is a proposed Standard Written Lease Agreement that could assist in regulating the relationship between tenant and landlord.

In the Name of Allāh, Most Gracious, Most Merciful.⁵

LEASE AGREEMENT [Including an Arbitration Clause]⁶

4.7.6.1. PARTIES

The parties to this agreement are

_____, hereinafter called "Landlord",
and _____
_____, hereinafter called
"Tenant".

If Landlord is the agent of the owner of said property, the owner's name and address is

4.7.6.2. PROPERTY

Landlord hereby lets the following property to Tenant for the term of this Agreement: (a) the property located at: -

⁵ This phrase and other similar 'Arabic terminology and Islamic terms would not be included in an agreement where both parties are not Muslims. Nonetheless the salient points and principles of *iḥsān* (doing good), *'adl* (justice) and *ḍarūrah* (social necessity) can and should be "codes of conduct" for Muslim landlords when entering into a lease agreement.

⁶ Extensive references were made to Blumberg & Grow, 1978 and publications of the OCR. In addition to these, Islamic concepts based on *Shari'ah* principles have been included. These include points of Islamic law stated by respondents (Muslim organisations) in this study. However, in South Africa while Islamic guidelines can have persuasive influence on Muslim landlords and tenants, it would be a recommended virtue for Muslim landlords to use these when contracting with tenants who are not Muslims.

and (b) the following furniture and appliances on said property:

4.7.6.3. TERM

The term of this Agreement shall be for _____, beginning on _____ and ending on _____.

4.7.6.4. RENT

The monthly rental for said property shall be R_____ due and payable on the first day of each month to the Landlord at _____ for which the tenant shall be given a written rent receipt.

4.7.6.5. UTILITIES/SERVICES

Utilities/services shall be paid by the party indicated on the following chart:

	Landlord	Tenant
Electricity	_____	_____
Water	_____	_____
Refuse removal	_____	_____
Other	_____	_____

(Where the tenant is indicated as the responsible party, there shall be a separate utility meter for that unit.)

4.7.6.6. USE OF PROPERTY

Tenant shall use the property only for residential purposes, except for incidental use in trade or business (such as telephone solicitation of sales orders or arts and crafts created for profit), so long as such incidental use does not violate the Shari'ah, local municipal laws or affects Landlord's ability to obtain fire or liability insurance.

4.7.6.7. TENANT'S DUTY TO MAINTAIN PREMISES

Tenant shall keep the dwelling unit in a clean and sanitary condition and shall otherwise comply with all local municipal laws requiring tenants to maintain rented premises. If damage to the dwelling unit (other than normal wear and tear) is caused by acts or neglect of Tenant or others occupying the premises under his or her control. Tenant may repair such damage at his or her own expense. Upon Tenant's failure to make such repairs and after reasonable written notice by Landlord, Landlord may cause such repairs to be made and Tenant shall be liable to Landlord for any reasonable expense thereby incurred by Landlord.

4.7.6.8. ALTERATIONS

No substantial alteration, addition, or improvement shall be made by Tenant in or to the dwelling unit without the prior consent of Landlord in writing. Such consent shall not be unreasonably withheld, but may be conditioned upon Tenant's agreeing to restore the dwelling unit to its prior condition upon moving out.

4.7.6.9. NOISE

Tenant agrees not to allow on the premises any excessive noise or other activity that disturbs the peace and quiet of other tenants in the building or neighbourhood. Landlord agrees to prevent other tenants and other persons in the building or common areas or neighbourhood from similarly disturbing Tenant's peace and quiet.

4.7.6.10. INSPECTION BY LANDLORD

(a) A joint inspection by Tenant and Landlord at the time of Tenant taking occupation of the premises and again three days prior to Tenant vacating the premises must take place. Any defect must be written down and attached as an addendum to the lease agreement. Failure to carry out as joint inspection will preclude any claim for cost of repairs from Tenant or for damage caused to the premises.

(b) Landlord or his agent may enter the dwelling unit upon 7 days written notice and with Tenant's consent only for the following purposes: to make repairs, and to exhibit the unit to prospective purchasers, mortgages, and tenants. Such entries shall not be so frequent as to seriously disturb Tenant's peaceful enjoyment of the premises. Such entries shall take place only with the consent of Tenant, which shall not be unreasonably withheld.

4.7.6.11. SECURITY DEPOSIT

a) Tenant shall pay Landlord, upon execution of this Agreement, a security deposit of R_____, which in any case does not exceed one month's rent. The said deposit will be kept in a separate account and the tenant shall be duly notified of the bank and the account number. Landlord may invest the money, with Tenant's approval, into an Islamic investment account. The accrued profit, if any, together with the full deposit shall be returned to Tenant. The said deposit may be applied by Landlord toward reimbursement for any reasonable cost of repair or cleaning necessitated by tenants' acts or omissions in violations of this Agreement (normal wear and tear excluded) and for which is due, unpaid, and owing.

b) Within three days after Tenant vacates the premises, Landlord shall return to Tenant the security deposit, less any deductions Landlord is entitled to make under section (a) of this paragraph. If any deductions are made, Landlord shall

also give tenant a written itemised statement of such deductions and explanations thereof.

c) If the Landlord fails to comply with sections (a) or (b) of this paragraph, then the Landlord waives the right to make deductions from the security deposit and will be responsible for returning the entire deposit to Tenant when Tenant vacates the premises.

4.7.6.12. LANDLORD'S OBLIGATION TO REPAIR AND MAINTAIN PREMISES

a) Landlord shall provide and maintain the building and grounds appurtenant to the dwelling unit in a decent, safe, and sanitary condition, and shall comply with all local laws, regulations, and ordinances concerning the condition of dwelling units which at a minimum must be maintained in decent, safe, and sanitary condition.

b) Landlord shall take reasonable measures to provide and maintain security on the premises and the building and grounds appurtenant thereto to protect tenant and other occupants and guest on the premises from burglary, robbery, and other crimes. Tenant agrees to use reasonable care in utilising such security measures.

c) As repairs are now needed to comply with this paragraph, Landlord specifically agrees to complete the following repairs on or before the following dates:

Repair	Date
_____	_____
_____	_____
_____	_____

This list is not intended to be exhaustive, nor is it to be constructed as a waiver as to any other defective conditions, which may exist.

d) If landlord fails to substantially comply with any duty imposed by this paragraph, Tenant's duty to pay rent shall abate until such failure is remedied. Upon Landlord's failure to make necessary repairs, Tenant may make or cause to be made said repairs and deducts the reasonable cost of said repairs from the next months' rent. This section (d) shall apply to defects within Tenant's dwelling unit only, and then only if Tenant has notified Landlord or his agents of such defects and has given Landlord a reasonable time to make repairs. The remedies provided by this section (d) shall not be exclusive of any other remedies provided by law to Tenant for Landlord's violation of this Agreement.

4.7.6.13. SUBLEASING

Tenant shall not assign this Agreement or sublet the dwelling unit without consent of Landlord. Such consent shall not be withheld without good reason relating to the prospective tenant's ability to comply with the provision of this agreement. This paragraph shall not prevent Tenant from accommodating guests for reasonable periods.

4.7.6.14. RETALIATION

If Tenant reasonably and peacefully exercises any right granted under this Lease Agreement or any relevant law, or if Tenant joins or organises a tenants' union, Landlord agrees not to retaliate against or harass Tenant in any way; specifically including but not limited to eviction, rent increase or services decrease, refusal to renew a term tenancy, or substantial alteration of lease terms.

4.7.6.15. DESTRUCTION OF PREMISES

If the premises become partially or totally destroyed during the term of this Agreement, either party may thereupon terminate this Agreement upon reasonable notice.

4.7.6.16. TENANT'S TERMINATION FOR GOOD CAUSE

Upon one calendar month's written notice, for good cause, Tenant may terminate this Agreement and vacate the premises. Said notice shall state good

cause for termination. Good cause shall include, but not be limited to, entry into active duty with the military services, employment in another community, and loss of the main source of income used to pay the rental.

4.7.6.17. TERMINATION

Upon termination of this Agreement, Tenant shall vacate the premises, remove all personal property belonging to him or her, and leave the premises as clean as he or she found them (normal wear and tear excepted).

4.7.6.18. LAWSUITS

If either party commences a lawsuit against the other to enforce any provision of this Agreement, the successful party may be awarded reasonable attorney fees and court costs from the other. Landlord specifically waives any right to recover treble or other punitive damages.

4.7.6.19. ARBITRATION

Parties to the agreement undertake to use all amicable ways to resolve any resultant problem or conflict arising from this contract, including arbitration. Both parties agree that should they submit themselves to arbitration, the decision of the arbitrator will be final and binding.

4.7.6.20. NOTICES

All notices provided by this Agreement shall be in writing and shall be given to the other party as follows:

To the Tenant: at the premises.

To the Landlord:

at _____

4.7.6.21. HOLDOVERS

If Tenant holds over upon termination of this Agreement and Landlord accepts Tenant's tender of the monthly rental provided by this Agreement, this Agreement shall continue to be binding on the parties as a month-to-month agreement.

WHEREFORE We, the undersigned, do hereby execute and agree to this Lease Agreement and call upon Allāh, exalted and mighty is He, to bear witness that this agreement was entered into without any coercion, deception or injustice.

LANDLORD’S:

TENANT’S:

Signature

Date of Signature

Witnesses’

Signature

Date of Signature

Signature

Date of Signature

Signature

Date of Signature

4.8. In Summary

4.8.1. At a macro level this study seeks to: -

- Press for the urgency of holding a world conference of leading Islamic scholars on landlord-tenant relationship.
- Produce a “blueprint” based on the *Shari’ah* to regulate the rights and obligations of landlord and tenant.

- Inculcate an Islamic orientation in the world community, the sense of sacredness that Islam offers as a basis for a new relationship eloquently argued by Prince Charles (1997:22-4).
- Establish the institution of *al-Hisbah*.

4.8.2. At a local level (South Africa) this study seeks to: -

- Stimulate interests among Islamic scholars and organisations to research the field of landlord-tenant relationship collectively.
- Make recommendations to the government to best accommodate the rights and obligations of landlord and tenant in addition to the newly introduced legislation, the Rental Housing Act 50 of 1999.

In short, Islamic scholars and organisations both locally and globally should strive to establish a just social order. Landlord-tenant relationship is one (neglected) area that requires urgent attention. At an international level, great deal of work has been undertaken by secular movements and organisations which can be supported and supplemented with *Shari'ah* principles. This would require: -

- 1) *Ijtihād* - discretionary opinions by Muslim jurists based on the *Qur'ān* and *Sunnah*.

- 2) Consensus by Muslim scholars. This would necessitate: -
 - Revisiting and thorough investigation of the collection of *aḥādīth* and *fatāwā* (juristic decisions).

 - In-depth knowledge of rural and urban life under the different Muslim governments.

 - Knowledge of contemporary rural and urban developments, laws and regulations.

 - Developing a legal framework for tenant-landlord relationship with the *Qur'ān* and *Sunnah* as the two primary sources.

This task would mean a major paradigm shift from the static or stagnant view and approach of not “opening the doors” of *ijtihad*.

UN Commission on Human Rights Resolution 1993

(adopted unanimously on 10 March 1993 in Geneva during the 49th Session of the UN Commission on Human Rights)

Forced evictions

Recalling resolution 1991/12 (Forced evictions) of 26 August 1991 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities,

Also recalling its resolution 1992/10 of 2 February 1992, in which it took note with particular interest of General Comment No. 4 (1991) on the right to adequate housing (E/1992/23, annex III) adopted 12 December 1991 by the Committee on Economic, Social and Cultural Rights at its sixth session and the reaffirmed importance attached in this framework to respect for human dignity and the principle of non-discrimination,

Reaffirming that every woman, man and child has the right to a secure place to live in peace and dignity,

Concerned that, according to United Nations statistics, in excess of billion persons throughout the world are homeless' or inadequately housed, and that this number is growing,

Recognizing that the practice of forced eviction involves the involuntary removal of persons, families and groups from their homes and communities, resulting in increased levels of homelessness and in inadequate housing and living conditions,

Disturbed that forced evictions and homelessness intensify social conflict and inequality and invariably affect the poorest, most socially, economically, environmentally and politically disadvantaged and vulnerable sectors of society,

Aware that forced evictions can be carried out, sanctioned, demanded, proposed, initiated or tolerated by a range of actors,

Emphasizing that ultimate legal responsibility for preventing forced evictions rest with governments,

Recalling that General Comment No. 2 on international technical assistance measures (1990), adopted by the Committee on Economic, Social and Cultural Rights at its 4th session, states, inter alia, that international agencies should scrupulously avoid involvement in projects which, inter alia, involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation,

Mindful of the questions concerning forced evictions included in the guidelines for States' reports (E/1991/23, annex IV) submitted in conformity with articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights,

Noting with Appreciation that the Committee on Economic, Social and Cultural Rights, in its General Comment No. 4, considered that instances of forced evictions were, prima facie, incompatible with the requirements of the International Covenant on Economic, Social and Cultural Rights and could only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law,

Taking note of the observations of the Committee on Economic, Social and Cultural Rights at its 5th (1990) and 6th (1991) sessions concerning forced evictions,

Taking note also of the inclusion of forced evictions as one of the primary causes of the international housing crisis in the working paper on the right to adequate housing, prepared by Mr. Rajindar Sachar (E/CN. 4/Sub. 2/1992/15),

Taking note further of Sub-Commission resolution 1992/14 (Forced evictions) of 27 August 1992,

- 1 Affirms that the practice of forced evictions constitutes a gross violation of human rights, in particular the right to adequate housing;
- 2 Urges Governments to undertake immediate measures, at all levels, aimed at eliminating the practice of forced evictions;
- 3 Also urges Governments to confer legal security of tenure to all persons currently threatened with forced eviction and to adopt all necessary measures giving full protection against forced evictions, based upon effective participation, consultation and negotiation with affected persons or groups;
- 4 Recommends that all Governments provide immediate restitution, compensation and/or appropriate and sufficient alternative accommodation or land, consistent with their wishes or needs, to persons and communities which have been forcibly evicted, following mutually satisfactory negotiations with the affected persons or groups;
- 5 Requests the Secretary-General to transmit the present resolution to Governments, relevant United Nations bodies, including the United Nations Centre on Human Settlements, the specialized agencies, regional and intergovernmental organizations, non-governmental organizations and community-based organizations, soliciting their views and comments;
- 6 Also requests the Secretary-General to compile an analytical report on the practice of forced evictions, based on an analysis of international law and jurisprudence and information submitted in accordance with previous paragraph, and to submit his report to the Commission at its 50th session;
- 7 Decides to consider the analytical report at its 50th session, under item 7, entitled " The realization of economic, social and cultural rights", and to determine how most effectively to continue its consideration of the issue of forced evictions.

In the name of Allah, the Beneficent, the Merciful

Questionnaire on the Rights and Obligations of Landlords and Tenants in Islam

1. What are the rights of :-
 - 1.1. landlords
 - 1.2. tenants?
2. What are the obligations of
 - 2.1. landlords
 - 2.2. tenants?
3. What was the position of landlords and tenants during the time of
 - 3.1. Nabī Muḥammad (Allāh bless him and grant him peace)
 - 3.2. *Al-Khulafā' al-Rāshidūn*
 - 3.3. the various Muslim governments
4. Is a verbal or written agreement of lease preferred?
5. What would be the essential clauses in a written agreement?
6. How should rentals be calculated?
7. What is the
 - 7.1. minimum, and
 - 7.2. maximum limits of rentals?
8. What is the situation with pensioners and hardship-tenants (experiencing financial difficulties) – is the private landlord obligated to reduce rentals, waive rentals (for a specific period), etc.?
9. Who is responsible for repairs and maintenance?
10. Who should pay rates due to local authority?
11.
 - 11.1.If a tenant is in breach, how should this be resolved - should a tenant be given a reasonable time to remedy the breach?
 - 11.2.If a landlord is in breach, how should this be resolved?

12.
 - 12.1.Can the landlord refuse to rent out his premises? On what basis?
 - 12.2.If there is a housing shortage, could the landlord refuse to rent out his premises?
 - 12.3.Is the landlord allowed to charge exorbitant rentals?
13. Can the landlord or tenant charge or utilise interest regarding:
 - 13.1.deposit kept in a trust account?
 - 13.2.legal costs?
 - 13.3.arrear rentals?
 - 13.4.any other purpose?
14. What should be done with accrued interests?
15.
 - 15.1.Can a landlord or his agent charge a collection fee?
 - 15.2.What should be the maximum amount?
16. How should conflicts be resolved?
17. Whose responsibility is it to provide housing?
18. Must the landlord provide a reason when serving a tenant with a notice of eviction?
19. What would be considered a reasonable period of notice to vacate?
20. Any comment you wish to make.

Jazākumu Allāhu khayr

Sayed-Iqbal Mohamed

In my letter I have indicated the purpose of my Master's research and I requested your response to my Questionnaire. I have also asked permission to use the information supplied by you in my studies. Please note that your completed questionnaires/response will be kept confidential. You need to sign below should you wish to participate.

Participant's Signature

<i>Al-'aqd</i>	A legally enforceable contract with mutual obligations
<i>Al-bai'</i>	Sale
<i>Al-'uqūd al-ṣahīḥah</i>	Valid contracts
<i>Al-Hisbah</i>	The commanding of good when it is neglected, and the forbidding of what is bad when it is practised; moral and socio-economic mechanism or system by the State to inspect market practices to ensure public morality and to prevent bad workmanship, fraud, extortion, exploitation and other malpractice.
<i>Al-maṣlāḥat al-āmmah</i>	General welfare. A human rights principle - the principle of general good, which includes the rights to food, clothing and shelter.
<i>Al-mazālim al-mushtarakah</i>	Joint or common injustice.
<i>Anṣār</i>	Muslim "Helpers" of the city of <i>Al-Madīnah</i> who were Companions of Prophet Muḥammad (Allāh bless him and grant him peace) and supported Islam and received and helped fellow Muslim emigrants of <i>Al-Makkah</i> .
<i>'Āqil</i>	Mentally competent being able to distinguish good from bad and benefit from harm
<i>Al-arḍ al-'ādīyah</i>	Deserted land without ownership or cultivator.
<i>Arḍ al-khāliṣah</i>	State owned land.
<i>Arḍ</i>	Land
<i>Arḍ mayyitah, Mawāt</i>	"Dead" land, uncultivated or waste land that was abandoned which a person cultivated or irrigated to "revive" it
<i>Arāḍin al-'ushrīyah</i>	Private land of Muslims
<i>Al-Ayyām al-Jāhilīyah</i>	Age of Ignorance, the period before Islam.

<i>Bāligh</i>	An adult
<i>Bayt al-Māl</i>	State Treasury
<i>Bi-l-kalām</i>	Verbal
<i>Bi-l- kitāb</i>	Written
<i>Dārūrah</i>	Social necessity. A principle used for permitting forbidden things in case of duress or extreme hardship.
<i>Darūriyyāt</i>	Necessities. <i>Al-darūriyyāt al-khams</i> refers to five fundamental necessities: (a) <i>ḥimāyat al-ḥayāt</i> or the protection of life, (b) <i>ḥimāyat al-dīn</i> or the protection of religion, (c) <i>ḥimāyat al-‘aql</i> or the protection of intellect, (d) <i>ḥimāyat al-mulkiyah</i> or the protection of property (and <i>ḥimāyat al-mal</i> or the protection of wealth) (e) <i>ḥimāyat al-nasl</i> or the protection of offspring.
<i>Dhimmi</i>	Protected community - a contract between the Islamic government and non-Muslims who paid <i>jizyah</i> to live freely under the protection of the State.
<i>Dīwān al-Nazr fīl Maẓālim</i>	A bureau to inspect grievances, to scrupulously ensure the rules of <i>Sharī‘ah</i> were observed, investigating violations of rights, ensuring justice, supervising and managing the <i>auqāf</i> .
<i>Ḍiyā‘</i>	Landed or country estate
<i>Faḍl māl bi-lā ‘iwad</i>	Unjust enrichment.
<i>Fai’</i>	Spoils of war.
<i>fai’ al-Muslimīn</i>	The conquered land of the Muslims.
<i>Fallāḥīn</i>	The farmers and land tillers.
<i>Farā’id</i>	Compulsory obligations.

<i>Farḍ kifāyah</i>	The collective social responsibility.
<i>Fāsid</i>	Corrupt.
<i>Fatāwā</i> (sing. <i>fatwā</i>)	Legal edicts or opinions.
<i>Fiqh</i>	The science of Islamic jurisprudence.
<i>Fī sabīl-il-Āllāh</i>	In the way of Allāh, free of charge.
<i>Fuqahā'</i> (sing. <i>Faqih</i>)	Muslim jurists.
<i>Ghanīmah</i>	Booty.
<i>Gharar</i>	Risk and uncertainty.
<i>Ghasb</i>	Unlawful seizure of property; a person uses a landed property without authorisation.
<i>Hājiyyāt</i>	Conveniences. This is the secondary purposes of law that are complementary to the five primary purposes of law (stated under <i>darūriyyāt</i>).
<i>Ḥakam</i>	An arbitrator.
<i>Halāl</i>	Permissible by <i>Sharī'ah</i> .
<i>Ḥarām</i>	Forbidden by <i>Sharī'ah</i> .
<i>Himā</i>	Land that was collectively owned by a tribe or several tribes.
<i>Hudūd al-Allāh</i>	Limits laid down by Allāh
<i>Iḥsān</i>	Benevolence, doing good in order to foster harmonious relationship.
<i>Iḥyā' al-mawāt</i>	Grant of land to make it cultivable.
<i>Ījāb</i>	Offer
<i>Ijārah</i>	Lease contract, hiring.
<i>Ijārah al-gharar</i>	Dubious hire.

<i>Ijārah fāsidadh</i>	Voidable contract.
<i>Ijmā'</i>	Consensus.
<i>Ijtihād</i>	A jurist's discretionary opinions.
<i>Inshā' Allāh</i>	God willing.
<i>Intifā'</i>	Right of priority use of wasteland.
<i>Iqtā'</i>	An administrative grant of a piece of land.
<i>Iqtā' istighlāl</i>	Concessions by the State granted to exploit the land only.
<i>Iqtā' khāṣṣ</i>	Land in the possession of Sultān (Ottoman <i>Khalifah</i>).
<i>Iqtā' tamlik</i>	Concessions by the State whereby full ownership rights were granted to an individual.
<i>Jizyah</i>	Poll tax paid by <i>dhimmi</i> s.
<i>Khalīfah</i>	A Successor to Prophet Muḥammad (Allāh 's blessings and peace be upon him).
<i>Khilāfah</i>	Islamic governance.
<i>Kharāj</i>	Land tribute - tribute on land paid by non-Muslims for the use of the land that belonged to the Islamic State.
<i>Kharāj al-basātīn</i>	Tribute on fruit trees.
<i>Kharāj al-zirā'ah</i>	Tribute on agriculture.
<i>Al-Khulafā' al-Rāshidūn</i>	The four rightly guided Successors to the Prophet (Allāh's blessings and peace be upon him): Abū Bakr, 'Umar, 'Uthmān and 'Alī (may Allāh be pleased with them).
<i>Khums</i>	One fifth of the booty

<i>Kirā' al-arḍ</i>	Lease of land.
<i>Kirā' ma'lūm</i>	Fixed known rent.
<i>Majālis al-'aqd</i>	The period between the offer and its acceptance.
<i>Ma'jūr (also mu'jar, musta'jar)</i>	Property or service hired.
<i>Māl</i>	Property
<i>Manfa'ah</i>	Usufruct
<i>Maysir</i>	Speculation or gambling.
<i>Mazālim</i>	Wrongful exaction or exploitation.
<i>Milk</i>	Ownership - a person having full ownership rights.
<i>Milk aymānihim</i>	Land conquered during war and considered <i>ghanimah</i> .
<i>Milk tamm</i>	Full ownership.
<i>Mīrāth</i>	Inheritance. Islamic system of inheritance based on the <i>Qur'ān</i> .
<i>Mu'āhadīn</i>	Those who enter into an agreement.
<i>Mubādalah</i>	A contract of hiring that is valid in exchange of a commodity that was certain, specified in clear terms before the actual transaction and mutually agreed by the contracting parties.
<i>Muḍārabah</i>	One party provides the capital and the other party (employee) shares the profit. The loss is borne by the capital owner or investing party.
<i>Muhājirūn</i>	Emigrant Muslims of Al-Makkah (may Allāh be pleased with them), Companions of Prophet Muḥammad (Allāh bless him and grant him peace).

<i>Muḥtasib</i>	A person in charge of <i>al-Ḥisbah</i> .
<i>Mukhābarah</i>	A lease of land against a certain part of a produce.
<i>Mu'jir (also mukārī, muktarī)</i>	Lessor, landlord, employer, hirer.
<i>Muqāsimah</i>	Proportional <i>kharāj</i> , i.e. land tribute on a portion of produce due after one single crop.
<i>Muqtā'</i>	Grantee of State land.
<i>Musammā</i>	Named, specified; contractual fixed rental
<i>Musāqāt</i>	Crop-sharing contract over the lease of a plantation; lease of fruit tree or orchard for irrigating, fecundating and protecting fruit trees for a certain share of the fruit.
<i>Mushrikūn</i>	Polytheists
<i>Musta'jir</i>	Tenant, a person hiring, employee.
<i>Mu'taman</i>	Assigned or entrusted.
<i>Mutrafūn</i>	Those who lead an easy life- a life of opulence.
<i>Al-Musrifūn</i>	Those who waste by extravagance and disliked by Allāh, <i>Qur'ān</i> , 6:141.
<i>Muzābanah</i>	An exchange of dry dates, raisins, etc. for dates or grapes still in growth, without specifying weight, measure or number, against an object which is specified),
<i>Muzāra'ah</i>	Lease of "white" or bare land for cultivation with produce as rent; sharecropping.
<i>Nuqsān</i>	Harm.
<i>Qabūl</i>	Acceptance
<i>Qiyās</i>	Analogical reasoning.

<i>Qādī</i>	Judge
<i>Raqabah</i>	Private ownership right.
<i>Ribāh</i>	Interest or usury which is forbidden in Islam.
<i>Rujū‘</i>	Withdrawal
<i>Rukḥṣah</i>	Exception to the general law of prohibition.
<i>Şāhib al-arḍ, mālik,</i>	Possessor of land
<i>Rabb al-arḍ</i>	
<i>Şahābah</i> (sing. <i>Şahābī</i>)	Companions of Prophet Muḥammad (Allāh bless him and grant him peace).
<i>Şalāh</i>	Obligatory daily "prayers".
<i>Şawāfi</i>	Ownerless or abandoned land.
<i>Şarī‘ah</i>	Islamic law that regulates every aspect of life.
<i>Şūrā</i>	Mutual consultation. The <i>Qur‘ān</i> exhorts Muslims to conduct their affairs by mutual consultation. Its application is mandatory and must be observed by the Islamic state.
<i>Şulḥ</i>	Land conquered peacefully by treaty. An agreement is entered into with the conquered.
<i>Sunnah</i>	Indicates the action or doings, historical and prophetic elements, in addition to <i>aḥādīth</i> (the sayings) of Prophet Muḥammad (Allāh bless him and grant him peace). <i>Aḥādīth</i> and <i>Sunnah</i> is the secondary source of the <i>Şarī‘ah</i> .
<i>Taḥkim</i>	Arbitration.
<i>Takhayyur</i>	Choice of following any of the four schools of Islamic Law.

<i>Taḥsīniyyāt</i>	Refinements. . This is the third category of purposes of law that are complementary to the first two categories: <i>ḍarūriyyāt and ḥājiyyāt</i> .
<i>Talfīq</i>	Reconciling diverse juristic opinions.
<i>Talji'ah</i>	Smaller land owners who looked for protection to owners of big estates from the burden of excessive taxation. These smaller land owners by integrating their land to the large estates became tenants.
<i>Taqwā</i>	A consciousness or fear of Allāh.
<i>Taḥsinīyāt</i>	Refinements.
<i>Tauhīd</i>	Belief in the oneness of Allāh.
<i>Ujrah</i>	Rental.
<i>Ujrat al-mithl</i>	Market rental.
' <i>Uqūd</i>	Obligations
' <i>Ulamā'</i>	Religious scholars; Muslim scholars-in the widest sense of the word.
<i>Ummah</i>	Community. The (world) Muslim community as an integrated and distinct body.
<i>Ummatan waṣāṭan</i>	A balanced (Islamic) society
' <i>Urf</i>	Conventions
' <i>Ushr</i>	Tithe or tribute imposed on crops on land owned by Muslims at the time of him or her having embraced Islam or as his share (as a soldier) of the spoils of war.

<i>Waqf</i> (pl. <i>auqāf</i>)	Property, a religious endowment, whereby the land is immobilised for the welfare of the public. There were two types of <i>auqāf</i> - <i>waqf al ahlī</i> or family <i>waqf</i> and <i>waqf al khayr</i> or charitable or welfare <i>waqf</i> . In terms of <i>waqf</i> , the grantor disposed of his or her property as an endowment.
<i>'Ulāj</i>	Serf tenants, tillers
<i>Wāqif</i>	Grantor
<i>Wazīfah</i>	Fixed tax, which was specifically levied on the land in relation to the yield or monetary value and was paid annually.
<i>Zakāh</i>	Compulsory alms levied on a fixed proportion of the wealth and property liable for <i>zakah</i> . It is one of the five pillars of Islam and is paid yearly for the benefit of, <i>inter alia</i> , the poor. The <i>Qur'ān</i> (9:60) has stipulated eight categories of beneficiaries: the poor the and needy, those in charge of administering the funds thereof, for those whose hearts are inclined (towards Islam), to free those who are in bondage, those overburdened by debts, for Allah's cause and for the wayfarer.
<i>Zulm</i>	Injustice

Urdu Terms

<i>Jāgir</i>	A fief.
<i>Jāgir dārī</i>	Feudalism.
<i>Pagrī</i>	Payment of extra amount for a transaction, e.g., "key money" or "goodwill".
<i>Zamīndār / Zamīndārī</i>	Landholder, landlord, a big cultivator of land / landed property, absentee landlord

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