



ISLAMIC DEVELOPMENT BANK
ISLAMIC RESEARCH AND TRAINING INSTITUTE

EFFECT OF ISLAMIC LAWS
AND INSTITUTIONS ON
LAND TENURE
WITH SPECIAL REFERENCE
TO SOME MUSLIM COUNTRIES



ISLAMIC RESEARCH AND TRAINING INSTITUTE

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The Islamic Research and Training Institute was established by the Board of Executive Directors of the Islamic Development Bank (IDB) in 1401H (1981). The Executive Directors thus implemented Resolution No. BG/14-99 which the Board of Governors of IDB adopted at its Third Annual Meeting held on 10 Rabi Thani 1399H (14 March 1979). The Institute became operational in 1403H (1983).

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

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Mahmoud A. Gulaid

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«Land, because of its unique nature and the crucial role it plays in human settlements, cannot be treated as an ordinary asset controlled by individuals and subject to the pressures and inefficiencies of market. Private land ownership is also a principal instrument of accumulation and concentration of wealth and therefore contributes to social injustice. If unchecked, it may become a major obstacle in the planning and implementation of development schemes. Social justice, urban renewal and development, the provision of decent dwellings and health conditions for the people can only be achieved if land is used in the interests of society as a whole...

Land is also a primary element of the natural and man-made environment and crucial link in an often delicate balance. Public control of land use is therefore indispensable to the protection of land as an asset and the achievement of the long-term objectives of human settlement policies and strategies)).

**UNITED NATIONS;
Report of Habitat, 1976.**

	Page
List of Appendixes	ix
Foreword	xi
Acknowledgements	xiii
Transliteration Scheme	xv
Glossary of Juristic Terminologies	xvii
1. THE AGRARIAN STRUCTURE OF MUSLIM COUNTRIES	1
1.1. Introduction	1
1.2. Structure of land holdings and scope of fragmentation	2
1.3. Variants of tenure modalities	5
1.4. Objectives and scope of the study	7
2. DETERMINANTS OF TENURE MODALITIES	9
2.1. Survey of conventional factors and the new land tenure economics:	9
2.1.1. Population.	10
2.1.2. Tenure reforms.	11
2.1.3. The new land tenure economics.	12
2.1.4. Land tenure determinants in empirical analyses.	12
2.2. Dynamics of reform based on Islam:	14
2.2.1. Paradigms envisaged in the Composite Scheme of relations:	14
i. The Benevolence factor.	14
ii. The institutional factor.	16
iii. The physical endowment factor.	17
iv. Choice endowment factor.	17
2.2.2. Dynamics of the Composite System:	18
A. The institutional framework adopted from Qur'an and <i>Sunnah</i> :	19
i. The Islamic Law of Inheritance (ILI).	19
ii. The institution of family in Islam.	25
B. Applications to land tenure modalities.	29

3. ASSESSMENTS	31
3.1. Assessment of the Composite System:	31
3.1.1. Distribution of proceeds according to ILI.	31
3.1.2. Applications to land tenure systems in Muslim countries.	32
3.1.3. Phenomena of land subdivision and fragmentation.	33
3.1.4. «Cooperation Islamique».	35
4. SUMMARY AND RECOMMENDATIONS	37
4.1. Summary.	37
4.2. Recommendations: Potential remedies for land subdivision and fragmentation in Muslim countries.	38
NOTES	43
APPENDIXES	47
BIBLIOGRAPHY	55

LIST OF APPENDIXES

	Page
1. Land Resource Endowment - Africa Group, 1983 .	49
2. Land Resource Endowment - Western and South East Asia Group, 1983.	50
3. Share of Distribution of Proceeds According to the Islamic Law of Inheritance.	51
4. Distribution of Inheritance According to the Hanafi School.	52
5. Composition of Heirs and Associated Shares as Percentages of (Nt).	53

FOREWORD

The Islamic Research and Training Institute (IRTI) was established by the Islamic Development Bank (IDB) in 1401H (1981). IRTI became operational in 1403H (1982/83). The primary objective of the Institute is to carry out research in the area of Islamic economics, banking and finance, to develop the capabilities of professional personnel in Islamic economics to meet the needs of research and *Shari'ah* observing agencies; to train personnel engaged in development activities in the Bank's member countries; and to develop databases in fields related to its activities to help foster the development of the IDB member countries.

The academic activities of the Research Division in IRTI are conducted within the framework of four research groups, namely: the Islamic Economics Group, Islamic Banking Group, *Shari'ah* Studies Group, and Economic Cooperation among OIC Member Countries Group.

The Islamic Economics Group concentrates on basic and applied studies on the behavior of the economic units at the micro and macro levels with emphasis on issues which directly or indirectly relate to the compatibility of actual practices with the *Shari'ah*.

This Study is the second in a series of two papers on economics of land in Islam by the author. The first of this series entitled «Land Ownership in Islam - A survey» has now been approved as a research paper for publication.

The objective of this study is defined as tracing out the distributive and proprietary functions of the Islamic law of Inheritance. The intent is to assess the effects this and other institutional factors as the «family» have on the structure of land ownership and implicitly tenure modalities in some Muslim countries. The nature and substance of tenure modalities in the context of this law is used to shed light on the role and importance of the distributive function as it affects land in many lesser developed countries of the region.

Section One of the study deals with definition of relevant conventional parameters and other behavioral variables that are commonly encountered in land economics. Section Two discusses the «paradigms envisaged in an Islam-based tenure system» and also introduces the dynamics of such a system. In Section Three, assessment of the composite system, its distributive effect, fragmentation, emphasis on cooperation, etc. are discussed. Section Four summarizes the study and lists some recommendations.

Despite shortcomings, like any other research effort, we are hopeful this study will give the reader a reasonably clear description of options available in institutionalizing land reforms based on equitable and fair distribution of land.

Officer-in-Charge,
Islamic Research and Training Institute

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As the tradition is, I, alone, bear responsibility of this research. Naturally, therefore, the Islamic Development Bank and the Islamic Research and Training Institute are both exonerated from errors that may still be found in this research effort.

M.A. Gulaid

TRANSLITERATION SCHEME
(Arabic, Persian & Urdu)

همزة	
ا	a
ب	b
پ	p
ت	t
ث	th
ج	j
چ	ch
ح	h
خ	kh
د	d
ذ	dh
ر	r
ز	z
ژ	zh
س	sh
ش	s.
ص	d.
ض	t.
ط	z.

ع	,
غ	gh
ف	f
ق	q
ك	k
گ	g
ل	l
م	m
ن	n
ن	n
و	w
هـ	h
ی	y
ے	è
اَفتحة	a
اِكسره	i
اُضمه	u
آ-ی	â (in âdam)
ز	ù (in' uyun)
ي	î (in siddiq)

GLOSSARY OF JURISTIC TERMINOLOGIES

1. *Amir Al Muminin* : Leader of the Faithful. This term often coincides with *Waliyal Amar*, or *Imam* depending on who is using the term and on what time reference one has in mind.
2. *Amiriya Lands* : Land under the jurisdiction of the State. This expression was commonly used during the Ottoman Empire to indicate lands under the jurisdiction of the state.
3. *Ard Al Matruka* : This refers to lands set aside for public use. Therefore may technically be referred to as zoned lands.
4. *Ard Al Mawat* : The root word, in Arabic, is *Mayit* meaning dead. *Mawat*, therefore, is that land which is not productive because it simply has died for one reason or the other. The expression bad lands, though often used, fails to take into account modern technology of reclamation and revival. There is no such thing as bad lands in the real sense of the term taking into account that possibilities to revive lands that are seemingly bad, in juristic parlance *Mawat*, exist.
5. *Ard Al Sulh* : Lands whose people had reconciled with Islam are referred to as *Ard Al-Sulh*. Ownership of such lands remains with those who had reconciled. Hence the term *Sulh* which, in Arabic, means to come to live with or reconcile.
6. *Ard Al Unwah* : This expression refers to the opposite of the preceding one. Here, land is taken over by force because unlike in the case of *Sulh*, people have decided to put up a fight and have therefore resisted *Islam*. Having lost this resistance or war, their land becomes classified as *Ard Al Unwah*.

7. *Baytul Mal* : National Coffers. An Institution serving as depository/treasury of a Muslim **nation's financial resources**,
8. *Fai'*: **War booty.**
9. *Faqih* : A muslim jurist, lawyer, or theologian (plural, *Fuqaha*).
10. *Fatwa* : An opinion on a point of law. The act of giving a *fatwa* is a *mufti* and the person who asks for *fatwa* is a *mustafti*.
11. *Fiqh* : Islamic law and jurisprudence based primarily on the *Quran* and the *Sunnah* and secondarily on *Ijma'* and *Ijtihad*.
12. *Haqq Allah*: Duties and obligations due directly to Allah.
13. *Iqta* : From the arabic word *Qata'* meaning *slice out a piece*. In relation to land, *Iqta'* means a *piece of uninhabited land sliced out to somebody for use*. Ownership of such land is with the state. Hence varieties of different types of *Iqta'* as *Iqta' Tamlik*, *Iqta' Irfaq*, *Iqta' Istiqlal*, etc.
- The state of uncouthness and disorder associated with pre-islamic scene. It denotes the related ideas of ignorance.
14. *Jahiliyah* :
15. *Jizya* : Poll or Head tax payable by non-muslims under a Muslim Government.
16. *Kharaj* Land Is a land that is subject to *Kharaj*; and *Kharaj* is Mand tax payable by non-Muslims who are under the protectorate of an Islamic state.
17. *Kharaj Al-Muqasama* : Land leased out to cultivators on the basis of a certain proportional share of output.
18. *Ushr* Land : Is a land that- is subject to *Ushr*, and *Ushr* is literally one tenth of presumably the output from land.

19. *Waqf*: Is a benevolent institution in Islam. The act of subscribing to *Waqf* subsumes the preference of future reward to present worldly benefits, hence sacrifice. *Waqf* Lands therefore refer to those that have been put under the tutelage of this benevolent institution.
20. *Zimmi* : A non-Muslim in a Muslim state.

1. THE AGRARIAN STRUCTURE OF MUSLIM COUNTRIES

1.1. INTRODUCTION

Eighty percent of the population in Africa live off the land by farming or by pursuing other land-intensive activities. Farming contributes nearly 75 percent of the jobs, 55 percent of the foreign exchange earnings, and nearly 40 percent of the GDP. Most remarkably, it provides over 75 percent of the food consumed by the population. The peculiarity of this enterprise is that it produces vast quantities of food outputs from less than two hectare plots that are often built on insecure tenure and other numerous highly risk-prone institutional, physical and climatological imponderables.

In Asia, a similar profile may be sketched but with less pronounced climatological repercussions than is the case with Africa. Exceptions to this rule are those countries in the path of the monsoons which have always been exposed to serious flooding as the case is with Bangladesh; or complete failure of crops often due to prolonged droughts as has historically been observed in some parts of the Indian subcontinent.

Of the total land area in the African countries listed (see Appendix 1), only five percent is arable according to FAO definition. Out of this, nearly 10 percent on the average is irrigated lands; the remaining being an ad-hoc cultivation based on rainfed agriculture.

Compared to the countries listed under the Western and South East Asia Group (in Appendix 2), arable land areas appear to be twice the size as is available in Africa. The proportion of this land that is subject to irrigation, however, is nearly six times as much.

Available figures on average per capita arable plus woodlands and forest for Africa, reveal a potential for expansion greater than that which exists for the Asia group. This statement, nevertheless, must be subjected to the proviso that there are conditions permitting exploitation of existing resources and that changes in land use can readily be instituted. In addition, the relationship between resource endowment (in this case land) and the population parameter often take on added weight especially in the context of the Asia group. Here, land use potentials ought to be interpreted with caution. The significance of the higher (three-fold) population density in the Asia group as compared to the African, is too complex to be captured in simple numericals as averages and per capita.

The conclusion that can be drawn from these figures is that the land resource base and potentials in the twenty seven countries listed, rest on how best the physical, climatological and the dictates of the demographic factors involved, *ceteris paribus*, are exploited. Also that agriculture in Africa, and to some extent in Asia, is synonymous with the bundle of activities pursued by the millions of people residing in the rural sector. Diversification of the rural economic base has not yet developed to a stage where the industrial and the service sectors could move out of the urban center. Association therefore between the tradition-old enterprise (i.e., agriculture per se) and those who actively engage in it remains, logically, inseparable. This makes , at least in some quarters, the idea that one may be equated with the other, especially in the context of rural Africa, tolerable.-

Rural Asia and Africa also have the added similarity that the majority of the population is directly linked with land as a physical property. This linkage may be in the form of holdings of small properties or alternatively the lack of such privileges. The command over properties held often is through the access to the usufruct of land however tenuous the attachment may be. Alternatively, this may be through other not-so-statutory grounds based on traditions observed by the rural folks. Those who do not have land holdings but still remain in the rural sector fall under the large number of the poor that are landless" and have to subsist as workers. These two major groups form the core of the human resource base in the rural sector and as such define the scope of activities performed in the African and the Asian rural economies.

1.2. STRUCTURE OF- LAND HOLDINGS AND SCOPE OF FRAGMENTATION

In Lebanon, the number of farm holdings, total area and the extent of fragmentation, all confirm the characteristics prevailing in the majority of the Lesser Developed Countries (LDCs). Farm categories between half to five hectares number over seventy percent of the total (95,371). The aggregate number of hectares under this class have been put at 164,000 - which is merely 25 percent of the total land area owned (approximately 650,000 Ha).

Those between 5 to 10 hectares in size number slightly over 13,000 or only fifteen percent of the total number of holdings. The area under this group slightly exceeds 100,000 ha or merely 16 percent of the total.

Farms greater than 10 hectares in size number 11,000 or approximately 12 percent of all categories. This class makes up approximately 380,000 hectares or 59 percent of the total. These are under a very few number of owners. Relative to the 0.5 to 5 hectare group, which has a small area and a very large number of individual owners, a contrast is thus established.

This situation is compounded by the scale of fragmentation often associated with small holdings. Over 95 percent of the holdings in the category 0.5 to 5 hectares are fragmented and often as seriously as between one to nine parts. As farm size increases, the degree of fragmentation becomes smaller. For instance, land holdings between 5 to 10 hectares are 70 percent fragmented. The scale of fragmentation often is between 1 to 9 parts. Those between 20 to 50 hectares are 60 percent fragmented; and those over 100 hectares only 57 percent. Summarizing these peculiarities, one may suggest that all types of holdings suffer from fragmentation; however, the significance of this phenomenon is more pronounced for smaller farm sizes than for larger holdings .

In Bangladesh, nearly 30 percent of the rural households are classified landless. Distribution of the agricultural land is evidently skewed towards larger land holding classes than to smaller ones. Nearly 48 percent of rural households own parcels between 0.004 to 0.81 hectares in size. The land under this class of ownership is approximately 22 percent of the total land area. Together they make a significant proportion of the households that have no sufficient and/or economically viable land holdings from which to eke out an existence.

Farm sizes between 0.81 to 1.62 hectares support nearly 13 percent of the rural households and make up 22 percent of the land area. Those that are in the category between 1.62 to 8.1 hectares (or 10 acres) support only 8 percent of the rural households even though the claim they have over the total land area exceeds 30 percent.

Farm sizes greater than 8.1 hectares support the smallest concentration of households of all categories - only 2.5 percent of the total. The significance of the latter is that these households claim the largest land area second only to those in the category 1.62 to 8.1 hectares. This is equivalent to 25 percent of the total land area .

Assessment of the 1978 Land Occupancy Survey undertaken in Bangladesh suggests that around 95 percent of all farm holdings are fragmented. Of these, over a half are broken up into six or more different parcels not exceeding 0.061 hectares (or 0.15 acres) each (de Vylder, 1981).

In Pakistan, a comparison between size of farm holdings in Sind and Punjab reveal somewhat similar trends in land fragmentation as observed elsewhere. According to some studies, over 68 percent of the farm holdings in Sind are fragmented as compared with only 40 percent in Punjab. The degree of fragmentation, for one reason or the other, is more pronounced in Sind than in Punjab. This phenomenon is nearly true for most of the less developed districts in Pakistan, which in some case may even show greater degree of fragmentation of holdings relative to those in Punjab or even Sind. As with the case in Bangladesh, the

number of fragments tend to increase with the size of holdings in Sind. This generalization is not true for Punjab (Khan, 1975).

In areas of Sind and Punjab, relationships between the peasants and the powerful landlords were such that the former group were often subjected to various forms of exploitation. Fragmentation of the family farms was the end-result. Such trends were observed not only in Sind and Punjab but also in the N.W.F.P. (Burki, 1976). Evidences along these lines were reported elsewhere, viz.:

«...The differentiation (between peasant and pseudo-feudal landlords) is increasingly based on the acquisition of capital by the capitalist farmers and exploitation of the landless and near-landless peasants. The agrarian transition in Pakistan is reflected by the disintegration of the peasant (family farms) and feudal landlord - sharecropper systems».(Khan, 1983).

Elsewhere in the same report, it was noted that:

.The share of landowners with over 100 acres (40.5ha) went down in their number and areas in each province. More striking, however, has been the increased share of landowners with less than 5 acres (2.03ha), particularly in Punjab and the N. W.F.P. This reflects mainly the subdivision of land within the small-sized holdings ... Owners of these holdings are the poor peasants who are increasingly forced to lease their land to rich peasants and seek alternative employment within or outside agriculture, therefore, increasing the number of poor (marginalized) peasants.),

For comparative purposes, evidence from the African experience, especially as portrayed by the Northern Nigerian States before Islam, may be used to show that land was held by communities and families. Individual members in the nucleus family were allocated tracts for own use. The bundle of rights over these allocations were subject to inheritance. «Retention of usufructuary rights depended upon continued cultivation of the land so allocated») (Famariyo 1987). Use rights, otherwise, reversed to the nucleus family to be allocated to other individuals or users.

With the introduction of Islam in the area that makes up today's Northern Nigeria, land ownership became subject to Islamic *Shari'ah* and subsequently to tenure arrangements envisaged by Islamic laws (Famariyo 1987). The Fulani conquest of Northern Nigeria transformed these holdings into *Waqf* and *Kharaj* lands, subjecting them thus to the doctrines stipulated in *Waqf* and *Kharaj* laws in so far as these lands (especially *Kharaj* lands) become State ownership even though use rights may be acquired by individuals .

1.3. VARIANTS OF TENURE MODALITIES

Land tenure, by definition, deals with the rights and patterns of control of land resources. The rights and patterns so expressed are, in themselves, extremely complex varying from one variant to another. This is understandable since each variant in any given location often determines the social, political and economic power base of the predominantly agricultural community it subsumes.

To simplify things, tenure modalities are often drawn up in the form of sketches that would approximate the structural representation of realities in place. These approximations must necessarily illustrate 'types of variation in land tenure systems and the extent to which the popular terms include more significant variations within a class than across classes' (Mellor, 1966, pp. 59). Accordingly, several modalities may be constructed which would represent the variants most likely suitable for any particular social, political and/or economic class of land holders. Following are some variants that are based on the historic development of tenure systems around the world:

A. Traditional (customary) tenure

This is a seasonal cultivation based upon alternating fallow. The variant so construed is meant to ensure access of individual and groups to land. Several universally accepted principles are often taken into consideration in this customary tenure. Among these are:

- i. acknowledgement of the rights or entitlements of every member of land holding family to a portion of land adequate to feed him and his family;
- ii. the imperative that no member of the land holding family may dispossess another member of his right to land; and
- iii. the injunction against alienation of land without the knowledge and consent of the family members especially the head(s) of the nucleus family, (Famariyo, 1987).

In most of the tenure literature, this variant is listed as owner-operated or in some literature cultivated system. The bulk of rights of use and control of land are held by the family which provides the primary labor force. This variant, in terms of occurrence, is one of the most widespread system to which most cultivators in the world aspire.

B. Landlord-tenant system

Classification on the basis of this option rests on how the functions and roles of the parties involved are separated. The owner of the land, in one extreme, often retains ownership role while delegating the supply of labor, and some managerial functions to the tenant. In this arrangement, which is customarily verbal, the landlord provides only the land. The operation of the land-based enterprise becomes the prerogative of the tenant. In the other extreme, the landlord may, besides providing the land, take on the 'added role of filling in the managerial function. Under this system, the tenant's role is reduced to that of a laborer (or supplier of the labor input). The extent to which the tenant has any security under this tenure option becomes the critical issue most worthy of attention.

C. The feudal variant

In this option the landlord has both ownership and use rights. The position of the tenant is reduced to one who works a portion of the land for his own ends. Payments are made to the landlord in the form of labor input or services to be tendered by the tenant on any piece of land developed by the landlord; or by handing over a part of the produce to the landlord. All facets of the tenant's life and resources, therefore, are controlled by the landlord for the period this relationship holds. As it is, agreement between the parties are thought to be unnecessary.

D. Communal system

This system ranges from conditions such that the concept of private property in land has no real meaning, to situations in which clear rights to private property have been relinquished to achieve certain state or private objectives in regard to production efficiency and distribution. The extent of private ownership allowed plays a significant role in defining the structure of this variant.

E. In addition to the variants listed above, there are others of interest. These include state farms, plantation systems, cooperative farms, or combination of variants thereof (Mellor, 1966).

By way of summary, I may say that if the purpose is to measure the relative importance of a given tenure modality with respect to another, then it is necessary that the population-land nexus be exposed to review. This is a very vital issue especially in connection with assessments of productivity of enterprises derived from such a relationship. If, however, social and welfare objectives are the focus of assessment of any tenure modality, then the issue of number of people benefiting or otherwise being adversely affected by the system becomes more crucial a subject. Alternatively, the policy target may be that of exclusively assessing the economic problems as measured by the proportion of land area or production

denoted by a given system. If so, then priority shifts to benefit versus cost configurations of the system vis-a-vis the parties affected. In the end, the choice of optimal policy depends on what is perceived as priority, i.e. whether socio-political reform or emphasis on economic reform is to be pursued. This dichotomy, has in the past, especially with reference to most of the developing countries, proven both illusive and hard to circumvent.

1.4. OBJECTIVES AND SCOPE OF THE STUDY

This study attempts to trace out the distributive and proprietary functions of the Islamic law of Inheritance. The intent is to assess the effect(s) this and other institutional factor as the «family» may have on the structure of land holdings and implicitly tenure modalities in some Muslim countries. I shall attempt to show that the nature and substance of tenure modalities in the context of this law and institution can be used to shed light on the role of land and its distribution as an important parameter in the economics of less developed Muslim countries.

In order to do this, I will attempt to explicitly define the magnitude of effects of those variables that have been empirically quantified and then augment these at a later stage with the special characteristics stipulated in the law of inheritance in Islam. The former group are referred to as «conventional factors» in this study and are discussed in the context of the new land-economics literature. The latter are behavioral factors and are discussed under „paradigms envisaged in Islam-based modalities.. These issues are covered in section two of the paper. Section two also introduces the dynamics of a reform that is based on a composite model rooted in the perceptions and experience of Islam. The mechanics of overall factor relations and dynamics will be emphasized.

In section three, an assessment of the composite system in terms of distributive effect, fragmentation, Islamic teachings on cooperation , and potential remedies for land subdivision and fragmentation in Muslim countries will be discussed.

2. DETERMINANTS OF TENURE MODALITIES

2.1. SURVEY OF CONVENTIONAL FACTORS AND THE NEW LAND TENURE ECONOMICS

Efforts undertaken recently in the Farming Systems Research (FSR) have pointed out a paradox of conflicting approaches. On the one hand FSR emphasizes a dynamic approach that is by definition iterative. On the other, efforts made here subdue the ever changing nature of the rural sector and the environment in which it operates. All considered, it has been established that FSR takes no account of the dynamic and continuously changing farming systems caused by the changing rural setting and its socio-economic environment.

Farming systems are exposed to a multitude of ^{determinants} Maxwell defines this concept as «the combination of natural and socioeconomic factors that produce a particular configuration of resource availability and factor use at the farm level» (Maxwell, 1986). These include physical factors such as climate and soils, biological factors such as weeds, pests, and diseases, and socioeconomic factors. Among the latter are markets, institutions, government policies and factors that are endogenous to the family. This mix of factors do not account for the historical evolution of the present farming system or likely developments of such systems over the medium term (Maxwell, 1986).

Within the socioeconomic bundle of determinants, two major classes may be identified. These are the endogenous and exogenous determinants. The former group contains factors affecting the system which are, in and of themselves, within the decision rule of the farming family itself or the corporate in modern agriculture. Examples of the former include family configuration, health and nutrition, education, food preference, risk aversion, family attitudes and goals, and gender relations.

The exogenous set of determinants within this class are those that are determined outside the farming system, and therefore, by definition, are taken as given by those who operate the farming system. The list here is inexhaustible and I only mention a few that include population, off-farm job opportunities, agricultural credit, markets, prices, input supply, saving opportunities, the social infrastructure within which the farming system must function and above all the land tenure modalities in place.

The consequence of these determinants, when properly applied to the farming system, is the transformation of that system into a more profitable enterprise.

Reforms, especially with regard to tenure, for instance, have been viewed as a method to mobilize labor resources and to generate productivity growth. This view is accepted by both the liberal and the Marxist development perspectives (Ruttan, 1986). The population parameter itself is so complex that agriculture without a demographic ramifications cannot be perceived regardless of where this system may be located around the globe. I trace the effects of some of these socioeconomic exogenous factor developments more closely in this section.

2.1.1 Population

Demographers have based their inference, that there exists a strong relationship between demographic processes and agricultural development, on the fact that most of the population in the LDCs resides, works and consumes in the rural agricultural areas. Earlier versions of this argument rest on the assumption that the supply of land is inflexible and that methods of production are constant due to unchanging or fixity of technological adoption on the part of users. The roots of these arguments rest in the Malthusian population theory and the classical economic theory of Ricardian origin.

Economists have challenged this approach because of its neglect of some significant response factors. Any increase in the rural population density by way of pressures on arable lands, would force more intensive uses to be employed in the scarce land cultivated. Hence, the relationship between scarcity and intensity of use of the land factor becomes the focus of the challenge envisaged by economists as opposed to the narrow definition based on the Malthusian-cum-Ricardian approach.

The stages of response to population growth from primitive to sophisticated land use options therefore depends on the level of the society's agricultural development in any given period of time and place. The responses, in turn, are determined by the level of living enjoyed by the society, the availability of off-farm employment opportunities (in the rural or urban sectors), the potential for labor-intensive land-saving technological change; the historic size of holdings and their distribution, the institutional structure in place, to mention only a few.

These complex interrelationships work differently for different environments in Africa, Asia and Latin America. In the case of Africa, during the last twenty years, a moderate change in arable land developments had occurred. This is thought to be due to the low population density and the not-too-heavy pressure, relatively, to utilize land more intensively as compared to S.E. Asia. Primarily however, government policies at work in Africa often determine how successful the response of population dynamics is in relation to intensification of land uses.

2.1.2. Tenure Reforms

Tenure is important because of its reform potentials. Tenure reforms have positive implications for the mobilization of labor resources and growth of productivity. The substance of this view has been subscribed to by many schools of economic thought irrespective of their political ideologies. The understanding is that the owner-operated systems, which we previously referred to as one to which most farmers aspire, proves most efficient in terms of resource use and extent of contribution to the economic growth of those countries under which the system operates.

Historically, in the context of sharecropping tenure as an element within the owner-operated system, the classical economists recognized that such a system represented a marked improvement over alternative modes in that, it provides greater positive incentives. The classical economists' argument along these lines was later supported by Marshall at the turn of the second decade of the century. Economists in this era especially during the period between 1920s and 1960s examined these arguments within the framework of the Hicksian neo-classical theory of the firm .

Summarizing the assessment of relationship between the tenure mode applied and productivity, it was recognized .that there is no substitute, from the standpoint of sheer productivity, and irrespective of sociological considerations, for an owner-operated agricultural system. (See Ruttan, 1986) .

On the practical side, support for these theoretical arguments can be substantiated in only few parts of the world. Only a few cases of success stories can, truly, be cited. For instance, the case of agrarian reform in Taiwan, Japan and South Korea may be seen to reflect the generalization depicted by theory. Other-wise in the rest of Asia, no widespread experience can be found where tenure reforms have successfully contributed to the argument that the owner-operated farms are economically viable, reasonably efficient, and capable of sustaining rapid increases in productivity.

The scenario for the rest of Asia is one in which «not a single example of a successful land reform program could be revealed when carefully reviewed in terms of contributions to growth of productivity or production' (Papi, et. al., page 593). For India, in particular, none of the land reform attempts undertaken had apparently changed the .deep economic disparities or the traditional hierarchical nature of inter-relationships which govern the economic life of village society". (Nair, 1962, page 196). These are but a few examples of the experience encountered on reform applications worldwide.

2.1.3. The New Land Tenure Economics

In the mid 1960s and 1970s, a new drive was launched that attempted 'to rationalize the persistence and relative importance of the share economy as a mode. This effort was necessitated by the fact that other land tenure modalities were subject to serious lack of consistency both from empirical as well as logical reasoning and especially as regards explanation of efficiency of operations and resource use. Subsequent efforts to explore and harmonize these theoretical discrepancies were approached within the realm of the «new land tenure economics Focus, hence was on the re-assessment and examination of root causes and effects likely to be embedded in the already accumulated stock of knowledge in the field, but one which may have been incorrectly interpreted or had alternatively evaded the scrupulous attention of researchers.

Cheung's pioneering work in 1968 and 1969 led to the conclusion long awaited. He suggested that it was not land tenure reform per se that was the bottleneck for the lack of achieving efficiency; but rather, the problem was one of focusing emphasis on development and the reform of existing property rights. In this regard, Cheung proposed that the arrangement by which factor costs and receipts were shared must be borne and determined within the share contract. The equilibrium solution therefore achieved in the implementation of the share contract between parties involved, must necessarily rest on joint maximization on the part of the landlord and the tenant. This is the focus of the new land tenure economics.

Recent 'developments in the literature of the new land tenure economics suggest the following characteristic determinants of the sharecropping modality:

- a. the difficulty of solving the labor and management system;
- b. the persistence of imperfections in the input and product markets; and
- c. risk aversion on the part of tenants and landlords: (Binswanger, 1984).

The conclusion that can be drawn from these developments is that there is no substitute for the owner-operated modalities, especially under the condition that factor and product market imperfections remain in place. This again supports the statement that owner-operated systems are most efficient and as such form the crux of the land tenure systems to which the majority aspires.

2.1.4. Land Tenure Determinants in Empirical Analysis

In a study on determinants of size of holdings, Huang (1973), makes policy distinctions between land reform and a desire to redistribute wealth in the LDCs

as compared to that of focusing primarily on efficiency in production as is common in the Developed Countries (DCs). The choice of land reform as a target is desirable for social and political reasons. In an attempt to quantify factors determining .size of farms., Huang defines two major categories of factors: those that are quantifiable and therefore can readily be subjected to empirical analysis, and those that are behavioral and could not precisely be measured. He isolates three economic factors, viz, resource endowment, industrialization and factor proportions to be given special emphasis in the study.

Several assumptions are made to justify the consideration of these economic bundle of factors as determinants of size of holdings. Given these assumptions, it is suggested that the average size of the farm is primarily determined by the population-land ratio in any given place and time (8), and that the greater the population-land ratio, the poorer the resource endowment and thus the smaller the average farm size ⁽⁹⁾ .

On Industrialization, the study suggests that migration out of agriculture would occur as job opportunities are created in the non-agricultural sector which often is located in the urban areas. As this proceeds, land is released by those who migrate to be used by those who remain in the rural sector. This phenomenon has the effect of increasing the average farm size

On factor proportions in agriculture, the study argues that this would change as a result of changes in the relative cost of capital with respect to labor assuming continuous progression into higher stages of development. These changes would be felt as a decline in the cost of capital which in the long run would make agriculture more profitable (Hayami, 1971, Chapter 6). This phenomenon assumes that changes will take place in the production function and choice of technology mix most commensurate with the enterprising behavior

Bardhan (1979,pp.48-57), emphasizing on the share-cropping mode of tenure in India, lists the following assumptions in an attempt to set theoretical analysis in line with empirical findings:

- a. that there is the conventional 50-50 crop share representing an agreed upon rental rate and
- b. that the landlord decides how much to lease out to the sharecropper.

The model thus assumes existence of «a situation of excess demand in the land-lease market at the conventional rental rate; with land rationing by the monopolist landlord».

The empirical analysis of this system under conditions stipulated in Burdhan's study suggest the following:

- a. where land improvement factors (by way of better or improved soil fertility, rainfall, irrigation, etc.) are larger, the percentage of area under tenancy will be higher;
- b. the higher the degree of imperfections in the input market, the lower the percentage of area under tenancy;
- c. the higher the labor-intensity of the crop harvested, i.e., the lower the labor-saving technological change, the higher the percentage of area under tenancy;
- d. the higher the interest rate charged on credits to agriculture the smaller the percentage area under tenancy; and
- e. the higher the unemployment facing the landless rural households, the higher the degree of tenancy.

2.2 DYNAMICS OF REFORM BASED ON ISLAM

I view the Islamic system of factors determining ownership in general as being composite and highly dynamic. The following schematic representation of land tenure is presented as a simplified option to elucidate this phenomenon in the case of land tenure and use systems (see Figure 1). In this section, I will describe some major factors that must be taken into account when defining the order of significance of determinants in a composite scheme. Accent in this presentation is particularly on inter-relationships, between:

- a. the benevolence factor and a Muslim's efforts to use God-given bounties for his/her welfare;
- b. the institutional endowment(s) and Man's attempt to adjust his/her pursuits according to the design stipulated in the Qur'an and *Sunnah*;
- c. the totality of physical endowment of factors and inputs granted to Man as a vicegerent of Allah and the uses he/she puts to them; and
- d. the Muslim's freedom and choice to exercise his/her own faculties in pursuance of felt needs and objectives in this life and the hereafter.

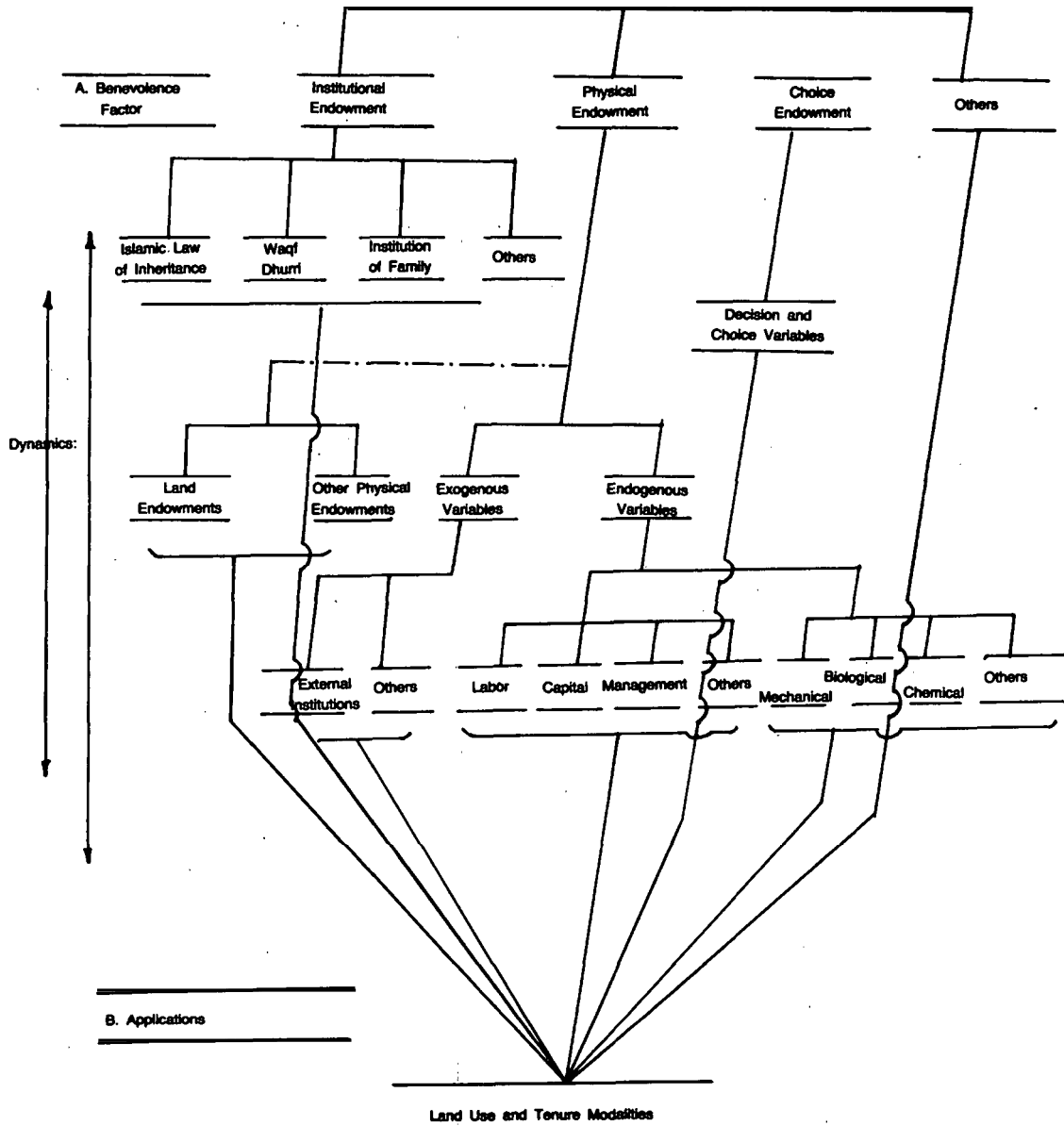
2.2.1. Paradigms Envisaged in the Composite Scheme of Relations i.

The benevolence factor

The benevolence factor may be interpreted in the context of what a Muslim is expected to do, the extent of mental, physical and financial resources he is

FIGURE - 1

SCHEMATIC PRESENTATION OF FACTORS DETERMINING LAND TENURE SYSTEM IN ISLAM



endowed with in order that he might implement the instructions given by *Shari'ah*, and how, in the presence of socio-ethical and economic guidelines, he ought to conduct himself. All of these directives are stipulated in the Qur'an and *Sunnah* and, where applicable, propounded by the science of social behaviour in the *Fiqh* of *al Mu'amalat*. More aptly, these are Divine directives set by the Almighty so that a Muslim would better serve Him and subsequently earn reward for having followed the ideal path defined by Allah. The effort exerted and the level of achievement of directives given primarily define the degree of success or failure of a Muslim on earth and his/her placement vis-a-vis *others* in the world hereafter.

The benevolence factor therefore represents the all powerful and generous authority of Allah to whom everything belongs. Man's status is defined merely as a caretaker and at best vicegerant of Allah to whom he is held accountable for what he had done to his life and property. As such, the factor defines the institutional framework that Man may adopt in pursuance of his earthly plans, the physical resources in place and its accessibility to him, and the freedom to make choices and decisions among alternatives relying on endowed faculties, insights and intellect. The final decision regarding the extent in which Man would get access to resources so as to exploit them depends on the Will of Allah. Everything in this scheme of dynamic interrelationship is priorly determined by the Divine authority. "Man" to follow the archaic but useful saying, «proposes and God disposes. Destiny, in other words, rests in the hands of the Almighty. The simplified schematic representation in Figure.1 assumes the authority of Allah - the most merciful, most beneficent - over all the entries listed.

ii. The Institutional factor

The Muslim is bestowed with an institutional framework upon which he or she should build. These schemes are also borne in the Qur'an and *Sunnah*. The institution of Inheritance in terms of distributive justice, anticipated beneficiaries and associated quantum specifications of shares assigned to each are explicitly cited in these sources. The Fiqh-based formalization, on the other hand, include the specification/distribution of *Waqf*, implementation of *Zakah* procedures vis-a-vis collection and distribution, the framework of self-government and the pursuit of equality and justice under *Shariah*, and the institution of family or household in Islam, to mention only a few. Fiqh-based formalization also include *Muzara'* and *Musaqah* especially in so far as the former represents an arrangement whereby the owner of land shares the output with the cultivator based on some terms agreed upon; and the latter refers to a contract-based sharing of tree crops with a caretaker on the basis of some stipulated conditions. These conditions are clearly defined in *Shari'ah* (See Al-Jaziri, 1986).

iii. Physical endowment factor

The benevolence factor subsumes physical endowment in the form of land, water, soils, biological conditions enabling the utilization or otherwise hindering land use, climatic conditions and the entire stock of fauna and flora characteristic of a particular area or region. The fertility of soils in addition to availability of constant flow of water determine the intensity of use of a specific stock of land at any one place and time. Add climatic and biological factors such as pests, weeds, etc., and you have a definite pattern of land-use activities established in a particular locality at any given period of time. Classification of and according to uses, taking these conditions into account, then becomes relatively easy to map accurately.

These factors are bestowed to Man in varying degrees. Variations between regions, and for that matter, within regions must, naturally, be expected. Existence of a single standard or replica of a basket of flora and fauna over all regions, according to the physical endowment principles, is not likely to be encountered even though the institutional factors may be commonly held by all Muslim communities wherever they may reside. Land use options practised in say S.E. Asia, therefore, should necessarily be expected to differ from those adopted in Africa, simply because, the scope of physical conditions and the resource mix differ between the regions. This is one explanation of diversity of land ownership in general and tenure modalities in the Muslim countries in particular.

iv. Choice endowment factor

If Man is a caretaker, how significant a role does he play in any decision-making process? The answer to this question reveals, from an Islamic point of view, that everything is decided a priori by Allah; yet Man is expected to make decisions on matters of direct concern to him. The link between the decision taken by Allah and that taken by Man can coincide only if Allah chooses or so decides. In the event the two decisions coincide, Man's efforts are blessed and success is achieved. However, should the two take on polar positions, then Allah has decided against the success of that particular effort and failure is the result. The former is a target all Muslims wish to achieve whenever decisions are promulgated. Hence, the *Sunnah* to formally pray to Allah to bless decisions about to be undertaken, and/or anticipated.

From .secular economics' point of view, choice and decision variables may be defined as those that require physical, managerial or financial resource commitments so as to produce outputs deemed useful. Factors specified for this production relations may be within the resource acumen or authority of the entrepreneur. If, by committing these resources into such a production relations, Man can make the decision required internally, then economists would view the vari-

ables covered by the decision as being endogenously determined. As such, the benevolence factor and the Will of Allah are implicit and the decision is attributed to have its origin in the decision maker himself. On the other hand, those factors/variables that are decided upon by authorities other than the entrepreneur, therefore those that are outside the scope of the latter's sphere of influence, are defined as exogenous variables. .

Mechanical inputs, extent of biological and chemical compounds applied to land in the production of wheat, for instance, define the variables determined endogenously within the system or acumen granted to Man. The extent of labor, capital and entrepreneurial abilities committed to a specific production relation also fall within the variables whose mix Man can endogenously determine.

Among those exogenously determined variables there exist some whose decisions lie with authorities outside the scope of the entrepreneur. The production relations under these circumstances are decided upon by outside forces. This phenomenon covers the issue of traditionality of a society in which an entrepreneur functions. Normally, it is argued, the more traditional a society is; the less it is responsive to changes and therefore the less chance the entrepreneur has to successfully adopt new innovations that might be necessary for his production relations. Alternatively the more conducive a society is to change, or the less rigid it is in regimentation according to traditions, the better the chance that the entrepreneur has to make wide ranging choices and implicit decisions.

Although Man is endowed with choice and decision authority, this is conditioned by the proviso that choices made and decisions taken are subject to the Benevolence factor and the Will of Allah. Hence, limitations on the extent Man can make and implement decisions without resort to the blessing of the Almighty.

2.2.2. Dynamics of the Composite System

In this section, the composite model viewed in Islam is discussed. The institutional framework adopted from Qur'an and *Sunnah* are highlighted. Emphasis is given to such vital factors as the Islamic law of inheritance, the institution of family in Islam, the *Waqf Dhurri*, social choice and public policy, and how these are interpreted in conjunction with the Islamic philosophy of cooperation. These determinants are then assessed on the basis of their effects on land holdings and implicitly land tenure modalities in Muslim countries. We take up the discussion of these issues individually in the order presented above.

A. The institutional framework adopted from the Qur'an and *Sunnah* i.

The Islamic Law of Inheritance(ILI)

Inheritance, in early Arab societies particularly during the pagan era (Al *Jahiliyah*), was based on injustice and could at best be characterized as merciless. The rights of children, the weak, women and the infirm (those not firm in mind or purpose) were severely transgressed. As such, only three factors formed the basis of qualification for inheritance, thus the totality of conditions under which one may be entitled to receive the wealth of the deceased. These factors were:

- a. parental relationships,
- b. adoption, and
- c. tribal oath confirming linkages that would facilitate transfer of inheritance proceeds.

The term «parental», in the context stated, is very important because it meant male offsprings only. It was customary to deny females any option of entitlement to inheritance proceeds. Preference hence was on male offsprings for it was a must that they be the masters of such wealth. If one had no son(s) to inherit the father's property, then the option to adopt was permissible under customary laws instead of letting daughter(s) be the legitimate heirs. The preference of the male gender over the female also had another stigma attached to it, viz., that the son be at an age of maturity, therefore a proof of capability to bear arms (*al qudratu ala ham/ al silah*) for this condition sharpened his legitimacy towards the proceeds under inheritance (Barraj, 1981, pp 66).

The Prophet's (pbuh) Hijira to Madina marks the demise of the customary laws in Makkah on the one hand, and the beginning of legislations based on Islamic *Shari'ah* on the other. The city of Madinah was in fact the first city-state in which Islam had implemented these ground rules as an example for the rest of the Muslim world. Laws were set up that would define social, economic and behavioral norms under which a Muslim should work. This had special significance in the context of legislation of laws that affected people, their properties, social interactions and cooperation, and policy choices that were to be sought by the Muslim state. The Prophet (pbuh) himself was at the helm to design and implement the laws. In the subsequent stages of development, these were copied by all self-governing Muslim societies across the globe.

The social background in Madinah at the time was such that its inhabitants, included a large population of *Muhajirs* (Migrants) and *Ansars* (supporters: indigenous population of Madinah). Legislations had to be promulgated that would establish harmony among these social groups in such a way that the social and economic environment would be able to foster the spirit of brotherhood and

cooperation. The Prophet (pbuh) assigned each *Muhajir* to one of the *Ansar* as a brother in faith. On the basis of this brotherhood, the Prophet (pbuh) decreed that the *Muhajirs*, by law, would inherit from the *Ansars*. The rationale was that the former had severed and lost linkages with their families, relatives and communities having decided to migrate with the Prophet (pbuh) to Madinah. Islam, then, defined the brotherhood factor as a primary condition that would facilitate inheritance among individuals or groups of people (Al Jaburi, 1969, pp27). Inheritance based on this condition⁽¹²⁾ supports the legality of brotherhood (*al qarabatul hukmiyah*) between the *Muhajirs* and the *Ansars*, and as such, had priority over inheritance based on blood relatives. This rule was in effect until the Islamic law of inheritance as we know it today was advanced (Barraj, 1981, p 67).

The Qur'an explicitly defines the conditions under which inheritance may be instituted. Definition of who among the deceased person's relatives, friends etc. should get the inheritance and how much would each of the said recipient should claim, is given.

For instance, verses 2, 4, 5, 7, 8, 11, 12, and 176 of -*Surah Nisa'a* formally define the particulars of those who are considered eligible under Islamic inheritance law. It begins with the orphans in verse 2, then takes up the role of women in verse 4, then it discusses the position of those who are weak in understanding (i.e, those we referred to earlier as being infirm) in verse 5. In verse 7, the men of the family are defined as legitimate heirs. In verse 8, the kinsfolk, the poor and the needy are discussed in conjunction with the division of inheritance and treatments to be accorded them. Verse 176 takes up the condition under which brothers and sisters may get shares of inheritance. The specifics of the shares going to each of the recipients are detailed beginning from verse 7, which states the following:

«From what is left by parents
And those nearest related
There is a share for men
And a share for women,
Whether the property be small Or
large,- a determinate share..

In verse 11, the following instruction is explicitly stated, that:

.God(thus) directs you
As regards *your* children's (inheritance): to the male;
A portion equal to that of two females: if only
Daughters, two or more,
Their share is two-thirds Of
the inheritance;
If only one, her share Is a half.

For parents; a sixth share Of the inheritance to each, If the deceased left children; If no children, and the parents Are the (only) heirs, the mother Has a third; if the deceased Left brothers (or sisters), The mother has a sixth. (The distribution in all cases Is) after the payment Of legacies and debt. Ye know not whether Your parents or your children Are nearest you in benefit. These are Settled portions ordered, By God; and God is All-knowing; All-wise».

In the translation and commentary by A. Yusuf Aliⁱⁱ, it is suggested that :

"The children's shares are fixed, but their amounts will depend upon what goes to the parents. If both are living, and there are also children, both father and mother take a sixth each: if only one parent is living, he or she takes his/her sixth, and the rest goes to the children. If the parents are living, and there is no child or other heir, the mother gets a third (and the father the remaining two-thirds); if there are no children, even if there are brothers or sisters, the mother has a sixth, and the father apparently the residue, as the father excludes collaterals... The proportion is established that children and parents always have some shares if they survive, but their shares are affected by the existence and number of the heirs in these categories" (p. 181).

Verse 12 defines the portion allotted to the husband or wife of the deceased, and to collaterals, viz.:

«In what your wives leave, Your share is a half, If they leave no child; But if they leave a child Ye get a fourth; after payment Of legacies and debts. In what ye leave, Their share is a fourth, If ye leave no child;

But if ye leave a child,
They get an eighth, after payment -
Of legacies and debts.

If the man or woman
Whose inheritance is in question
Has left neither ascendants nor descendants,
But has left a brother
Or sister, each one of the two
Gets a sixth; but if more
Than two, they share in a third
After payment of legacies
And debts; so that no loss
Is caused (to any one).
Thus is it ordained by God;
And God is All-Knowing,
Most Forbearing"

Verse 176 takes up the condition that there is no known immediate heir as stipulated in the foregoing verses, i.e., that neither a descendant nor an ascendant can be specified, viz.:

((They ask thee
For a legal decision.
Say: God directs (You)
About those who leave
No descendants or ascendants
As heirs. If it is a man
That dies, leaving a sister
But no child, she shall
Have half the inheritance: If
(such a deceased was)
A woman, who left no child,
Her brother takes her inheritance: If
there are two sisters,
They shall have two thirds
Of the inheritance
(Between them): if there are
Brothers and sisters, (they share)
The male having twice
The share of the female.
Thus doth God make clear
To you (His law), lest
Ye err. And God
Hath knowledge of all things"

The Majority of the Islamic jurists (the Shafi's, Maliki's and Hanbali's) define proceeds (*al tarika*) as the totality of wealth left by a person after death (see, Samih, page 77). These proceeds include wealth, in its physical sense, and all financial obligations and rights payable irrespective of whether these are inheritable or not. Wealth in this sense, therefore, is composed of all things that have or might have, in the lifespan of the deceased, entered into the authority of that person as a legal owner. The majority also views these proceeds to include things as a result of action(s) taken by the deceased when he was alive (see, Samih, page 78). An illustration may be in order. Suppose a prey had fallen into a hunting trap placed by the deceased. This is considered a sufficient cause for ownership which, when subjected to the definition of the majority, becomes an acceptable condition that would classify the «prey» as part of the total inheritable proceeds left by the deceased. By the same token, if a human being accidentally steps on or falls in the trap, claims on damages incurred are payable from the proceeds inherited from the deceased. Pre-emption rights in Islamic jurisprudence (*Figh*), when these are properly justified, also fall under the definition of proceeds that are subject to inheritance.

Wealth in its physical sense epitomizes land, buildings and other physical (resource) endowments that have legally been sanctioned in *Shariah*. Ownership of land by Muslims and the legal decorum pursued have been the subject of discussion and deliberation in *Shariah* since the Prophet's Hijra. We only concern ourselves here with inheritance as applied to land. Accent, therefore, is on the Islamic law of Inheritance as a determinant of land tenure systems in Muslim Countries. This section illustrates the mechanics of the law as decreed in the foregoing passages of the Qur'an and, thus, promulgated by *Shariah*.

Islamic *Shariah* laws regarding inheritance apply to individually owned properties (including land and other forms of wealth). Since other modes of ownership such as *Waqf*, community and State lands fall under different jurisdictions, only those properties individually owned are subject to this law.

The background of the law, as prescribed in the preceding verses, is that Allah wishes fairness and equality in the distribution of inheritance proceeds among the parties involved and without prejudice. This condition of fairness is all the more particular taking into account Man's established tendencies towards greed and lack of impartiality in distribution even among his blood relatives and/or family members. Tendencies to prefer, say, one offspring to another, or to alter-natively skew distribution directly or indirectly towards a favoured son as opposed to others including daughters, has been a common transgression in the history of many societies including Muslims. What is suggested in the preceding verses is that distribution of inheritance proceeds should be done in accordance with Divine Guidance. As such, it should be understood that this activity is exogenous to and therefore outside Man's decision making sphere and/or choice endowments.

Removing the distributive function from Man's responsibilities suggests that Allah had decided on who should get what of the proceeds. These include parents and their offsprings, the relatives, kinfolk, the poor, the infirm and the shares assigned to each. The position of Man is merely to implement that decree. Man, in this context, has no authority to change either the configuration of participants, or the scope of shares assigned to heirs. Had this been left for Man to decide, he would have most likely included beneficiaries that did not deserve, or would have otherwise denied the needy and the infirm their rightful shares.

Taking the distributive function out of the realm of Man's sphere of decision-making also insures dominance of the institution of family in Islam, especially as regards assignment of priorities. Allah has decreed that the stronger the relationship between the deceased and his heirs (i.e. the closer they are to each other), the larger the share they are entitled. Inversely, the further away the relationship, the smaller the share. These proportions are highly correlated with the degree of closeness of heirs to the deceased, and as such signify the importance of the «family» unit both as a social entity in Islam as well as a basis for calculation of inheritance entitlements. (I note here that the concept of family in Islam is based on blood and genes and, therefore is technically genetic in character. That is why adoption is not encouraged. No share is due to the adopted child).

The preceding conditions and premises stipulated in the inheritance law may now be summarised as follows:

1. the «institution of family» is the foundation upon which inheritance is based;
2. the inheritance law as decreed by Allah augers well with the establishment of a strong family set up that emphasizes brotherhood, togetherness and piety;
3. the mechanics of distribution of proceeds should establish, foremost among other things, the hierarchy of relationships between the deceased and the heir(s);
4. the configuration of heirs and share-entitlements established in the law are compulsory and have to be implemented as given in the Qur'an;
5. the deceased may not choose his heirs contrary to the premises stipulated in the law, except for a third of the proceeds which he is entitled to distribute to whosoever he may wish to receive this outside the stipulated heirs as *Sadaqas*. Thus, he/she can exercise his/her Will (in the western sense of the term) upto a maximum of one-third (1/3) of the total provided that no part of the willed proceeds is given to a heir;

6. no distinctions can be made among immediate male heirs contrary to the observed custom in some parts of the Muslim world to give the eldest son entitlements larger than those of younger brothers;
7. women are not denied the share of inheritance stipulated in the law, since women's overall needs, relative to their male counterparts in the family, are taken into consideration (Abadi, 1968, pp 181-196; Abu Zahra, pp 13-143).

ii. The institution of family in Islam

"A family" in Islam reflects a phenomenon that is more than a case of mere relationship between a group of people. I can only give a brief outline of the salient features of this institution in this study. The subject is adequately discussed in appropriate *Fiqh* literature especially the *Al Ahwal al Shakhsiyah*.

The law of inheritance is based on the institution of family in Islam. Without the latter, the inheritance law can not be juridically entertained as a legal condition. The reasons lie in the causes defined for the law to take hold, which specifically rest on the foundation of familiness.

"Cause", in the parlance of *Fiqh*, is seen as a condition that is outside the occurrence of an event; i.e., exogenous to it such that for the event to occur, the cause must be established independently of the event. In this regard, Allah had chosen to link the two such that if there is the cause then "the event" automatically follows. By the same token, an absence of a sufficient cause inhibits the occurrence of an event (see, *Kashshaf Al Asrar*, p. 1290; also, *Ahkam Al Mawarith*; pp. 59-60).

The majority of the schools of *Fiqh* agree that the following make up sufficient "cause" for inheritance to occur, viz.:

- a. a marital relationship,
- b. parental relationship, and
- c. *Al-Wala'* (a form of guardianship), that is, a relationship between a former slave and his former master, which applies when there are no kin or marital relationship.

A marital relationship (*al Qarabah al Zawjiyah*), has a strong influence in the definition of causes of inheritance in Islam. Whichever of the married couple that is left behind (survives the other) inherits the other according to the Qur'an; vide verse 12 of *Surah al Nisa'* which reads:

«In what your wives have,
Your share is a half, If they
leave no child;»

This relationship factor is seen as a base for familiness upon which rests the foundation of the inheritance itself.' Therefore, between the couple bound in matrimony must exist a strong commitment. For inheritance to take place via marital relationship, the following must hold:

- i. existence of an authentic and juridically verifiable marriage agreement between the two persons; and
- ii. existence of an effective marriage; i.e., a relationship that is continuously existing till death does one of them part (see, Barraji, page 170).

' A parental relationship (*al qarabah al haqiqiyah* or *al nasab*), on the other hand, takes into account a linkage based on existence of offsprings between the deceased and a heir. This condition, in Islamic jurisprudence, is termed *al qarabah al haqiqiyah* so as to distinguish it from legalized relationship or the "*qarabah al hukmiyah*". (See, Barraji, page 186).

The former essentially covers two general types of relatives, viz.:

- i. the parents and the offsprings (or the *Usul* and *Furu*) which include parents, grandfathers (from the father's side only), uncles, aunts (from the father's side only), sons, daughters, grandsons, granddaughters, etc.; and
- ii. other relatives which are referred in *Fiqh* as «*Dhawi al Arham*, i.e., those who are related to the deceased through a woman only".

Al qarabah al hukmiyah, on the other hand, is a legally decreed relationship that is not based on offspring but has been sanctioned by law as in the case of *Wala'*.

The relatives in a family that qualify as heirs for a deceased person's wealth may be classified according to following three types:

A. Those who inherit on the basis of a definite" proportion or share, in *Fiqh*, are called "*Ashab al furud*". This group has priority over other heirs in the distribution of inheritance proceeds (see, Barraji, 1981). Vide, also, the *Hadith* narrated from the Prophet (pbuh) by Ibn Abbas:

Deliver the "fara'id" to their people; and the balance to beneficiary male heir. (See, *Kanz al Ummal*; pp.3; also, Musnad Ahmad , pp.338-339).(Author's translation).

B. Those who inherit the deceased but have no predetermined shares are referred to, in the parlance of *Fiqh*, as "*Al Asabah*" and include the following:

sons, daughters with son(s), grandsons, fathers, grandfathers, brothers, and father's brothers and sisters from the same grandfathers. They often follow the first group in terms of priority in the distribution of the proceeds in which case they get the balance after the first group had taken their definite shares. In case there are no "Ashab al furud", the "Asabah" claims the entirety of the inheritance proceeds.

C. The "*Dhawi al Arham*" constitutes the third category of relatives with the deceased. In *Fiqh*, these are classified neither as "*Ashab al furud*" nor as "*Asabah*" in relation to the deceased (see, *al-Hawi lil al Nawawi*, p. 193). The degree and order of relationship is used as criteria for placement of relatives vis-a-vis the deceased. Therefore the "*Dhawi al Arham*" occupy furthest order of classification relative to other heirs. They become entitled to inheritance only under the condition that neither "*Furud*" nor "*Asabah*" are existing. This is the position taken by the Hanafi school of *Fiqh* (see, *Al Mugni*, p. 219). Imams Shafi', Malik and others, however, suggest that the "*Dhawi al Arham*" do not inherit therefore have no place in the distribution of the wealth (see, *Rawdat al Talibin*, p. 6; also *Hashiyat al Rashidi ala Nihayat al Mujtahid*, p. 11)¹⁴. Children of daughters, children of the grand daughters, children of sisters, children of nieces, aunts and uncles from the mother's side, the grandfather from mother's side, to mention only a few, are defined as "*Dhawi al Arham*".

These laws and ensuing mechanisms as given in the preceding section are applied in almost all Muslim societies. The intensity of application of these principles, however, varies from one country to the other. This phenomenon of variability rests, naturally, upon the degree in which the fundamental principles underlined in the Islamic Law of Inheritance find themselves in the formulation of the overall juridical preambles governing these countries.

Waqf Dhurri (Ahli):

Waqf has been defined as a juridical process of taking the corpus of any property out of the ownership of oneself, transferring it permanently to the ownership of Allah, and dedicating its usufruct to others. (see Sharafat Ali Hashim; p.19). From this definition, it is suggested that *Waqf* show the following characteristics, viz.:

- a. relinquishment of the *Waqif's* proprietary rights and transfer of ownership to Allah,
- b. permanence and irrevocability, and
- c. that the corpus of the property is detained and the benefit from the *Waqf* property is applied according to the terms and conditions of the *Waqif* (op. cit. p. 20).

The history of this institution began with the formation of religious *Waqfs*. The Ouba' Mosque which the Prophet (pbuh) built when he first arrived in Madinah as a *Muhajir*, followed by the Prophet's Mosque built during the first year of Hijra were two major *Waqf* undertakings. These were subsequently followed by the formation of benevolent *Waqfs*. The Prophet's *Waqf* of the seven gardens bequeathed to him by Mukhayriq (the Jew) was the first such institution under this category ever devised. Then came Omar bin Al Khattab's *Waqf* of the famous "*Thamaq*" garden which, according to the conditions stipulated by him, were to be governed by the following criteria:

"It (Thamaq) should not be sold or given as a gift and it should not be heritable. It is to be given as an act of Charity for the benefit of the poor and the destitute, the wayfarer, the setting free of a relieving slave, invaders fighting for the cause of Allah and guests. He who manages it may eat from it in all fairness and he may also feed a friend from its fruits provided such a friend is not rich. (Seen in Mustafa al Zarqa, pages 8-9)

. A number of the Prophet's companions also made *Waqf* of their properties. Among these, the following may be cited, viz.: Osman Ibn Affan, Ali Ibn Abi Talib, Zubayr Ibn Al Awwam, Mu'adh Ibn Jabal, Zayd Ibn Thabit, A'isha and her sister Asma' Bint Abi Bakr, Saad Ibn Abi Waqqas, Khalid Ibn al Walid, Jabir Ibn Abdallah

Waqf, in Islam, has been dedicated to a multitude of essentially pious purposes. Among these are Mosques, the poor and the destitute, education, health and to seekers of knowledge. *Waqf* can also be dedicated to an individual or a group of individuals such as the children of any specified person; to the *Waqif's* own sons and their sons, or to the elderly and the orphans of a deceased person, a given family or a particular group of people. From here, it can be deduced that *Waqf* can be classified either as "*Khayri*" (i.e., for generally pious purposes) or "*Ahli*" (for the purpose of the *Waqif's* relatives as beneficiaries). *Waqfs* dedicated to the *Waqif's* own children and their children or to his relatives is referred in *Fiqh* as "*Waqf Ahli or Dhurri*".

In so far as the usufruct of a piece of an individually owned land can be dedicated to a particular beneficiary, as defined above, then implications on land ownership and use-right delegation appear to be significant in the case of *Waqf Dhurri*. The distributive functions or effects of this institutional phenomena therefore, should be considered in the definition of the composite determinants of land tenure modalities.

B. Applications to land tenure modalities

The variants of tenure modalities in section 1.3 may now be subjected to the paradigms stipulated in the composite system. Three broad classifications can be identified at the onset, viz.:

- a. owner-operated modes;
- b. contractual tenancies; and
- c. state-owned and operated modes.

The owner-operated modes include lands held and operated by the household. Under this option, tenure variants would include all options that effectively link any land with those who hold the titles or use-right jurisdictions sanctioned either by *Shariah* or the contemporary secular laws. Family or household farms owned by more than one household, a tribe, a village or a number of adjacent villages who collectively operate a given land may also be fitted in this definition. For the latter effort to take place, however, it is necessary that two separate events occur simultaneously, viz. that the property be legally classified as community owned; and that the community as a whole operates the property subject to arrangements previously agreed upon.

In the case of a household-owned and operated land, the full extent of the effects of the institutional determinants stipulated in the Islamic Law of Inheritance and *Waqf Dhurri* may be expected to function. If land is commonly held, however, individuality and private ownership by household becomes subdued and often voluntarily sacrificed in favour of collective use. The collective spirit linking all households in the tribe or community at large becomes dominant. Under these circumstances, access to use-rights of the said lands are commonly shared among all participants. Options exemplified as such are governed by cooperation rules envisaged by the household/households or the community to achieve common objectives or a welfare criterion rather than a limited set of individual household ends.

Inter-personal, or for that matter inter-household, competition to individualize property ownership is likely to create an atmosphere for efficiently administering land use design when the spirit of collective use is weak or non-operational. This is often the case because such drives normally replace community alternative no matter how earnest some individuals may wish to maintain the common perspective whenever this is applicable. In such a circumstance, the desire to privatise land ownership, even within the nuclear family, becomes a force to be reckoned with and therefore a trend in that direction gains the popular support.

In addition to these internal dynamics, the owner-operated modes should be governed by the Islamic Law of Inheritance and *Waqf Dhurri*, *ceteris paribus*,

particularly since these laws deal with the transfer of property rights as well as use-rights per se. It is in this connection that the owner-operated tenancy differs from other suggested alternative modes.

Modes based on contractual or other risk-sharing tenancies include the *Muz-ara'ah*, *Ijarah* (renting), *Shirkah* (partnership), to mention a few. Any association between two or more parties via one or the other of the above legal contracts would entail an agreement that is meant to exploit use-rights of a given piece of land in a fashion stipulated by the contract. Ownership of the property being exploited in no way enters into the substance of such agreements. Hence, separation of the juristic functions of ownership of land on the one hand, and use-right transfer on the other. This is one distinct difference between the owner-operated mode which does not involve any transfer of use-rights, and the contractual modes which may be based on negotiations on the allocations of the use-right privileges for a particular endeavour or for a particular piece of land stipulated under a particular agreement.

State-owned and operated farms are unambiguous in terms of who has both the ownership and the use-rights. In this case, the state is the sole proprietor as well as the effective operator of the land under this classification. Only when the state decides to let the land to interested parties other than itself, does the question of premises upon which negotiation should be undertaken come to place. Contractual arrangements as those suggested above may be employed under conditions stipulated by a contract most appropriate for the type of transaction desired.

3. ASSESSMENTS

3.1. ASSESSMENT OF THE ((COMPOSITE SYSTEM)

The "composite system» presented in the preceding chapter is assessed here relative to the following criteria:

- a. distribution of proceeds according to the Islamic law of inheritance;
- b. applications to land and tenure systems in Muslim countries;
- c. phenomena of land subdivision and fragmentation;
- d. "Cooperation Islamique" and other remedies.

In the last section of this study, I present some concluding remarks. These issues are discussed in the text in the order given above.

3.1.1. Distribution of Proceeds According to the Islamic Law of Inheritance

Distribution of inheritance proceeds involve intricate procedures that are meant to effectively implement the specifics of the law as instructed in the Qur'an and observed by *Sunnah*. The most competent authority in this matter is the *Qadi and the Shariah* Court. The first step in this complex juridical matter is the definition of the proceeds that are subject to inheritance on the one hand, and the identification of the heirs and beneficiaries on the other. The former includes systematic steps that attempt to account for the location, nature and size of the wealth that is under consideration. The latter involves identification of all those who have claim over the proceeds in whatever form this might have been identified.

The desire to distribute the proceeds must first be expressed to the court by one or more of the identified heirs or beneficiaries. Only then would the court set the mechanics and necessary procedural rulings relevant to the case under review in motion. The court equally entertains the wish to collectively own the proceeds if this is expressed by the heirs. This option has strong implications for the determinants of land tenure and I shall return to it shortly. Suffice it to say here that if such a desire is conveyed to the court, then the integrity of the proceeds left by the deceased can be kept intact as the need to subdivide it among heirs would not be necessary as long as the internal agreement supporting this position remains operative.

Given the wish to subdivide the proceeds, however, three priority matters must immediately be attended to post mortem. One of these is the preparation

of the deceased for burial in which case all expenditures incurred to do this must be deducted from the proceeds. Following this step, all outstanding debts, financial obligations and legacies left by the deceased must be paid off from the proceeds. The third item of priority before rendering the proceeds to subdivision among the heirs is the fulfilment of the will (which is confined upto 1/3 of the total) if there is any. Once these deductions have been made, the balance is divided among the heirs according to the shares earmarked for each in the inheritance law⁽¹⁷⁾.

3.1.2. Applications to Land Tenure Systems in Muslim Countries

Assuming that the inheritance proceeds left by the deceased have been cleared of debts and financial obligations, and that the will has been paid to its beneficiary(ies), the remainder may now be distributed between the heirs if that is their desire.

A distribution based on Islamic Law of Inheritance would indicate share distributions as given in the examples shown in Appendix 3. We could interpret the disposition of shares in this appendix relative to a physical quantity of land left by the deceased for his family including the *Asabah*, *Ashab al Furud* and the *Dhawi arham*.

Suppose a physical quantity of land equal to 100 hectares is to be subdivided among a group of heirs who collectively wish this to be implemented according to Islamic law. Appendix 5 shows a series of proportions based on different family configurations. The first row of this table suggests the shares that each of the mother, wife and two children (a male and a female) would get when the 100 hectares have been subdivided among them. It is worthy to take note that the male offspring gets almost a half of the total quantity of land that is subject to subdivision, i.e. 47.2 hectares. The female offspring, in comparison, gets almost a quarter of the total land equal to 23.6 hectares.

Increasing the number of children from two to four. reduces the share that each male offspring gets to 20.2 hectares and that of the female offspring to 10.1 hectares. This calculation assumes that the composition of male children is three times as much as the female, i.e., a ratio of 3 male: 1 female. The total shares received by the three male offsprings is equal to 60.6 hectares. Those who have fixed shares (i.e., the mother and the wife) together receive 29.2 hectares. These figures have useful comparative implications to which I shall return shortly.

Assume, alternatively, that the deceased had left a father, a mother and a wife in addition to five children. The composition of the children is 4 male:1 female. The share of land that each son may get is equal to 12 hectares. The single female offspring gets only 6 hectares. The father and the mother get 16.7 hectares each,.

If, on the other hand, we subdivide the land among the father, mother, wife and 10 children, as the case may be in a very large family, we find that share entitlements would be such that the father and the mother would get the usual fixed amount equal to 16.7 hectares. The wife would also get her fixed share of 12.5 hectares. Each of the sons would, however get 5.9 hectares, and the daughter only 2.9 hectares.

This illustrative example, as a result of application of the Islamic Law of Inheritance, suggests that subdivision or the wish to have the proceeds distributed among them, in the end, becomes a difficult exercise especially when you have a large number of beneficiaries.

3.1.3. Phenomena of Land Subdivision and Fragmentation

The phenomena of subdivision of land among the family as a result of expansion of the size of the household is a reality in many rural areas of the world. This occurs irrespective of religion or socio-cultural affiliations of societies and also their level of economic development. In addition, subdividing land in many LDCs has been found to put pressure on the meagre economic opportunities and re-sources that are available outside the rural agricultural sector. Naturally therefore, this tends to restrict possibilities of gainful employment outside the rural sectors in many of these countries. The outcome often is urban glut, incidences of high unemployment, and urban squalor.

Subdivision of land among the household when the occasion warrants, implies creation of new economic opportunities and also a means to strengthen the social structure of the rural household. However, in view of the increasing demographic pressure on land, attention has recently been oriented to the understanding of possible effects that this may have on the economies of these countries. Planners and policy makers are seriously considering these ramifications in the light of recent conditions emanating from the overwhelming rural population dominance in the LDCs. These countries have, with few exceptions, high dependence on agriculture as was pointed out in section 1.2 of this paper. In addition, focus, in all these countries, is on the issue of land ownership and other such transfers as . proprietary and usufruct rights. It is in this regard that the Islamic Law of Inheritance comes into the limelight.

I have, by way of review of literature in the preceding section, shown the existence of land subdivision propensities among the rural household. I also indicated that the Islamic Law of Inheritance is applied in almost all Muslim countries even though with varying intensities. I reiterate here that a subdivision of land among the heirs, assuming this defines the proceeds left by the deceased and therefore subject to the law of inheritance, is a natural phenomenon which, when correctly implemented, often proves to be a viable piece of legislation in

and of itself, and may also imply piety on the part of those who execute it. All considered, a subdivision of land as an activity, especially under the proviso that the Divine law of inheritance is observed, Can be fair and in line with traditions adopted by Muslim societies.

From an analytical point of view, a subdivision, as an arithmetic function or operation, entails a process of breaking up of a whole into parts. The implicit assumption is that the whole, however, is divisible. This is, in and of itself, a neutral process that is devoid of negative appendages (socio-cultural or psychological) that are often attributed to most of such operations.. The positive result of subdividing proceeds or for that matter any wealth or property should be considered synonymous with a distribution process that is fair and equitable.

I wish to emphasize, however, that not every attempt and/or means used to subdivide land or any other form of proceeds, however this may be defined, is economically viable. When these are conditioned to the criteria of fairness and equitability, as is found in the Islamic Law of Inheritance, does the process of subdivision become positive, fair and just to all the parties concerned.

Fragmentation, on the other hand, can be seen as a phenomenon that occurs independent of subdivision or in conjunction with it, therefore a precursor. Land owned by a family may be located such that parcels are noncontiguous and therefore separated from one another. In a case like this, parcels are physically fragmented and occur independent of subdivision. However, if lands located in different places are subdivided among the family members; then fragmentation as a by-product of sub-division becomes further accentuated. Interest in any case is in the loss of efficiency entailed, therefore, in so far as fragmentation of land as a result of, say, subdivision causes loss of efficiency in production and resource use, this phenomenon might be seen as a negative outcome of the desire by the members of the family to subdivide. Under these circumstances, execution of "Pre-emption Rights" (known as *Shufa'a* in Arabic) may in most cases, resolve such bottlenecks. (For juridical application of this instrument in the Sudan and Egypt, see Said M.A. Al Mahdi, pp. 101-155).

Given subdivision and/or fragmentation, the economics of size of land often entails assessment of the production possibilities of the holdings. This has been a focus of interest on the part of planners and policy makers as well as researchers during the last decade.

From the preceding discussion, it can be shown that:

- 1.- large segments of populations in the LDCs depend on land, hence the validity of a critical reassessment of policies affecting land distribution and ownership;

2. the proportion of family farms, i.e. small holders or peasants owning marginal holdings, however defined, have numerically increased;
3. intra-household transfers of land whether legal or not-so-legal is a normal practice that is likely to continue in the future;
4. the desire, on the part of the rural population, to own physical land properties rather than cash them in, reinforces the trend towards further fragmentation of the already marginal size of holdings;
5. fragmentation and/or subdivision of lands often result in abandonment of parcels of land that could otherwise have been put to use;
6. fragmentation, in most cases, is the result of absence of acceptable, secure and fair modes or arrangements of property transfer; and
7. that fragmentation (of the family farm) may be seen as a continuous process as long as strong population pressures (and other factors affecting ownership) remain unabated.

3.1.4. Cooperation Islamique»

Cooperation in Islam is a paramount principle which is embedded in all matters that may bind any two or more people who confess and practise the religion. As such, it may be the *modus operandi* among individuals in the family; or within families, tribes or nation; or it may be among nations and societies in Islam itself that are located distinctly and have their own sovereign political, cultural and legal statutes and autonomies.

Cooperation among individuals may take the form of a common destiny or a pursuit of goals that are to be shared together through common conviction or necessity, or it may be among families bound together by common ancestral linkages. It may be among a larger spectrum of individuals such as societies within a nation or among the aggregate of nations under Islam. The proviso in all these circumstances, is that these multitudes of Muslims have something in common and wish to share it in unison.

Cooperation (*Ta'awun*, in Arabic) implies togetherness and therefore the spirit of establishing harmony between things that would otherwise take up opposing views. Positions taken by some people, for instance, on issues affecting them as a group are not altogether harmonious because there are those who would, often, take a polar position relative to the opinion of others. This tends to aggravate the condition of non-reconciliability and therefore dominance of conflict-prone stances among individuals and/or entities involved in the choice of means and

ends. The nature of Man itself, no doubt, is such that each seeks his/her intrinsic values and goals knowing full well that this course of action can surely come in collision with those of others.

The crux of the principle of cooperation in Islam, therefore, is the support to be enlisted so as to uphold unity on matters commonly shared by the aggregate members of the family, society or nations. As such, it entails sacrifices on the part of the individual in favour of the aggregate, however that may be defined - e.g., family's, society's, nation's, *or Muslim *Ummah* at large. This principle explicitly underlines welfare gains that can be achieved through cooperation by the aggregate as compared to that of an individual in isolation.

The Composite System which most perceive as Man's best effort to apply Islam to his/her worldly affairs, anticipates conditions in which Muslims could establish a cooperation atmosphere among any set of inter-acting parties. In this setting, the role of the "institution of family" in Islam seems to take the dominant position. The relationship envisaged in this principle may be interpreted as the foundation upon which a collective and inter-active action can be designed by pooling in the multitude of participating parties. As such, the family represents the smallest unit and therefore the base for constructing higher order of institutional arrangements.

Inputs that go into the design of such an atmosphere must take into account the rights and privileges accorded to the individual in Islam especially via the institutional, physical, choice and other endowments⁽¹⁸⁾. For instance, cooperation among the members of the family or society assumes that each member has the right to build the structure of a descent family subject to Islamic teachings. The individual also has the right to search a secure means from which he could generate an adequate standard of living for himself and family; the right to own and develop economic resources to achieve the above; the right to exert effort and/or offer labor services so as to earn; the right to get justice, equality and brotherhood amid that society, to mention only a few (see, Khayad, 1981, pp. 74-80).

4. SUMMARY AND RECOMMENDATIONS

4.1. SUMMARY

Summarising the material discussed in the text, I point out that the diagnosis made on the problem area, i.e., subdivision and fragmentation, is based on the analyses of the environment under which Muslim countries find themselves in at this time and age. I take the view that the system represented in the Composite model is dynamic, flexible and, for all practical purposes, able to cater for the needs of the Muslim *Ummah*. How intensively that system is deployed in each Muslim country may, however, vary. This suggests the existence of a large diversity among Muslim countries, since in reality, not all of them apply the *Shariah* law with the same intensity and purpose. This notwithstanding, it can be safely said that since the Composite model is universal, solutions derived from it must also be universal. If so, then these solutions should have a wide range of applicability in the countries that apply the principles of *Shariah*.

In this regard, I pointed out some elements that make up the system of variables influencing the Muslim's institutional structure, its character, conduct and expectations. Among these, I had specifically mentioned the following:

- a. the Islamic Law of Inheritance,
- b. the institution of family in Islam, and
- c. the Islamic concept of cooperation.

The Islamic Law of Inheritance is a Divine Doctrine which, when rendered operational, determines the proportion in which inheritance proceeds should be distributed among heirs. The distribution is geared in the direction of assigning fair and equitable shares to each beneficiary. Proper application of the law ensures the establishment and maintenance of strong family institutions bonded together through brotherhood, togetherness, and cooperation.

For distribution to take place, the *a priori* decision that all the members, or a segment thereof, wish this to be done must be explicitly declared in front of a competent court. Only then would distribution according to the Islamic Law of Inheritance become operational. If, however, it is explicitly stated that the wish of the heirs is to keep the proceeds undivided, then the court would rule to differ subdivision, and that this verdict would remain operational until otherwise suggested.

I have also discussed what, in the context of the institution of family, the problem of subdivision and fragmentation entails. I only reiterate that the essence of this phenomenon is to strengthen the social structure of the rural household in so far as each member of the family is assured the usufruct of a parcel of land so as to guarantee a secure means of livelihood for him and his offspring. Implicitly, therefore, this is seen as a means to generate new economic opportunities for the ever-expanding size of the rural household. In addition, the problem of fragmentation as a continuous process specially in view of the high growth rates of rural population; dependence on land as a major source of livelihood; absence, in some countries, of acceptable and secure modes of land transfer arrangements; and preference for physical land ownership over liquidity, etc. all tend to make solutions remote.

The third factor is the call to cooperate on matters that serve the interest of the aggregate; hence cooperation in Islamic context.. I pointed out here that this concept has the foundation of "family" as its premises and as such advocates togetherness, voluntary sacrifices (*Sulh* and/or *Hibah*) in favor of overall welfare gains; and abstention from coercive methods (however subtle its calculations may be) to alter the design as stipulated the Divine law.

4.2. POTENTIAL REMEDIES FOR LAND SUBDIVISION AND FRAGMENTATION IN MUSLIM COUNTRIES

Taking these into consideration, I put forth the following potential remedies⁽¹⁹⁾

- a. It is necessary that each Muslim country determine its own definition of an economic unit of land. This should take into account social, economic and technological factors prevalent in that country. Once defined, this measure may be used as a floor beyond which further subdivision (as a result of traditional or statutory laws) can not be entertained, at least from an economic standpoint.
- b. With this in place, I may point out that if farmers in some parts of the world can be paid to withdraw land from production, as the case is in USA and recently the EEC ⁽²⁰⁾, then the Muslim land holding family can also be paid not to subdivide land beyond the stipulated "economic unit".
- c. Fragmentation in the spatial sense poses efficiency problems that can be readily resolved. This phenomenon assumes parcels are not contiguous therefore require the owner to spend a great deal of effort and time to move himself and his equipments about. Add subdivision to an already fragmented parcel, and you have the problem multiplied. For the former, a solution may be horizontal integration such that a member of the family is delegated to manage the affairs of the discontinuous parcel on behalf

or the rest of the family members. This may be done through arrangements inside the family, in which case an appropriate incentive system may be developed so as to reward efficient management of the unit. The element of consensus is important because it upholds the spirit of cooperation and togetherness in the family.

- d. The desire to link size of holdings with the concept of an economic unit of land, however this may be defined, and still have the inheritance doctrine implemented seems to be a formidable undertaking at least at this stage of theoretical development. On the one hand, one cannot stop the physical effect embedded in subdivision (i.e., fragmentation) as long as the wish of the beneficiaries' to have the total proceeds distributed remains outstanding. On the other, one cannot institute the economic rationale alone and hence freeze the size of holdings to a predetermined configuration based on purely economic criteria without changing or checking the course of the more difficult effect of driving subdivision physically to the extreme.

Linking the two, as we have argued, is conceptually difficult given the state of theoretical thinking now prevailing. Going one way in favor of either rule leaves a lot of gaps unattended to. One is then left to explore the option of adjusting the theoretical rationale based on economic criteria according to the doctrine of "fair distribution" that is contained in the Law of Inheritance.

Even though the option to freeze size of holdings to the economic unit might satisfy purely economic goals, this would most likely weaken the operability of the Islamic Law of Inheritance. This is true because, instituting production/technical, economic and/or managerial efficiency criteria does not emphasize the important condition of equitable distribution of proceeds among beneficiaries. The proposition is hereby articulated that the economic unit argument may perhaps be used to augment and/or support the more dominant objective, at least in the perception of the Muslim, of leaving every beneficiary fairly endowed in the distribution effort. If such is the case, then the concept of economic unit, as it relates to land, should be interpreted in the context of the social, economic, technical and managerial peculiarities of the Islamic economy contrary to the secularism of contemporary neo-classical-keynesian economics now prevailing.

- e. The general contention that land fragmentation is an inevitable consequence of the Islamic Law of Inheritance, has no foundation. I cite the condition stipulated in the invocation of the said law whereby heirs express the desire to subdivide. There is a logical alternative to this rule which denotes the wish not to subdivide. This option may be interpreted as a deliberate effort on the part of the family to collectively own the property and to operate the unit in any fashion they deem appropriate. This is an economically viable option that should be explored. The argument (i.e.

contention) as entertained ignores the likelihood that collective ownership and cooperation are equally just as possible as the wish to subdivide.

- f. Alternatively, subdivision invoked by the Islamic Law of Inheritance may continue as long as the size of holding remains greater than the defined "economic unit". If further subdivision will result in the parcels being less than the economic unit, then the families wishing to subdivide according to ILI must be paid not to further break up the parcels (i.e., to voluntarily abstain from the idea of removing the parcel from the parent body). This would serve as an incentive that would sanction an economically viable size of holdings as the floor instead of having a multitude of small units that are difficult to operate. The advantage of this incentive mechanism is that the rural household is paid to be pious by following Divine instructions as per Islamic Law of Inheritance on the one hand, and for being cooperative by collectively pooling his land and other resources with those of their fellow family members, on the other hand.
- g. The overriding motive behind the Islamic Law of Inheritance, in any case, is that distribution, in this case, of land property, even though likely to be subjected to extreme fragmentation, need not adversely affect the desire to improve ones economic position through deployment of individual or collective effort.

Taking this into account, a distinction should be drawn between the physical phenomenon of subdivision of say, land between beneficiaries on the one hand, and the invocation of the Law of Inheritance in Islam, on the other. The former is a socioeconomic phenomenon which embodies own rules including a plethora of economic laws, efficiency criteria and equally intricate system of social, institutional and structural conditions and biases. The latter, is a Divine dictation that is meant to ensure that each and every beneficiary gets his or her fair and equitable distribution of whatever there is to be distributed among any number of potential legal heirs.

These two phenomena are not in any way contradictory. Taken together, one can envision an order whereby the two are harmonized in such a way that the distributive justice in the Islamic Law of Inheritance is upheld and the economic performance of all those immediately concerned simultaneously advanced. This ideal position, which defines the goal of the Divine rule, can only be achieved if the socioeconomic whims and drives of the society can be tempered in such a way that this upholds the element of justice contained in the Divine law.

The role of the Islamic State in the Composite System is all the more vital. Only the following may particularly be cited, viz:

- i. the function of educating the public on the correct application of the Law of Inheritance;

- ii. management of Muslim common lands;
- iii. definition and appropriate stratification of the "economic unit" especially if this concept is found acceptable taking into account conditions in each locality and country;
- iv. the function of encouraging, through any rational economic means, intra or inter-household, family(ies), nation and/or multinational cooperation based on Divine injunctions, as per *Surah Al Ma'idah*, Verse 2, and others in the Qur'an along the same lines.

NOTES

- (1) Landlessness is a phenomenon that is facing an increasing number of the rural population. It has been explained via several inter-locking factors the causes of which reside in, among other things, the:
 - a. Shrinking land frontiers given population growth rates that outrun the ability of the rural sector to adopt new technologies;
 - b. Stringencies and inequities of various forms of tenancies, and
 - c. Inefficient distribution systems based on ill-conceived emphasis on individual ownership rights.
- (2) Information about Lebanon is based on the Ministry of Agriculture's Census of 1970. See, Agriculture and Development, No. 4; FAO-ECWA; June, 1980.
- (3) Information about the distribution of agricultural lands in Bangladesh is based on F. Jannuzi and J. Peach, "Bangladesh - A profile of the countryside", US AID, Dhaka, 1979.
- (4) Kharaj lands, according to Hanafi School of thought, include the following: (i) conquered lands whose people do not embrace Islam, but who remain as users subject to payment of rental, (ii) reconciled lands in which the *Imam* establishes an agreement with the non-Muslim resident owners subject to payment of *Kharaj* (rental), (iii) reclaimed (or revived) lands by Muslims via use of *Kharaj* land water or use of lands adjacent to other *Kharaj* lands, (iv) *Ushr* lands bought by non-Muslims which, under these circumstances, transform into *Kharaj* lands. For the position of the majority of *Fiqh* schools of thought, see, Al Abadi, pp. 315-318.
- (5) The work by Schultz, 1940; Johnson, 1950; Drake, 1952; Georgescu-Roegen 1960, may be mentioned in this regard.
- (6) The historical transition and development of the theory of sharecropping tenancy is discussed in greater details in Ruttan's paper, 1986, pp. 39-63. Also in the works of those pointed out in footnote no.5
- (7) Assumptions here often include the following:
 - a. that a country in the study sample is at its early stages of development with majority of population residing in the rural sector and therefore dependent on land for livelihood;
 - b. that there are negligible employment opportunities in the non-agricultural sector; and
 - c. that social and political factors are taken as given.
- (8) This factor is calculated as the ratio of total population to total agricultural land, given time and place.
- (9) Calculations based on this method would suggest that the Islamic countries have high population/land ratios. If this argument is accepted, it would imply that the average farm size would tend to be smaller. Relaxation of the conditions assumed under this line of thinking would, alternatively, suggest that the smaller the average farm size, the larger would be the scope of fragmentation, which is what had been suggested earlier in this paper.

- (10) The percentage of the GNP which originates from the nonagricultural sector is used as a proxy for industrialization and indicates a measure of the extent of non-agricultural employment opportunities. In the study, this is referred to as GNP industrialization ratio. This line of reasoning ignores the reality that in the non-agricultural sectors of most of the LDCs, hardly any significant job opportunities are created; simply because these sectors, from macro-economic point of view, are small, marginally endowed and therefore have small multiplier effects, especially with regard to job and employment-creation.
- (11) The reservation that the latter assumption is very rigid and does not take into account the cost of capital, which is still high in rural LDCs relative to labor, should be expressed here. We believe that this is a strong argument even if it is assumed that the enterprise attitude and behaviour, on the part of the rural household, exists.
- (12) Elements facilitating this condition include:
- a. the small size of the Muslim population at the time;
 - b. the need to bring together these communities as a united force; and
 - c. the desire to avoid the wealth of the Muslims to go others who might use it against Islam. See *Surah Al Ahzab*, verse (6). Also *Surah Al Anfal*, verse (75).
- (13) The verses of the Qur'an which are quoted in English in this study are those translations by A. Yusuf Ali.
- (14) For positions and legal justifications given on this subject by different schools of *Fiqh*, see: *Al Majmu' : Hashiyat al Muhtaj ; Bidayat al Mujtahid*. For the Hanafite position, see Ibn Majah; p. 914; Al Tirmidi, p. 421.
- (15) My thanks to Br. Mazin S. El-Taher of the Administration Division, IRTI, for translating this text. It may be added here that Omar's conditions listed above included the following:
- "that he had declared himself as manger of the *Waqf* he instituted, and stipulated that management of the *Waqf*, upon his death, should be made the responsibility of his daughter Hafsah. He further stipulated that upon the death of Hafsah, management of the *Waqf* he instituted should become the responsibility of the senior member of his family, Al Oman.
- (16) For details see, Abu Bakr Al Khassaf; in *Ahkam Al Awqaf*. The tendency to put properties under *Waqf* by the Companions of the Prophet (pbuh) was based on the Prophet's saying that: "if a son of Adam dies, his activities cease, except on three occasions:
- a. a continuous "*Sadaqau*
 - b. knowledge properly put to use, and
 - c. a pious offspring who prays for him"
- (narrated from the Group except Al Bukhari and Ibn Majah). See, Sheikh Mustafa Al Zarqa, *Ahkam Al-Waqf*, 1947, p. 10. The Companions interpreted the expression "continuous *Sadaqa*" to mean „*Waqf*" because ownership was detained even though the stream of benefits from the property could continuously be transferred to the beneficiary (or ..ies).
- (17) Let (Nt) represent total proceeds that is subject to inheritance, that is, the balance after deduction of burial expenses, debts and legacies and the will (if there is any) have been made. This can be taken as a whole number equal to the numerical 1. The shares going to the first group, i.e., the father, mother and wife are fixed in the law of inheritance. These are given as 1/6, 1/6 and 1/8 respectively (see, verse 11 of *Surah Al Nisa*). The sum of shares going to this group is shown in equation (1).
- $$1/6 + 1/6 + 1/8 = (4 + 4 + 3) / 24 = 11/24 \dots (1)$$

Top get the children's allotments algebraically, the total amount of shares going to this group must be subtracted from (Nt) such that:

$$(Nt) - 11/24 = 13/24 \dots (2)$$

The fraction denoted by 13/24 given in equation (2) suggests the scope of the share that is subject to distribution among beneficiaries, however large their number may be. The proportion that each of the male and female child gets is determined in the Qur'an and therefore is definite [see, verse 11, A/ Nisa]. A subdivision of the proceeds say, among two children after deduction of shares going to the father, mother and wife, in which case the male gets twice as much as the female child can be represented as:

$$13/24 \cdot 1 / (n + 1), \text{ where } n \text{ is equal to } 2 \dots (3)$$

Equation (3) suggests that the female child would get a share equal to $\frac{13}{72}$ of (Nt); and the male child a share equal to twice as much and therefore an amount equal to $\frac{26}{72}$ of (Nt).

For n = 3, representing a combination of two males and a female heir, a single share would be equivalent to:

$$13/24 \times 1/(n + 1 + 1) = 13/24 \times 1/5 = 13/120 \dots (4)$$

If n = 4, and under the assumption that you have 3 males and a female, a share would be equivalent to:

$$13/24 \times 1 = 13/24 \times 1/7 = 13/168 \dots (5)$$

For n = 5, composed of four males and one female, each share is equal to $\frac{13}{216}$. For n = 6 children, each share would be equal to $\frac{13}{264}$. And so on.

Under given assumptions, the preceding configuration can algebraically be generalised as follows:

$$\text{A female share} = (Nt - Fx) \cdot \frac{1}{(n + (n - nt))}$$

or

$$\text{simply: } \frac{(Nt - Fx)}{(n + nm)}$$

In equation (6), by a female share is meant the amount that should go to a female child, hence the basis for calculation of the male child's (or children's) corresponding share(s). Fx denotes the combined amount taken up by the fixed proportions going to the father, mother and wife of the deceased; n is the total number of children in the family, nm is the number of male children and nf the total number of female children. These calculations are summarised in Appendix 1. For more extensive applications, see Appendix 4 which gives a schematic representation of share proportions according to the Islamic Law of Inheritance based on the position of the *Hanafi Fuqahas*.

- (18) This takes us back to the Schematic Representation and the Institutional Endowment discussed under Paradigms envisaged in the Composite System; see Figure 1 in the text.
- (19) These remedies are tentative. However, each of the relevant parameters can be exposed to a serious analytical regimentation at the level of the Member countries, especially those interested in further pursuing the suggestions outlined here.
- (20) Reference is made here to the American agriculture and its incentive payments to withdraw land from production. Also the recent debate in the EEC countries to adopt similar policies. The motives, in this regard, may be different but the result undoubtedly would, besides improving efficiency of size of units, strengthen cooperation among members of the family, which is what Islam advocates.

APPENDIXES

APPENDIX - 1

LAND RESOURCE ENDOWMENT: AFRICA GROUP - 1983

Country	Total Land Area	Arable Land	Irrigated Land	Woodland +Forests	Per capita Arable + Woodlands & Forests	Per capita Irrigated + Woodland & Forests	Mid-Yr. Pop.
(1,000 Hectares)							
1. Algeria	238,174	7,504	348	4,384	0.580	0.231	20.5
2. Burkina Faso	27,380	2,633	2	7,020	1.485	1,080	6.5
3. Egypt	99,545	2,471	2,471	2	0.054	0.054	45.9
4. Guinea	24,586	1,571	13	10,360	2.294	1.995	5.2
5. Mali	122,000	2,053	115	8,680	1.431	1.173	7.5
6. Mauritania	103,040	195	9	15,134	8.516	8.413	1.8
7. Morocco	44,630	8,394	520	5,195	0.615	0.259	22.1
8. Niger	126,670	3,560	36	2,720	1.083	0.475	5.8
9. Senegal	19,200	5,225	180	5,942	1.773	0.972	6.3
10. Sierra Leone	7,162	1,771	7	2,050	1.092	0.588	3.5
11. Somalia	62,734	1,066	165	8,710	1.845	1.675	5.3
12. Sudan	237,600	12,448	1,850	48,010	2.964	2,444	20.4
13. Tunisia	15,536	4,695	163	555	0.761	0.104	6.9
14. Uganda	19,971	6,300	5	5,910	0.836	0.405	14.6
Africa Group Total	1,148,228	59,886	5,854	80,672	1.809 (Average)	1.419 (Average)	172.3

Source: Statistical Monograph, IDB, 1986, Columns 1, 5 & 6 are calculated from tables in this document.

APPENDIX - 2

LAND RESOURCE ENDOWMENT: WESTERN AND SOUTH EAST ASIA GROUP: 1983

Country	Total Land Area	Land	Arable Land	Irrigated Woodland + Forests	Per capita Arable+ Woodlands & Forests	Per capita Irrigated+ Woodland & Forests	Mid-Yr. Pop.
(1,000 Hectares)							
1. Bangladesh	138,391	9,136	1,848	2,143	0.119	0.042	94.7
2. Indonesia	187,157	20,310	5,418	121,280	0.908	8.813	156.5
3. Iran	163,600	13,700	4,000	18,000	0.753	0.523	42.1
4. Iraq	43,397	5,450	1,750	1,500	0.473	0.221	14.7
5. Jordan	9,718	416	38	41	0.138	0.024	3.3
6. Lebanon	1,023	298	85	70	0.142	0.060	2.6
7. Malaysia	32,855	4,340	380	21,670	- 1.746	1.480	14.9
8. Pakistan	77,872	20,490	14,320	2,990	0.259	0.191	90.5
9. K.S.A.	214,969	1,135	395	1,601	0.264	0.192	-10.4
10. Syria	18,405	5,607	567	499	0.636	0.111	9.6
11. Turkey	77,076	26,390	2,080	20,199	0.985	0.471	47.3
12. Y.A.R.	19,500	2,790	245	1,600	0.708	0.298	6.2
13. P.D.R.Y.	33,297	212	70	2,420	1.196	1.132	2.2
West & South East Asia Total	886,26	- 109,274	31,196	194,533	0.660 (Average)	0.428 (Average)	524.5

Source: Statistical Monograph, IDB, 1986, Columns 4, 5 & 6 are calculated from tables in this document.

APPENDIX - 3

SHARE OF DISTRIBUTION OF PROCEEDS ACCORDING TO ILI

Heirs No. of Children*	Father	Mother	Wife	Daughter	Son	Total
2 children	12/72	12/72	9/72	13/73	26/72	1
3 children	20/120	20/120	15/120	13/120	26/120	1
4 children	28/168	28/168	21/168	13/168	26/168	1
5 children	36/216	36/216	27/216	13/216	26/216	1
6 children	44/264	44/264	33/264	13/264	26/264	1

Calculations are based on the following share distributions:

- i. Father: 1/6 of (Nt)
- ii. Mother: 1/6 of (Nt) $F_x = (i)+(ii)+(iii) = 11/24$
- iii. Wife 1/8 of (Nt)
- iv. Daughter's share: $(Nt - F_x) / n + (n - nf)$
- v. Son(s) share: twice the daughter's share, i.e.
 $2 (Nt - F_x) / (n + (n - nf))$,
 where $(n - nf) = nm$
 or simply $2 (Nt - F_x) / n + nm$.

These calculations assume only one daughter

APPENDIX - 5

COMPOSITION OF HEIRS AND ASSOCIATED SHARES AS PERCENTAGE OF (Nt)

<u>Heirs</u> No. of Children	Father	Mother	Wife	Daughter	Son	Total
2		16.7	12.5	23.6	47.2	100
3		16.7	12.5	14.1	28.3	100
4	-	16.7	12.5	10.1	20.2	100
5	16.7	16.7	12.5	6.0	12.0	100
6	16.7	16.7	12.5	4.9	9.8	100
9						
10	16.7	1.6.7	12.5	2.9	5.9	100

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ISLAMIC DEVELOPMENT BANK

Establishment

The Islamic Development Bank is an international financial institution established in pursuance of the Declaration of Intent issued by the Conference of Finance Ministers of Muslim Countries held in Jeddah in Dhul Q'adah 1393H, corresponding to December 1973. The Inaugural Meeting of the Board of Governors took place in Rajab 1395H, corresponding to July 1975, and the Bank was formally opened on 15 Shawwal 1395H corresponding to 20 October 1975.

Purpose

The purpose of the Bank is to foster the economic development and social progress of member countries and Muslim communities in non-member countries individually as well as jointly in accordance with the principles of Shari'ah i.e., Islamic Law.

Functions

The functions of the Bank are to participate in equity capital and to grant loans for productive projects and enterprises besides providing financial assistance to member countries in other forms for economic and social development. The Bank is also required to establish and operate special funds for specific purposes including a fund for assistance to Muslim communities in non-member countries, in addition to setting up trust funds.

The Bank is authorized to accept deposits and to mobilize financial resources through Shari'ah compatible modes. It is also charged with the responsibility of assisting in the promotion of foreign trade, especially in capital goods, among member countries; providing technical assistance to member countries; and extending training facilities for personnel engaged in development activities in member countries to conform to the Shari'ah.

Membership

The present membership of the Bank consists of 53 countries. The basic condition for membership is that the prospective member country should be a member of the Organization of the Islamic Conference, pay its contribution to the capital of the Bank and be willing to accept such terms and conditions as may be decided upon by the IDB Board of Governors.

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Up to the end of 1412H (June 1992), the authorised capital of the Bank was two billion Islamic Dinars. (The value of the Islamic Dinar, which is the accounting unit in the Bank, is equivalent to one SDR -Special Drawing Right- of the International Monetary Fund). Since Muharram 1413H (July 1992), in accordance with a Resolution of the Board of Governors, it became six billion Islamic Dinars, divided into 600,000 shares having a par value of 10,000 Islamic Dinars each. Its subscribed capital also became four billion Islamic Dinars payable according to specific schedules and in freely convertible currency acceptable to the Bank.

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Financial Year

The Bank's financial year is the lunar Hijra Year.

Language

The official language of the Bank is Arabic, but English and French are **additionally** used as working languages.

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