



**WANA**  
INSTITUTE



# Legal Empowerment

## The Islamic perspective



# About the WANA Institute

The WANA Institute is the only region-focused, interdisciplinary policy think tank working towards more informed development strategies in the West Asia – North Africa region. The Institute conducts qualitative and quantitative research, hosts conferences and events that provide a space for non-politicised discussion on key development challenges, and undertakes capacity building initiatives for civil society groups. All of the Institute's work is focused on the areas of social justice, green economy and human security. The Institute believes that development challenges require regional, cooperative approaches from an interdisciplinary perspective. Additionally, it believes civil society must be strengthened to become a vital stakeholder in the region and that we need far greater insight into the impact of development initiatives to ascertain levels of success. The WANA Institute is chaired by His Royal Highness, Prince El Hassan bin Talal and operates from the Majlis El Hassan in Amman, Jordan.

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## Introduction

Legal empowerment presents a practical approach to human rights law focused on addressing the exclusion of the world's poor from accessing their legal rights. The global development initiative assesses how the grand values of human rights law, e.g. equality, justice, and protection for the marginalised, can be translated into realistic policies and methods of action that meaningfully improve the lives of the poor. The successful application of these principles in any region depends on reformers' abilities to acknowledge and utilise indigenous support for legal empowerment concepts within the prevailing cultural and religious worldviews of the particular society.<sup>1</sup> In the West Asia-North Africa (WANA) region, this requires that reformers and policy-makers understand how the key principles of legal empowerment relate to the Islamic legal tradition. In addition to highlighting the support for equality before the law, protection of rights and dignity, and the security of property in Islamic law, this paper uses an objectives-based approach to the *Shari'ah* to assess how the foundational principles of Islamic law can be implemented in ways that protect and enhance the legal, labor, business, and property rights of the poor.

This paper is divided into two sections that reflect the two main forms of exclusion that contribute to the disenfranchisement of the poor: unequal access to the formal legal system and to the formal economy. The first section is primarily devoted to the first pillar of legal empowerment and demonstrates the centrality of equality before the law, protection of the

disadvantaged or oppressed, and a fair and accessible justice system in Islamic law. The second section examines how Islamic theories of poverty, welfare, and just distribution of wealth also address the three pillars of legal empowerment concerned with property, labor, and business rights. The third and final section of the paper summarizes specific recommendations for the practical implementation of Islamic legal concepts and institutions in relation to legal empowerment priorities and goals.

## What is legal empowerment?

The understanding of legal empowerment concepts in this paper primarily draws from the UN Commission on Legal Empowerment of the Poor Report, "Making the Law Work for Everyone."<sup>2</sup> Legal empowerment is a global development project based on the principle that providing the poor with the tools and environment they need to access and protect their legal rights is the best way to alleviate the devastating effects of global poverty. Legal empowerment recognizes the practical limits of legal reform. It emphasizes that the official codification of certain rights does not necessarily improve the lives of marginalised or oppressed segments of society unless they are made aware of and given access to functioning systems and means of protection.

The Commission developed a comprehensive agenda for legal empowerment divided into four main themes: 1) access to justice and the rule of law, 2)

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<sup>1</sup> See Zulifar's discussion of the benefits of an Islamically justified labor rights code, page 29.

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<sup>2</sup> Commission on Legal Empowerment of the Poor, and United Nations Development Program. *Making the Law Work for Everyone*. Report of the Commission on Legal Empowerment of the Poor. New York. United Nations Development Program, 2008.

property rights, 3) labor rights, and 4) business rights.

In detailing the practical application of legal empowerment theory, the Commission outlined certain criteria for measuring success in each

domain, or pillar (see Table 1). This paper pays particular attention to how legal concepts, institutions, and foundational principles within the body of Islamic law might specifically address each criterion.

Table 1: Four Pillars of Legal Empowerment<sup>3</sup>

<b>Four pillars of legal empowerment</b>	
<b>Access to justice and the rule of law</b>	
	<ul style="list-style-type: none"> <li>• Ensure everyone has the fundamental right to legal identity, and is registered at birth.</li> <li>• Repeal or modify laws and regulations that are biased against the rights, interests, and livelihoods of poor people.</li> <li>• Facilitate the creation of state and civil society organizations and coalitions, including paralegals who work in the interest of the excluded.</li> <li>• Establish a legitimate state monopoly on the means of coercion, through, for example, effective and impartial policing.</li> <li>• Make the formal judicial system, land administration systems, and relevant public institutions more accessible by recognizing and integrating customary and informal legal procedures with which the poor are already familiar.</li> <li>• Encourage courts to give due consideration to the interests of the poor.</li> <li>• Support mechanisms for alternative dispute resolution.</li> <li>• Foster an institutionalize access to legal services so that the poor will know about laws and be able to take advantage of them.</li> <li>• Support concrete measures for the legal empowerment of women, minorities, refugees and internally displaced persons, and indigenous peoples.</li> </ul>
<b>Property rights</b>	
	<ul style="list-style-type: none"> <li>• Promote efficient governance of individual and collective property in order to integrate the extralegal economy into the formal economy and ensure it remains easily accessible to all citizens.</li> <li>• Ensure that all property recognized in each nation is legally enforceable by law and that all owners have access to the same rights and standards.</li> <li>• Create a functioning market for the exchange of assets that is accessible, transparent, and accountable.</li> <li>• Broaden the availability of property rights, including tenure security, through social and other public policies, such as access to housing, low interest loans, and the distribution of state land.</li> <li>• Promote an inclusive property-rights system that will automatically recognize real and immoveable property bough by men as the co-property of their wives or common-law partners.</li> </ul>
<b>Labor rights</b>	
	<ul style="list-style-type: none"> <li>• Respect, promote, and realize freedom of association so that the identity, voice, and representation of the working poor can be strengthened in the social and political dialogue about reform and its design.</li> <li>• Improve the quality of labor regulation and the functioning of labor market institutions, thereby creating synergy between the protection and productivity of the poor.</li> <li>• Ensure effective enforcement of a minimum package of labor rights for workers in the informal economy that upholds and goes beyond the Declaration of Fundamental Principles and Rights at Work.</li> <li>• Increase access to employment opportunities in the growing and more inclusive market economy.</li> <li>• Expand social protection for poor workers in the event of economic shocks and structural changes.</li> </ul>

<sup>3</sup> Ibid.

- Promote measures that guarantee access to medical care, health insurance, and pensions.
- Ensure that legal empowerment drives gender equality, thus meeting the commitments under ILO standards that actively promote the elimination of discrimination and equality of opportunity for, and treatment of, women, who have emerged as a major force in poverty reduction in poor communities.

#### Business rights

- Guarantee basic business rights: including the right to vend, to have a workspace, and to have access to necessary infrastructure and services (shelter, electricity, water, sanitation).
- Strengthen effective economic governance that makes it easy and affordable to set up and operate a business, to access markets, and to exit a business if necessary.
- Expand the definition of 'legal person' to include legal liability companies that allow owners to separate their business and personal assets, thus enabling prudent risk-taking.
- Promote inclusive financial services that offer entrepreneurs in the developing world what many of their counterparts elsewhere take for granted—savings, credit, insurance, pensions, and other tools for risk management.
- Expand access to new business opportunities through specialized programs to familiarize entrepreneurs with new markets and help them comply with regulations and requirements, and that support backward and forward linkages between larger and smaller firms.

## What is Islamic law?

Just as legal empowerment encourages the distinction between the international human rights ideals and the actual practice and implementation of law, any discussion of Islamic law must necessarily distinguish between divine eternal law, the *Shari'ah*, and cumulative body of Islamic jurisprudence, or *al-ahkam*. As Allah (سبحانه و تعالی) 's divine intent for the true path toward social and moral goodness, the *Shari'ah* is eternal, absolute, and unchanging. In contrast, Islamic legal science and its human attempts to codify and explain divine law, or *fiqh*, are temporal, fallible, and context-specific. For this reason, Islamic jurisprudence acknowledges and accepts a diversity of opinion, as exemplified by the coexistence of eight official prominent *Sunni* and *Shi'a* schools, or *mudh'hab*.<sup>4</sup> Although all Islamic

scholars recognize the primacy of the direct divine revelation to the Allah's Messenger, the Prophet Muhammad ﷺ, or the Qur'an, Islamic scholars from each school attach varying weights and standards to next three main sources of *ahkam al-Shari'ah*: the speech and actions of the Prophet ﷺ and his Companions, the *Sunnah*, the unanimous consensus of the Muslim community, or *Ijm'a*, and individual reasoning through analogy, or *qiyas*. For the purposes of this paper, the author will endeavor to use the term "Islamic law" to generally refer to the cumulative body of Islamic jurisprudence commonly accepted by most scholars, regardless of school.<sup>5</sup>

<sup>4</sup> This is best evidenced by the first point of the Amman Message, commissioned in 2004 by His Majesty King of Jordan Abdullah II bin al-Hussein for the purpose of clarifying the true nature of Islam and defining who is a Muslim. Twenty-four of the most senior religious scholars from all over the world, supported by an international Islamic conference of 200 of the world's leading Islamic scholars from 50 countries, unanimously issued two rulings specifically recognizing the validity of all eight *mudh'hab* of

*Sunni, Shi'a and Ibadhi* Islam and forbidding declarations of apostasy between Muslims. The three points of the Amman Message have since been endorsed by over 500 leading Muslim scholars worldwide. More information on the Amman Message and a list of its endorsers can be found at [www.ammanmessage.com](http://www.ammanmessage.com).

<sup>5</sup> Although differences in the priorities and approaches in each school can result in vastly different interpretations of the *Shari'ah* that can have very real legal consequences for Muslims in certain cases, an in-depth analysis of each individual school is beyond the scope of this paper. For this type of analysis, refer to Bakhtiar, Laleh, trans. "Encyclopedia of Islamic Law: A Compendium of the Views of the Major Schools." ABC International Group, 1996.

This paper utilises two useful frameworks for approaching Islamic law on the subject of human rights. The first is the division of the *Shari'ah* into laws that define man's relationship with the divine, or *'ibadat*, and laws that define man's relationship with other individuals and with society, or *mu'amalat*. While some aspects of human life are considered to fall into both categories, this paper will mainly focus on laws that outline relationships between people rather than rules of worship, religious ritual, etc. Because the *mu'amalat* govern the relationship between individuals and societal norms, this focus adds an additional layer of adaptability to particular cultures and contexts. Secondly, this paper will work from the principle-guided view of the *Shari'ah* first outlined by the influential and well-respected eleventh-century Islamic scholar, Imam Al-Ghazali. Al-Ghazali wrote that Islam guarantees five essential rights to all individuals: the protection of religion, the protection of life, the protection of lineage, the protection of posterity and intellect, and the protection of property.<sup>6</sup> In Al-Ghazali's view, the intent behind every law can be traced back to the assurance of these essential rights. Consequently, these principles form the objective criteria through which Islamic scholars are able to determine whether a legal concept promotes public interest and protects an individual's rights from violation by another person or by the state.

Additionally, Islamic scholars who find themselves confronted with modern issues that are not fully addressed by primary sources can turn to four

additional secondary sources. Three out of four of these sources clearly reflect Al-Ghazali's objective-based framework. Al-Ghazali himself established the secondary source of *al-maslahah al-mursala*, or consideration of the public interest as defined by the five essentials.<sup>7</sup> This methodology allows a Muslim scholar to take into account the needs of the society when resolving questions that have not already been answered by the first four sources. Another secondary source, juristic preference or *istihsan*, describes the process through which a jurist selects the most acceptable solution or grants an exception to a previous ruling based on stronger evidence for the public interest.<sup>8</sup> In his explanation of Islamic legal theory, 'Araf cites the example of juristic preference for photography or laboratory analysis as a more reliable means of proof than oral testimony favored by classic sources.<sup>9</sup> The final secondary source, *al-'urf*, also takes into account the considerations of a particular society by affirming any customs or norms that uphold the five essential objectives of the *Shari'ah* and do not explicitly contradict the primary sources. For example, although slavery was historically tolerated by the Qur'an and the Sunnah at the onset of Islam, Muslim jurists sometimes cite *al-'urf* as the source for its universal prohibition in all Muslim countries today.

According to 'Araf, these secondary sources guard against possible unfairness that could result from rigid, literal interpretation of law. This limited flexibility and acknowledgement of changing norms and needs inherent in the process of developing and

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<sup>6</sup> 'Arafa, Mohamed A. "Corruption and Bribery in Islamic Law: Are Islamic Ideals Being Met in Practice?" *Annual Survey of International and Contemporary Law* 57 (2012): 171–242.

<sup>7</sup> Al-Marzouqi, Dr. Ibrahim Abdulla. *Human Rights in Islamic Law*. First. Abu Dhabi, UAE: n.p., 2000.

<sup>8</sup> Ibid.

<sup>9</sup> 'Arafa, "Corruption and Bribery in Islamic Law," 2012.

implementing Islamic law corresponds to the legal empowerment responsiveness to the practical needs and interests of the poor in different cultural contexts. Moreover, the essential principles that restrict this flexibility are clearly compatible with the objectives and priorities of the legal empowerment movement.

## I. Access to justice and rule of law

The Commission describes the first pillar of legal empowerment, access to justice and rule of law, as the right that guarantees all others. Without access to a well-functioning justice system, the poor are unable to benefit from laws designed to legally empower them. As part of establishing rule of law, state and public institutions must be committed to recognizing and reforming procedures and processes which

result in the exclusion of or bias against the poor. Islamic law identifies three key characteristics of a well-functioning justice system: equality before the law, fair and unbiased judges, and appropriate relationships between crime and socially beneficial punishment. Recognizing the need for gradual reform of traditional views of justice and dispute resolution, Islamic law has provided important checks and balances on the tribal legal systems in the WANA region since its inception. Islamic law also considers protection of the rights of the marginalised and vulnerable in society to be a collective responsibility of the legal system and the Islamic community as a whole. Lastly, each individual's right to a legal identity is guaranteed by Islamic law from birth.

يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ شُهَدَاءَ لِلَّهِ وَلَوْ عَلَىٰ أَنفُسِكُمْ أَوِ الْوَالِدِينَ وَالْأَقْرَبِينَ إِن يَكُنْ غَنِيًّا أَوْ فَقِيرًا فَاللَّهُ أَوْلَىٰ بِهِمَا

*Stand out firmly for justice, as witnesses to Allah, even against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for Allah can best protect both.*

Surat An-Nisa' 4:135

## Introduction to concepts of justice in Islam

Justice and equality before the law is a re-occurring theme throughout the Qur'an. In numerous descriptions of the last day of the world, also referred to as "Judgment Day," the Qur'an stresses the exactness of the justice that will be allotted to each soul. It repeatedly warns that each individual will be held accountable for every good and evil act committed on earth, regardless of social status, gender, race, etc.<sup>10</sup> Similarly, the Qur'an vividly details

how each sin will be matched to an appropriate punishment of equal weight in the afterlife.<sup>11</sup> This "eye-for-an-eye" justice stressed by the Prophet ﷺ and Qur'anic revelations was a vital improvement on pre-Islamic retribution that demanded the execution of a murderer's relatives, often leading to generations of tribal feuds. Holding human life as a sacred and essential right, the Qur'an heavily condemns all traditional tribal customs that result in the murder of an innocent person, such as the practice of female infanticide.<sup>12</sup> The merit and fate of each soul is

<sup>10</sup> For example, the wealthy man is punished just as surely as the poor man *Surat Al-Humazah* 104: 1-9.

<sup>11</sup> See *Surat Al-Ahqaf* 46:19, *Surat Yunus* 10:27, and *Surat Al-'an'am* 6:160.

<sup>12</sup> See *Surat At-Takwir* 81:8-9

determined by the individual's good and evil deeds rather than by the social status or affiliations into which they were born. This principle of equality before Allah (سبحانه و تعالی) and before the divine law in the afterlife underlies the Islamic judicial ideal in this life as well. The Qur'an calls for every person treat one another with equal dignity and celebrates the diversity within mankind as a gift from Allah (سبحانه و تعالی).<sup>13</sup>

Dr. Muzammil H. Siddiq, Chairman of the Fiqh Council of North America, writes in his *fatwa* on worker justice that there are actually two words used by the Qur'an to mean justice: following a balanced path of moderation (*al-'adl*) and recognizing each person's rights in order to give each his due (*al-qist*).<sup>14</sup> As Fazlur Rahman explains in his hugely influential book, *Major Themes of the Qur'an*, Qur'anic justice is the merciful justice of Allah (سبحانه و تعالی), "the most compassionate, the most merciful."<sup>15</sup> Merciful justice takes into account intent, individual circumstances, and the best interests of the society as a whole. 'Araf outlines three guiding principles for the Islamic judicial system that balance values of justice and mercy: individual accountability, a clearly defined relationship between crime and punishment, and the non-retroactivity of criminal laws.<sup>16</sup> Most relevant to legal empowerment concepts is the scholar's discussion of the importance of equality before the law, the Islamic theory of the

social objectives of punishment, and the moral conduct of judges.

'Araf writes that judges hold a special place in the Islamic community precisely because they apply the equality principle between individuals, serve as the guardians of the five objectives of the *Shari'ah*, and protect against injustice and social disorder. On one hand, Islamic law allows for judicial discretion in order to balance the principle of equality before the law and personal accountability. On the other hand, Islamic law restricts the flexibility of the judge by clearly outlining his duty to the community. All crimes whose punishment is not specifically prescribed by the primary sources of Islamic law make up the category of *ta'azir* offenses.<sup>17</sup> Penalties for these crimes are decided by the judge according to the three social objectives of punishment: justice, deterrence of future crimes, and the rehabilitation of the criminal. This means that judges must weigh objective and subjective culpability, the nature of the crime, and the status and character of the offender when adjudicating the proper penalty.

Additionally, the Qur'an unequivocally condemns the bribing of judges and forbids them from accepting gifts or favors that could endanger their impartiality.<sup>18</sup> In fact, 'Araf notes that corruption and bribery are so harmful to the community that Islamic law considers them to be both religious and criminal offenses. Bribes clearly threaten both the rule of law and the equal access of the poor to the judicial system. Unfortunately, the heritage of customary tribal law has made the eradication of favoritism and unequal

<sup>13</sup> See *Surat Al-Hujurat* 49:13.

<sup>14</sup> Siddiq, Muzammil H. "Rights of Workers in Islam." *OnIslam*, May 1, 2014. <http://www.onislam.net/english/shariah/shariah-and-humanity/shariah-and-life/456899-rights-of-workers-in-islam.html>.

<sup>15</sup> Rahman, Fazlur. *Major Themes of the Qur'an: Second Edition*. University of Chicago Press, 2009.

<sup>16</sup> 'Arafa, "Corruption and Bribery in Islamic Law" 2012.

<sup>17</sup> *Ibid.*

<sup>18</sup> See *Surat Al-Baqarah* 2:188.

access through social affiliation difficult in many Arab countries in the WANA region.

#### Integration of customary tribal law and *wasta*

As part of their agenda for the first domain of legal empowerment, the Commission recommends that states should strive to “make the formal judicial system, land administration systems, and relevant public institutions more accessible by recognizing and integrating customary and informal legal procedures with which the poor are already familiar.”<sup>19</sup> However, effective integration must first take into account the legacies of tribal values and customs and the benefits and drawbacks of their incorporation into the formal justice system. In their paper on customary law of the Al-Serhan tribe in Jordan, Furr and al-Serhan explore the interaction between tribal law and civil law, state intervention in tribal matters, the influence of tribal customs on civil law, and the influence of *Shari’ah* law on tribal laws.<sup>20</sup> Aseel Al-Ramahi examines the tribal practice of *wasta* as a both a beneficial method of traditional conflict resolution and a modern manifestation of political corruption or nepotism.<sup>21</sup> Both papers discuss the important implications tribal justice procedures have on equal access to justice in Arab society and demonstrate how the culturally appropriate and familiar Islamic values of equality before the law can help to mitigate inequality stemming from these practices.

<sup>19</sup> Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone*, 2008.

<sup>20</sup> Furr, Ann, and Muwafaq Al-Serhan. “Tribal Customary Law in Jordan.” *South Carolina Journal of International Law and Business* 4, no. 2 (Spring 2008): 17–34.

<sup>21</sup> Al-Ramahi, Aseel. “Wasta in Jordan: a Distinct Feature of (And Benefit for) Middle Eastern Society.” *Arab Law Quarterly* 22, no. 1 (2008): 35–62. <http://www.jstor.org/stable/27650608>.

Furr and al-Serhan begin by making the case that the Jordanian Penal Code, the *Shari’ah* Personal Status Law, and Bedouin tribal law co-exist in Jordan and are generally concerned with specific legal areas. An in-depth investigation of the historical relationship between the three legal systems reveals that limiting the jurisdiction of tribal courts was vital to the gradual integration of the Bedouin people<sup>22</sup> into one national identity during the process of Jordanian state formation.<sup>23</sup> A key turning point occurred in 1976, when King Hussein bin Talal signed Article 34, which abolished previous 1936 Tribal Control Laws that served as the legal basis for the tribal court system.<sup>24</sup> But although Article 34 ostensibly brought all Jordanian citizens under the jurisdiction of one civilian law, in practice tribal laws and judges remain an integral part of Jordanian legal system. When it comes to certain types of conflict, state officials allow, actively encourage, and even play a role as mediator in conflict resolution arrived at by tribal custom.

While the Bedouin use the formal legal system for most legal matters, the Jordanian legal system defers to tribal conflict resolution in disputes involving murder, rape, and honor offenses, which Furr and al-Serhan identify as the primary concerns of Bedouin customary law. Using the example of the death of a tribe member, Furr and al-Serhan show how tribal law and Jordanian law cooperate in contemporary

<sup>22</sup> “The traditional tribes living in desert lands of Syria, Jordan, Israel, Iraq, and Saudi Arabia who care for animals and engage in seasonal migration are referred to as the Bedouin. The word Bedouin is from the Arabic word, *badawiyin*, which means “inhabitants of the desert”—the *Badia*. Strictly speaking, the term “Bedouin” refers only to the camel-herding desert dwellers, but it has been used as a general term to cover all nomadic Arabs.” Furr and Al-Serhan, “Tribal Customary Law in Jordan,” 2008.

<sup>23</sup> Alon, Yoav. *The Making of Jordan: Tribes, Colonialism, and the Modern State*. (New York: I.B. Tauris & Co, 2007).

<sup>24</sup>*Ibid.*

society through a legal recognition of public right and personal right. While public right falls under the jurisdiction of the state and can be satisfied through a conviction by the state system, private right must be relinquished by the victim's family through tribal procedures. Once this occurs, the courts avoid the potentially violent consequences of the execution of a tribal member and reduce the sentence to imprisonment.

Furr and al-Serhan also demonstrate how the state plays a limited supervisory role in tribal legal procedures in order to maintain the state monopoly on coercive power, another one of the Commission's legal empowerment concerns. For example, the first truce between two tribes after a murder has occurred is secured by the police, who then provide protection during the tribe's customary evacuation. Although he plays a limited role in the proceedings, an officer from the local security forces will also represent the state's interest in the case and supervise the signing of a written official peace agreement. Likewise, in instances where the honor of a female tribe member is questioned, the police will intervene to remove the woman to a safe location to forestall the possibility of an "honor killing."<sup>25</sup>

For all Jordanian Muslims including the Bedouin, the formal state *Shari'ah* courts handle matters that fall under the Jordanian family law, such as marriage,

divorce, alimony, custody, or inheritance. In many cases, this helps to protect rights guaranteed to women under *Shari'ah* law but denied to them under tribal custom, such as the right to a certain share of inheritance. Recent reforms to the Jordanian Personal Status Code in 2010 were designed to counteract social pressure on rural and Bedouin women to follow tribal custom and sign their inheritance shares over to their male relatives. Moreover, the Islamic repudiation of the tribal custom of giving a young woman in marriage in order to seal a peace agreement led to its prohibition by the Jordanian government in 1936.<sup>26</sup> Jordanian government also directly amended tribal law when it reduced the number of generations of descendants co-liable for a violent crime from five to three. But tribal customary law has also influenced the Jordanian penal code and its implementation. Although both Jordanian state law and Islamic law definitively prohibit so-called "honor killings," the controversial Articles 304 and 97 of the Penal Code reduce the sentence for perpetrators of such crimes.

The cultural practice of *wasta* is the major way tribal reconciliation methods are reflected in both the formal justice system and the formal economic system in Arab countries like Jordan or Egypt. Al-Ramahi agrees with the legal empowerment principle that dispute resolution mechanism should be culturally informed in order to be successful, but she also recognizes where cultural practices conflict with equal access to rule of law.<sup>27</sup> Al-Ramahi begins by explaining the historical origins of *wasta* as a method of third-party intermediation to prevent future conflict

<sup>25</sup> Honor killing is the term used to describe the murder of a woman accused of indecent sexual behavior or the violation of social norms by her male relatives, usually her father or brothers. Accurate statistics on the prevalence of honor killings in the WANA region are difficult to obtain. However, honor killings remain a persistent issue in Jordan; nine deaths from honor killings have been reported in the first four months of 2014 alone. As-Saleh, Muhammad. "جرائم قتل لأردينيات في 4 أشهر 9" (Nine Jordanian Women Killed in Honor Crimes in 4 Months). *Ammon News*. May 5, 2014. <http://www.ammonnews.net/article.aspx?articleno=191466>.

<sup>26</sup> Furr and Al-Serhan, "Tribal Customary Law in Jordan," 2008.

<sup>27</sup> Al-Ramahi, "Wasta in Jordan," 2008.

and acknowledging its vital role in the formation of the Jordanian state. However, she mainly focuses on its modern manifestation as the act of a patron intervening on behalf of a social connection to obtain certain advantages for the client. Al-Ramahi writes that almost all economic and political transactions in the country are based on this kind of tribal networking including employment, college admissions, and representation in court. Patron-follower relationships permeate many aspects of the Jordanian government including parliamentary elections, political appointments, and discretionary funding allocations. A 2000 Arab Archives Institute study revealed that although 87% of respondents stressed the need to eradicate *wasta*, the majority believed that *wasta* was necessary to complete tasks in a government office and more than 90% reported expecting to use it at some point in their lives.<sup>28</sup>

In 2000, His Majesty King Abdullah II pushed forward several initiatives to combat corruption such as the “Towards Transparency in Jordan in 2002 and the ratification of the United Nations Convention against Corruption on February 24, 2005. Although opponents of an anti-corruption commission draft law pointed out that *wasta* can sometimes be used to protect the rights of the poor, the practice more often results in family and tribal affiliations determining access to government services and the justice system. His Majesty wrote in a public letter to the Prime Minister in 2005,

*We look upon the phenomenon of wasta (patronage) and favoritism, a public complaint,*

<sup>28</sup> Basem Sakijha & Sa'eda Kilani, *Wasta in Jordan: The Declared Secret* (Amman: Jordan Press Foundation, 2002).

*as another form. While we are proud of our values of solidarity, social responsibility and human understanding of others' problems, which are rooted in our Arab and Islamic heritage, favoritism and patronage infringe on the rights of others, have squandered public funds, and deprived some citizens of their rightful opportunities. Thus, patronage that deprives others of their rights is incongruent with Jordanian values and should be regarded as a gross violation of justice and equality that is punishable by law.<sup>29</sup>*

Yet Al-Ramahi cautions against the general Western dismissal of *wasta* as corruption and highlights the positive reconciliation aspects of the practice, such as in economic transactions when a common respected affiliation assists two parties in reaching a workable solution. Like al-Serhan and Furr, Al-Ramahi reaffirms the Jordanian government's recognition of customary dispute resolution as a more culturally successful method for containing tribal conflict than Western, individualistic approaches. She echoes the four merits of employing the *wasta* principle of mediation suggested by Cunningham and Sarayrah: “making positive, appropriate use of a powerful third party and well-connected outsiders, the need to air repressed grievances in a public area, the trading of moral condemnation and symbolic goods for substantive concessions, [and] that social harmony must prevail over individual interests.”<sup>30</sup> The authors all differentiate

<sup>29</sup> Letter of His Majesty King Abdullah II to Prime Minister H.E. Dr. Adnan Badran on Anti-Corruption fight (26 June 2005) on website [www.kingabdullah.jo](http://www.kingabdullah.jo)

<sup>30</sup> Robert B. Cunningham & Yasin K. Sarayrah, 'Taming Wasta to Achieve Development', *Arab Studies Quarterly* (Summer, 1994).

between tribal or Bedouin customs and Islamic law, but they could do more to recognize the potential intermediary role Muslim jurists could play in integrating formal and informal justice systems in more egalitarian way.

In conversation with tribal ethics since its inception, Islamic law as a whole represents a halfway point between external international human rights standards and the indigenous customary law with which the rural or nomadic poor are most familiar.<sup>31</sup> Islamic legal institutions provide a culturally accessible way to introduce human rights restrictions on informal tribal customary laws, thereby simultaneously maintaining rural community access to informal justice systems and reforming those systems toward international legal standards like gender equality. In countries like Jordan, where Islamic jurists or muftis are employed by the State in a public department, the State could encourage the inclusion of trained religious leaders in tribal reconciliation processes. Alternatively, independent religious leaders could act as consultants to the process as opposed to a direct intrusion of the government or civil justice system into tribal matters.

With regards to the integration of customary legal procedure into the formal judicial system, an emphasis on Islamic support for equality before the law represents an important path to reducing the effects of tribal values that result in corruption in the formal justice system. In her book on Islam's revival in the Middle East, Caryle Murphy suggests that Islamic egalitarian values are seen by many

Egyptians as an answer to *wasta* corruption and nepotism in modern Egyptian society, just as they had been in the first Muslim community.<sup>32</sup> Karen Armstrong's influential portrait of the Prophet ﷺ as a social reformer is just one of many classic and modern biographies that illustrate how the Qur'anic message directly confronted the misdistribution of wealth, corruption, and favoritism that marked the Qurayshi elite in Mecca.<sup>33</sup> Armstrong highlights how the Prophet ﷺ reminded the Arab people of the traditional Abrahamic values of justice, equality, and mercy within the tribal ethical system and called on believers to regard each other as brothers in faith, deserving of loyalty, protection, and generosity regardless of tribal affiliation. The Prophet ﷺ is likewise celebrated as an arbitrator that brought about peace between the various Arab and Jewish tribes in the Arabian Peninsula. His style of mediation drew from the Arab conflict resolution values Al-Ramahi emphasized: mediation by objective third parties, the public expression of grievances, individual accountability, and the ultimate goal of social harmony. Following in the Prophet ﷺ's example, Muslim government should encourage these cultural benefits of the tribal system while working to reduce unequal access to government officials like judges through social affiliations.

#### **Women's access to religious courts and *khula'***

The Commission notes that the poor's exclusion from the formal justice system is often compounded by gender factors. The division of judicial branches in many of the Muslim countries in the WANA region

<sup>31</sup> Layish, Aharon. *Legal Documents from the Judean Desert: The Impact of the Shari'a on Bedouin Customary Law*. BRILL, 2011.

<sup>32</sup> Murphy, Caryle. *Passion for Islam: Shaping the Modern Middle East: The Egyptian Experience*. Simon and Schuster, 2002.

<sup>33</sup> Armstrong, Karen. *Muhammad: A Prophet for Our Time*. New York: HarperCollins, 2006.

complicates the equal access of men and women to the justice system. Because *Shari'ah* courts deal with parts of Islamic law deeply intertwined with traditional gender roles, providing for a women's equal access to religious courts is a major concern. While full discussion of women's rights in Islam is outside the purview of this paper, the next section will focus on an area where women's unequal access to religious courts and gendered financial vulnerability intersect.

As a self-proclaimed Muslim feminist, Azizah al-Hibri identifies three important issues that most concern Muslim feminists about women's equal status in religious courts: the right of a woman to contract her own marriage, the ability of a judge to enforce a wife's obedience, and a woman's right to initiate divorce.<sup>34</sup> Of these issues, equal access to divorce rights through religious courts is the most relevant to the legal empowerment of poor women. The issue of divorce in Islamic jurisprudence is a highly complex area of law that requires recognition of the balance between the financial rights and obligations of husbands and wives in an Islamic marriage.

Additionally, the relationship between issue of women's equal access to *Shari'ah* courts and Islamic divorce is complicated because men generally are free to divorce their wives without needing to involve a judge (*talq* divorce). Although wife-initiated divorce, *khula'*, has clear precedent in Islamic law, its status in many Muslim countries is uncertain. Depending on the state, Muslim women are theoretically allowed to

sue for divorce in the religious courts provided they return their dowry, or *mahr*, and renounce any right to financial compensation. For impoverished women, giving up the right to alimony and paying back a dowry is a financially devastating prospect.

Moreover, the Egyptian National Council for Women reported that domestic abuse in connection with drug abuse and poverty was most common reason Egyptian women filed for *khula'* in 2011.<sup>35</sup> Egypt is one of a handful of WANA states in which women with evidence for abuse or infertility have option to sue for divorce in civil courts and retain their financial rights. However, the Daily News Egypt reported in 2012 that many Egyptian women do not consider civil divorce a feasible option as the process can take more than seven years. While civil court lawsuit are subject to appeals and year-long delays in issuing final ruling, the six- or nine-month *khula'* divorce process consists of a preliminary mediation session guided by psychologists, social workers, and legal specialists, court procedures such as the return of the dowry, and second and third chances at reconciliation conducted by relatives and religious arbiters.

The most immediate and direct method of increasing women's access to their right to divorce involves supporting the work of organizations like the Association for Development and Enhancement of Women, which provide free advocacy services for poor Egyptian women applying for divorce.<sup>36</sup> However, academics and activists in the region

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<sup>34</sup> Al-Hibri, Azizah. "Islam, Law, and Custom: Redefining Muslim Women's Rights." *American University International Law Review* 12, no. 1 (1997): 1-44.

<sup>35</sup> Roshdy, Adham. "Khula: The Last Resort?" *Daily News Egypt*. October 12, 2012, sec. In Focus. <http://www.dailynewsegypt.com/2012/10/10/khula-the-last-resort/>.

<sup>36</sup> Roshdy, "Khula," 2012.

recommend the inclusion of higher percentages of women judges in both civil and religious courts as the best long-term strategy for improving equal access to justice for women.

Identifying the access to justice and involvement in judicial decision-making as a key indicator of citizenship and equality, the Social and Human Science Sector of UNESCO commissioned a series of country studies in the WANA region in 2006 aimed at exploring the relationship between women's judicial decision-making and gender justice.<sup>37</sup>

Moghdam's broad regional summary found a wide range in the inclusion of women in the judiciary in WANA countries.<sup>38</sup> Moghdam reports "respectable" percentages of women judges in Tunisia, Algeria, Syria and Lebanon but also noted that women are legally prohibited from serving as judges in Iran and Saudi Arabia. Moghdam also compared complaints of judicial bias against women in states with separate civil and religious court systems. In Afghanistan, women are permitted to serve on family courts but not in the adjudication of criminal cases. In a 2004 fact-finding mission, Amnesty International found that Afghani legal professionals displayed a prevailing lack of knowledge about the application of adultery laws and often gave harsh and arbitrary sentences to women.<sup>39</sup> In contrast, Malaysia allows women to

serve in the general civil courts but bars them from serving in the *Shari'ah* family law courts. Sisters in Islam, a Malaysian faith-based women's rights group, argues that Islamic law supports the appointment of women judges in *Shari'ah* courts and that this practice could help to alleviate the prejudice Malaysia women feel against them in the religious courts.<sup>40</sup> Other studies sponsored by UNESCO found similar conclusions for specific WANA countries. In her examination of the Turkish judicial system reforms, Elveren contends that an increase of women judges and prosecutors in the higher courts would build legitimacy and confidence in the legal-judicial system, as well as improving women's access to law and the legal profession.<sup>41</sup> In Amir-Arjomand et al.'s review of women's status in judiciary branch in pre- and post-revolution Iran, the authors likewise posit that women judges and lawyer have a positive impact on preventing biases against women, especially in family law.<sup>42</sup> Lastly, despite significant achievement in women's rights in Jordan that paved the way for women's access to prominent positions within the legislative and judicial bodies, Ibtisam al-Atiyat warns that legal amendments are limited so long as women continue to be excluded from judicial appointment to Jordanian *Shari'ah* courts.<sup>43</sup> However, meaningful reform toward the inclusion of female

<sup>37</sup> Moghdam, Valentine, and Anjum Haque. *Women, Law and Judicial Decision-Making in the Middle East and North Africa: Toward Gender Justice*. Seminar. The Second World Congress for Middle Eastern Studies. Amman, Jordan: UNESCO Social and Human Sciences Sector, June 11–16, 2006.

<sup>38</sup> Moghadam, Valentine M. "Women, Law and Decision-Making: A Regional and Comparative Overview (summary)." *UNESCO Social and Human Sciences. Women, Law, and Judicial Decision-Making in the Middle East and North Africa: Toward Gender Justice* (2006): 5–6.

<sup>39</sup> "Afghanistan: Women Failed by Progress in Afghanistan", [www.amnestyusa.org/countries/afghanistan](http://www.amnestyusa.org/countries/afghanistan) Accessed 5 May 2006.

<sup>40</sup> BARAZAI, *A Sisters In Islam Bulletin* (SIS). Vol.1, No.1, 2005, p.6.

<sup>41</sup> Elveren, Dilek. "Turkey: Legal and Judicial Reform Movement and Gender Equality." *UNESCO Social and Human Services. Women, Law, and Judicial Decision-Making in the Middle East and North Africa: Toward Gender Justice* (2006): 10–11.

<sup>42</sup> Amir-Arjomand, Ardeshir, Amir Nikpey, and Reza Eslami-Somea. "The Status and Role of Women in the Judiciary in Iran." *UNESCO Social and Human Services Sector. Women, Law, and Judicial Decision-Making in the Middle East and North Africa: Toward Gender Justice* (2006).

<sup>43</sup> al-Atiyat, Ibtisam. "Women, Law, and Judicial Decision Making: The Case of Jordan ." *UNESCO Social and Human Sciences Sector. Women, Law, and Judicial Decision-Making in the Middle East and North Africa: Toward Gender Justice* (2006): 14.

judges in religious courts in the region depends on the consensus of religious authorities in each country and the permissibility of women serving as judges has proven to be a contentious issue in Islamic law.

### Islamic legal rights of the marginalised

From its very beginnings, Islam as both a way of life and a comprehensive moral code has called for more than just leveling of the playing field between wealthy elites and ordinary citizens. The Qur'an also repeatedly commands the protection of the marginalised and vulnerable in society. Several verses pay particular attention to the legal and property rights of orphans, who could be easily taken advantage of in pre-Islamic society.<sup>44</sup> Additionally, the Qur'an stipulates that the mentally disabled have their needs met and be treated with dignity and respect. The elderly, especially one's parents, are expected to be cared for and maintained by their children and society as a whole. The Prophet ﷺ also charged the besieged Muslim community with the sheltering and maintenance of the vulnerable and growing population of war widows. He set an example for the community by marrying several widows; in fact, biographers recorded that, out of twelve or thirteen wives, all but one, 'Aisha (رضي الله عنها), were either divorced or widowed and in many cases much older than the traditional age of marriage at the time.

In addition to widows, orphans, the elderly and the disabled, Islamic law recognizes eight classes of individuals who are entitled to receive the obligatory

charity, *zakat*.<sup>45</sup> Half of these classes are identified because of their vulnerable status in society and the other half for their service to the community. The first class, the needy or *faqir*, are defined differently according to the specific schools, ranging from those individuals who own less than the minimum taxable amount of assets after providing for their basic needs to those who do not possess year's provision for themselves or their families. Although the distinction between the first and second class is not clearly delineated, the destitute or  *miskin*, are generally considered to be worse off than the needy, sometimes defined as possessing less than half of what they need to survive. Bakhtiar writes in the Encyclopedia of Islamic Law, "whatever be the case, there is no essential difference between the schools in their interpretation of the terms *faqir* and  *miskin* for the objective is that the poor-due be used to fulfill the urgent need for housing, food, clothing, medical care, education and other needs."<sup>46</sup> Charity is also spent for the benefit of those in debt for legitimate reasons and travelers who are cut off from funds necessary to return home. Lastly, the fifth category of *zakat* was to be set aside for the manumission of slaves and is often cited as one of Islam's methods of gradually phasing out slavery.<sup>47</sup> Although Bakhtiar writes that the four major schools consider this provision defunct in today's world, modern-day slavery equivalents like human trafficking, forced prostitution, child labor, child pornography, and abusive labor laws still very much exist in every region of the world.

<sup>44</sup> See Surat An-Nisa' 4:2, 4:6, and 4:10; Surat Al-Baqara 2:220 and 2:83; Surat Al-'an'am 6:15; Surat Al-'Isra' 17:34.

<sup>45</sup> See Surat At-Tawbah 9:60.

<sup>46</sup> Bakhtiar, Laleh, trans. Encyclopedia of Islamic Law: A Compendium of the Views of the Major Schools . ABC International Group, 1996.

<sup>47</sup> See discussion of the Qur'anic methods for the phasing out of the practice of slavery, page 30.

Organizations such as the Zakat Foundation of America urge Muslims donate their *zakat* charity to causes that seek to eradicate these practices.<sup>48</sup>

### Women's property rights and *mahr*

Another way the Qur'anic message ensures the protection of the marginalised is by affirming the right of women to own, dispense with, and inherit their own property without the interference of their husband, fathers, or brothers. In fact, the Islamic affirmation of women's property rights set Islamic law apart from the civil codes of most other civilizations for centuries. The foundation Islamic law sets for a woman's financial independence and security has great potential for protecting women from poverty. In particular, the Islamic marital contract can be reframed as an opportunity for women to formally protect their legal rights.

In her investigation of the women-empowering aspects of classical Islamic law, Quraishi-Landes is not alone in urging the use of existing Islamic doctrine to improve the lives of Muslim women, especially impoverished women.<sup>49</sup> Quraishi-Landes's recommendations for a new paradigm for Islamic marriage contracts that emphasizes women's empowerment and property rights build off of Kecia Ali's influential work on classical Islamic sexual ethics. Ali argues that the classical Islamic understanding of marriage and sexuality was deeply

intertwined with the permissibility of sexual slavery at the time.<sup>50</sup> Therefore, explanations of the laws surrounding marriage contracts unabashedly included analogies to the purchase of slaves and concubines, which still influence feminist criticisms of Islamic family law today. In light of the unanimous modern condemnation of slavery, however, Quraishi-Landes presents a new analogy for marital contracts as a partnership agreement and redefines aspects of an Islamic marital contract as tools for women's empowerment.

Quraishi-Landes argues that the *mahr*, or the financial gift given to the bride at the signing marital contract, is more like "an insurance policy" than a "bride-price," as it is commonly translated in Western academia. Quraishi-Landes argues that the *mahr* serves to facilitate female financial independence both during marriage and in the case of divorce because it remains her property even if her husband decides to leave her. Likewise, classical Islamic law protects a wife's right to the exclusive control over her property without her husband's interference. Unlike men, Muslim women are not obligated to maintain relatives or use their assets in providing food, shelter, and other necessities to dependents. In addition to decreeing her pre-marriage property as her own separate property, Islamic law asserts that any money a Muslim wife earns during her marriage is exclusively hers. Quraishi-Landes directly contrasts this with family law in the United States, which considers any income acquired during a marriage to be owned equally by both partners.

<sup>48</sup> Zakat Foundation of America. "Combating Human Trafficking Through Education At Home and Abroad." Zakat Foundation of America, March 17, 2014. <http://www.zakat.org/news/combating-human-trafficking-through-education-at-home-and-abroad/>.

<sup>49</sup> Quraishi-Landes, Asifa. "A Meditation on Mahr, Modernity, and Muslim Marriage Contract Law." In *Feminism, Law and Religion*. Edited by Marie A. Failinger, Elizabeth R. Schiltz, and Susan J. Stabile. 173-195. Ashgate, 2013.

<sup>50</sup> Ali, Kecia. *Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith, and Jurisprudence*. Oneworld Publications, 2008.

Access to these rights requires education and awareness on the part of brides and the male religious leaders who conduct marriage contracts. Quraishi-Landes sheds light on the discomfort some modern women feel with negotiating their own *mahr* because they view it as an outdated custom or equivalent to selling themselves. Women will oftentimes give up certain protections guaranteed to them under Islamic law due to ignorance or external pressure, among other reasons. Many brides are not aware that they are allowed to include certain stipulations in their marriage contract that protect them from financial or personal vulnerability, such as conditions that prohibit husbands from taking an additional wife without the wife's consent. In fact, less-educated Muslim clerics in rural areas who conduct marriages outside of the formal legal process may not even know the classical Islamic legal basis for these rights. Sheikh Hassan Al-Arqoub, a mufti in the Jordanian government who works to re-educate imams, muftis, and judges in Jordan about Jordanian personal status law, lists the misunderstanding of a woman's exclusive right to her income and property earned before, during, and after marriage as one of the top four misconceptions about women's rights in Islam.<sup>51</sup>

Groups working to protect the legal and property rights of women should use the occasion of the marital contract to educate Muslim women about protecting themselves from financial vulnerability. Ideally, the imam or mufti conducting the contract would be informed on the issue and confirm that the woman is fully aware of the legal consequences of

signing the contract. By emphasizing the connection between educating husbands and wives about their rights in Islam and healthy, stable marriages, organizations can motivate Muslim clerics to work together with women's rights groups to construct basic models for marital contracts that actively protect legal and property rights of women. Additionally, women's advocacy groups should seek to cooperate with Muslim religious leaders to develop sustainable training programs to educate clerics about these issues.

### **Introduction to concepts of legal identity in Islam**

In their agenda for the first pillar of legal empowerment, the Commission states that the protection of legal rights of the individual within a formal legal system depends first and foremost on his or her right to a formal legal identity.<sup>52</sup> Islamic law similarly recognizes the interaction between identity, rights, and obligations and therefore places a high value on the importance of the right to a clear identity within a society.<sup>53</sup> As mentioned previously, the protection of one's lineage is one of the five essential objectives of the *Shari'ah* identified by Al-Ghazali. In fact, many prohibitions or guidelines can be traced back to the importance of ensuring that a child's father and lineage can be definitively identified. For example, polyandry is prohibited in Islam even as polygyny is permissible precisely because the latter could lead to uncertainty over the identity of a child's father. Waiting periods in divorce laws are also

<sup>51</sup> Al-Arqoub, Hassan. Women's Rights in Islam. Interview by Maria Benjamin. Personal Interview, January 22, 2014.

<sup>52</sup> Commission on Legal Empowerment of the Poor, Making the Law Work for Everyone. 2008.

<sup>53</sup> Donnelly, Jack. "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights." *American Political Science Review* 76, no. 2 (June 1982): 303-316.

constructed to prevent misidentifying paternity.<sup>54</sup> Adopted children must keep the name of their biological father and are not considered a member of the family in terms of *mahram* relationships.<sup>55</sup> Islam also protects the right of a married woman to keep her own name after marriage, and therefore retain her connections to her lineage and tribe. In fact, Muslim religious leaders often criticize the Western custom of changing a wife's name to match her husband's as transgressing on a woman's identity rights.<sup>56</sup>

#### Juristic personality and *dhimma*

Islamic jurists agree with the Commission's premise of the concept of legal personality as a starting point for situating an individual within Islamic law. Every human being is considered to have a legal personality that begins at birth and ends with death. In classical Islamic law, the main attribute of a legal personality, the legal capacity to acquire rights and bear obligations or *ahliyyat al-wujup*, is encapsulated in what is referred to in classical Islamic law as an individual's *dhimma*. *Dhimma* is a concept usually defined as a juristic container for all of a legal personality's rights and obligations, such as financial debts or even religious duties. Mahdi Zahraa argues that this concept forms the basis for the understanding of juristic personality recognized in most Muslim countries in the WANA region.<sup>57</sup> According to some Islamic scholars, charitable institutions, foundations, and even commercial companies can also be considered to have a *dhimma*

that is separate from their administrators and employees. As an example, this allows an administrator of an Islamic foundation, or *waqf*, to carry out transactions on behalf of the foundation without involving his own *dhimma*.

The ability to separate one's legal personality from that of one's business is an important legal empowerment priority for ensuring the business rights of the excluded poor.<sup>58</sup> Businesses excluded from the formal economy often depend directly on the resources of one family or on loans from informal creditors for short periods of time. However, by enabling a business to constitute a legal entity distinct from its owners, the corporation can enter into contracts or take on debts and obligations without being tied to the legal personality of any one person. This allows entrepreneurs and small business owners to raise more capital and take bigger risks. With their personal finances legally separated from the business, entrepreneurs and their families will not lose everything in the event of failure. Similarly, when the entrepreneur suffers financially or dies, the business can be sold or transferred without being entangled in an individual or family's debts or obligations. Reaffirming the Islamic legal precedent for expanding the definition of "legal person" to include legal liability companies can help to secure those risk management benefits for otherwise unprotected entrepreneurs and assist in their access to both the formal legal system and the formal economy.

<sup>54</sup> Al-Marzouqi, Human Rights in Islamic Law, 2000.

<sup>55</sup> See Surat Al-Ahzab 33:5.

<sup>56</sup> Al-Marzouqi, Dr. Ibrahim Abdulla. Human Rights in Islamic Law. First. Abu Dhabi, UAE: n.p., 2000.

<sup>57</sup> Zahraa, Mahdi. "Legal Personality in Islamic Law." Arab Law Quarterly 10, no. 3 (1995): 193–206.

<sup>58</sup> Commission on Legal Empowerment of the Poor, Making the Law Work for Everyone. 2008.

## Conclusion

The question of independent legal personalities for small businesses demonstrates an important overlap between the legal and business rights of the excluded poor. Legal empowerment depends on equality before the law, encourages the integration of alternative dispute resolution, and ensures the protection of the marginalised and vulnerable in society. But it also incorporates issues of a legal recognition of property rights, businesses as legal entities, and freedom from corruption and bribery. Full legal empowerment expands beyond equal access to courts and into equal access to the marketplace as well.

## II. Access to the formal economy

In addition to ensuring equal access to the formal justice system as a means to protect the legal rights of the poor, the Commission also advocates for equal access to the formal economy as a means to protect property, labor, and business rights of the excluded poor. Many poor people operate within an informal market without the benefit of regulation or protection against economic disasters and exploitation. Islamic law approaches economic reality of poverty and the distribution of wealth in a society as religious and moral issues. Three key Islamic economic institutions were developed on the basis of the principles of equality of opportunity, fair business practices, and the collective responsibility for providing for the basic needs of each individual in the community: *zakat*, *waqf*, and *Shari'ah*-compliant finance. The following section will explore the poverty alleviation potential of these institutions as well as Islamic legal support of labor rights.

## Introduction to Islamic economic theory of wealth and property

While a thorough examination of the thriving field of Islamic economic theory is outside of the scope of this paper, it is important to note several important foundational principles in Islamic concepts of wealth and property that underlie the Islamic perspective on access to the formal economy. First of all, Islamic economic theorists like Mannan and Kahf demonstrate that an economy governed by Islamic legal principles must take into account "Islamic rationalism," which describes the rational behavior of a Muslim believer, rather than classical economic rationalism.<sup>59</sup> That is, Islamic economics differs from typical economic analysis because it considers how a rational Muslim weighs the consequences of his actions in the afterlife. Behaviors that are calculated to have zero or even negative utility in classic economics may have positive utility in Islamic rationalism. The ultimate return on investment in the afterlife motivates the Muslim to engage in many pro-social economic behaviors that have greater benefit for the entire community like lending without charge, giving to charity, and generally providing for the welfare of future generations.

Secondly, Kahf argues that the *Shari'ah* rejects the capitalist definition of success and replaces utilitarianism as a moral standard with the moral standards of the *Shari'ah*. Mannan asserts that Islamic law runs counter to modern patterns of consumption and materialism. The words and actions of Allah's Messenger ﷺ epitomized moderation in

<sup>59</sup> Kahf, Monzer. "A Contribution to the Theory of Consumer Behavior in an Islamic Society." In *Studies in Islamic Economics*, edited by Khurshid Ahmad, 19–36. Leicester, UK: The Islamic Foundation, 1980.

all things and, along with explicit passages in the Qur'an, condemned any sort of waste or excess.<sup>60</sup> Without glorifying complete asceticism and excessive deprivation, the Prophet ﷺ also extolled the virtue of periodic fasting in addition to the obligatory fasting during Ramadan. Islamic economics as a whole shows a clear preference for liberating human resources from consumption for spiritual practices. Thirdly, it must be emphasized that Islamic law unequivocally supports the right to private property and ownership. The Islamic theory of wealth, however, begins from the recognition that absolute ownership of all creation belongs to Allah (سبحانه و تعالی) alone.<sup>61</sup> Mannan writes that the Qur'anic declaration "It is He Who hath created for you all things that are on earth" signifies that Allah (سبحانه و تعالی)'s creation belongs collectively to the whole of human society and therefore subjects all ownership to certain moral obligations.<sup>62</sup> Mannan categorizes these obligations as the eight rules of the Islamic laws governing the private ownership of property. The first rule is that all property must not be left under- or un-utilised and requires productive methods of utilisation that work toward balanced growth and balanced distribution of wealth. The second rule obligates all private property to be purified through the donation of a certain portion of wealth called *zakat* to those who are unable to provide for their basic needs. The next five rules specify what constitutes lawful use and obtainment of property; property must be used in a way that benefits society through the promotion of the public good, does not cause harm to others, does not

employ devices like dishonesty, usury, or monopoly, maintains a proper balance between prodigality and parsimony, and does not secure special privileges or undue advantages. Lastly, private ownership must adhere to Islamic inheritance law once the owner passes away.

Accordingly, Islamic legal and economic understandings of wealth and private property exemplify the Islamic interdependence of rights and obligations. The empowerment of the poor and the provision for the basic needs of every member of society is the collective responsibility of all members of the Muslim community and rooted in the most basic foundations of the Islamic economic system.

#### Poverty alleviation and *zakat*

In his analysis of the role of Islamic economic institutions in poverty alleviation, Habib Ahmed notes that poverty should not be defined only on the basis of income but also on measures of "vulnerability, social exclusion, voicelessness, and access to social capital."<sup>63</sup> In the spirit of addressing these aspects of poverty, progressive Islamic scholars have called for a renewed look at the wealth redistribution mechanisms promoted by Islamic law, starting with *zakat*. As one of the "Five Pillars of the Islamic Faith," *zakat* is considered to be both a form of worship (*'ibadat*) and a religious obligation to one's community (*mu'amalat*). Donating a prescribed portion of one's assets to charity serves the religious function of purifying of one's wealth and the social function of providing for the basic needs of the most vulnerable. As mentioned in the previous section, the

<sup>60</sup> See *Surat Al-'Araf* 7:31 and *Surat Al-Ma'idah* 5:90.

<sup>61</sup> See *Surat Al-Baqara* 2:29.

<sup>62</sup> Mannan, M.A. *Islamic Economics: Theory and Practice*. The Islamic Academy, Cambridge: Hodder and Stoughton, 1989.

<sup>63</sup> Ahmed, Habib. *Role of Zakah and Awqaf in Poverty Alleviation*.

Occasional Paper. Jeddah, Saudi Arabia: Islamic Development Bank, Islamic Research and Training Institute, 2004.

Qur'an outlines eight classes of people entitled to receive *zakat* funds.<sup>64</sup> While the different schools of Islamic jurisprudence disagree about the precise definitions of the categories and what portion of *zakat* funds should go to each, there is an important consensus that the key social objectives of *zakat* are 1) ensuring a minimum means of livelihood for each individual and 2) promoting the productive use of economic resources for the well-being of the community.<sup>65</sup>

As *zakat* has been both traditionally and contemporarily understood as a function of an Islamic government, the process of redefining the proper role of Islamic state in the last half-century has resulted in revitalization of the systems of government-run *zakat* collection and disbursement. The most direct example of state collection and disbursement of *zakat* funds is the Pakistani model, in which *zakat* funds are automatically deducted from bank accounts and directly deposited in the Central Zakat Fund maintained by the State Bank of Pakistan.<sup>66</sup> In most states in the WANA region such as Egypt, Jordan, and Lebanon, *zakat* funds are calculated by the individual and voluntarily given to the Zakat department of the government to be distributed. Many individuals choose to distribute their *zakat* themselves to people they know who are in need without involving the government or other organizations.

Recent studies that have examined current *zakat* institutions in the region have mainly focused on its poverty alleviation potential. Ahmed's particularly influential study explores various scenarios through which properly collected *zakat* could fully eliminate poverty in several WANA nations.<sup>67</sup> Along with other scholars who have tackled the same question using their own *zakat* calculation techniques, Ahmed advocates for the expansion of *zakat* collection along more generously interpreted definitions of "*zakatable*" assets. Using the international poverty line of \$1 USD a day, Ahmed claims that a *zakat* collection policy that results in the collection of up to 4.3% of the GDP of a sample of 24 Islamic Development Bank member countries would allow half of those countries to lift their entire population of poor people out of poverty. Shirazi et al. conducted a similar, updated study for OIC member countries in which the authors concluded that several WANA countries including Egypt, Iran, Jordan, Morocco, Pakistan, Tunisia, and Turkey would be able eliminate poverty below \$1.25 USD a day by mandating an expanded interpretation of *zakatable* assets.<sup>68</sup> Moreover, the authors argue that collecting the full *zakat* potential in all OIC-member countries into a common pool through which country surplus is transferred to more needy countries in the region, all poverty below the \$2 USD a day standard in every OIC-member country could "easily be eliminated." With this powerful potential of *zakat* collection in mind, the practical mechanisms of

<sup>64</sup> See *Surat At-Tawbah* 9:60.

<sup>65</sup> Faridi, F. R. "Zakat and Fiscal Policy." In *Studies in Islamic Economics*, edited by Khurshid Ahmad, 19–36. Leicester, UK: The Islamic Foundation, 1980.

<sup>66</sup> *Ibid.*

<sup>67</sup> Ahmed, Habib. *Role of Zakah and Awqaf in Poverty Alleviation*. Occasional Paper. Jeddah, Saudi Arabia: Islamic Development Bank, Islamic Research and Training Institute, 2004.

<sup>68</sup> Shirazi, Nasim Shah, Muhammad Fouad Bin Amin, and Talat Anwar. "Poverty Elimination Through Potential Zakat Collection in the OIC-Member Countries: Revisited." *The Pakistan Development Review*, Papers and Proceedings Part II Silver Jubilee General Meeting of the Pakistan Society of Development Economists, 48, no. 4 (March 2010): 739–54.

*zakat* distribution should aim to put in practice legal empowerment principles of equal access, transparent monitoring, and sustainability to end the exclusion of poor from legal, property, labor, and business rights.

A critical assessment of current models of *zakat* collection and disbursement in the WANA region highlight the following obstacles to legal empowerment: corruption, lack of accountability, distrust of governmental bodies, and unequal access to funds. Moreover, traditional models of direct transfer payments could result greater dependency and a general complacency about economic inequality. In the face of this criticism, Islamic scholars are pushing for legal empowerment reinterpretations of *zakat* that include investment initiatives, decentralized systems with local accountability, and improved targeting of beneficiaries through clearer criteria for eligibility for receiving benefits.<sup>69</sup> With the gradual elimination of poverty as the ultimate goal, *zakat* funds could be reassessed to progressively move away from direct transfer payments to investment practices that benefit intended beneficiaries in the form of a long-term income source. In the meantime, transfer payments would remain in place in limited situations or until the benefits from long-term investments provide enough support to the beneficiaries. Recommendations for a shift in policy toward micro-credit financing or loans have been met with resistance from religious authorities who insist that *zakat* must be preserved as direct assistance to the poor. Regardless, the Islamic Development Bank Group Islamic Research and Training Institute claims that a change in mindset from charity culture toward

a humanitarian action-based business mentality represents a return to the original principles behind Islamic economic theory.<sup>70</sup> Successful examples of this informal campaign include Madad, an Egyptian social business attempting to shift charitable donations to sustainable development NGOs, and the Grand Mufti of Egypt's Misr al-Khair foundation, which is pioneering the use of *zakat* funds for sustainable projects like micro-finance and human development research.

### Public funding allocation and *awqaf*

The second Islamic economic institution, a *waqf* or Islamic trust or endowment, is the foundational framework in Islamic law for allocating funding and other assets to particular causes. Analogous to common law trusts, *awqaf* preserve and distribute assets either for a designated period in time or in perpetuity for specified beneficiaries, which can be private, e.g. for individual family members, or public charitable causes. This paper will examine the potential for a regional *waqf* designed to promote the legal empowerment of the poor in the WANA region based on Abdelhady's proposal for the establishment of a multilateral food security *waqf* as a vehicle of investment in the future food security of the WANA region.

The first example of a *waqf* in Islamic history was established by the Prophet ﷺ for the purchase and maintenance of a public well benefiting all the citizens of Medina. Abdelhady writes that the use of

<sup>69</sup> Faridi, "Zakat and Fiscal Policy," 1980.

<sup>70</sup> Integrated Regional Information Networks News. "Analysis: A Faith-Based Aid Revolution in the Muslim World?" *IRINnews*, UN Office for the Coordination of Humanitarian Affairs. Accessed July 20, 2014. <http://www.irinnews.org/Report/95564/Analysis-A-faith-based-aid-revolution-in-the-Muslim-world>.

*waqf* reached its height during the Ottoman Empire, when *awqaf* were established for a variety of purposes from the establishment of children's hospitals to the support of families of members in a particular guild. Many *awqaf* protecting holy sites, mosques, and religious educational institutes still survive to this day, although use of *waqf* diminished during the period of colonization as colonial administrations attempted to bring the vast *awqaf* assets under their control.

Abdelhady argues that much of the legal empowerment potential of the institution of *waqf* stems from its independence from political authority and government interference.<sup>71</sup> A *waqf* provides the framework for the creation of a stand-alone legal personality which can independently enter into contacts and provide services. The initial contract can be drawn up to include clearly defined performance benchmarks and governance standards. Additionally, the management of the *waqf* is done through an appointed *nazir* or *nuzzar* separate from any one national government. A well-run *waqf* promotes equal access in spite of political pressures because *waqf* funds are designated to certain beneficiaries in perpetuity. Similarly, Abdelhady argues that the establishment of a regional *waqf* provides a sustainable solution to long-term, collective crises in the WANA region in part because *waqf* guidelines protect those funds from being redirected into more politically motivated causes. Moreover, a *waqf* would be politically feasible in the WANA region because its legitimacy is

based on unifying Islamic origins and clear *Shari'ah*-compliance rather than national identity or a particular ideology's ideals.

#### **Risk management and *Shari'ah*-complaint finance**

The strength of proposals like Abdelhady's food security *waqf* or Faridi's active investment *zakat* funding lies in their combination with *Shari'ah*-compliant financing. If the expansion of *zakat* collection and the establishment of regional *awqaf* represent key sources of principal funds, *Shari'ah*-compliant finance outlines how to ethically invest and convert those funds into a sustainable source of income. The values behind Islamic legal guidelines on proper investment technique are deeply compatible with legal empowerment understandings of the causes and implications of poverty.

Poor people excluded from the formal economy are vulnerable in part because they are the most exposed to risks such as natural disasters, political instability, and environmental pollution.<sup>72</sup> Moreover, the poor lack the resources and assets to absorb the consequences of such risks. This means that impoverished entrepreneurs and small-business owners tend to be more risk-averse, which in turn excludes them from high-risk, but potentially profitable business ventures. Improving the poor's access to risk management tools is an extremely important aspect of the fourth pillar of legal empowerment, business rights. The Islamic guidelines followed by the Islamic banking system can provide the poor with access to such tools and contribute to economic growth and development in

<sup>71</sup> Abdelhady, Hadeel. "Islamic Finance as a Mechanism for Bolstering Food Security in the Middle East: Food Security Waqf." *Sustainable Development Law & Policy* 13, no. 1 (2012–2013): 29–35.

<sup>72</sup> *Attacking Poverty*. World Development Report 2000/2001. Oxford University Press: The International Bank for Reconstruction and Development/The World Bank, 2001.

situations of recession, stagnation, and low-growth-level.<sup>73</sup> Also called *Shari'ah*-compliant finance, this system is primarily built on the key principle that ethical loans share risk and profit between the lender and the borrower, rather than shouldering the borrower with all of the risk.<sup>74</sup> Preferring certainty and transparency, *Shari'ah*-compliant finance prohibits income based on the time value of money including both interest and speculative activity.<sup>75</sup>

The types of profit-sharing and risk-sharing revenue-generating practices most commonly used by Islamic banks and therefore potential regional *waqf* foundations include: commodity placements<sup>76</sup>, *murabaha* financing<sup>77</sup>, investments in *sukuk*<sup>78</sup>,

investments in *ijarah*<sup>79</sup>, and *qard* loans<sup>80</sup>. Each of these mechanisms allows Islamic banks to generate usury-free revenue by exposing the lender to the same risks as the borrower. In practice, these methods allow initiatives like the Islamic Solidarity Fund for Development, the poverty reduction arm of the Islamic Development Bank, to generate revenue to fund empowerment programs for OIC member countries such as the Microloan Support Fund and the Vocational Literacy Program.<sup>81</sup>

On an individual level, entrepreneurs can benefit from small *Shari'ah*-compliant micro-loans in the form of *murabahah*, *ijarah-wal-iqtina*, and *bai'salam* loans. In the case of *murabahah* loans, or contract financing, the lender purchases the raw materials required for productive activity on behalf of the

<sup>73</sup> Lodhi, Suleman Aziz, Rukhsana Kalim, and Mazhar Iqbal. "Strategic Directions for Developing an Islamic Banking System." *The Pakistan Development Review*, Papers and Proceedings Part II Twentieth-first Annual General Meeting and Conference of the Pakistan Society of Development Economists, 44, no. 4 (December 2005): 1003-1020.

<sup>74</sup> Uzair, Muhammad. "Some Conceptual and Practical Aspects of Interest-Free Banking." In *Studies in Islamic Economics*, edited by Khurshid Ahmad, 19-36. Leicester, UK: The Islamic Foundation, 1980.

<sup>75</sup> Barden, Kenneth. "Both a Borrower and Lender Be: Can Islamic Microfinance Bring Peace to Palestine?" *World Policy Journal* 27, no. 1 (Spring 2010): 97-102.

<sup>76</sup> The Islamic Development Bank defines commodity placements as "placements are made through banks and are utilized in the purchase and sale of commodities at fixed profit. The buying and selling of commodities is limited by the terms of agreement between the Fund and the banks. Commodity placements are initially recorded at cost including acquisition charges associated with the placements and subsequently measured at cost less any amounts written off...Income from commodity placements through banks is recognized on a time apportionment basis over the period from the actual disbursement of funds to the date of maturity."

<sup>77</sup> The Islamic Development Bank defines *murabaha* financing as "an agreement whereby the Fund sells to a customer a commodity or an asset, which the Fund has purchased and acquired based on a promise received from the customer to buy. The selling price comprises the cost plus an agreed profit margin. Amounts receivable from *murabaha* financing are stated at the cost of goods sold or disbursements made to the beneficiaries income recognized by the Fund to the date of the statement of financial position, less repayments and provision for impairment...Income from *murabaha* financing is accrued on a time apportionment basis over the period from the date of the actual disbursement of funds to the scheduled repayment date of installments."

<sup>78</sup> Classified as "a fair value through the statement of activities," the Islamic Development Bank defines investments in *sukuk* as "investments [that] are

initially recognized investments at fair value at the date of the contract is entered into and are subsequently re-measured to their fair value at the end of each reporting period with the resulting gain or loss recognized in the statement of activities...Income from investments in *sukuk* is accrued on a time apportionment basis using the rate of return advised by the issuing entities."

<sup>79</sup> The Islamic Development Bank defines investments in *ijarah* as "consist[ing] of assets purchased by the Fund, either individually or through a syndicate agreement and leased to beneficiaries for their use under *ijarah muntahia bittamleek* agreements...income from *ijarah* is accrued based on the repayment schedules or the rate stipulated in the *ijarah* agreement." An *ijarah muntahia bittamleek* agreement is "an *ijarah* contract that ends up with the transfer of ownership of leased properties/assets from the lessor to the lessee at the end of the contract tenor. This type of *ijarah* (*ijarah* ended with ownership) may come in many forms, principal among which are: *ijarah muntahia bittamleek* that entails full transfer of ownership after the last installment has been paid, *ijarah muntahia bittamleek* that calls for full transfer of ownership after the end of the contract and for a preset price, and *ijarah muntahia bittamleek* which allows the lessee to choose from three options (purchase, renewal, termination) at the end of the lease tenor." From: Investment & Finance Encyclopedia.

<sup>80</sup> According to the Islamic Development Bank, *qard* loans "are recognized when cash is disbursed to the borrowers. *Qard* represent amounts disbursed in respect of projects plus the *qard* service fees due, less repayments received relating to the outstanding capital portion of the *qard* as determined according to the *qard* agreements...Income from *qard* service fees is accrued according to the service fee repayment schedule appended to the *qard* agreement."

<sup>81</sup> *Islamic Solidarity Fund for Development. Fifth Annual Report 1433H-2012G. Annual Report, 2012.*

borrower rather than providing the funds. When the product is sold, the borrower repays the purchase price of the materials plus a previously agreed upon mark-up. For less short-term activities and in the case of financing equipment, lenders might use *ijarah-wal-iqtina*, or leasing loans. In this case, the lender purchases the equipment and leases it to the borrower who repays the lender a portion of the principal as well as an agreed upon profit for the bank in installments over time. Ownership of the lender's property is transferred to the borrower at the completion of the payments. In a *bai'salam* loan, the lender purchases an item to be delivered at a later date, although Islamic law requires the goods to be in existence and date of delivery to be fixed to ensure compliance. The borrower then delivers a portion of the goods, such as harvested crop, to the financier who sells it to recover a profit. Palestinian micro-loan organizations for West Bank farmers represent the best current example of the successful implementation of these types of *Shari'ah*-compliant loans in the WANA region.

Bringing the rural poor into the stable framework of the formal economy is essential for ensuring the poor's ability to assert their labor, property, and business rights. This is especially true in places like the West Bank, where Committee of the Red Cross reported that half of the population lived in poverty in February 2010, with 50% of the population living in rural communities and 16% of the labor force in agriculture-related jobs.<sup>82</sup> This poverty is compounded by equal access issues that legal

empowerment seeks to address. Most of the new money coming in from the Palestinian Diaspora is concentrated in urban centers and fewer than 10% of West Bank Muslims, who make up three-quarters of the population, have checking accounts or access to banking services. Most commercial banks and financial institutions prefer to operate in larger international business sectors and are unwilling to service the kind of small loans on which Palestinian farmers depend.

The Palestinian Network for Small and Micro-Finance seeks to fill that need by providing local *Shari'ah*-compliant loans that are generally under \$10,000. Although some organizations in the network are organized as non-profits that depend on funding from donor agencies and foundations abroad, others like Reef Finance provide more sustainability as private companies owned by shareholder investors that can use revenue from micro-finance investments to pay off loans, provide dividends to investors, and build additional capital.

In his article on Reef Finance's work in the West Bank, Badran argues that Islamic financing creates a partnership that fosters communication and interaction rather than a conventional lender and borrower relationship.<sup>83</sup> Shared reward and risk motivates micro-finance organizations to provide assistance that might minimize such as training, skill development classes, periodic progress check-ins, and expert advice to the client. In addition to a group of advisors who maintain regular contact with clients, the loans are monitored closely by a panel of Islamic

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<sup>82</sup> Badran, Kenneth E. "Both a Borrower and Lender Be: Can Islamic Microfinance Bring Peace to Palestine?" *World Policy Journal* 27, no. 1 (April 1, 2010): 97-102. <http://www.jstor.org/stable/27870323>.

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<sup>83</sup> Ibid.

clerics and scholars who ensure the fairness of the agreement and the transparency of the transaction. The legal empowerment benefits for the individual entrepreneur, small-business owner, or farmer are significant. Formalized micro-loan agreements with such organizations allow clients to assert their legal rights, give them access to the formal economy and Islamic banking system, and help them avoid crippling debt. However, Badran notes that some critics argue that interest-based loans allow clients to pay off the loan over a longer period of time and *Shari'ah*-compliant micro-loans take advantage of the religious and cultural restrictions to charge higher revenue rates.

### Introduction to labor rights in Islam

Greater legal empowerment of labor rights in the WANA region must first begin from an acknowledgement by Islamic scholars that such rights exist in Islamic law. Faridi claims that such rights were downplayed in the last century because regimes in the region perceived unions and collective bargaining as posing a threat to their power.<sup>84</sup> Dr. Muzammil H. Siddiq, Chairman of the Fiqh Council of North America, hopes that Muslim clerics are capable of rising above such political pressures and highlights the need for Muslims scholars to develop specific rules and regulations for government and corporations regarding worker justice. In his aforementioned *fatwa* on worker justice, the jurist elaborates on five important Islamic teachings regarding the fair treatment of workers<sup>85</sup>: clear and

proper agreements,<sup>86</sup> the dignity of workers,<sup>87</sup> kindness to workers,<sup>88</sup> proper and timely wages,<sup>89</sup> and the freedom to form unions. Using similar proofs, another Islamic scholar, Adnan Zulifar, developed a model for a labor rights code designed for Muslim-majority countries in the WANA region that reconciles international law standards and the basis for workers' rights in Islamic law.

Zulifar argues that in Muslim-majority countries in the WANA region, an Islamically-justified labor rights code would provide greater sustainability, adaptability, and stability than secular laws that draw solely from UN rights conventions.<sup>90</sup> This is because religious sanctification provides the concepts with indigenous authenticity and local ownership, allows them to be easily integrated into the moral systems of the average Muslim, and transcends transient national identities or political allegations in the region.

Although Islamic law discusses labor rights mainly in the context of agriculture and trade, Zulifar argues that the Qur'anic injunctions for the moral treatment of slavery act as a precursor to the modern employer-employee relationship. For instance, the Islamic encouragement toward emancipation of slaves sets the basis for the principle of free mobility

<sup>86</sup> See *Surat Al-Ma'idah* 5:1. The Prophet ﷺ said, "Muslims must abide by their agreements, unless there is an agreement that makes halal what is haram or makes haram what is halal" (At-Tirmidhi).

<sup>87</sup> See *Surat An-Nisa'* 4:36-37.

<sup>88</sup> The Prophet ﷺ said, "Your brothers are your responsibility. Allah has made them under your hands. So whosoever has a brother under his hand, let him give him food as he eats and dress as he dresses. Do not give them work that will overburden them and if you give them such task then provide them assistance" (Al-Bukhari)

<sup>89</sup> See *Surat Al-A'raf* 7:85.

<sup>90</sup> Zulfiqar, Adnan. "Religious Sanctification of Labor Law: Islamic Labor Principles and Model Provisions." *University of Pennsylvania Journal of Labor and Employment Law* 9, no. 2 (2007): 421-43.

<sup>84</sup> Faridi, "Zakat and Fiscal Policy," 1980.

<sup>85</sup> Siddiq, "Rights of Workers in Islam." 2014.

of labor. It is important to note previously-discussed complete and unquestioned consensus among all modern scholars that Islamic law prohibits slavery and actively promotes anti-slavery ideals. Although slavery was legal and codified in classical Islamic law, modern Muslim jurists unanimously agree that the institution of slavery is entirely un-Islamic. The Qur'an was revealed in a time when slavery was known, sanctioned, and practiced by all civilizations, including the Arabs, and had been since antiquity. Moreover, Abdullah asserts that humanity did not witness "an organized, conscious, serious, and practical effort to do away with slavery" until the advent of Islam. Abdullah argues that the Qur'an warns that slavery is an economic, moral, and social wrong uses economic (*zakat* donations), moral (manumission as expiation for sins), and social means (marriage of slave women to free them and elevate their status) to encourage the gradual phasing out of slavery.<sup>91</sup> In fact, contemporary Islam's prohibition of slavery is an excellent example of how the Qur'anic stance against oppression and injustice and the essential principles of human dignity are used as criteria for measuring the intent of Islamic laws. Drawing on these principles, Zulifar includes this prohibition against all forms of compulsory and forced labor in his labor rights code.

Zulifar's code also employs the Islamic finance profit-sharing model of *mardaraba* to require every firm to establish a profit-sharing scheme for its employees. He envisions an agreed portion of the firm's net profit set aside annually to be partly distributed among

employees and partly used to improve employee benefits, for which he provides four suggestions: improvement of worker conditions, educational allowances, health-care benefits, and subsidies for food, clothing, and housing. Zulifar creatively invokes the *fiqh* principle of customary law or *'urf* as a legitimate source of *Shari'ah* to mandate that employers pay wages according to prevailing industry standards and the customs of the particular occupation. Likewise, Zulifar cites the Islamic concept of consultation, or *shura*, to defend an employee's right to collective bargaining to represent their interests in relation to their employers.<sup>92</sup>

Zulifar demonstrates Islamic support for three of the basic principles established by the 1998 International Labor Organization Declaration on Fundamental Principles and Rights at Work: freedom of association and the right to collective bargaining, the elimination of discrimination in the workplace, and the elimination of forced and compulsory labor. However, Zulifar argues that a fourth foundational principle, the abolition of child labor, is not feasible to ban in developing countries in the WANA region. Instead, he recommends laws that create provisions to promote humane working conditions in order to indirectly protect child from abusive conditions. In addition to pointing out the lack of collective bargaining rights in the 1990 Cairo Declaration on Human Rights in Islam, Zulifar criticizes the Declaration for not effectively opposing laws that discourage women from working.

<sup>91</sup> Abdallah, Fadel. "Islam, Slavery, and Racism: The Use of Strategy in the Pursuit of Human Rights." *The American Journal of Islamic Social Sciences* 4, no. 1 (1987).

<sup>92</sup> See *Surat Ash-Shuraa* 42:38. Zulifar restricts the power of collective bargaining associations in cases of disruption of state function based on the Islamic legal concept of "causing disorder on the earth," or *fasad fil'ard*.

Zulifar provides a substantial starting point for the development of an updated Islamic labor law code that can encompass all five principles of worker justice in Islam mentioned by Dr. Siddiq. With the public support of religious leaders, a joint council of Islamic scholars from the WANA region should develop an updated standard labor law code based on this model that can then be adapted and adopted for the Muslim states of the WANA region.

#### **Fair business practices and *hisbah***

Just as Islamic law endeavors to promote fair and just judicial and legal systems, Muslim jurists throughout Islamic history have been deeply concerned with the maintenance of a fair and just economic system as a moral and religious duty of the Islamic state. The Islamic economic institution of the *hisbah* was designed to provide the state with a method for maintaining the proper balance between the non-interference of open market mechanisms and the prevention of unfair and unethical business practices. Saleh contends that the understanding of the market regulation aspects of the *hisbah* as a religious function has declined due to the establishment of secular branches of government that achieve the same purpose.<sup>93</sup> In his discussion of the practical role of the *hisbah* in modern society, Saleh does not criticize the existence of these secular institutions but instead aims to emphasize the religious and moral obligation Islamic law places on the Muslim governments to ensure equal access to a well-functioning formal economy.

The main objective of the *hisbah* is to encourage a favorable business climate that guarantees equal opportunity for all business enterprises, especially entrepreneurs and the excluded poor. The primary method of achieving this goal is through the dismantling of monopolistic practices and unfair competition. Saleh outlines the ten duties of an ideal *hisbah* commission, which include legal empowerment concepts such as clear legal procedures for investigating and determining the accuracy of unfair business practice accusations, stipulating losses incurred by affected businesses and the society as a whole, and the authority to impose sanctions on violators of the law. Saleh notes that the appointed director of the *hisbah* institution, or the *muhtasib*, was also historically charged with protecting the faith and monitoring people's fulfillment of religious duties. He considers the Saudi Arabian religious police to be the only contemporary model of a *hisbah* that carries out these functions. However, Saleh does not suggest that other Muslim states in the WANA region adopt the model of the Saudi Arabian religious police force, whose methods of social control are deeply controversial from a human rights and religious freedom standpoint. Instead, Saleh points to other examples of secular institutions in Muslim nations that he believes embody the ideal *hisbah* role as a public institution, law enforcement agency, and independent arbiter. First among these is Komisi Pengawasan Persaingan Usaha, or the Commission for the Supervision of Business Competition, which has successfully worked to maintain healthy competition between businesses,

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<sup>93</sup> Saleh, Fauzen. "The Institution of Hisbah: Its Roles in Nurturing Fair and Just Economic System in Islam." *Seminar Ekonomi Islam Peringkat Kebangsaan* (2009): 1–10.

prevent monopolization, and promote justice in economic dealings in Indonesia since 2000.<sup>94</sup> Secular and religious market regulatory bodies should be empowered to use corrective means against unfair business practices that disproportionately hurt the poor. To this end, Islamic governments in the WANA region should transition from the *hisbah* model which focuses on the imposition of a public moral order to one that effectively regulates the market and discourages corruption and bribery. Regardless of whether government departments for the regulation of business practices are established as secular or religious institutions, Saleh's examination of the purpose and objectives of the *hisbah* clearly demonstrate the priority Islamic law places on maintaining a formal marketplace that ensures equal opportunity and access to business rights.

### Conclusion

In conclusion, Islamic economic institutions have enormous potential in providing practical models for implementing legal empowerment priorities in the West Asia-North Africa region. Current implementations of the institutions offer concrete lessons in ending the exclusion of the global poor from the formal economy. Grounding international development loan strategies in Islamic principles of risk management and profit-sharing has been shown to lead to a culturally appropriate method of transitioning impoverished rural communities into systems that more effectively protect their legal, property, business, and labor rights. On a more abstract level, Islamic legal scholars have explored

how the creation of a regulated and goal-oriented system of *zakat* may be able to tap into a currently underutilised and informal poverty alleviation resource. Similarly, a modern re-imagining of the Islamic charitable foundation could provide a basis for the accomplishment of collective social objectives in the region, such as the long-term support of legal or business rights of the poor. Islamic legal theory also offers policy recommendations at the governmental level. The imposition of labor rights laws that align with international human right standards is more culturally feasible if the Islamic legal support for their provision is clearly emphasized. Lastly, businesses may also concede to greater regulation of the marketplace if ethical business practices were framed as religious obligations.

### III. Recommendations

This paper is by no means a comprehensive examination of Islamic law, its principles or legal precepts. As an introductory text, this paper is intended to start a conversation between legal empowerment policy makers, non-governmental organizations, activists, and Muslim scholars and jurists about the common goals and values shared by the legal empowerment global initiative and Islamic reformers in the region. The following suggestions are meant to connect the practical steps put forward by the Commission and relevant lessons from the current and proposed models for the implementation of Islamic institutions and principles in the WANA region.

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<sup>94</sup> Ibid.

**Table 2: Recommendations for the Four Pillars of Legal Empowerment<sup>95</sup>**

Recommendations for the four pillars of legal empowerment
<p><b>Access to justice and the rule of law</b></p> <ul style="list-style-type: none"> <li>• Based on the principle of juristic preference, encourage the use of modern paternity testing techniques to protect the legal identity rights for children born out of wedlock.</li> <li>• Support the appointment of female judges to both civil and religious courts.</li> <li>• Use marriage contracts as an opportunity to educate the poor and bring them into the formal legal system.</li> <li>• Include trained religious leaders in the informal tribal reconciliation process.</li> <li>• Foster and strengthen anti-corruption commissions to address unequal access to government services and the formal justice system. End the toleration of patronage systems which grant special access privileges based on social affiliations.</li> <li>• Repeal or modify laws and regulations that reduce sentences for murders based on tribal customary laws that contradict Islamic law.</li> <li>• Create a regional <i>waqf</i> foundation with clear objectives for the legal empowerment of the poor in the WANA region.</li> <li>• Develop a legal empowerment training program for rural religious leaders.</li> </ul>
<p><b>Property rights</b></p> <ul style="list-style-type: none"> <li>• Educate women about their options for marital contract conditions that protect them against economic vulnerability.</li> <li>• Ensure the long-term protection of communal and collective property through the establishment of public <i>awqaf</i> with clear mandates and independent supervisory councils.</li> <li>• Form a regional zakat fund to collect and distribute charitable funds across borders.</li> <li>• Develop clear criteria and a fair application process for zakat recipients.</li> <li>• Re-direct state-controlled zakat funds to productive investments and grants in the name of appropriate beneficiaries with the aim of eventual financial independence.</li> <li>• Enforce family law codes that protect the inheritance rights of Muslim women and provide practical means for curtailing familial and social pressures faced by women within the customary tribal legal system.</li> </ul>
<p><b>Labor rights</b></p> <ul style="list-style-type: none"> <li>• Encourage the use of profit-sharing schemes for employees that promote greater equality in wages and invest in safer and fairer work conditions.</li> <li>• Develop a labor law code that builds off of the five principles of worker justice in Islam and appeal for the public support of Muslim jurists.</li> <li>• Recognize, draw attention to, and condemn working conditions equivalent to forced servitude. Support the use of zakat funds to end modern-day slavery in the WANA region.</li> <li>• Reform laws that actively dissuade women from seeking employment.</li> </ul>
<p><b>Business rights</b></p> <ul style="list-style-type: none"> <li>• Improve the poor's access to Shari'ah-compliant risk management practices for small businesses and entrepreneurs.</li> <li>• Facilitate the process for registering small businesses as legal entities independent from the legal personality of the business owner.</li> <li>• Expand Islamic micro-loan initiatives similar to the Palestinian model. Key characteristics of successful <i>mardabah</i> programs will feature for-profit investments models and close ties between the lender and borrower in the form of regular monitoring, advice, and assistance.</li> <li>• Connect Muslim investors outside the region interested in Shari'ah-compliant finance with micro-loan initiatives in the region.</li> </ul>

<sup>95</sup> Commission on Legal Empowerment of the Poor. *Making the Law Work for Everyone*, 2008.

- Promote inclusive financial services by Shari'ah-compliant banks that offer Muslim entrepreneurs in the region savings, credit, insurance, pensions, and other tools for risk management.
- Establish consumer watchdog and anti-corruption organizations based on hisbah principles to promote fair business practices that protect the rights of workers and consumers.

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