RESPONSIBILITY AND THE TRADITIONAL
MUSLIM BUILT ENVIRONMENT

by
JAMEL A. AKBAR
M.ARCH. A.S., Massachusetts Institute of Technology
Cambridge, Massachusetts
February 1981

SUBMITTED TO THE DEPARTMENT OF ARCHITECTURE IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF THE DEGREE OF DOCTOR OF PHILOSOPHY IN ARCHITECTURE, ART AND ENVIRONMENTAL STUDIES

June 1984

(c) Jamel A. Akbar 1984

The author hereby grants to M.I.T. permission to reproduce and distribute copies of this thesis document in whole or in part.

Signature of the author
Jamel Akbar
Department of Architecture, May 4, 1984

Certified by
N. John Habraken, Professor of Architecture
Thesis Supervisor

Accepted by
Professor Stanford Anderson, Chairman
Departmental Committee on Graduate Students

MASSACHUSETTS INSTITUTE
OF TECHNOLOGY

JUN 1 1984

LIBRARIES

Rotch

Responsibility and the Traditional Muslim Built Environment

by
Jamel A. Akbar

Submitted to the Department of Architecture on May 4, 1984
in partial fulfillment of the requirements for the degree of
Doctor of Philosophy in Architecture, Art and Environmental Studies.

ABSTRACT

This study aims to analyze the effect of the responsibility enjoyed by individuals over the built environment. To understand these effects the study concentrates on the physical state of the property. It is concluded that three claims will affect the physical state of a property: the claim of ownership, the claim of control and the claim of use. These three claims can be enjoyed by one or more individuals at the same time over the same property. A model is developed to explore the relationships between the three claims and the parties involved in sharing them, and it is then used to explain the physical state of a property. For example, given the same circumstances, we may expect a property that is owned, controlled and used by one person to be in a different state than if it is owned by one person, controlled by a second and used by a third. In the first case, responsibility is unified in one person, while in the second, it is dispersed among the three persons. In addition to these two, the developed model recognizes three more patterns of responsibility into which a property may be submitted. These five states of submission of the property are called the "Forms of Submission of Property."

The relationship between the individuals sharing the responsibility over a property will affect the state of the property. If the relationships between the responsible parties change, the state of the property will change. The relationship between responsible individuals in the traditional Muslim built environment differs from that of contemporary environments which have changed the physical state of properties. By concentrating on the traditional built environments, this study highlights these differences. It investigates various elements from both traditional and contemporary environments within the different forms of submission. First, the study investigates each form of submission independently, and then it explores the coexistence of the various properties that are in different forms of submission in the traditional built environment. This explains the relationship between the individuals responsible for different properties. From these explorations the conclusion is reached that responsibility in the traditional environments has shifted to outsiders in contemporary environments. In traditional environments the users had more responsibility; in contemporary environments outsiders share the responsibility with the inhabitants through interventions in all claims. The study demonstrates that the structure of the built environment has changed because of the change in the pattern of responsibility. Examples of such changes are: the potential of the physical environment, the conventions of the society, the social relationships between users and the territorial structure.

Thesis Supervisor: N. John Habraken
Title: Professor of Architecture

ACKNOWLEDGEMENTS

When I came to MIT in the fall of 1978, I had little knowledge about Architecture. I was fortunate to work with Professor N. John Habraken for six years. Our meetings and discussions produced this study. His encouragement and guidance were invaluable. He is my only teacher.

I would like to express my deepest thanks to Professor Oleg Grabar and professor Stanford Anderson. Their invaluable comments, intellectual contributions and interest for the last two and one half years since the threshold of this dissertation have been very constructive and are gratefully appreciated. Professor Muhsin Mahdi's comments on the entire manuscript are very much appreciated. I would also like to convey my gratitude to Professor Francoise Choay, Professor William Porter, Professor Francois Vigier, Dr. Saleh al-Hathloul, Dr. Rafique Keshavjee, Dr. Mona Serageldin and Assistant Professor Nabil Hamdi for their comments on the proposal for this study.

I take this occasion to express my thanks to those who helped me with their expertise. Among them are Mr. Fawzi Abd ar-Razzaq of Widener Library at Harvard University who assisted me in locating and obtaining needed materials from Northern Africa; Mrs. Christine Bodger for her typing of the entire manuscript and her sacrifice of much of her free time to meet my deadlines; Mrs. Miriam Caldwell and Ms. Helen Sniveley for their superb editing. I also wish to thank Sameer and Nabil Akbar as well as Abd al-Hakeem Hakeem for their assistance in the Taif case study. The Association for Preserving the Medina of Tunis for providing the materials on Tunis; the finanicial support of King Faisal University is also appreciated.

Finally, and most importantly, my special gratitude to my former wife Sameeha. She stood beside me, tolerated me and provided unending support during the several years that we spent in Cambridge, Massachusetts. Her kindness and patience provided me with the needed personal reinforcement. I dedicate this dissertation to my son Eyad.

TABLE OF CONTENTS

Page

ABSTRACT. ii

ACKNOWLEDGEMENTS iii

LIST OF ILLUSTRATIONS vii

INTRODUCTION 1

THE MODEL. 13

PART A, FORMS OF SUBMISSION OF PROPERTY. 23

1. FORMS OF SUBMISSION OF PROPERTY IN THE TRADITIONAL ENVIRONMENT. 23

Introduction 23

Principles of Ownership in the Traditional Environment. 25

Ownership of Height. 27

The Dispersed Form of Submission 29

The Trusteeship Form of Submission 39

The Permissive Form of Submission. 41
Servitude. 43
Leasing. 48
Summary Statement. 53

The Possessive Form of Submission. 55
Agricultural Land. 57
Appropriating Places 62

The Unified Form of Submission 69
Revivification 71
Allotment. 74
Principles of Revivification and Allotment. 76
Negligence 76
Time Limitation. 77

Page

Effort 79
Authorities' Permission. 80
Concluding Notes 81
Levels of the Unified Form
of Submission. 84

2. CHANGE OF THE TRADITIONAL FORMS OF SUBMISSION 89

Introduction. 89

Ottoman Empire. 91
Historical Review 91
The Possessive Form of Submission 94
The Unified Form of Submission. 100
The Permissive Form of Submission 102

Arab World. 104
Historical Review 104
The Unified Form of Submission. 106
The Possessive Form of Submission 110
The Permissive Form of Submission 115
Public Spaces 115
Leasing 116

PART B, SYNTHESIS OF THE FORMS OF SUBMISSION. 127

3. THE SYNTHESIS 129

Reminder. 129
The Party 130
Significance of the Forms of Submission 135
Synthesis of the Forms of Submission. 139

4. FORMATION OF TOWNS AND ORIGINAL GROWTH. 149

Formation of Towns. 149
Terminology 152
Al-Kūfah. 160
Baghdād 175

Original Growth 183

5. PRINCIPLES OF THE AUTONOMOUS SYNTHESIS. 197

Neither Darar Nor Dirār 198
Freedom and Damage. 205
Counteracting Damage. 211
Pre-existing Damage 215
Right of Precedence 217
Autonomy of a Property. 227

Page

6. ELEMENTS OF AUTONOMOUS SYNTHESIS 235

Finā' 236
Ownership 237
Control 238

Street. 241
Ownership 244
Control 245
The muhtasib. 246
Encroachments on the Street 249
The Street as a Medial. 255

Dead-End Streets. 260
Ownership 261
Collective Control. 263

7. SIZE OF PARTY VERSUS SIZE OF PROPERTY 275

Sadaqah 276
Ḣibah 277
Mushāᶜ. 278
Inheritance 279
Pre-emption 281
Disputes Among Members. 286
Divisibility of Elements. 292
The Principles of Subdivision 297
Territorial Transformation. 304

PART C, CONCLUDING CHAPTER

8. CONSEQUENCES OF THE SHIFT OF RESPONSIBILITY. 319
Contemporary Regulation 320
Ordered Versus Organized 328
Territories 349
Initiative of Responsibility 359
Potential of the Physical Environment 366
A Case Study 373

NOTES 385

APPENDICES 445
Appendix 1, 2 (Legal Documents). 446
Appendix 3, 4 (Legal Documents). 447
Appendix 5 (Terminology) 448
Appendix 6 (Photographs) 450

BIBLIOGRAPHY 461

LIST OF ILLUSTRATIONS

Figure page

1. Al-Kūfah - Al-Janabi's interpretation of al-Kūfah...... 163
2. Baghdād - Lassner's interpretation of Baghdād.......... 178
3. Baghdād - Creswell's interpretation of Baghdād........ 180
4. Sfax - A residential tissue showing free-standing dwellings.. 186
5. Tunis - A residential tissue showing abutting buildings.. 187
6. A hypothetical illustration of original growth of towns.. 195
7. Tunis - Layouts of the Medina showing the locations of the selected blocks in figures 5 and 8 313
8. Tunis - Ground floor plan of block no. 44 showing the territorial transformations and dead-end streets..... 314
9. Tunis - Upper floor plan of block no. 44 showing territorial transformations......................... 315
10. Tunis - Upper floor plan of two adjacent properties that have been transformed into one property......... 316
11. Sfax - Plans showing the process of subdividing a jnein.. 317
12. Al-Fustāt - Traditional dwellings 334
13. Al-Medina - Plan of the qāᶜa traditional houses 346
14. Al-Medina - Floor plans and a section for the qāᶜa type house.................................... 347
15. Taif - layout of several blocks, dead-end street (E) and a through street (H) 380
16. Taif - Layout of three blocks showing the locations of the streets in the study......................... 381
17. Taif - Dead-end streets A, B and C 382
18. Taif - Ground floor plan of through street J 383
19. Taif - Upper floor plan of through street J 384

Diagrams

1. A venn diagram of the claim of ownerships, control and use 16

2-6 Forms of submission of property 19

7-14 Synthesis of the forms of submission of property...... 143

INTRODUCTION

Why do people kick Coke, coffee, or food machines? Maybe they are reacting to losing their coins, and/or they do not care much about the fate of the machine. Why do cars owned by the state deteriorate faster than those owned by individuals, even though they have the same mileage? Such questions can have diverse answers, but one way or another, they all relate to the responsibility enjoyed or given to us as humans. Responsibility is embedded in us; we all share some responsibilities such as not littering the streets; we also have individual responsibilities not to litter our homes or to allow others to litter our yards.

To the best of my knowledge, in the field of architecture, the question of responsibility was first raised in "supports" in 1962 by John Habraken. It was also raised by John Turner in "Housing by People". However, it has not yet been dealt with sufficiently and was not raised in the Muslim world. Logically, the condition or the state of any object relates mainly to the question of responsibility; this can be observed easily in our daily lives. Furthermore, this conclusion is an essential point of departure for the study. The state of a property is mainly determined by the responsible individuals as it will be explained.

Most studies in our field in the Muslim world concentrate on individuals, their actions, conventions etc. and/or other factors such as climate, economy and physical morphology. Here, I will emphasize the other side of the coin, which is totally neglected, that is the state of the physical environment as it reflects these factors and individuals' actions. This reflection is manifested in responsibility.

In both the traditional and the modern Muslim built environment, responsibility plays a fundamental role but we have yet to understand its true significance. I would argue that a society may improve the state of the built environment by changing the patterns of responsibility that determine it. Yet the matter is not quite that simple; first, we have to understand responsibility and its consequences, which is the prime task of this study.

In this study, I would like to illustrate and explain the kinds of questions which have to be answered when we seek to understand responsibility in the built environment.

Two works have alerted me to the importance of ownership and control. These are: J. Habraken's theory, as stated in "Transformation of the Site," which raises the question of control by the acting parties and its importance for environmental form; and S. Anderson's "Thresholds" which takes Savannah as a case study concentrating on the parcelling change over time which is primarily a question of ownership. These studies, no doubt, stimulated me to think about the issues of control and ownership and made me analyze them further and differently.

After writing the whole text of this study and looking back at it, I remembered Popper's advice to students which states:

> 'Try to learn what people are discussing nowadays in science. Find out where difficulties arise, and take an interest in disagreements. These are the questions which you should take up.' In other words, you should study the problem situation of the day...people have already constructed in this world a kind of theoretical framework -- not perhaps a very good one, but one which works more or less; it serves us as a kind of network, as a system of co-ordinates to which we can refer the various complexities of this world. We use it by checking it over, and by criticizing it. In the way we make progress. (1)

At the same time, I observed and searched for answers according to my own instincts finding Popper's other argument true in my case as well:

> ...The growth of the theories of science should not be considered as the result of the collection, or accumulation of observations; on the contrary, the observations and their accumulation should be considered as the result of the growth of the scientific theories. (This is what I have called the 'searchlight theory of science' -- the view that science itself throws new light on things; that it not only solves problems, but that, in doing so, it creates many more; and that it not only profits from observations but leads to new ones.) (2)

To deal with the question of responsibility I have developed a model that allows us to determine the "physical state" of a property relative to people's responsibilities to it. The model will help us to analyze the changes in responsibility that may take place. The model is only a tool to help us understand the importance of responsibility vis a vis the state of property. As such it was useful in my investigation. Other models or theories may be needed to carry the subject further. I do not present a theory of responsibility in the built environment. However, I do believe that there is a need for such a theory; a theory that will have a <u>predictive value</u>. I see my work as a contribution towards this goal. In our profession, the question of the need for a theory that will have a predictive value often meets with opposition since our job often ends the minute the building is designed or the users have moved in, and rarely beyond that. Thus the development of such a theory will make the built environment rationally predictable. Referring to tradition, Popper states that "[j]ust as the invention of myths or theories in the field of natural science has a function -- that of helping us to bring order into the events of nature -- so has the creation of tradition in the field of

society";[3] I would continue, so has a theory of responsibility in the field of Architecture.

I have used the developed model to investigate the traditional as well as the contemporary built environment. However, I have concentrated on traditional environments as contemporary environments are more familiar to us especially when compared with traditional environments. Certainly, today's society differs from the traditional ones. My aim in this study is not to introduce the traditional ways of responsibility to be applied in modern days, but rather, to draw attention to their qualities. The failure of contemporary environments has aroused the concern of architects and planners, and many are turning to the traditional environment in their search for answers. Unfortunately, the traditional environment is often seen romantically: today professionals tend to fall in love with traditional environments. They observe its forms and use, its rules and patterns. This is part of a broader return to tradition. The Middle East may soon have an Islamic renaissance. In this study, I argue that patterns of responsibility in the traditional environment were different from the ones today which affects all aspects of the physical built environment. To give one example, a dead-end street traditionally implied a specific form of responsibility among its users (inhabitants) that made it a functional element. It cannot, in terms of its physical form, be successfully copied to be used in contemporary environments without regard to such implication of responsibility. Architects today tend to include dead-end streets in their designs; they use terminologies such as private, semi-private, semi-public and public spaces without fully understanding the dynamic relationship between form and responsibility. Examination of

responsibility will contribute to a deeper understanding of the built environment praxis. The concept of responsibility suggests itself as a way of looking at the environment as a process and not merely a product. It contributes and elucidates phenomena we could not otherwise see. It would also help us to understand the ontology of the physical environment and its creators.

Although the traditional environment is the subject of most of the work, this is not a historical investigation in itself, but rather history used to illuminate the present. This means that my study is not intended to describe a particular region or period of time in all its various details but rather is an attempt to suggest a number of issues by using historical data. In such a case, hypotheses and generalizations are inevitable.

Indeed, it is a perilous task to study in general a vast region and a long period of time in the Islamic world in which the built environments differed from one another and changed in various ways. Nevertheless, certain features affecting responsibility seem to have existed in common and differences in details should not vitiate our attempts to investigate the consequences of responsibility. Moreover, this study relies on certain basic human tendencies which are constant, not as variable as climate or geography. For example, individuals always seek to improve their environment, and often desire to expand their properties, or they try to implement their norms and to avoid the intervention of outsiders. These innate tendencies remain, regardless of the geographical or political situation. Moreover, the question of responsibility is closely related to the Islamic legal system which, I will argue, was a constant and did not change much over a thousand years.

J. Michon describes the institutions of Islam as being based on three sources: the Qur'ān, the tradition of the Prophet and the teaching of jurists. The first two sources were always referred to by jurists in interpreting the law. This resulted in the development of different schools of law, and gave the Islamic legal system its identity and cohesion. The most authoritarive schools of law are: the Māliki school of law founded by Mālik (d. 179/795) which covers North and Central Africa, Upper Egypt, the Sudān and West Africa; the Ḥanafi school of Abū Ḥanīfah (d. 150/767) which covers India, Pakistan, Turkey, parts of Syria, Southeast Asia and China; the Shāfiᶜi school of law of Imām Shāfiᶜi (d. 204/820) which covers Egypt, the Southern and Eastern Arabian peninsula, East and Meridional Africa and parts of Southeast Asia; the Ḥanbali school of Aḥmad b. Ḥanbal (d. 241/855) which covers the Muslim world does not prevail in any region except the central Arabian peninsula. Any individual can choose any rite as they are considered equally valid or can even change from one school to another. The major differences between these schools are methodological, based on the particular method each founder used to interpret the law. Qiyās (analogical reasoning) is accepted by all schools; however, ra'y (opinion) is distrusted by the Shāfiᶜis. 'Ijmāᶜ (consensus doctorum) was interpreted by ash-Shāfiᶜ as the agreement of scholars at a particular period, while Mālik limited it to the scholars of Medina and Aḥmad b. Ḥanbal to the Prophet's companions.[4] A fifth school of law that I did not investigate is the Shīᶜite which is in Persia, parts of Iraq and Lebanon and parts of the Eastern region of the Arabian peninsula. Also, I did not investigate the Zaydi and 'Abāẓi rites which cover parts of the Arabian peninsula.

The different methods used to interpret the law resulted in different opinions regarding the same case. For example, if two neighbors disputed the building of a parapet on a roof terrace one person using his terrace and the other demanding it be walled, we may get two different rulings by two schools of law. The first may forbid the person from using the roof terrace unless he builds a parapet, while the second may compel the person to build a parapet. Although the two opinions may seem controversial, they both avoided intervention at the outset and did not impose regulation. The two schools of law believed that they should not intervene unless one person sued his neighbor. They both assumed a similar pattern of responsibility. Moreover, if a person takes his case to a court the judge will try to resolve the dispute through agreement [ṣulḥ]; if he cannot, then he imposes the ruling over one of them. The similarity of the steps taken by the schools of law is the major determinants and not the differences. These shared steps will result in an agreement between the neighbors which will have an impact on the built environment. In other words, although there are differences of opinion, those differences are within certain limits. This is the result of interpreting the same sources -- Qur'ān and the Prophets tradition. In this study, I included the controversial opinions as much as possible . This means that if I did not give controversial opinions then all rites consulted by me were in agreement on the stated opinion.

An important reason for the survival of the Islamic legal system without much change is the belief among Muslims that the two main sources -- Qur'ān and tradition -- are from God and his Prophet, and that their validity, in any region or any time, should not be questioned. These sources are always correct and can only be interpreted within limits,

which means that there is no need for revising a law regardless of its validity. This is still true these days. A good example is the fatwa (legal opinion) of Shaikh M.H. Makhluf, the mufti of Egypt, who gave (in 1948) a legal opinion regarding the limits of ownership in which he interpreted the sources to prove that the Islamic system of ownership is still valid for this century.[5] This model of law is very different from the legal system in western countries, for example, in which the law can be tested and revised, and thus may change dramatically over time; on the contrary, the Islamic legal system is based on principles that can only be interpreted, and may not be changed. Certainly, this model of interpreting and applying the law contributes to the continuation of the Islamic legal system without change over time.

Another reason for this continuation is the principle set by the Prophet of rejecting every new innovation [bid^{c}ah]. The Prophet proclaimed: "He who innovates something in this matter of ours that is not of it will have it rejected."[6] In fact, many other traditions emphasize this point. For example, the Prophet counseled: "...Beware of newly invented matters, for every invented matter is an innovation and every innovation is a going astray and every going astray is in Hell-fire."[7]

One may argue that the wide geographical distribution of Muslims and the many political developments have all meant that variations in interpreting the law do appear if not in matters of principle, at least in applying these interpretations. To some extent, this is true. For example, J. Michon relates that "Muslim jurists have, for centuries, fully and formally accepted ^{c}ādāt (or local customs) as a legitimate source of legislation alongside the other classical principles in

accordance with which the rules of the sharī^{c}ah [legal system] have been elaborated."[8] However, as will be seen, the variety of opinions and rulings, in different regions and periods, did not affect the traditional model of responsibility since it is more related to the principles of the legal system than to interpretations.

The role of the ^{c}ulamā' (the learned religious elite) also contributed to the survival of the Islamic principles that affect the model of responsibility and affirmed the application. For example, describing the role of ^{c}ulamā' in the later middle ages, Lapidus relates that the ^{c}ualamā' were judges, jurists, prayer-leaders, scholars, teachers, and readers of Qur'ān. Their essential duty was to give an Islamic community moral guidance as well as to preserve the knowledge of religion. They enforced the morals of Islam and upheld its laws. They were the administrative, social and religious elite. Furthermore, he relates, "[b]iographies indicate that many masons, stoneworkers, carpenters, coppersmiths, soapmakers, and especially pharmacists were ulama." He adds "[a]ll realms of public affairs were an intrinsic part of the duties of this multicompetent, undifferentiated, and unspecialized communal elite."[9] Moreover, the schools of law reached out to include the populace at large. Any Muslim was a member in a school of law. Individuals looked at the ^{c}ulamā' for authoritative guidance on how to be a good Muslim.[10] The above suggest that the role of ^{c}ulamā guaranteed the application of the Islamic legal system.

Among the ^{c}ulamā', the qādi or the judge played a major role in applying the legal principles. He was often more powerful than the governor. Because of his important judicial and administrative duty, he had employees and students. He appointed sub-delegated judges, executive

and clerical deputies and employed court attendants and strong-arm men[11] However, another important post among the ʿulamāʾ was the jurist or the legal counsellor [mufti] to whom the judge often referred in order to base his verdicts on surer ground, since consulting others [shūrā] is mandatory according to Qur'ān.[12]

Closing the doors of 'ijtihād (personal reasoning) to judge disputes also contributed to the continuation of the Islamic legal system without much change over time. In resolving any new disputed case, the mufti (legal counsellor) based his decision [fatwāa] on preceding cases resolved by other major jurists. The mufti did not pronounce rulings regarding disputes nor did he formulate punishments or approbation, he elucidated the rules and the evidence on which his decision was based.[13] The judge ruled cases according to the opinions of the muftis. Thus, in this study, if we rely on documented legal opinions [fatāwi] we are indeed dealing with real cases. For example, the legal opinions of 'Ibn Taymiyyah (d. 728/1328) were applied by the judge 'Ibn Jamāʿah.[14] Furthermore, judges were always friends, students or relatives of jurists and had close ties with them. To name a few examples, Muḥammad ash-Shaybāni (d. 189/805) the judge of ar-Raqqah, and Ḥafṣ al-'Azdi (d. 194/810) the judge of Baghdād and then al-Kūfah, were students of Abū Ḥanīfah (d. 150/767). 'Ibn ʿAbd al-Ḥakam (d. 214/829) the judge of Egypt, was the friend of ash-Shāfiʿi. When Suḥnūn became a judge in 234/849 he appointed Ḥabīb at-Tamīmi as judge in Tunis. Sulymān b. Sālim, the friend of Saḥnūn, was the judge of Sicily. The jurist 'Ibn Rushd (d. 520/1126) became the judge of Cordoba. The jurist ʿIyaḍ as-Sabti (d. 544/1149) became the judge of Sabtah and then Granada. ʿAbd al-Wāḥid, the son of al-Wansharīsi, (d. 914/1508) became the judge of

Fez. In short, the legal opinions of jurists were always applied in real life. A good example is the book of 'Ibn ar-Rāmi, the building expert who used to work with judges in investigating the cases of disputes between neighbors. In his book regarding the legal system in the built environment, 'Ibn ar-Rāmi describes the opinions of jurists and then derives a real case to demonstrate the applications of the jurists' opinions. Therefore, jurists' opinions documented in books of law are as valid as the real cases documented in courts. In this study, I depend on both of them.

My study is divided into three parts preceded by a section which describes the model of responsibility that is used as a frame of reference. Part A concentrates on properties or elements of the built environment individually; chapter one is devoted to the elements of the traditional built environment, while chapter two investigates the elements in the contemporary environment. Chapter one has two purposes: it demonstrates the use of the model as well as the state of properties in the traditional environment. Chapter two exemplifies the change of the state of property. In part B we will investigate the relationship between properties in the light of the developed model by concentrating on the traditional environment. Part C, or the last chapter, is open-ended. I will comment on both the traditional and the contemporary built environment through case studies and examples that will demonstrate the consequences of the change of the model of responsibility between the traditional and the contemporary built environment.

Finally, I have tried to reduce the extent of Arabic terminology in the text. When Arabic terms are used they are defined. However, they are not underlined since they are numerous in some cases. Dates are

given in both Muslim and Christian eras in this order. I have used the translation system of the <u>Encyclopedia of Islam</u> excluding the letters ḳ and dj which are rendered as q and j.

THE MODEL

It is appealing to try to understand the structure of the "built environment" by exploring aspects of the physical setting, such as sizes, shapes, materials, relationships between spaces and elements, conventions of form and patterns. Similarly, investigating sociological aspects related to that environment, such as social life, tradition, culture and convention is also attractive. Furthermore, relating these two fields to others, for example, the economy, in order to understand their effects on each other and, consequently on the built environment, is fascinating research. But, to the best of my knowledge, in the traditional and contemporary Muslim environment another question is yet to be dealt with, that of responsibility. What is the responsibility of the actors who have shaped and are shaping the built environment; who is making use of and decisions about it; and what is the relationship between them?

To explore this, one might analyze the relationship among these actors. As an example, the rule of a municipality which states that owners of property should have a specified setback explains the relationship between the owners and authorities in terms of responsibility and control, a relationship which will have consequences on the environment. Another approach of analyzing these relationships is to deemphasize the actors, and address instead the traces of those actors in the property itself, i.e., the state of the property. To personify these traces as if the physical environment could talk and tell us about its condition, we could ask what would it say? Let's ask the setback, "why have you not been provided for?" The answer could be, "I was left unbuilt because my owner was not allowed to do so by the authority, and that is why he is

not using me." Or it may say, "I am being used by a person who is not the owner and not interested in maintaining me."

This method may sound anthropomorphic, or even very similar to the first method, but in fact they are very different. The first method emphasizes the responsibility of the actors in the built environment, while the second emphasizes the states of the properties in the built environment. Each method has it advantages.

Here, we will apply the second method. To do this, I have developed a model for explaining the condition of property. The model is not being imposed on the structure of these environments. Rather this model has been developed by observing and comparing the states of the property in the traditional and in the contemporary environments. However, this presentation is the reverse of the observation used in order to clarify the structure of the built environment and to simplify communication. Of course it would be possible to simply delineate the states of properties in the traditional and contemporary environments, and then use these to create the model. However, my conviction is that such delineation would not elucidate much because we are interested in relationships and not simply scale, size, value, material and nature of the properties.

First, I will describe the model. It is hoped that the model when used will be useful in explaining the state of properties. Although I believe that the model can be pushed much farther theoretically, I will avoid doing so. Rather, I will push it to the extent that would serve our inquiry, as it is my purpose to analyze the differences between the structure of the traditional and contemporary built environment rather than to invent a model. Next we will apply the model to the traditional environment. Then, still using the model, I will observe the change that

has taken place in the contemporary built environment. The investigation of both environments is not a thorough one, but rather a selectively detailed one.

This model can be seen as the outcome of the interaction of two concepts, the concept of claims and the concept of parties. First consider the concept of claims. Logically, any object may be used and owned by different persons. A house owned by one person may be used by another through leasing, for example. A chair in a classroom is owned by the Institute and used by the student. A park is owned by the state and used by the public. On considering other such examples, one may conclude that ownership is a claim that is different from the claim of use and they can be easily distinguished. Additionally, control is a third claim which can be observed. The owner of a house has the ability to add rooms if he wishes; but the tenant cannot add a wall to subdivide a room, for he does not control the walls of the apartment although he is using it. The tenant may rearrange the furniture in his room; he controls the furniture. The mayor may have the ability to change the function of a building although he does not own it or use it. Thus, regarding claims, we may theorize that any property is subject to three distinct and observable claims: the claim of ownership, the claim of control and the claim of use.

In some cases these claims may not be clear, for example, who controls a leased car, the owner or the driver? How is control defined regarding such objects? With respect to the built environment, which is our realm of interest, the three claims are always distinguishable. Furniture owned by parents is used and controlled by their son. A room used by a guest is owned and controlled by the host. A street used by

the people is owned and controlled by the authority. Therefore, we will define ownership as the ownership of a property apart from the control or use of it. The miri lands, for example, during the Ottoman empire were controlled and used by the peasant who cultivated but did not own them. The state had the ownership of the land. Secondly, control is defined as the ability to manipulate elements, without using or owning them, such as the decision to erect a wall, open a window, demolish a building, or plant trees. The nāẓir (trustee) of a waqf (endowment) does not own or use the property, but does control it. Thirdly, use is the enjoyment of a property without controlling or owning it, such as the tenant who lives in a rented house, the guest using a room in a hotel, or the individual who uses the park, etc.

To grasp the relationship between these three claims, we will use a Venn Diagram of three overlapping circles, in which each circle represents one of these three claims, as in Diagram 1.

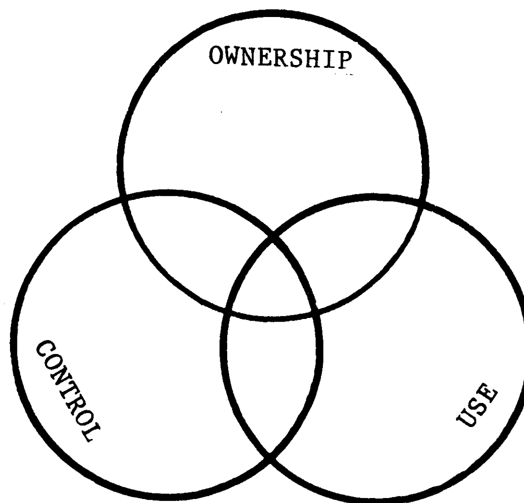


Diagram 1

The second of the two concepts which make up the model is that of parties. From the point of view of the property -- not persons -- the property can be owned by one party only. A house can be owned by one person, two brothers, one family or a company. Any decision regarding the sale of the house is one made by all the partners as one party. The brothers, for example, who own a house may disagree among themselves regarding the sale of the house, but eventually the decision has to be made by both of them as one party. They must agree. Their decision whether to sell the house or divide it among themselves can be seen as the decision of one party. In regard to the property, it makes no difference. Thus, whoever owns a property will be considered as one party, whether it is a child or a government. The same notion applies to control. Property is controlled by one party only. The decision to join two rooms to form one is a single decision only. The family members may disagree about it, but eventually the decision must be made. Even if such a decision is not accepted by some members, it is still a decision made by one party. The decision made by a party is obviously based on the interaction of values, norms, and motivations, and on instinctive, cognitive, cultural, social, psychological, traditional and religious factors. All of these factors converge in a specific decision. Regarding use, property is used by one party only. That party can be one person, a family or the public. We may say that whether it is three persons or two families using the house, it is only one party. In regard to a park, for example, it does not make a difference whether it is used by one person or many persons. What matters is that it is used. Certainly, the size of the party using the property will affect the condition of the property. A chair that is used by one person (a party)

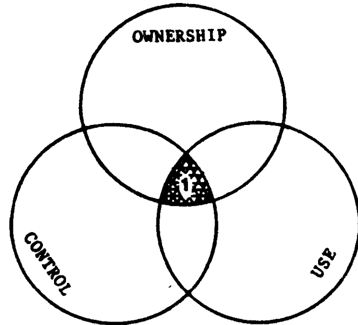
may not be affected in the same way as it would be if located in the park and used by the public (as one party). The same theory can be applied to control and ownership. A property controlled by one person as a party may behave differently than one controlled by many individuals as one party. The size of the party has a great impact on the property's condition. From the point of view of the property, the size of the controlling or owning party does not make a difference, because any decision is one decision; for example, whether or not to sell the house, whether or not to divide a room, whether or not to paint the walls. But use is a different question. To avoid complications, we will not deal with this issue in the first part of the thesis: In the second part, we will explore it further, and illustrate that considering the users as one party is not a handicap, but is instead of great advantage to the model.

Now, we will relate the concept of claims and the concept of parties. We saw that each claim -- ownership, control and use -- can be exercised by one party only. On the other hand, one party can exercise more than one claim. For example, we may think of a party that owns, controls and uses the property, i.e. one party enjoys three claims. Thus each party can have the right of one claim or more, while two parties will not share the same claim. This means that any property can be shared only by one or two or three parties.

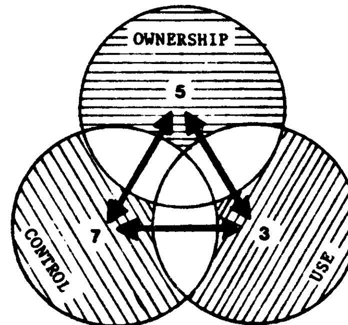
By investigating the possible relationships among the three claims and the number of the parties that would be involved in sharing the property, we derive five basic forms. The first possibility occurs when the same party owns, controls and uses the property. In this case the party has to deal with itself only. The individual who both uses a house and owns it does not need permission to change things in his house. This

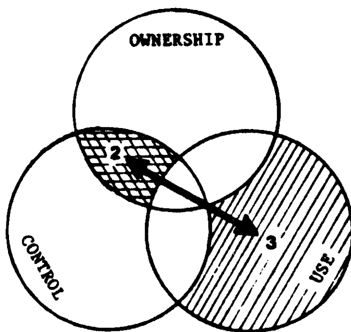
FORMS OF SUBMISSION OF PROPERTY

D. 2 UNIFIED

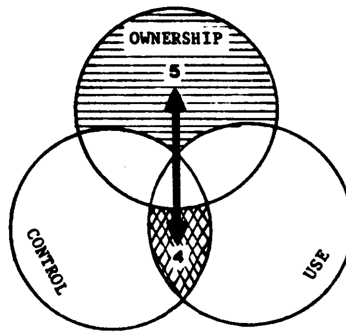


D. 3 DISPERSED

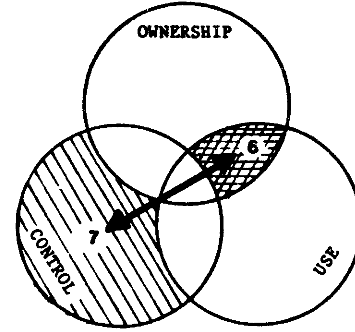




D. 4 PERMISSIVE



D. 5 POSSESSIVE



D. 6 TRUSTEESHIP

1) A party owns, controls and uses. 2) A party owns and controls. 3) A party uses. 4) A party controls and uses. 5) A party owns. 6) A party owns and uses. 7) A party controls.

possibility will have one form only, Diagram 2. The second possibility, in contrast to the first, occurs when a property is shared by three independent parties. One party owns the property, a second controls it, and a third uses it. In this situation, each party must deal and communicate with the other two parties. Such an example is a waqf (endowment) where a property is devoted to God, not owned by any human, is controlled by an appointed trustee and used by a third party -- elderly people or orphans. This possibility also has one form only, Diagram 3. Between these two extremes lies the third possibility where a property is shared by two independent parties. This may take three different forms, depending on the relationship between the parties and the claims. Firstly, as in Diagram 4, the party that uses a property has to deal with the party which owns and controls that property; such as a tenant of a rented apartment. The second form, as in Diagram 5, is when the party that uses and controls a property has to deal with the party which owns the property, such as the peasants who use and manipulate (e.g., cultivate) land owned by the state or a lord. The third form, as in Diagram 6, is when the party that controls the property has to deal with the party which owns and uses it, such as the trustee of a property inherited -- owned -- by an orphan who lives in it.

The relationship between the parties involved in sharing a property both effects and reveals to us the state of the property. For example, the tenant of an apartment does not always maintain it adequately because he does not own it. The owner of an apartment does not usually maintain his leased apartment as he would if he himself were residing in it. That is, the relationship between the parties affects the condition of the property, which in turn reflects the relationship between the parties.

Any property submits to one of the five basic forms, but not to two forms at the same time. To find out to which form a property belongs, one has to observe ownership, control and use. Without such observation, the five basic forms can be easily confused. For example, a house owned by two brothers jointly as one party, and who both control and reside in it, is a very different form than that in which the house is owned by one of them. In the first case, the house is owned, controlled and used by one party; in the second, the house is owned and controlled by one party which is the owners, and used by a second party, that is the two brothers jointly. The owner is only a member in the using party. In both cases, the property is submitted to two different forms. We will call these five basic forms the 'Forms of Submission of a Property.'

Theoretically, one may invent other forms by eliminating one or two of the claims. For example, one may argue that a large rock which is used by one party not controlled by any party because of its nature, does not belong to the five forms of submission; or a parcel of land in the desert is not owned or controlled by any party. In fact, a series of quibbles can be developed because of the nature of the property or the parties' desire to avoid exercising a claim. For instance, the state may not show any interest in controlling the desert. This does not mean that the desert has no party that has the right to control; rather, it means that the state is not exercising its right. In short, if we disregard those aberrant cases, all the elements of the man-made environment fall into one of the five forms of submission.

From the point of view of a party on the other hand, the combinations of the claims that can be enjoyed are seven. 1) A party owns, controls and uses. 2) A party owns and controls. 3) A party

uses. 4) A party controls and uses. 5) A party owns. 6) A party owns and uses. 7) A party controls. Finally, the possible relationships between parties are six, which appear as straight lines in the diagrams.

PART A, CHAPTER 1

FORMS OF SUBMISSION OF PROPERTY IN THE TRADITIONAL ENVIRONMENT

INTRODUCTION

Before investigating the five forms of submission, a few clarifications regarding the use of the model have to be made. Firstly, within each form we will examine a few properties, in which scale or nature is not at issue. Consider a person (A) owns a party-wall standing between him and his neighbor (B), and the neighbor (B) rents from him an area of that wall against which to rest his wooden beam. We will deal with that rented spot of the party wall as a 'site', which the neighbor (B) uses but does not control or own. This is the same model of relationships as in a rented house which the tenant uses but does not control or own. i.e., the same form of submission (as in diagram 4). In both cases, two parties are involved in sharing the property, and the same relationship between the parties and the claims (Ownership, Control, Use) exists. The party that owns the party-wall is dominant because if we view that spot as a 'site', we will realize that if the owner of the party-wall decides to demolish it, the neighbor (B) has to remove his wooden beams. But the adjustments of the neighbor's (B) wooden beam does not disturb the owner of the party wall. Although the relationship between the neighbors is subtle, in fact one (A) is the dominant party. Similarly, the owner of the house dominates the tenant. Alternatively, if the party wall were owned by the two neighbors collectively then it belongs to another form of submission (D.2) i.e., the two neighbors as one party owns, controls, and uses the party-wall. Secondly, in investigating a rented house, for

example, we will find that the walls are used by the tenant but not controlled or owned by him (D4). While the furniture of the tenant is used, controlled and owned by him, which is a different form of submission (D2). Thirdly, the same object will be viewed and treated differently by the different parties, although it is the same form of submission. For example, a corridor in an apartment building for a tenant is just like a street, he does not own it or control it, he only uses it by passing through it (D.4.). But that same object -- the passageway -- for the owner of the building is, like an item in his storage; he owns it, controls it, but does not use it (D.4). Although, physically, this passageway may look like the dead end street of a traditional Muslim town, it is in fact totally different. We have two different forms of submission. We will, later, examine those differences carefully.

To simplify communication, I will give each basic form of submission a name which reveals its distinctive nature, such as the condition of the property or the relationship between the parties involved. Later, we will see how the form of submission for the same property is different in the contemporary environment. Then, we can compare the traditional and contemporary forms of submission of a property by referring to the names only.

This chapter has two tasks: the first is the examination of the main elements in the Muslim traditional built environments in order to inquire into the forms of submission for those elements; the second is to grasp the use of the model by examining different elements in the traditional built environment as a case study.

The three claims parties can exercise on property are not explicitly distinguished by Muslim jurists. Nevertheless, they are implicitly dealt with and comprehensively detailed in various sections of the law pertaining to topics such as renting, leasing, allotments, acquisitions, waqfs, pre-emption, gifts, inheritance, state revenue and most importantly ownership. We will now examine the principles of ownership in the Muslim tradition, then we will review each form of submission independently.

PRINCIPLES OF OWNERSHIP IN THE TRADITIONAL ENVIRONMENT

There are some basic principles which determine the intrinsic nature of properties and characteristic behavior of owners in the Muslim world. Firstly, it is essential to realize that Islam recognizes and respects the right of ownership. In keeping this right, the owner of property is entitled to defend it as he would defend his life or possessions, even if such defense results in the death of the aggressors. This right is explicit in the prophets' traditions. "Whoever is killed while protecting his property then he is a martyr."[1] "The blood, money, and property of every Muslim are taboo to all other Muslims."[2] It is also implicit in Qur'ān: "O ye who believe! devour not your property among yourselves by unlawful means, except that you earn by trade with mutual consent. And kill not yourselves. Surely, Allah is Merciful to you."[3] Thus, the right of defending one's property grants the owners immense responsibility and control within the Islamic legal system. The above formulation may not be acceptable at this point in history, nor be truly

grasped by contemporary readers; but in order to understand what follows, it is best to bear the principle in mind throughout the thesis.

The first principle of ownership, in general, is that everything which is necessary and useful for survival within the Islamic Consonance is subject to ownership, and conversely, what is not necessary or even useful cannot be owned. Moreover, such ownership should not harm others according to the tradition "There should be neither harming nor reciprocating harm."[4] Regarding this principle, Al-Qarāfi (d. 684/1285) relates that the sole rationalization for ownership is need [al-ḥājah]. An embryo, for example, although unborn, has the right to inherit and own properties, because he or she will make use of them; while dead persons do not need things, thus he or she can no longer own properties.[5] Later, we will explore the principle of need and its effect on the environment.

Logically the objects that contribute to living will not be fully useful unless they are utilized -- maintained, modified, developed, or erected. Thus, in order for an object to be productive, it has to be controlled by someone, i.e. used, manipulated, or whatever. Therefore, to be an owner, one must exercise these privileges or allow others to do so. Almost all the definitions of ownership given by Muslim jurists express explicitly or even stipulate the principle of control.[6] For example, 'Ibn Taymiyah's definition (d. 728/1328, from the Hanbali rite) of ownership is that, it is "the legitimate ability of manipulating the object."[7] In short, in order for a thing to be utilized it should have a survival value and be a source of benefit to a person and must be capable of exclusive appropriation and manipulation by that person. The principle of possession and control was also used implicitly by Muslim jurists to distinguish what may or may not be owned; things that are not

capable of control or possession may not be owned and vice versa; for instance, sun rays, air, and fish in the sea.[8]

The previously mentioned principles -- need and control without harming others -- have been the main prerequisite of ownership. They were the decisive criteria to establish ownership. To demonstrate the use of these principles, we will investigate a case which was resolved by using these principles; the issue was the ownership of height.

Ownership of Height

Does the owner of a territory own what is above it, up to seventh heaven or what is beneath it down to seventh ground? What is the limit? Al-Qarāfi's opinion is that the owners of territories usually benefit from heights, for example, for viewing rivers and gardens or for protecting their privacy by building parapets on their edifices, but such benefits do not exist beneath the ground beyond the foundation of the building. Al-Qarāfi further argues that since the principle is "what is needed can be owned and what is not cannot,"[9] then what is beneath a territory to seventh ground cannot be owned, in contrast to what is above a territory.[10] This opinion was contested by 'Ibn ash-Shaṭ (d. 723/1323) who pointed out that the owners of territories can, indeed, benefit from the ground of their territory by digging deep wells or basements,for example; moreover, if someone attempted to erect a room beneath his neighbor's territory he would unquestionably be stopped, even if he were to reach such room from his own territory. He argued that according to the principle of need there is no justification for preventing a person from deepening his well. Thus the owner of a territory has the right to

raise or deepen his territory as he wishes as long as he does not harm others.[11]

The principle of need and control are very powerful ones. They grant owners greater responsibility and freedom, which will have a unique impact on the structure of the physical environment. These principles allow us to understand the structure of the built environment in the Muslim world. To name one example; it has been taken for granted, among many contemporary scholars, that building height in Muslim towns and cities are low rise because of the privacy issue. But, many towns, such as the ones in Yemen, have variable building heights with some buildings five or six stories high. All the schools of law emphasize that the owner of a territory has the right to raise his building as he wishes as long as he does not harm others by viewing their properties and invading their privacy, for example.[12] Thus the reason for low rise buildings in Muslim towns may not be a cultural one but, rather, a technical one.

While Muslim jurists agree on a person's right to own what is above his property, they disagree on the issue of selling such right as a commodity. Can the owner of a dwelling sell the space on his roof to others as a piece of land or not? Some schools of law consider the selling of heights-right as a selling of the air above a territory, which is not controllable; thus it is illegal. The Ḥanbali and Māliki schools of law consider the heights-right as an ownership[13]; thus an owner can sell the space on top of his house, as long as an agreement is reached between concerned parties. The Ḥanafi, Shāfiᶜi, Ẓāhiri and Zaydi schools of law consider the heights-right as an individual right, to be enjoyed only by the owner, and not compensable.[14] Meanwhile all schools of law agree that an owner of a building can sell the upper floor(s) or any

parts of his building as long as it is built, since it is well defined and controllable.[15] They all agree that if a building is owned by different parties, and such building collapsed then the owners of the upper floors have the right of ownership of that specific property, although it is in the air. The owner of the upper floor may even compel the owner of the lower floor to build so he can rebuild his property.[16] Regarding the selling of a part of a territory in the air for projecting cantilevers (janāḥ, rūshān) to adjacent neighbors; the Shāfiᶜi and Ḥanafi schools of law disapproved such transactions, since it is a selling of an air which is not controllable.[17] The Māliki and Ḥanbali schools of law approve it and consider the cantilevered part as intrusion into one's own property; thus it is compensable.[18] All schools of law agree and emphasize that an owner has a full right to prevent, if he wishes, any intrusion by others, whether it is an projection of an adjacent building or even a tree limb.

THE DISPERSED FORM OF SUBMISSION

Here, we will examine what I call the "Dispersed" form of submission, whereby three parties share a property. One party uses it, a second controls it, a third owns it. To understand this form of submission we will investigate, waqfs, their meaning, origin, the relationship between the three parties involved in sharing the waqf property and the implication of such a relationship for the property's condition.

Waqf is one of the most complex topics in law. Its literature is vast. This is not surprising if we consider that in 1925, three-fourths of the arable land in Turkey was endowed as waqf. One-half of the

cultivable land in Algiers, at the end of the nineteenth century, was dedicated. In Tunis one-third, and in Egypt one-eighth, of the cultivated soil was waqf.[19] Waqf literally means detention or stopping.[20] According to the Ḥanafi school of law, waqf implies the limitation of a man's power to do what he likes with his property.[21] 'Ibn Qudāmah's (from the Ḥanbali school of law, d. 620/1223) definition of waqf is "detaining the substance and giving away the fruits."[22] All the definitions given by Muslim jurists imply the same concept.[23] The ownership (Bare Ownership - raqabah) is immobilized forever, and the revenue is devoted to a special purpose, usually of a religious or charitable nature. This is made clear in Abu Yūsuf's (d. 182/798) definition of waqf: ". . . the tying-up of the substance of a thing under the rule of the property of Almighty God, so that the proprietary right of the wāqif [founder of waqf] becomes extinguished and is transferred to Almighty God for any purpose by which its profits may be applied to the benefit of his creatures."[24] Thus, from those definitions, we may conclude that a waqf is not owned by any party which shares the property, but is conventionally owned by God. No human can claim ownership. So how does this affect waqfs?

Contemporary scholars and observers are disappointed with waqfs.[25] A. Qureshi concludes:

> The disadvantages of the waqf-system are many. It allowed the huge accumulation of estates without proper effective management with the result that there was much corruption at all levels. Buildings fell into decay; no one attempted repairs because of the pressure of the demands for funds on the part of the usufructuaries. The soil became neglected and the size of estates diminished. Peasants and beneficiaries became lazy and indolent; the indebtedness of the cultivators often embarrassed the directors of the waqfs. Many men joined the ranks of the unemployed and lost all interest in work because of the fact that all their

> funds were tied up in this manner, thus taking away all initiative. (26)

Almost all scholars ascribe the cause of such failure to (1) the perpetuity and irrevocability of properties; to the extinction of the founder's right,[27] (2) to the role of the nāẓir or mutawallī; the guardian or the trustee of the waqf, who has no stake in running the waqf property. The lack of incentive among these trustees and the successive beneficiaries, resulted in a bad state of disrepair and maintenance.[28] A. Fyzee claims that

> Agricultural land deteriorates in the course of time; no one is concerned with keeping it in good trim; the yield lessens, and even perpetual leases come to be recognized. In India, instances of the mismanagement of waqfs, of the worthlessness of mutawallīs [trustees], and of the destruction of waqf property have often come before the courts. Considering all these matters, it can by no means be said that the institution of waqf as a whole has been an unmixed blessing to the community. (29)

Describing the Waqf institution during the Mumluks' regime, Lapidus reports that the governor, Tankiz, in 727/1327 expelled those living illegally on the premises of schools in Damascus. Tankiz even obliged these illegal occupants, as well as those who used th spaces as storehouses, to pay rent for past occupancy.[30]

An immediate conclusion is that waqfs are indeed torn between the user, who is often poor and does not invest in that property simply because he does not own it; and the controller's interest is not in maintaining the property. Even if he does maintain it, he may make minimum improvements. To name one incident, al-Wansharīsī (d. 914/1508) documented a case in which a house was endowed for the benefit of a mu'adhin (who calls for prayer); another for a man who sweeps the mosque. The two men exploited the properties without maintaining them. The properties were so damaged that a great deal of repair was required.[31]

The first personal experience I had with waqf is when I visited my grandfather's rubaṭ (a waqf intended for the use of a specific group of people that was built by his father) in Mecca. It was a shocking experience. The rubaṭ is a four storied courtyard building, with twenty rooms on each floor. It was built in the thirties (1353H). It was apparent that the founder of this waqf was very careful and much involved in its construction. The basic structure of the complex is well built, with thick stone walls, steel beams, and with stone-paved floors. Expensive materials and skilled labor were invested in building that rubaṭ. Yet it is shocking how badly it is maintained. With only a little effort and money such a building would be a pleasant place to live (see photos no. 1 & 2 for an external and internal view). I asked: "Grandfather, why don't you improve this place?" He answered, "Well! You know that I live in Taif. It is hard for me to take care of it, so I lease it to Mr. Ḥarīri." I then asked, "Why does Mr. Ḥarīri not do it?" He answered, "You do not understand; this is a waqf. He [Mr. Ḥarīri] leases some floors to a Muṭāwif [a pilgrimage guide] who leases the rooms to the pilgrims. You know that these pilgrims who reside in rubaṭ are often poor. This rubaṭ is intended for poor people, thus it has to be inexpensive because we have to fear God. Also, why should we improve it? Since the pilgrims are here only temporarily, they may misuse and ruin the building."[32]

During the summer of 1983 my grandfather asked my brother to travel to Mecca and bring him the unpaid balance of that year's rent from Mr. Ḥarīri. I traveled with him. This was during the last ten days of Ramadan, when Mecca becomes very crowded. Mr. Ḥarīri leased 35 rooms to pilgrims from Morocco. Each room rented for 8,000 to 10,000 Saudi

Riyals[33] for ten days and was shared by three to five pilgrims, depending on the room size. He (Mr. Ḥarīri) rented each room from my grandfather for 3,000 S.R. per year on the condition that he would maintain the building, supply water, etc. When we approached Mr. Ḥarīri, he responded that he had spent the balance due to tile the walls of the bathrooms. He gave us a warning document which he received from the inspector of the Ministry of Pilgrimages and Endowments, requiring the trustee of the rubaṭ to rebuild and maintain specific parts of the rubaṭ.[34] One of the requirements was to repaint the whole rubaṭ, inside and outside, with white paint. Mr. Ḥarīri had repainted the outside only and tiled the walls of the bathrooms on the ground floor only. He claimed that the balance due was already spent, yet he did not have any documents to prove his claim except one for 4,000 S.R.[35]

This is a clear case of "cross purposes," where the founder of the waqf invested much, seeking God's mercy, while the nāẓir (guardian) appointed a manager who leased some rooms himself and others through a muṭāwif who leased the rooms to pilgrims who did not much care. At the time, I convinced myself that this was a special case. However, in Taif in another rubaṭ (Rubāṭ al Bukhariyya) I saw the same phenomenon, although the users are there permanently--elderly people. I asked the manager about improving the building. His retort was, "Those people are living for free." I questioned the residents. Their answer was that they do not own it so they do not invest in it. In fact, a quick review of the legal opinions [Fatāwa] of ''Ibn Taymiyyah or al-Wansharīsi regarding waqfs will reveal the sad state of some waqf properties.[36] For example, jurists of Cordoba were asked about their opinion regarding the demolition of houses that were near the great mosque of Cordoba. Those

houses were dedicated for the benefit of the poor, who resided in them. Other cases of oppression are reported. For example, a ruined house that is abutting a mosque became, over time, a dumping place and affected the walls of the mosque.[37] This form of submission is, indeed, dispersed. Responsibility is dissipated. The property is not owned by any human, the controller is indifferent, and the user merely consumes. It is no wonder waqfs deteriorate over time, getting worse and worse. The situation is indeed one of three divergent parties sharing one property.

Waqfs also provide food, lodging and clothes for their inhabitants. This arrangement is illustrated by the wit who wrote on the wall of a mosque which had been dedicated under a pious foundation for the purposes of prayer only: "Why should a mosque be built without the provision of bread?" To this another added, "It was built for prayer, O shameful one." Whereupon the bread-seeker added, "Prayer can be performed in the open air; may the mosque fall into ruins upon the founder's head."[38] The waqf as an insitution does not always function badly.

> One must not lose sight of the very great service the waqf-institution did for the Muslim community. The Empire had no department for public works; bridges, roads, roadhouses, caravanserais, mosques, schools, libraries, etc., all owe their existence entirely to the waqf. Hārūn ar-Rashid's (170/786) wife, Zubaidah, for example, built all the roads and roadhouses from Baghdad to Mecca for the use of pilgrims entirely out of a waqf established by her. The whole system of Muslim education depended entirely on the waqf. . . No less than block forty college-mosques were in use in Cairo when the French occupied that country at the end of the eighteenth century; there were three hundred elementary schools in the same town, one was established for 400 boys and 400 girls. . . All these places provided food, lodging and clothes for teachers and students. (39)

The question is, why are waqfs in various conditions of decay? Some waqfs deteriorated, others did not. To find out, we will trace the origin and rules of the waqf.

The principal justification for establishing waqfs is to please God. It derives from the belief, which is clear in the Prophet's tradition, that: "Man's deeds come to an end with his death, and only three things do not pass away from the world with him: (1) charity, which endures forever, (2) knowledge, which benefits others, (3) and a virtuous son who prays for him."[40] This tradition stimulated some Muslims to transfer most of their property to waqfs. However, the Prophet primarily encouraged the Muslims to bequeath their properties to their heirs and heiresses. Muslim jurists agree that one should leave his inheritors wealthy rather than poor. This is clear in the Prophet's tradition, as narrated by Sa^{c}d bin Abī Waqqās, who asked the prophet while he (Sa^{c}d) was sick, "May I will all my property (to charity)?" The Prophet said, "No." Sa^{c}d asked, "Then may I will half of it?" The Prophet answered, "No." Sa^{c}d said, "One third?" The Prophet answered, "Yes, one third. Yet even one third is too much; it is better for you to leave your inheritors wealthy than to leave them poor, begging from others. Whatever you spend for God's sake will be considered a charitable deed, even the handful of food you put in your wife's mouth."[41] At that time Sa^{c}d had only one daughter. Many verses of Qur'ān and many traditions of the Prophet support the giving of ṣadaqah[42] (a charity that is owned by the donee). There is no evidence of the waqf institution in the Qur'ān. Some Muslim jurists trace the institution to the Prophet, although the support for waqf institution in the Prophet's tradition is slight compared with other things. 'Ibn ^{c}Ābdīn, from the Ḥanafi rite, states that "establishing rubaṭs, schools, and other charities that did not exist in the early Islamic periods is considered a desirable innovation [bid^{c}ah mandūbah]."[43] But it is mentioned by the legists that the

companions of the Prophet and the Caliphs used to establish waqfs. The earliest waqf mentioned by the legists is that of ᶜUmar (d. 23/644) the Second Caliph. 'Ibn ᶜUmar narrated that "[w]hen ᶜUmar got a piece of land in Khaybar, he came to the Prophet saying 'I have got a piece of land, better than which I have never got. So what do you advise me regarding it?' The Prophet said 'If you wish you can keep it as an endowment to be used for charitable purposes.' So, ᶜUmar gave the land in charity (i.e. as an endowment) on the condition that the land would neither be sold nor given as a present, nor bequeathed, (and its yield) would be used for the poor, the kinsmen, the emancipation of slaves, Jihād, and for guests and travellers; and its administrator could eat in a reasonable just manner, and he also could feed his friends without intending to be wealthy by its means."[44]

It seems that the previous tradition is the basis of interpreting the laws of waqfs.[45] For instance, can the founder of a waqf have the usufruct of his endowment? From the previous tradition Al-Bukhāri concludes: "ᶜUmar stipulated that the administrator (trustee) of an endowment could eat from the yield of the endowment. The founder of an endowment or somebody else may be the trustee of the endowment. Similarly, if one offers a Badana (a camel for sacrifice) or something else in Allah's Cause, he is allowed to benefit by it in the same way as others benefit by it even if he did not stipulate that."[46] The tradition and the interpretation suggests that the party which controls can, in fact, benefit within limits from the waqf.

For whom should a waqf be donated? Jurists agree that the priority for relatives, according to the Prophet's action regarding Talḥa's charity.[47] But the donor is free to select any person or group of

persons to enjoy the usufruct of that property. A waqf can be in favour of relatives, the poor or all Muslims depending on the stipulation made originally by the donor.[48] The profits of a waqf can even be donated to institutions. Al-Azhar University, for example, has a tremendous income from waqfs' usufracts. The Rector of Al-Azhar, for instance, had at one time a special usufruct for his mule, another for its fodder. Later in the twentieth century a special fatwa was produced to change the usufruct from a mule to limousine.[49] In short, there are no rules regarding waqfs beyond those established by the founder of a waqf to the exclusion of selling. A case is reported in which the benefits of a house are given for Al-Qarawiyyīn great mosque in Fez. The house deteriorated. The trustee wanted to sell it, but was prevented from doing so and was asked instead to improve it.[50] Furthermore every object that is useful can be dedicated as waqf including gardens, houses, shops, working cattle, war horses, even Qur'āns for reading in mosques.[51] Most jurists agree that if a waqf is damaged and consequently its usufracts diminish, as when a house collapses or a mosque becomes too small because of the growing number of people praying, then parts of it may be sold to fix the rest or even all of it, to be replaced by another.[52] Even its function can be changed. For example, a case is brought to the jurist Mūsā al-ᶜAbdūsi about the ablution place that was built around the great mosque -- possibly in Fez. The ablution place gradually fell into ruins to the point where it was totally useless and the stench annoyed those praying. It was transformed into shops according to the fatwā (legal opinion) given by al-ᶜAbdūsi.[53]

The previous description is an attempt to illustrate that waqfs can be controlled by the donor and his successors. They can manipulate the

waqf as long as they do not intend to become wealthy as a result. For me this is the crucial issue for waqfs. Those who control a waqf, if they fear God and want credit for charitable deeds, will act, in fact, as if they seek profit. They will improve it and maintain it. But if they do not fear God, as often is the case, and seek mundane profit, then their actions are not of interest of the waqf. In the first case we have a party that controls the waqf and acts to improve the property. This party is acting according to the owner's desire (God). In this case it logically does not belong to this form of submission (dispersed) because the controller (trustee) may be seen as an employee of the owner, i.e. the waqf is shared by two parties, one party uses, the other controls and owns it (Diagram 4). In the second case we have a party that controls a waqf not necessarily according to the owner's desire (God). Now we have three independent parties, possibly with divergent interests, sharing a property which is thereby dissipated. The same notion is applicable to the users. We may think of a waqf controlled and used by two different parties who fear God and consequently act and use the property according to God's rules. In this case we may assume that one party owns, controls and uses the property (Diagram 2). The waqf institution, in fact, may take all different forms of submission depending on the diversity of the parties. If the people fear God, the waqf institution is a blessing to the Muslim community. If they do not, then it is a disaster. In conclusion we may say that a property shared by three disparate parties can spell disaster.

THE TRUSTEESHIP FORM OF SUBMISSION

This form of submission is very unusual, and rarely exists. When it does, it is unstable. In this form we have two parties sharing the property. One controls it only, the other uses and owns it, like a resident of a house who owns it and yet cannot make decisions about it. This is, indeed, a very unusual situation. This form is known among Muslim jurists as ḥijr. Ḥijr literally means "prohibition" or "prevention;"[54] and legally means preventing a person from manipulating his own property for some reason.[55] The concept of ḥijr is an application of the Qur'anic verse:

> And give not to the foolish your property which Allah has made for you a means of support; but feed them there-with and clothe them and speak to them words of kind advice * and prove the orphans until they attain the age of marriage; then, if you find in them sound judgment, deliver to them their property; and devour it not in extravagance and haste against their growing up. And who is rich, let him abstain; and whoso is poor, let him eat thereof with equity. And when you deliver to them their property, then call witnesses in their presence. And Allah is sufficient as a reckoner. (56)

Since this form of submission is rare, and few incidents are documented, it was delineated by Muslim jurists through the interpretation of principles. All jurists classify ḥijr (prevention) into two types.[57] First, trusteeship to protect the owner himself; such as preventing a child, an insane or a prodigal [safīh] person from mismanaging his own property. The jurists agree that children and insane persons may not be capable of running their own property. Thus, as a protection to themselves and society, properties have to be controlled by others. However, issues have been raised regarding the limits of prodigality. Is prodigality extravagance on what is not needed [tabthīr] or unreasonable lavishness on what is necessary [isrāf].[58] Most legists

consider both -- tabthīr and isrāf -- as prodigality,[59] even were a prodigal person to spend all or most of his money in erecting a mosque,[60] because such spending would harm the person and eventually leads to his insolvency, and reliance on the treasury of Muslims [bayt al-māl]. All jurists except Abu Ḥanifa, agree that if a person becomes safīh (prodigal), the authority should assume trusteeship over him, regardless of that person's age.[61]

The second type of trusteeship is to protect others. In this type the authority uses the right to control the actions of insolvent individuals and mortgagers to protect the creditors and mortgages.[62]

In both types[63] the owner of the property may or may not be the user of his property, but he does not control it. If neither he nor the trustee uses the property then the property is in a dispersed state, since it is owned by one party, controlled by a second, and used by a third. If the property is used by the owner, then it is in a state of trusteeship. In all cases, eventually the property will be transferred to another form of submission. The orphan will ultimately take control of his property; the insolvent will buy back his debt or lose his property. The mortgagor will regain control of his property or lose it. And eventually the safīh who does not change his attitude, or the insane who does not recover, will lose ownership -- through death, for example -- to others. This means that this form of submission will be replaced by other forms. It is unstable, and always a transitional form of submission. The trusteeship form involves a vigilant attitude between the involved parties. Each party patiently waits and attentively watches the other party. A good traditional example is given by 'Ibn Ishāq, who relates that Al-Qāsim b. Muhammad (d. 101/719) used to run the property

of an old man from Quraysh[64] who was insane. The old man told al-Qāsim, "Give me my property, there should be no custody of men like me." Al-Qāsim said, "No." The old man threatened to divorce his wife and give away all his possessions -- to be owned by others -- if al-Qāsim did not give him his properties. Al-Qāsim said, "How can I give you your property while you are in this condition?"[65] 'Ibn Ishāq bemoaned, "It was very shameful for a man to be in custody."[66]

The party that owns and uses a property will try to eliminate control by the other party. In some cases, the party which governs may try to extend its control for longer periods of time. The trustee of an orphan's property who benefits from such trusteeship may try to extend the control, but the orphan is watching and waiting. In short, this form of submission is always temporary, compared to all other forms; and consequently, it will, inevitably, change to other forms of submission. As we will see, intervention by the Muslim authority, in all other forms of submission, was minimal compared to intervention in this form. What jurists debate with this form is the limit and timing applicable to the authorities' intervention. According to the jurists, this intervention is always necessary and is not destructive. External intervention by the party which controls will be terminated sooner or later; thus this form of submission is always temporary and is a transitional state.

THE PERMISSIVE FORM OF SUBMISSION

In this form of submission, two parties share a property; one owns and controls it, the other uses it (Diagram 4.) It can be leased like a house or rented like a passageway (by a neighbor), or like a place in a mosque given for free. It may be small in size, like a spot in a party

wall, or as large as a palace. It can be built like a room or unbuilt like a yard. It may be an object such as a tool, or a site such as an apartment. In short, this form of submission can be easily classified into categories depending on the observer's interest. This was the case among Muslim jurists. They dealt with it in different sections of the law such as leasing, easement rights ['irtifāq], "privatation right" ['ikhtisās], loans of objects [ᶜāriyya].

The concept of having to furnish elements to utilize a property will be helpful in establishing logical classification for this form of submission. The two basic types in this form of submission in terms of users and the furnishing of elements are (1) the type where the party <u>will not</u> bring elements in order to utilize the property, such as a passageway used by a neighbor to reach the street, and (2) the type where the party <u>will</u> furnish elements in utilizing the property, e.g. a leased house to which the tenant will bring furniture. Here, some elements are needed for the utilization of the property. We will examine this form of submission based on the previous classification, bearing in mind that these two types were often classified into more than two by Muslim jurists and observers, causing confusion since similar terms were used differently by various Muslim jurists.

Here we must pause and introduce a concept that is necessary in organizing our inquiry and facilitating communication. The concept of levels and dominance in the built environment has been developed by N.J. Habraken. His theory includes that we can observe different "levels" through change.[67] For example, the change of furniture in a room will not disturb the walls, but the change in wall locations might disturb the furniture. If the wall and the furniture are controlled by different

parties then the party that controls the wall is dominant over the party that controls the furniture. The physical form imposed a dominance relationship between the two parties, as they control elements at different levels. The party that controls streets dominates the parties that control dwellings in the block, because a change in street direction or width could disturb the dwellers, but not the reverse. Dominance between parties can occur also if two configurations at the same level have a certain position to one another. An example is the flow of water from the municipal pipelines to the dwellings. Although the pipelines may not be physically different, and are at the same level, the municipality will be dominant because of its position in the network. Now we will investigate the permissive form of submission.

Servitude

The first type is when the party which uses will not furnish elements to utilize the property. This type is basically the easement right, which is a form of servitude [ḥaq al-'irtifāq]. Careful observation of this type will help us to understand -- in the second part of this thesis -- the structure of the traditional built environment from a territorial point of view. Easement right is defined as "an exclusive benefit of an immovable over another [adjacent] immovable in which the two immovables are owned by different parties, while the benefit belongs to the first immovable even if its owner changes unless it was relinquished through conventional transaction."[68] Al-Qābisi's definition of right [ḥaq] is: "It is the private right of the personal benefit and servitude,[69] and it is not a complete manipulation . . . such as the passage of a house, the gulley of water and the path of the road. The

person may benefit from the flow of his water on the neighbor's roof and the path of his house [through the neighbor's house]; and he [the user] may not sell this right or give it as a gift to others."[70]

From these definitions we may recognize, in principle, three domains: 1. The property which provides the servitudes; 2. the property which needs the servitude; 3. the overlapping part between both properties which is owned and controlled by the owner of the property that provides servitude and used by the owner of the latter. Since the two properties will belong to two different parties, the relationship between the two parties is one of dominance and subordination due to their relative positions. The owner of the property that provides servitude in practice is dominant over the latter who needs the servitude. Logically the dominant party can be very destructive to the dominated one by exercising its ability to deny use. Since both properties are of the same level and one became dominant to the other merely because of its position, the servitude, therefore, was recognized as a right by Muslim jurists, to eliminate or ameliorate such dominance between two parties operating in the same level. To give a case[71] which illustrates the point, there was a man, ad-Ḍaḥḥāk, who wanted to run a stream through the land of another, Muḥammad bin Maslamah, who refused to allow it. ad-Ḍaḥḥāk brought his suit to ᶜUmar (the second caliph d. 23/644). ᶜUmar ordered Bin Maslamah to allow the stream to run, but, again, he refused. ᶜUmar asked, "Why do you withhold such benefits from your brother, which would benefit you also, since you drink from it, and it does not harm you?" Bin Maslamah answered, "No, before God, [I will not]." ᶜUmar responded, "Before God, he will run it [ad-Ḍaḥḥāk's stream] even [if it is] on your tummy."[72] Although this incident mean that a

property owner will be forced to allow neighbors to pass through his property, many jurists do not compel a party to allow his neighbor to pass through. The Shāfiᶜi jurists, for example, comment that, in this incidence, aḍ-Ḍaḥḥak had the right of servitude.[73] Furthermore, the right of servitude may not be established without the owners' consent.[74]

The overlapping domain between the two properties was not only recognized by all Muslim jurists as a right that may not be hindered by the dominant party, but some go further so that the dominated party's property becomes an encumbrance imposed upon the dominant party's property. For instance, Saḥnūn (who was the judge of Qayrawān, d. 240/854) asked 'Ibn al-Qāsim "if a house is inside the other, (one house surrounds the other), and the residents of the internal house have the right of way within the external one, and the owners of the external house decided to relocate or change the position of the door, while the owners of the internal house objected, can they relocate the door?" 'Ibn al-Qāsim answered, "If the relocation is a simple one and will not harm the internal owners, then they should not be restrained, but if the relocation is radical, such as shifting the door to the other side of the house, then that can be prevented if the internal owners object."[75] 'Ibn ar-Rami (d. 734/1334) reports a case in which a man had an orchard behind another person's orchard. The owner of the external orchard, wanted to wall his property and erect a gate, while the owner of the internal orchard had the easement right through the external one. The opinion of the jurists was that such a wall could not be erected without the internal owner's consent, because the internal owner would no longer have the freedom to pass. If he were to come in at night, they might not open the gate for him.[76] In another case in Cordoba, (444/1052), a man had an

orchard that was surrounded by fallow lands owned by different people. The owner of the orchard used to reach his land from different directions, i.e., he did not use a specific pathway. The owners of the external land wanted to build a wall on their lands. 'Ibn al-Qaṭṭan's opinion was that they would be prevented from doing so unless they all agreed, and unless they created for the internal owner a passageway from the external land and according to the orchard's owner desire.[77] These cases denote that regardless of any change in the external property, the servitude right may not be hindered. They illustrate the fact that the dominated party's right of servitude is well recognized. Hence, dominance is greatly minimized, if not eliminated. This brings stability to the internal territory.

The mechanisms which cause the formulation of the overlapping domain between two properties are three. The first is a subdivision, in which a property is subdivided and a part of the subdivision needs an access. To name a case, al-Yaznāsi was asked about two brothers who inherited land and subdivided it in which one share had an access and the other did not. The subdivision agreement did not deal with the servitude right. Later the owner of the external part denied the easement right. Al-Yaznāsi ruled that since the external owner did not stipulate the denial of easement right, the internal owner will have the right of servitude.[78] Subdivision also resulted in overlapping domains other than circulation; the gulley of waste or rain water are other examples.[79] We will further elaborate on the overlapping domains resulting from subdivision in chapter seven.

The second mechanism is incremental growth, in which a property proceeds others by establishing its path, for example, and then other

properties have to respect this path. This will be explored in chapter four.

The <u>third</u> is conventional transactions. All rites approve selling, renting or giving easements rights. A person can sell part of his property to be used by his neighbor as a passageway, a gully of water or even a stream through an orchard. As long as the two parties agree about its position and its dimensions, it is approved.[80] In such cases, the property which has been given away is transferred from one owner to another, hence it is not a servitude. But if the owner sells, rents or gives the easment right as a gift without giving away the ownership or control, then it is an easement right. "Ibn ᶜĀbdīn, for example, relates that an owner can sell the right to pass through his dwelling to others without physically selling the passageway [raqabat at-ṭarīq]. The reverse is also possible, in which the owner can sell the passageway physically, while keeping for himself the right of passage [ḥaq al-murūr].[81]

If a party -- user -- has the right of servitude, is it possible to sell it to others, and not to the owner of the property? In other words, if A has the right of servitude in B, can A sell such right to C and not A? Differences occur among the Muslim schools of law regarding the value of the easement right. The Ḥanāfi and Zaydi schools of law do not consider the easement right as having material worth (māl) thus it <u>cannot</u> be sold or leased.[82] Other schools of law -- Shāfiᶜi, Ḥanbali, Māliki and Imāmi -- consider the easement right as having material value, therefore it <u>can</u> be sold and leased.[83] The second opinion encourages the involvement of a third party. The two opinions will have different impacts on the overlapping domain.

In the case of easement right, we were dealing with a property between two parties operating at the same level. This type also exists between two parties operating at different levels, such as a street controlled by the community collectively or the authority, where an individual is allowed to use it without bringing elements. This is known as allowing or sufferance ['ibāḥah]; which is the permission the authority gives to individuals to use a mosque, or a bridge, in which the user has the right of the benefit for himself only as long as he is there.[84] For example, he cannot reserve a space in a mosque for his friends.[85] There the principle is "first come first served." In this first type, usages are temporary such as passing through or praying. Now we will examine the second type, which is satisfies occupancy of longer duration.

Leasing

In this type, the party that uses a property will bring elements to avail themselves of its use. Its essence is the permission of the owner to others to utilize his property. It is attained mainly through agreements such as leasing or lending ['iᶜārah], which is free. It is known among Muslim Jurists as tamlīk[86] al-manfaᶜah -- the action of allowing others to own a usufruct -- which is "the permission (by the owner) to a person to utilize, or permit others to utilize, property; for free, as in borrowing, or not, as in leasing . . . it is an absolute ownership for a specified period according to the agreements in the case of lease, or as conventionally established, in the case of borrowing."[87]

We will examine the leasing principles to elucidate the relationship between the owner who controls and the one who uses a property. Hopefully, this will shed light on the physical state of the property.

Interestingly, renting ['ijārah] among Muslim Jurists, is considered a selling transaction. 'Ibn Qudāmah (d. 620/1223) states that renting is "a kind of selling since it is the selling of the benefits."[88] "In general, the lessee will own the benefits through transaction as the buyer owns the object through selling. And the ownership of the lessor will be dropped as the ownership of the vendor is passed on."[89] As with selling, leasing is a transaction between two parties that may not be terminated by one party without good reason.[90]

The basic principle of selling is the agreement between two parties, and the same principle applies to leasing. Jurists stipulate that all items of a lease should be clear to both parties.[91] The principle of considering the lease as a selling transaction means that the party which uses -- the lessee -- will have the responsibility and freedom to use the property exactly as the owner does. Such responsibility is gained by the user party through agreement. How do agreements relate to responsibility?

The principle of responsibility in general is: the lessor is responsible for what makes a property usable, such as walls and doors. 'Ibn Qudāma relates that, it is the responsibility of a lessor to "rebuild the wall if it collapses [while the lessee is in residence], exchange a wooden beam if it is broken, tile the bathroom, fix the doors, and the gulley of the water, since such repairs keep property usable, while what makes a property functional, as buckets and robes . . . is the responsibility of the lessee. While neither of them [lessor and lessee]

is responsible for the complementary and beautifying things."[92] It is considered illegal if a lessor stipulates that the lessee should make repairs at his own expense, unless it is deducted from the rent, since such repairs are the responsibility of the lessor.[93]

As mentioned earlier, leasing is a transaction that may not in general be terminated by either party, but in the case of disputes between the two parties regarding the continuation of the lease, does the lessor or lessee have the right to terminate the lease? The concept of usability is a decisive factor in such cases. 'Ibn Qudāmah relates that if a wall falls down in a rented house or is threatening to collapse or the water in its well is depleted, or there are other similar defects, then the lessee has the right to terminate the lease.[94] When a cat fell into a well in a leased dwelling in Cordoba it was ruled that the lessor should pick it up, as the house would not function without the well being clean.[95] Jurists agree that if the lessor repairs such defects then the lessee has to continue with the lease because the property now is usable. Interestingly, deficiency of privacy is considered as deficiency of usability. If a neighbor builds a room or creates an opening that would affect the privacy of the lessee, then the lessor has to prevent such exposure or the lessee has the right to terminate the lease.[96] However, the lessor is not compelled to fix such defects.[97] But if auxiliary elements are defective--which does not damage the use of the property--then it is not the lessor's responsibility.[98]

Interestingly, all the cases pointed out by Muslim jurists involving the concept of usability and resolution of disputes deals implicitly with the different levels of the physical form. The distribution of responsibility between the tenant and lessor is based on the

corresponding physical level, i.e. the owner is responsible for providing functioning walls, roofs, columns, beams, stairs, doors and windows.[99] The tenant is responsible for maintaining them physically. In principle, all disputes between the lessor and the lessee are resolved by examining the state of the corresponding physical levels. 'Ibn ar-Rami (d.734/1334) reports that if the lessor and lessee have a dispute at the end of the lease, in which the lessee claims that he has added certain elements to the property, while such claims are denied by the lessor, then in such cases elements that are part of the building will belong to the lessor, while that which is not part of the building, such as doors or bricks placed in the yard, will belong to the lessee.[100] An interesting difference of opinion arises regarding the water collected in a cistern [mājil]: who owns it, the lessor or the lessee? According to the principle of usability, it belongs to the lessee. Meanwhile, according to the principle of corresponding physical level as determinant, it belongs to the lessor. The jurist 'Abū Muḥammad ᶜAbdul-Ḥamīd held the opinion that such water belong to the lessor. If a person leases a house he is, in fact, leasing the walls to be used for residency; the water is not involved neither legally nor conventionally. On the other hand, other jurists were of the opinion that the water belongs to the lessee for the reason that the water is considered a necessary benefit. 'Ibn ar-Rāmi relates that such dispute is decided according to the customs of each town.[101] Other than this unique case, all disputes were resolved by examining the corresponding physical level. For example, the judge Saḥnūn, when he was a student, asked, "If I rented a house, do I have the right to put whatever I like in it and bring beast animals . . ." 'Ibn al-Qāsim (d. 191/807) answered, "Yes, as long as no

damage is done to the building."[102] 'Ibn Qudāmah states, "Whoever rents a house for residing, he may reside in it, and others may reside with him if he wishes, as long as such residency does not cause more damage than that caused by him [the lessee] . . . and he may not store heavy things in upper floors that would damage the wooden beams, he also may not do anything that damages the building unless he stipulates [he will do] it [at the outset of the lease]."[103]

Furthermore, the condition of the building elements physically overrules the stipulations by the owner. For instance, the judge Saḥnūn inquired about a case where a person leased a room(s) in a house and the lessor -- who lived in the same house -- stipulated that the lessee should reside by himself only. Later the lessee married and brought his wife and a servant to reside with him. 'Ibn al-Qāsim answered, "If there is no damage for the lessor, he [the lessee] should not be prevented; but if such thing caused damage for the houseowner, then he should be prevented. However, it is possible that the owner's stipulation had some reason such as the wooden beams being weak and if the lessee resides with others, the room may collapse."[104]

Meanwhile, the contract stipulation by the lessee overrules the physical condition of the building elements. For example, Saḥnūn asked about the man who rented a shop and decided to change its function and become a bleacher or miller or blacksmith. 'Ibn al-Qāsim answered, "If such an action would damage the building elements [bunyān] and harm the shop, he [the lessee] may not do it [change the function]. And if it does not damage the building elements, then he may do it. But if the lessee stipulated that he [the lessee] would be working as a bleacher, blacksmith, miller or performing a similar function, and such works would

damage the physical elements, he [the lessee] may do so anyway. The owner does not have the right to prevent the lessee since he [the lessor] agreed at the outset [to the arrangement]."[105] 'Ibn ar-Rāmi relates that if the lessee stipulated the use of the property as a furnace, and then such use burns the property, he is not liable.[106]

Summary Statement

As a summary statement about the first type of permissive form which is primarily the easement right, one may say that it is basically an agreement between two parties. The dominant and dominated parties have to compromise, yield and agree. The dominated party has to have access through the dominant party's property. It has to accede because of its needs. The dominant party has to provide such service, whether it likes it or not, since access is recognized as a right of the dominated party by the law. It has to acquiesce, whether the easement right is considered a material value or not, or otherwise be compelled to do so. They have to be in accord. The two parties are forced to communicate because of their relative position in the physical environment. This is clearly a type where the physical environment influences the relationship between individuals. The physical environment effects the social environment.[107] Naturally, it is logical for both parties to want to avoid intervention by outsiders, such as an authority. The dominant party may fear the imposition of servitude right by the authority. The dominated party fears annoyance and retribution by the dominant party. This type is mainly a covenant.

The second type is mainly leasing, which is based on covenant too. At the outset of a lease, both parties are totally free to accept or

reject any item of the lease. But the owner wants the tenant's money, in the case of leasing. He may seek other interests in the case of lending [ᶜīriyyah]. In any case, he has motives for agreeing. The user -- tenant -- needs the owner's property. He should accede also. For complementary interests they will reach agreement.

The Muslim principle of considering leasing as a selling transaction is a simple yet a powerful concept. It grants users a full utilization, as long as they do not damage the property physically. They may even change the function of a property. Under modern contract law, we can imagine, for example, a man who rented a jar which the owner stipulated in the lease was to be used for drinking water by the lessee only. Drinking water from the jar will be the only benefit for the user. Alternatively, under traditional agreements, if the lessee is told that he temporarily owns the jar, on the condition that he should not damage it, then we may expect him to wield it differently; he may use it for transporting, storing, or boiling different liquids. The jar, although not damaged, is then more fully utilized.

The principle of measuring the lawfulness of the user's action relative to the damage caused to the physical form, will contribute to the full exploitation of the property. As we saw earlier, the stipulation of the owner is being overruled by the condition of physical form. On the other hand, the stipulation by the user overrules the condition of the physical form, since it is based on agreement. No regulation is imposed on the user other than the behavioral conventions among neighbors, which has to be followed by the owners, too. This type of permissive form is mainly one of a yielding to agreement between the involved parties. The owner is not compelled to fix damages which affect

the usability, but if he does not, he will lose his customer. Those principles of referring to the physical elements as decisive tools in cases of disputes, provides freedom to both parties, clarifies their limits, and allows them to exploit it.[108]

THE POSSESSIVE FORM OF SUBMISSION

In general, this form of submission is shared by two parties. One uses and controls, the other owns the property (Diagram 5). Control is ordinarily exercised by owners. The association between ownership and control is customarily the natural state of properties. But if the owner is not capable, not allowed, or not interested in exercising control, and control, for some reason, shifts to the users, then we should expect the remoteness of owners from the property which is very characteristic of this form of submission. Owners are remote. Some do not intervene, while others show their existence through rules to be followed by the users who control. The owner who shows lack of control in traditional environments is often the authority, or all Muslims collectively, as with agricultural lands owned by the state, controlled and used by farmers; or markets owned by all Muslims collectively but controlled and used by merchants. To simplify communication I will alternately use the word "possess" to indicate control-and-use, while the "possessive party," the "possessor" refers to the party that controls and uses.

A prominent issue in this form of submission is rules and regulations. Non-intervention by owners, due to lack of interest or feebleness or any other reason, does not grant the user full control. Owners' presence is felt through their regulations. Rules issued by

owners, to be followed by possessors, implicitly means a conflict of interest. If the party that controls and uses acts according to the owner's wishes, the owner would have not developed rules in the first place. The owner's perturbations or desire to regulate, or the users' aberrant actions result in regulations. The relationship between the party that owns and the party that possesses is basically a tug-of-war of regulations. This is especially true if the party which owns is characterized by remoteness as with the state which owns mineral lands. This should not be understood as a prevailing divergence of interest between the two parties. Tug-of-war is the characteristic relationship between the two parties only in cases of conflicting interests. If the party that controls and uses acts exactly according to the owners' desires, then the two parties are in fact one, in which case it does not belong to this form of submission. Thus the relationship between the two parties in this form inclines towards rules, and not agreements as in the permissive form of submission. This does not imply that the two parties never agree -- they may often agree, but extent of agreement is not the issue in this form. Logically, owners may be regulators, but not every regulator an owner.

The fundamental difference between this form of submission and the previous one -- permissive -- is agreements. In the permissive form of submission, agreement is between the owner of a property and the user -- lessor and lessee. The user has no control and no relationship with adjoining properties other than moral and behavioral ones. It is the responsibility of the owner, who controls the boundaries, to agree with neighbors -- e.g. about a party wall in the case of a leased house. In the possessive form of submission, it is the user's responsibility to

negotiate agreement with neighbors. For example, the merchant who appropriates a space in the market will furnish elements to utilize the space. The merchant uses and controls the elements and he may own them. While he controls and uses the space; he is like the lessee of a house who brings elements to utilize it. The elements in both examples may be of the same level, and both are owned and controlled by the user. The difference is that the lessee must agree with the owner and not with neighbors, while the merchant must obey the owner and agree with the neighbors. In terms of physical elements they are very similar, but in fact they belong to two different forms of submission.

Any property may fall into this form of submission. The prevailing types in traditional Muslim environments are agricultural lands, mineral lands and appropriated spaces, as in streets or markets. We will examine two of these types briefly.

<u>Agricultural Land</u>

Agricultural land in general is dealt with in two major sections of the sharī^{c}ah:

1) Where a property is owned by individuals and exploited by others.

2) Where the property is owned by the state and exploited by individuals.

1) This first type is known as muzara^{c}ah, mughārasah, mukhābarah and musāqāt.[109] It is generally a contract between the owner of the tillable land and the tiller of the soil. Depending on the nature of the contract, the user's control varies from complete control as in muzāra^{c}ah, to that of being merely an employee as in Musāqāt. In fact, such contracts may or may not belong to this form of submission,

depending on the degree of control accorded by the contract. Most of these contracts[110] of tenancy were subject to debate among Muslim jurists. Depending on the contract's nature, some jurists approve, others disapprove of them. Since the disadvantages of speculative dealings exists if the owner does not share the risk,[111] and this is illegal in Islam.

The opinion of those opposing these contracts relies on a few traditions in which the Prophet prohibited such leases. Rāfi^{c} bin Khadīj states, "During the time of the Prophet, we used to lease land for cultivation and to fix one-third or one-fourth of the corn crops as the rent of the land. One day one of my uncles came and said, 'The Prophet has prohibited us from this business which was profitable for us, but obedience to God and his messenger is incumbent on us. He has prohibited us from renting the land on a rent of one-third or one-quarter of the corn crop and has ordered that the owner should either cultivate the land himself or should give it to others to cultivate. The Prophet had disliked giving lands to others on rents.'"[112] Other traditions encourage the owner of a land to give it free to other Muslims if the owner is not capable of cultivating it himself.[113]

The tenets which approve such contracts rely on the practice of the Prophet and his companions of leasing lands, especially in Khaibar.[114] 'Ibn Qudāmah, for example, concludes that those traditions were just pieces of advice which the Prophet in his characteristic manner used to give as a charity and benevolance.[115]

The conclusion that can be drawn from opinions opposing contracts is that private investment in land should be restricted to that which the individual is able to cultivate himself. It also implies that excess

lands have to be distributed among those who are landless. H. Dunne concludes that "Islam opposes the prevailing capitalist feudalism which permits the absolute private ownership of land, just as it opposes atheistic communism, which calls for state ownership of land . . . the individual should own as much land as he can cultivate and that the excess should be given free of charge to those who are landless."[116]

The term "contract" implies agreement between the two involved parties, which is not characteristic of this form of submission. As mentioned earlier, this type may, in fact, take any form of submission depending on the nature of the agreement. In musāqāt, where the individual is hired to irrigate only, one party -- the owner -- uses, controls and owns the property (Diagram 2), while in muzāraᶜah the user actually controls the land according to the agreement with the owner. In this form of agreement the user has full control while the owner shares only in the profits. This topic is a whole separate inquiry in itself, and regardless of the controversy among jurists, the only conclusion I would like to offer is that in principle, more parties are being impelled by law to act. Such action is the natural outcome of encouraging owners to give their lands[117] to others who are landless. That is, the percentage of the parties who control properties in their roles as owners increases because of this principle. On the other hand, the principle of sharing risk between two parties pulls the two parties toward communication and agreement, which thereby reduces the control of owners. In other words, it increases the percentage of controllers in the built environment. Thus, both controversial cases -- where the individual is encouraged to give his land to landless or agreed with others through

contract -- results in increasing the percentage of the controlling parties.

2) Where a property is owned by the state and exploited by individuals, I have argued earlier that as a result of the remoteness of the owner, the relationship between the user who controls and the owner is one of rules and not of agreements. We will now trace briefly the evolution of this type in order to explore the relationship between the two involved parties.

First let us explore the origin of the state's ownership of these lands. How did the properties come to be owned by the state?

It is the duty of Muslims to invite non-Muslims to accept Islam. The first step is to invite them peacefully. Without this formal invitation, any other action is unlawful. If they accept the invitation, they are to be treated respectfully like all other Muslims. The Prophet said, "If the people become Muslims they attain their blood and property."[118] In this case, as all other Muslims, they will own their land and will pay ᶜushr tax -- literally a tenth (or tithe), which is almsgiving, the poor's rate on the fruits of the earth [zakāt].[119] If non-Muslims reject the invitation, then they are called upon to submit to jizyah, or capitation tax. If they accept this, their properties are regulated under the terms of the treaty of peace, and they have the right to exercise their own religion. In this case, they own their properties and they have to buy kharāj -- tribute imposed upon the lands whose inhabitants have been left free to exercise their own religions[120] -- as well as capitation tax. In both cases, the Muslims and the non-Muslims own their property. Although they pay different taxes which will certainly have its effect, the property is not owned by the state. Thus

it does not belong to this form of submission, regardless of the differentiation of tax payment.

If non-Muslims reject both alternatives, then they are to be warred upon, and if they are defeated and their lands are conquered, then their properties are considered ghanīmah -- booty or plunder. In this case, one of the three following alternatives would be used:

1) The non-Muslims would be given back their lands and such lands would be ᶜushri land--subject to tithe. This happened when the Prophet conquered Mecca.[121]

2) The property of non-Muslims would be considered booty, and four-fifths of it would be divided among the participant soldiers [ghānimīn] as in the Prophet's action upon conquering Khaybar.[122] The remaining fifth is retained for the public treasury.

3) The property of non-Muslims would go to the Muslim community, as in the Caliph ᶜUmar's action in Iraq, where it became a model for most -- if not all -- conquered areas. When the Muslims conquered Mesapotamia, the conquerors intended to divide the land among themselves, as in Khaybar. But ᶜUmar said: "Before God, hereafter no land shall be simply a large piece of booty when it is conquered. It must belong instead to all Muslims."[123] A. bin Ḥazim states, regarding as-Sawād land in Iraq, "It [the land] cannot be sold or bought, it belongs to all Muslims."[124] Those lands were allowed to remain in the hands of the previous owners on condition that they pay both the land tax [kharāj] and capitation tax [jizyah]. In which case, the land is owned by the public treasury, but used and controlled by the original inhabitants. The majority of the conquered lands followed this model in which the Muslims collectively --

represented by the state -- owned the land as one party while individuals controlled and used them as a second party.

To explain the relationship between the two parties we will review some statements and cases. Interestingly the land that is conquered remains kharāji land even if the original inhabitants accept Islam as a religion. To illustrate: A man came to the Caliph ᶜUmar and said, "I became Muslim, lift the land tax [kharāj] from my land." ᶜUmar answered, "Your land has been taken by force."[125] Mālik bin 'Anas (d. 179/795) states that "if a non-Muslim in a land that has been conquered became Muslim, his land remains in his hands, he may build on it, and meanwhile he pays the kharāj tax."[126] 'Ibn ᶜĀbdīn states that many companions of the Prophet bought kharji lands and continued paying the kharaj tax.[127] In other words, the state of the land will not change even if it is bought by Muslims.[128] Abu Ḥanīfa (d. 150/767) says, "If a man does not utilize his kharāji land, he will be told to cultivate the land and pay the tax, or otherwise the land will be given to another person to cultivate it."[129] Mālik states that if a person, whether Muslim or not, builds shops or any other building on a kharāji land -- conquered land -- he is obliged to pay the kharāj tax, since he benefits from the buildings as he would from cultivation.[130] In short, the relationship between the party that controls and uses, and the party which owns is one of rules[131] and not agreements.

Appropriating Places

Appropriating places is mainly associated with marketing, where people appropriate places for a period of time to sell goods. They use

the place and control it by bringing elements and furnishing it to function as shops, but they do not own the place. It is known among Muslim jurists as "Privatation Right". Some schools of law use the word haq (right) others use the word 'ikhtisās (privatation) to be distinguished from other rights.[132] 'Ibn Rajab (d. 795/1393) defines it as "the merited person's privateness of benefitting [from the property] and no one has the right of rivaling him, and it is not compensatable or salable . . . such as the ample servitutive spaces in the market [marāfiq al-'aswāq] where the preceding person is merited."[133] Some jurists define this right as the ownership of benefit [mulk al-'intifā^c] which is different from the ownership of a usufruct. The difference is that the owner of the benefit ['intifā^c] only has the right to use the property, while the owner of usufruct [manfa^cah] has the right to use the property and to compensate or sell such benefits to others.[134] "Ownership of benefitting is the permission to a person to benefit by himself only from the property, such as the permission of residing in schools, rubats and sitting in mosques and markets . . . the person who is permitted may benefit only by himself and may not compensate, sell or allow others to reside in such property."[135]

As mentioned earlier, the difference between this form (possessive) and the permissive form of submission is not only the restriction of the user's right of compensation with others, but also in terms of control. Although the user is not allowed to sell or rent such a place, he is nonetheless in control of the place, i.e., he must yield to the regulation that forbids him from renting or selling the space to others, while the party that uses space in the permissive form has the right to compensate or sell usufruct. The user who controls is allowed to bring

elements to utilize the place and negotiate directly with adjacent neighbors, while in the permissive form of submission the owner is the one who has to agree with adjacent neighbors, and the user has to agree with the owner. In the possessive form of submission, the user has to follow the rules of the owner. Such rules are very explicit in 'Ibn Qudāmah's (d. 620/1223) statement, "The streets and the roads in urbanized areas may not be revivified[136] by any person whether it is spacious or narrow, whether it annoys people or not, since it is shared by all Muslims and it relates to their interests, as in mosques. Meanwhile the servitude is permitted in the wide of it [streets and roads] by sitting, to sell, or to buy goods on the condition that doing so does not annoy anyone or harm the passers-by. This [convention] is agreed upon by the residents of all towns at all times without objection, since it is an allowable servitude, and does no harm. Thus it has not been forbidden, just as passing [is not forbidden]. 'Aḥmad ['Ibn Ḥanbal, the founder of the Ḥanbali school of law, d. 241/855] said, 'The first comer to a shop of the market at dawn has [the right to occupy] it until the night, this was the practice in al-Madina market in the past.' The Prophet had said that Minā[137] is the place of occupany for 'first-comers.' [The appropriator of a place] may shade himself, so long as he does no damage to [the place], by using cloth, a straw mat, an awning or other thing, since they are needed [to provide the necessary shade] without harm. And he may not build benches or similar things which obstruct the way of passers-by during the night or the blind during day and night. Since such structures would remain, [the user] could then claim ownership of the place . . . [However], 'Aḥmad said, 'we should not buy from those who sell on the [narrow] roads.'"[138]

The previous definitions and statement elucidate what the user of a place can or cannot do, whether he likes it or not. The spaces in front of shops at the markets are also spaces used and controlled by merchants and owned by Muslims collectively. The same regulative characteristic is evident in 'Ibn al-Ukhuwwa's (d. 729/1329) statement, "Traders must not set out seats or benches in narrow streets beyond the line of pillars supporting the roof of the sūq so as to obstruct the way for passers-by. The Muhtasib should remove such things and prohibit such doings, since it causes harm to the people. Also the prolongation of wooden beams [al-fawāsil], projecting cantilevers [al-'ajniḥah], planting trees and building benches are forbidden in narrow streets. . . ."[139]

An interesting theme arises from all previous legal definitions of privatation right, which is "priorityship," a method in which appropriating a place is based on the capability of preceding others ("first come, first served"). This is the principle in Islamic Shari^c^ah, and it was the practice in the markets at least in the early periods. To name only two examples:

1) The first market in Islam in Medina was based on this principle, where the Prophet chose baqi^c^ al-Zubayr as the site for the market and said "this is your market [sūq] it is not to be narrowed [falā yuḍayyaq, by buildings for example] and no tax is to be collected from it."[140]

2) During ^c^Umar's and Mu^c^āwiyah's reign (d. 60/680) while al-Mughīrah was a governor of al-Kūfah, the appropriator of a place in the market at dawn kept it till night.[141]

The principle of priorityship, in fact, by itself is a rule practiced by the owner of the property, that is, all Muslims as represented by the authority. The nature of the rule is a competitive

one. Appropriators had to compete to claim places, which raised disputes. We should note that those disputes are not between the parties sharing a property, but rather between the parties that control and use adjacent properties. Such disputes were dealt with by Muslim jurists, and some controversial opinions emerged due to the different interpretation of the principles by the jurists. For instance, does the appropriator's right to claim a space end by the end of the day or does it end when he removes his belongings? The Ḥanbali school of law supports the first opinion; their reason is that if a person is permitted to reserve the place until the next day then he, in fact, owns the place, which is not the case.[142] Mālik's opinion is that if a person usually occupies the same place, and such occupancy is well-known to others, then to avoid conflict, the user has the right over others to occupy it. Mālik go as far as to consider that even if such continuous appropriation results in the ownership of the place by the user he should not be prevented, since such appropriation is in the user's interest.[143]

Another issue is whether an appropriator of a place can give the right of privatation to others? If he permits a second person to occupy his place, but meanwhile a third person preceded the second and occupied it, who will have the right of privatation? 'Ibn Rajab (d. 795/1393) states that two opinions are possible. First, according to the principle of priorityship, the third person has the right since he preceded the second. Secondly, if the first person moved temporarily from the place for any reason he still has the right to come back, thus he may allow any one to use his place as if he were occupying it himself. Therefore, the second person has the right of privatation. 'Ibn Rajab himself supports the second opinion.[144]

Previous discussion points out the competitive nature of priorityship. Priorityship not only stimulates parties to act by appropriating spaces and to attempt to extend such appropriation to claim the place, but also it invites intervention by others to resolve disputes. This was a debatable issue among Muslim jurists. Does the governor have the right to intervene in organizing the appropriation of places or not? Can he allot places to individuals? Al-Māwardi (d. 450/1058) relates that "it depends on the ruler's judgment. His judgment may have two possibilities. First he acts to prevent infringement and to stop them (appropriators) from harming each other and to reconcile them in cases of dispute. However, he (the ruler) does not have the right to stir an appropriator, much less to give precedence to one over others. The predecessor has the right. Secondly, he acts as a mujtahid (the person who is capable of interpreting the law) by alloting places to those he thinks are righteous individuals. . . But in both cases he may not charge rent to them."[145] As-Suyūṭi (d. 911/1505) states that if the ruler alloted a place in the street, the allottee has the right of privatation but not of ownership. Even if others appropriated that place during the allottees absence, the allottee has the right to reappropriate that place.[146]

Indeed, the nature of this type of submission invites intervention. This type and the trusteeship form of submission are the only ones -- to the best of my knowledge -- where Muslim jurists did not reject but even supported authority intervention. Although the Prophet prohibited acquiring, building and taxing the places in the market, the market was acquired, built and taxed in the early periods. Al-Hathloul emphatically describes the evolution of markets from unbuilt to built and covered

markets. In al-Fusṭāṭ, buildings were taking place in the market during ᶜAbd al-Malik's reign (65/685-86/705).[147] Al-Balādhuri (d. 279/892) as a historian reported that markets in al-Kūfah during al-Mughīrah's governorship formerly was based on priorityship, which indicates that such method is not practiced in markets anymore.[148] Al-Balādhuri also relates that in madīnat as-Salām or Baghdād, al-Mansūr (136/754 - 158/775) designated al-Karkh as a market and ordered the merchants to build shops and levied taxes on them.[149] During al-Mahdi's reign (158/775-169/785) the market of Baghdād was taxed for the first time.[150] According to al-ᶜAli, the market had, in the past, been inspected by the market inspector during ᶜUmar's reign -- the second caliph. The market inspector did not have much power then, and did not intervene often. Mahdi B. ᶜAbdur-Rahman was the first inspector to have the title of muḥtasib -- apporximately 103/721.[151] Soon the role of the muḥtasib was recognized. Manuals for regulating and organizing markets were developed. Ultimately, markets were owned by individuals. During the Mamluk's reign, for example, some markets were owned by the ruling class.[152] Thus the market as an element, historically, shifted from one form of submission to other forms. In short, the first intervention by the authority is evident in markets. But from 'Ibn Qudāmah's (d. 620/1223) statement, it seems that the practice of appropriating spaces in the streets continued anyway. Aḥmad's (d. 241/855) statement "we should have not bought from those who sell on the roads" denotes that the practice of appropriating places on streets and roads -- not built markets -- was still practiced. Those who appropriate such places may harm passersby, but still they acquire places. The muḥtasib -- as it is evident from all manuals of ḥisba -- is supposed to prohibit them,

otherwise there would be no need for those manuals. The relationship between the party that controls and uses, and the party that owns is, indeed, a tug-of-war, of regulation, and not agreement.

Finally, the places abutting mosques and public building belong to this form of submission and follows the same rules of appropriating places.[153]

THE UNIFIED FORM OF SUBMISSION

In this form, one party owns, controls and uses a property (Diagram 2). Muslim jurists consider this form the most highly desired. Although it is not distinguished by them as a distinctive form, all their actions and interpretation stimulates and consummates this form, as will be seen. At the outset of this chapter, I described the principles in which the concept of controllability and need were the determinants of ownership. I used the ownership of height to illustrate this principle. We also saw how the Islamic Sharī^{c}a recognizes and encourages owners to defend their property. This is applicable to all forms of submission, but it is particularly significant for this form.

As property in this form is owned, controlled and used by one party, then that party does not have to have rules to be followed by controller or user. The owner does not have to watch vigilantly or wait to regain his or her control from the controller. The controller is interested in improving the owner's investment and ameliorating the property to the user's satisfaction. The user does not need permission from the owner or controller to change his environment in order to meet his changing needs. Indeed in this form of submission the three interests coincide in one

party, which is the extreme opposite to the dispersed form of submission in which the three interests are independent and may diverge.

It is true that some property within this form of submission is unsatisfactory by some standards and norms, for example, shabby and badly maintained houses. In such cases, the reason is not one of the relationships between the parties, but instead it is either economical or the indifference of the owner or something else. A dwelling belonging to a poor or apathetic person will always be substandard to others. Let us not mix poverty or value judgments with the inquiry of the different forms of submission. I will further explore this issue in chapter three.

The previous formulation points to an absence of relationships within the property because the property involves a single party; therefore the main relationship of the party that controls, owns and uses a property is with other outsiders. The owner who resides in his or her house has a relationship with his or her neighbors, or society, for example, and these relationships are moral and behavioral ones. The owner may, for example, interact with others regarding the legality of that party's action, for instance, in placing and replacing physical elements. This is not a submission inquiry, but rather an investigation about relationships between properties owned by different parties, a situation which will be explored in part B of this study as we investigate the relationships between controllers. Here I will discuss the mechanisms which encourage the establishment of the unified form of submission and its limitations, such as in the revivification of dead-lands and the parceling of allotments. Then, because of the importance of this form, we will examine it at different levels, as with a house and dead-end streets, for example.

Revivification

The mechanisms that create ownership, in general, are:

1) establishing it through appropriation, which is the logical origin of any ownership.

2) transferring property by selling or giving,

3) continuity through inheritance.[154]

Regarding lands, the first mechanism, appropriation, was essential, since populations and towns were expanding, and lands were often vacant. Not unexpectedly, it has been discussed extensively by Muslim jurists. They recognized unowned and unused lands as dead-lands, and followed certain principles in utilizing them.

Mawāt literally means dead. Regarding property it means unowned and unutilized lands.[155] Ash-Shāfiᶜi (d. 204/819) defines mawāt as "what is not urbanized or built on [ᶜāmir] and that which belongs to it [pasture lands, for example], even if [that land] is abutting urban land."[156] Differences among schools of law exist regarding the abuttment of unutilized lands to urbanized areas. Is it to be considered dead-land or not? Most schools of law consider it as dead-land.[157] Few disagree as Abu Yūsif (from the Ḥanafi school of law, d. 182/798) who defines it as, "Any land distanced from the urbanized areas so that if a man calls out loudly from thence [the edge of urbanized area], his voice cannot be heard from there."[158] A few Ḥanafi scholars -- almost the only ones -- stipulate non-abuttment as a condition for dead-land. In general, lands are considered dead if there is no trace of building or cultivation, if it is not used by the neighboring locality as, for example, a common pasture, burial ground, or as a source of wood or food for cattle.[159] Otherwise, all lands are dead if not owned by individuals.

The custom is that dead-lands may be revived. 'Iḥyā' literally means "life-giving." If a person gives life to a dead-land, he will own it. In other words, controlling and using dead lands brings ownership to the reviver. Dead-lands then fall into the category of unified form of submission. There is ample evidence from the Prophet's traditions, rulers' actions and jurists' opinions to support the principle of assuming ownership of a dead-land by reviving it through cultivation or by building on it. The Prophet said, "He who has utilized ['aᶜmara] land that does not belong to anybody is more rightful [to own it]"[160]. It is also reported that the Prophet said, "The people are God's people, the land is God's land, he who revives a piece of dead-land will own it, and the unjust root has no right."[161] Mālik (d. 179/795) explained, "The unjust root is whatever is taken, or planted without right." He also stated, "[Reviving] what is [customarily] done in our community"[162]. Even A. 'Ibn Ḥanbal reported that the prophet said, "He who revives dead land will be rewarded by God [in the day of judgement]"[163]. A man who had revived dead land came to ᶜAli (the fourth caliph) and said, "I came across a land that was ruined or its [original] inhabitants had left it, and I dug streams and cultivated it". ᶜAli responded, "Eat pleasurably [enjoy it] you are righteous not impious, a reviver not a destroyer."[164] It is reported that the eighth Umayyad caliph, ᶜUmar B. 'Abdul-ᶜAzīz (d. 101/720), wrote to his governor advising him to recognize the dead lands, on the hands of those who revived them, as ownership.[165] 'Ibn Qudāmah (d. 620/1223) adds that "reviving dead lands is the custom in all towns ['amṣār] even if there are differences among jurists regarding its regulation."[166]

Some differences arises among jurists regarding revitalization of unutilized lands that are owned. Such land can be classified into three categories:

1) Firstly, land that is owned by someone through purchase, for example, but not utilized by him. All Muslim jurists agree that such land may not be revived.

2) Secondly, land that is owned by someone who revived it, and it was then neglected and consequently became over time dead-land again. Mālik's opinion is that such land may be revived again and owned by others, whether the original owners are known or not. Abu Hanīfah maintains that if the original owner is unknown, then it may be revived and owned, but if the original owner is known, then it cannot be revived. Ash-Shāfiᶜi (d. 204/819) states that it cannot be revived, whether the original owner is known or not.

3) Thirdly all jurists agreed that if a land is owned and is urbanized by non-Muslims and becomes a dead-land over time, it may be revived and owned, even if there are traces of a building, such as the remains of the Roman empire.[167]

What action is necessary to own dead-land? What is considered reviving? In principle, the action which results in ownership is considered reviving "if it will lead to the conventional use of the intended form of revivification."[168] For example, if the reviver's intention is to reside there then he must erect walls.[169] Al-Māwardi stipulates that the reviver should erect walls and roof "since this is the essence of the complete dwelling that is to be inhabited."[170] If the intention of the reviver is cultivation then he has to supply water in case of dry land, or drain water in case of a savanna. Then he has to

plough the land.[171] In short, reviving is defined in terms of a set of requirements that change as conventions change and those requirements relate to the intended use of the revived land. We will now investigate the concept of allotment and then discuss the limits and effects of both revivification and allotments, since they are similar in most features.

Allotment

'Iqṭāᶜ literally means the act by the ruler of bestowing or alloting a piece of land to individuals. Dead-land may be alloted to individuals to be cultivated or built on; land that is owned by individuals may not be alloted by the ruler for any reason. Allotment is, in general, of two types. The first type is basically one of alloting fiefs to be owned through revival ['iqtāᶜ tamlīk]. The second is that of alloting land with the right of utilization but not ownership ['iqtāᶜ 'istighlāl][172]. In both types the ruler may make allotments to individuals from the dead-lands. In other words, the allotment need not be owned by the state. The ruler, as a representative of Muslims, may bestow allotments from dead-lands. However, lands that the ruler may allot other than dead-lands are the ones conquered or owned by the state. The later is land given voluntarily to the state by the original owners. When the Prophet migrated to Medina, for example, the inhabitants of Medina gave him the lands which they could not irrigate themselves and authorized the Prophet to do whatever he liked with them. Also subject to allotment are lands taken by Muslims through conquest, as were those belonging to the Persian king and his family. These lands were known as ṣawāfi -- literally 'strained or filtered'. Each type of land has been further

subdivided into categories by jurists according to which type could be owned and which could only be utilized without ownership.[173]

Documented examples of fiefs alloted by the Prophet and the caliphs are numerous. To name one example, al-Balādhuri, in his documentary, Futūḥ al-Buldān, cited over twenty seven major fiefs alloted to individuals by the third Caliph ᶜUthmān. In the same book the word 'iqtāᶜ -- allotment -- was mentioned more than ninety times. In one of those citations, for example, he reports that when the Caliph Jaᶜfar al-Mutawakkil resided (232/847) in Hārūni he "built many buildings and made allotments to the people in the back of (the town of) Surrah-man-ra'a . . . Then he established a town that he called al-Mutwakkiliyyah; he built it and resided in it and made allotments to the people . . ."[174] "When ᶜUthman became the caliph he wrote to Muᶜāwiyah [who was the governor of ash-Shām, i.e., Syria, Lebanon and part of Jordan] ordering him to fortify the coasts and allot land to those who resided there, which he [Muᶜāwiyah] did."[175] In short, alloting lands was a common and well understood mechanism practiced by all rulers at all times for establishing ownership. The important point is that the concept of allotment leads to the unified form of submission of what previously was dead-land or land owned by the state.

The principle of ownership, at least in theory, is that "that which has survival value can be owned and vice versa." This implies that unutilized lands are not owned by individuals; lands outside of towns and villages are consequently dead-lands. Therefore revivification and allotment are the mechanisms for establishing ownership in most, if not all, areas around towns and villages that expand, as well as in newly established towns such as al-'Amṣār. Thus, because of the importance of

both mechanisms for establishing ownership, we will investigate carefully some principles governing them in different schools of law. These principles concern negligence, time limitations, effort, and authority's permission. However, we will investigate the impact of these principles on the morphology of the built environment in the fourth chapter.

Principles of Revivification and Allotment

Negligence: First, does the ownership of any property in general lapse as a result of negligence by the owners? Second, is the ownership of revived dead-land rescinded because of the reviver's abandonment? Regarding the first question, all schools of law agree that the ownership does not lapse as a result of owner's negligence.[176] Some jurists, e.g., az-Zarkashi (d. 794/1391), argue that some objects, because of their nature, can be taken over by others if neglected by the original owners. He gave examples such as stones and building materials left on the streets which may be picked up, since the person who picks them up derives benefit from them. This principle does not apply if such objects fall from a building without the owner's knowledge, or if they belong to a waqf or to an orphan.[177] The distinction is illustrated by the case in which Ziyād constructed the governor's building in al-Baṣrah. He proposed rebuilding it in order to eradicate the association of his name with the building -- it seems the building was known as Ziyād's building. He was told that such reconstruction would, to an even greater extent, link his name to the building. Thus he demolished it and abandoned it. "Thereafter, most of the dwellings around it were built by [using] its deserted muds, bricks and doors."[178] As-Samhūdi reports another incident which may have a political revenge in which the governor of al-Madina,

during Hishām B. ᶜAbdul-Malik's reign (105/724-125/743), constructed the market and leased it. When Hishām died, the inhabitants of Madina demolished the construction, 'Ibn Shabbah relates that "the people demolished the building, appropriated its doors, the wood and palm-leaf stalks. By the third day [the building] was leveled."[179]

Regarding the second question, some of the Ḥanafi jurists consider long-term negligence as tacit permission for others to use the property and not a relinquishment of ownership. Others argue that ownership lapses with negligence.[180] Interestingly, the Māliki school of law -- the prevailing school of law in Northern Africa -- considers revived land that is neglected for a long time as a dead-land. Mālik invokes "such land can be taken because of the [Prophet's tradition] 'he who revives dead-land owns it.' Since the land was originally available and if it is neglected so that it becomes dead again then it returns [to its original state] of being available, as when a person takes water from a river and returns it."[181]

Time Limitation: Previously, we discussed the action necessary to revive a dead-land. Does demarcating a piece of land ['iḥtijār] with stones or the like constitute revivification? And what is the time limit for keeping land demarcated without reviving it? What is the time limit put on having an allotment without utilizing it? Whether a person demarcated land or was allotted a fief by the ruler, the limit, all schools of law agree, is three years. If the property is not utilized within three years, the reviver's or allotee's right lapses.[182] It is reported that ᶜUmar -- the second Caliph -- said "he who revives dead-land owns it, but the demarcator [muḥtajir] has no right after three years." Abu Yūsif (d. 182/798) explained, that the reason for ᶜUmar's

proclamation is that people began to occupy dead-lands without utilizing them.[183] Regarding demarcation as a first step towards revivification, the Ḥanafi school of law considers placing stones or other markings around the land merely an action preceding others, giving the reviver the right not to be harassed by others.[184] The Shāfiᶜi school of law considers that whoever "begins reviving [a piece of land], by digging foundations or marking out a piece of land or nailing up wood [columns] but cannot continue [reviving], as demarcator, i.e., he prevents others from reviving the land. Thus [for three years] he has the right of privatation but not ownership . . . and so he may not sell the land or give it away as gift."[185] The 'Imāmi school of law considers the allotee's right on the land as privatation right and not ownership, unless it has been genuinely revived. With respect to demarcating land to revive it, this school of law considers it merely a preliminary action of taking precedence over others and not of ownership. In both demarcation and allotment, it is stipulated that the reviver or allotee may not sell the land until it is revived.[186] 'Ibn-Qudāmah from the Hanbali school of law reports that if the allotee did not revive the allotment "the Sultan should order him either to revive or leave [the land] so others could do it. Since he is usurping from the people their common right, [the allotee] should be treated as if he were standing in [the middle of] a narrow road, . . . he is not benefitting himself, meanwhile he is not allowing others to benefit."[187]

Al-Balādhuri reports that when Ziyād alloted land to individuals, he would allow them two years to utilize the land. If the allotees did not do it, he took it away from them and gave it to others.[188] The principle of taking away allotments from unproductive allotees seems to have been

started by the Caliph ᶜUmar. When the Prophet alloted Bilāl b. al-Ḥārith the area of al-ᶜAqīq -- a large piece of land -- he did not utilize it. When ᶜUmar became a Caliph he told Bilāl, "You asked the Prophet for a long-wide allotment. The Prophet was not accustomed to reject requests, but you can not utilize what you have [been given]." Bilāl said, "Yes, [I can not]." ᶜUmar continued, "Judge [for yourself] what you may utilize and keep it. What you cannot, give it back to us, and we will divide it among Muslims." Bilāl answered, "Before God, I will not [give away] the allotment given me by God's messenger." ᶜUmar replied, "Before God, you will," and he took away the unutilized land and divided it among Muslims.[189]

From the previous opinions of jurists and actions of rulers, it is evident that demarcated lands or allotments are not owned and so may not be sold unless they have been revived.[190]

Effort: The principle of putting in effort is clear in all previous cases. The reviver or allotee has to put in some effort in order to own the property. Even with regard to demarcation, jurists require some effort be made in order to establish the right of privatation -- taking precedence over others. A.Y. al-Ḥanbali (d. 458/1064) goes as far to stipulate that "demarcation can only be established by walling around the land."[191]

The principle of revivification, by its nature, invites the overlapping of claims. For example, a person may revive deliberately or inadvertantly a land that is owned by others. However, the reviver does not lose his effort. The Prophet said, "He who cultivated the land of others without their permission will have his expenses; but not his cultivation."[192] Cases were brought to the Caliph ᶜUmar, in which some

people revived pieces of lands thinking that they were dead-lands; and later the original owners of the lands proved to ᶜUmar their ownership. The original owners were given by ᶜUmar the right either to compensate the revivers for their expenditure and to reclaim their lands, or to accept a price for the lands from the revivers and transfer ownership to them.[193] 'Ibn ar-Rāmi relates that if the owner refused to compensate the reviver for his expenditures, then both -- the owner and the reviver -- will share the property as partners. Meanwhile, the reviver will not be compelled to pay the owner the value of the land.[194]

If a person builds on land owned by others while the owners were witnessing and were ignorant, then the owner should compensate the builder for his expenditures in cases of dispute. But if the owner repudiated, then the builder has to demolish, and has the right to take what he has built.[195]

If a person revives land that is demarcated or alloted to others but is not owned, does he own that land? Does he have to give compensation? The principle is that the "demarcated or alloted land is not yet owned." If a person revived unowned land he would own it; thus, "the reviver is more rightful [in owning the land] than the demarcator."[196] If a person "demarcated a land intending to revive it he is more rightful. But if [an]other person revived it instead, then he [the second person] owns it."[197] In fact, many cases were reported in which overlapping of efforts took place during the early Islamic periods. Those cases were used as guidelines by Muslim jurists in resolving such disputes.[198]

Authorities' Permission: If an individual decided to revive dead-land, does he need the ruler's or the state's permission? Most of the schools of law and jurists agree that the permission of the state is

not needed. The exception is a few jurists from the Ḥanafi school of law as Abu Ḥanīfa -- the founder of the Ḥanafi rite, who assert that permission from the authority is needed in order to claim the right of ownership.[199] These differences of opinion are raised because of the Prophet's tradition that "he who revives dead-land owns it." The jurists who assert that the authorities' permission is necessary claim that the Prophet made such a proclamation because he was the Imam (ruler) of Muslim and acted as one.[200] According to Abu Yūsif, such assertion by Abu Ḥanīfa is the outcome of interpreting hypothetical cases. For instance, what would happen if two persons desired the same site to revivify it. In such cases, the ruler's permission is advocated.[201] But this view is opposed by all respected and eminent jurists, e.g. 'Aḥmad b. Ḥanbal, ash-Shāfiᶜi, Abu Yūsif, al-Māwardi, 'Ibn-Qudāmah, and A.Y. al-Ḥanbali.[202] They argue that the Prophet, as God's messenger, delineated the principles to be followed. They maintain that the tradition in this issue is very clear, that no permission from the ruler is necessary. They even recommend that, in view of the clear principle set forth by the Prophet about the revival of dead-land, not only does the person have the right to revive dead-land without permission, but the state should recognize his right of ownership in cases of disputes.[203] Regarding this issue, Mālik makes a distinction between dead-lands abutting urbanized areas and those which are distant from it. He concedes that the former requires permission, but not the latter.[204]

Concluding Notes

In all these principles regarding allotments and revivification, one fact may have been noticed but is not explicitly stated, that land is

never sold by the state to individuals. Rather, it is taken over at no cost by those who put in effort. This basic concept implies incentives; parties are provoked to act in order to own properties. If a party realizes that it does not need permission from the authority to act and eventually claim property, it will do so, simply because owning property is among the most desirable accomplishments for many individuals. This is especially true for the poor. If a party, as a reviver, knows that it will not only own the land by reviving it, but will also be rewarded by God on the day of judgment, it will be encouraged to act. If a party knows that unutilized lands are considered dead-land by some schools of law, or it has tacit permission to utilize the land by other rites, it will be motivated to act. If a party realizes that a land revived by others but neglected by them becomes dead, and can be owned through revivification, it will be stimulated to act. If a party recognizes that if it does not utilize the land it has become owner of through revivification, that other parties may therefore revive it and take it away, it is apt to act. If a party recognizes that it can build using what others have neglected and left behind, such as wood or bricks, it may act. If the party that is allotted a fief knows that if it does not utilize the land within three years, it will lose it, it will be provoked to act. If a party knows that its allotted or demarcated land is not yet considered as ownership, and that there is a possibility that such land can be taken over by other parties through revivification, it is more likely to act. If a party knows that if it acts and puts in effort, such effort will not be wasted even when it turns out that the land belongs to another, because it will be compensated for its expenditure, it will be stimulated to act. In summary, the claims of use and control bring the

claim of ownership to the same party. Property shifts from the category of dead-land to the unified form of submission. Thus we should expect the unified form of submission to constitute the majority of the built environment.

On the one hand, parties are purposely stimulated to act; on the other, parties have a natural tendency to expand, otherwise the Prophet would not have said, "He who usurps a handspan of land will be made to wear seven worlds around his neck."[205] "Whoever takes the land of others unjustly, he will sink down the seven earths on the Day of Resurrection."[206] In fact, if we reexamine the principles of ownership in the light of this tendency to expand, we will recognize that they were established essentially to deal with conflicts between expanding parties.

Parties that want to expand are stimulated to act, and can do so without authority permission. The authority does not intervene either because of technical and organizational incapacity or for ethical and religious reasons. To name one example, when az-Ẓāhir Baybars took power (658/1260), he decided to take over all the lands in the hands of those who could not prove legal ownership and turn them over to the Muslim treasury. The Muslim jurists, led by an-Nawawi, protested that such action is illegal in Islam, and that whoever had a property in his possession, owned it. They recommended that the authority should not annoy the owners, but should recognize their ownership; furthermore those owners should not be required to give proof of ownership so long as ownership was generally known and accepted by others. "An-Nawawi kept insisting and advising the Sultan until in the end he [an-Nawawi] stopped the Sultan."[207] This case demonstrates that most lands were owned by the people without the authority's permission.

The only intervention by the authorities was in allotments, which were based on intervention by their nature. Assigning lands by the state to be utilized by individuals is intervention in itself. Nevertheless, even such intervention has a limit; the party that does not utilize an allotment within three years will lose it. Allotments that are not yet revived cannot be sold by allottees; if those allotments are then revived by other parties, they will henceforth be owned by those parties. These are not intervention on allotments; rather they are principles to guarantee the utilization of property. In short, intervention by centralized authority is minimal.

In conclusion we may say that intervention by the authority is minimal among motivated parties who seek expansion. Logically, in such environments, disputes would arise among parties. As we saw earlier, overlapping of efforts occurs between parties. Such disputes have to be resolved, therefore parties have to communicate and consequently dialogue takes place. In order to have stable environments with no intervention by the authority, agreements should be achieved among parties. In the second part of this thesis, we will examine the previous statement to ascertain its validity.

Levels of the Unified Form of Submission

The unified form of submission existed on different levels in the traditional Muslim environment. Generally the previous section dealt with the characteristics of the unified form, which emphasized private properties. Here we will explore the concept as manifested in the public realm. The unified form may not be private at all; we may think of a dead-end street, which is semi-private, that is owned, controlled and

used by its inhabitant. We may also think of a pasture land, which is public, that is legally owned and controlled by the villagers. In both cases the property is owned, controlled and used by the same party, the inhabitants of the dead-end street or the village. In short, the inquiry into the unified form of submission -- and all other forms -- is not related to the question of publicness and privateness. To mention one example, we may refer to a park owned and controlled by the state and used by the public, a totally public space. On the other hand, a leased apartment used by the lessee, but owned and controlled by the lessor, is totally private space. The park is public, the apartment is private and both of them belong to the permissive form of submission.

For now, I will briefly discuss two levels of the unified form of submission. This step is needed to explain the existence of levels within the forms of submission, and to compare traditional with contemporary situations in the unified form of submission. In the second part of the thesis, we will investigate some of those levels in more detail, because of their importance to our inquiry.

Ḥimā: is defined as the protection of a piece of land from being revived or owned exclusively by individuals so that it can be owned and used by a specific group. It is based on the Prophet's tradition that "Muslims are partners in three, water, pasture and flame."[208] It is reported that a man asked the Prophet to allot him a piece of land that was a source of salt (milḥ Ma'rib).[209] The Prophet was told that the salt of such land is like water, it is to be accessible to all people. The Prophet then refused to allot him the land and said, "No ḥima except for God and his Apostle."[210] This means that such land is shared by all Muslims by benefiting from it. In this case the specific group is all

Muslims collectively. These traditions, among others, seem to be the source of consensus among Muslim jurists that lands which are indispensable to the public, such as salt, forage, and pitch that can be acquired with little effort, should not be owned by any one person but should belong to all Muslims.[211] Additionally, sources of building materials -- as, for example, a quarry where stones can be taken from the surface of the earth with little effort -- should be owned by all Muslims collectively.[212] Such lands should not be allotted by the rulers to be revived by individuals, nor should the ruler claim it for himself for any reason.[213] It is possible to designate ḥimā for a specific group. For example, the designation of ḥimā for the use of the poor to the exclusion of the wealthy, but not the reverse.[214] Jurists stipulate that the ruler may not designate the majority of the dead-land as ḥimā,[215] the reason for this probably is that if all the land around a town were pasture land and as such were designated as ḥima, then people would have no dead-lands to develop.

Regarding pasture lands, Abu Yūsif relates that "if the residents of a village have a common land for grazing animals or getting wood, that land is owned by them. They can sell it or inherit it. They can make things in it [manipulate it] as any person does in his property."[216] He adds that the inhabitants of a village have the right to prevent others from grazing animals or getting wood from their land, if such use would harm them -- the owners of the pasture land. This is especially true if many villages exist in a valley or on a mountain where the residents of each village have their own pasture land.[217] Al-Wansharīsi documented a case in which the inhabitants of a village divided the pasture land of the village among themselves.[218]

The convention among Muslim jurists is that some elements and spaces will not function properly if they are owned by the state or any individual; such spaces and elements, e.g., roads, rivers, streams,[219] and riverbanks, should be owned by all Muslims collectively.[220] As-Suyūṭi (d. 911/1505) states that riverbanks cannot be owned or revived and this is the opinion of ash-Shāfiᶜi and the consensus expressed in all schools of law.[221] Al-Bazzāzi adds that "maintaining the riverbanks is the responsibility of the Muslim treasury since it is for the people and if the treasury is not able to do it then the people will be compelled to maintain it."[222] 'Ibn al-Ḥāj (d. 529/1135) said, "No one should build on river banks whether for residency or for any other reason."[223]

Concerning dead-end streets, Muslim jurists always made distinctions between throughways and dead-end streets in judging the legality of residents' actions.[224] For example, al-Māwardi's opinion regarding projecting cantilevers into the streets is that "If the road is dead-end [ṭarīq ghayr nāfidh] [the resident] may not project a janāḥ [cantilever] into the street unless it is permitted by all its residents; whether the Janāḥ is causing damage or not, as the road is owned by the adjacent inhabitants. No one is allowed to act or manipulate [things] in it, but only has the right to pass through it . . . If all of [the residents] give permission for him to project his janāḥ [into the street] then it is lawful whether it is doing damage or not, since it is their right, and not shared by others."[225] The opinion of Abu Yūsif (d. 182/798, who was a judge during the reign of the Caliph al-Mahdi, al-Hādi and Hārūn ar-Rashīd) regarding the legality of establishing ẓullah (awnings or a shed) on to the dead-end streets is that such actions are judged not by "considering the damage being done, but according to whether the

permission of the other parties is obtained."[226] 'Ibn Qudāma's opinion regarding the building of chambers over dead-end streets is that it is legal only if all adjacent owners permit it, "and if the residents of the dead-end street ['ahl ad-darb] are compensated by [the resident who wants to build the chamber], it is as legal as if the owners of the street were one owner."[227]

PART A, CHAPTER 2

CHANGE OF THE TRADITIONAL FORMS OF SUBMISSION

Introduction

We have investigated the physical state of property and not parties, scale or type of property. And since the forms of submission do not change nor does the relationship between parties, then how did the state of the property change? Observing the state of property in existing environments and comparing it to the state of property in traditional environments leads to the distinction of two kinds of changes.

1) Within the same form of submission for the same property the identity of the party has changed. For example, a commercial street that was controlled by the muḥtasib is now controlled by the municipality. Or a new class of property has emerged within the same form of submission but different identity of parties. An example of this is a dwelling in a housing project that is owned and controlled by the state and used by individuals. This is the permissive form of submission in which the property was traditionally controlled and owned by an individual. The lessee has to deal with the state and not with an individual. This does not mean that individuals do not own and lease dwellings in contemporary environments; it means, rather, that a new class of property emerged in the built environment with different identities of parties.

2) Properties have shifted from one form of submission to another. An example is a dead-end street that used to be owned, controlled, and used by the residents as one party -- unified form of submission. Such properties are now owned and controlled by the state -- permissive form

of submission. The property has shifted from the unified to the permissive form of submission.

The task of this chapter is to identify these two types of changes. These changes were caused primarily by the intervention of the authorities. Though some will disagree and attribute those changes to other factors, I will try to substantiate my claim in this chapter. Furthermore, these two types of changes may seem trivial but, in fact, they invert the structure of the built environment by changing the responsibilties of the parties as will be discussed in the second part of this thesis. I will not characterize such intervention as reform or evolution, which implies progress, but rather I will call it a change of the traditional forms of submission, or an emergence of the existing forms of submission.

To trace and describe the exact process of emergence of the existing forms of submission in the Muslim world, both chronologically and geographically, is perhaps possible but impractical in the context of this study. Similarly, a thorough description of such changes would be tedious, because we will be dealing with more than twenty states (Egypt, Saudi Arabia, Tunisia, Syria, etc.), each state having its own regulations, civil code and path of emergence. Rather I will give a brief historical summary which should allow us to grasp the gradual change of the forms of submission and its ramifications. This should be sufficient for my purpose because: (a) those changes are paralleled in most, if not all, Muslim states and, (b) all changes share similar characteristics.

The most significant changes took place in the nineteenth and twentieth centuries. Because of dynasty interest in greater revenues,

changes in regulations and codes pertaining to property dealt predominantly with agricultural lands from which revenues mainly derive, especially in the Ottoman Empire. We will emphasize the changes that are similar in most states and which had a significant impact on the physical environment. In addition, we will investigate in detail selected changes which shed light on the relationship between the parties involved in manipulating property. The changes that we will examine were established by authorities for different reasons and were considered to be reforms. We will not deal with those reasons and not evaluate whether those regulations were improvements. We will not deal with the "whys," instead we will explore the "hows." We are interested in the impact on the relationships between parties sharing an object. We will first review the Ottoman Empire and then the Arab World. In both cases, we will investigate mainly rules, regulations and civil codes pertaining to property. We will emphasize three forms of submission, namely the unified, possessive, and permissive forms, as those three forms constitute the majority of the current built environment.

OTTOMAN EMPIRE

Historical Review

The regulation of property in most Middle Eastern countries was influenced by Ottoman administration, as those countries, excluding Egypt, were under the rule of the Ottoman Empire until the end of the First World War. Therefore we must briefly examine the property law in the Ottoman Empire.

The property law in the Ottoman Empire was based on the Ḥanafi school of law. It was the rite of the Empire which was later codified in 1869 by a commission of experts appointed by the Emperor and published under the title of "Majallah." It was used for guidance by all the courts of the Empire.

As we noted throughout the previous chapter, the Ḥanafi school of law is among the most conservative rites. The Ḥanafi school of law is the one which stipulates the permission of the ruler as a condition for owning land through revivification; it is the rite which defines dead-land as the land that is remote from the urbanized areas; it is the school of law which gives the ruler the right to allot places in the market for individuals and organize them; in short, it is the school of law, compared to the other schools of law, which encouraged the authorities' intervention. The Ḥanafi school of law was the rite of the Ottoman Empire, so we should expect intervention by the authority.

The Majallah is codified into 1851 Articles.[1] Although the codification is based on Islamic Sharīᶜah, it defines and organizes information in a format that would eliminate the need for interpretation and dialogue among concerned parties. For example, Article 1289 reads that the "Ḥarīm (the protected area which may not be revived by others[2]) of the tree that was planted (by the reviver) <u>through the Sultan's permission</u> (emphasis added) on a dead-land is five cubits from each side, no one is allowed to plant any tree within such area." This Article not only stipulates the necessity for permission of the authority to plant a tree in a dead-land, but also eliminates dialogue between parties by establishing the five cubits as a distance of the tree from all sides regardless of its size. The Majallah, in fact, can be viewed as <u>both</u> a

first step toward centralization by the increasing of the authority's responsibility, and as an organized documentary of the Ḥanafi school of law. The Majallah dealt primarily with contracts, leases, pre-emption, joint ownership, private ownership, and so on, i.e., the property of individuals and the relationships among those individuals, while property concerning the Empire such as miri-lands owned by the state or roads was dealt with in the comprehensive Land Code of 1274/1858.

Prior to 1858 the tīmar system was the prominent feature of the Ottoman land system. In return for the military service of the cavalrymen, they were granted income derived from agricultural tax revenues. This income was known as tīmar. Tīmar is defined as a "grant for an income derived from agricultural taxation for the support generally of members of the provincial cavalry."[3] The men who held tīmars were called timariots (tīmar-holders). The tīmar system was the backbone of the administrative and military organization of the Ottoman Empire, an interesting system based on a territorial unit called sanjak. A sanjak was composed of one or more villages in which resided timariots. Lands held by timariots were cultivated by peasants. The timariots were the delegated authority over the peasants, while they (the timariots) reported to a sanjakbeg. A Sanjakbeg was the administrator and the chief military officer of a sanjak. A group of sanjaks composes a beglerbeglik. A beglerbeglik was controlled by a beglerbeg or "bey of the beys," who reported to the Sultan. The first beglerbeg was appointed by the Sultan Murād I (761/1360). In 796/1393 the second beglerbeglik was formed. By 1018/1609 there were thirty-two beglerbegliks. In other words, the Empire territorially was composed of beglerbegliks,[4] and each

beglerbeglik composed of sanjaks,[5] with tīmar-holders residing in the sanjaks.

The relationship between a tīmar-holder and the authority was based on the tahrīrs (cadastral survey). Each conquered region was surveyed. The tahrīrs "were an essential instrument of Ottoman administration. They listed all sources of revenue, village by village, for each sanjak . . ."[6] From these tahrīrs other documents were established which spelled out the obligations of the tīmar-holders and their responsibilities. Tīmars were considered as revocable grants given to the tīmariots by the sultan and not as personal property.[7] N. Itzkowitz relates, "[i]n theory all land, except religious endowments and the small amount that had been allowed to become private holdings, belonged to the sultan. He allowed others certain rights on the land; for example, the tīmar-holder enjoyed a share in the revenue from the land in return for his service."[8] That is to say the sultan or the state owned the property, while the peasants had hereditary usufructury rights on the land. Between the peasant and the sultan, many administrative mediators existed, such as tīmariots, sanjakbeg, and beglerbeg.

The Possessive Form of Submission

Prior to 1858 it was possible for individuals to convert unowned land to private ownership through revivification. To insure that such ownership would not be rescinded by the state, those owners used to dedicate the property as waqf. By doing so the State cannot rescind those revived properties, meanwhile the revivers had insured all the lands benefits to themselves and their descendants. One of the main objects of the 1858 Land Code was to stop this taking of state lands,[9]

thus minimizing the conversion of dead-lands to lands owned by individuals.

Another object was to minimize the number of the mediators between the state and land holders. As explained earlier the administrative hierarchy contained many mediators, which invited corruption. When the Empire found its expenditures outstripping income, it decided to collect taxes directly from the peasants. Thus the Land Codes contain provisions that are aimed at strengthening the relationship between the user of a land who controls -- the cultivator -- and the owner of the land -- the state. Such strengthening, according to the Codes, can be achieved by eliminating the numerous mediators acting between the users and the states. This removal would bring the state into direct relationship with the users. For instance, Article 3 of the Land Code abolished the role of the tīmar, zeamet [10] (feudal estates) and multazim, muḥaṣṣil (tax-farmer) and emphasized that users of miri lands -- lands owned by the state -- should receive a title deed called tapu through the government agents upon payment of prescribed fee in advance.[11] The customary system of collecting taxes was replaced by a government system. In short, every effort was made by the state to minimize the number of mediators between the state and the farmers, in order to eliminate the corruption caused by the mediator, thus increasing revenues, while holding onto the ownership of the land by the state. For example, the initiative of registering the lands failed because the farmers thought that such registration was a preliminary step toward a draft for military services or towards an imposition of taxes. Consequently, they registered property under another's name, such as a relative or the head of the tribe who was not liable for military service.[12] Although the

registration was in principle mandatory, by 1918 -- the Tapu Department had been issuing title deeds for over half a century -- the majority of the miri land had not been registered.[13]

The Land Code of 1858 divided lands into five categories:

1) the mamlūkah property or property held by individuals in absolute ownership. In this category the owner could convert his property into waqf or bequeath it. The ability to bequeath a property or to dedicate it as waqf was the highest form of manipulation, denoting a state of ownership.

2) Miri properties or properties owned by the state and possessed by individuals who use and control it.

3) Waqfs.

4) Matrūkah property or property for the public use.

5) Mawāt or dead-land.[14]

The miri and matrūkah properties, the ones owned by the state and controlled by the users, are the ones within this form of submission, possessive; thus we will investigate them closely.

<u>Miri Property</u> is defined as property owned by the state over which the user has the right of usufruct. He controls it within the state's regulation.[15] The previous description of registering the property denotes a tug-of-war relationship between the owner -- the Empire -- and the controller who uses it -- the farmer. To illustrate this, we will review some examples. Under the Land Code of 1858 the holder of the right of usufruct was not authorized, except with the state's permission, to use the soil of the land to make bricks (Art. 12), plant trees on the land (Arts. 25 and 29), erect buildings (Arts. 31 and 32), to use part of

the land as a burial place (Art. 33), or to bequeath (Art. 38), transfer (Arts. 36, 37 and 120) or even mortgage the land (Art. 116). Furthermore any transfer of the right of usufruct must be granted by the agent of the government appointed for this purpose (Art. 3). Later, those regulations were changed. In 1867, a law issued the extension of the right of inheritance in miri land. In 1911 the state allowed the holder of usufruct to erect buildings, plant trees,[16] and to use the soil to make bricks (Art. 5). By reviewing the Codes one can observe fluctuations in the regulations. It was in the state's interest to increase revenues. The state's attitude affirmed its ownership of miri lands through registration, and at the same time invented regulations to replace previous ones which did not work.

The state, like any other party, would try to expand its properties. For example, under the Land Code, the properties owned by individuals who die with no heirs reverts to the state. Property that is conquered by Muslims, abandoned by its original inhabitants, and later occupied by non-Muslims, belongs to the state. The property that is owned by unknown individuals belongs to the state.[17] The state's expansion means that properties which were originally within other forms such as the unified are now moving to the possessive form of submission. Furthermore, all those properties -- miri -- can be leased by the Sulṭan to people, but the lessee may not lease the property to others without the Sulṭan's permission.[18] Also a series of regulations have been developed to control succession on miri lands. Dr. al-ᶜAbādi concludes that such regulations "eventually lead to a system of succession that is very different from that under Islamic law." For example, the percentage share of the heirs in this system is very different from that in the

Islamic system. The justification is that the miri property should be viewed as an allotment from the ruler, thus he can establish any regulations of succession, just as the endower of waqf can bequeath its revenues as he wishes.[19]

In summary, the relation between the party that owns and the party that controls and uses miri lands came to be increasingly regulated. It is immediately apparent that such a relationship is unlike the traditional one - even unlike the tīmar system. It is true that corruption existed in the tīmar system, but the peasants had more control, as long as they paid their taxes. After the Land Code of 1858, the authority not only imposed new rules, but its every action served its own interests. If the regulation did not work, it invented new rules. It is clear that this development reduces the control of the users while increasing the owner's control since the owner is the authority. The result is "centralization." Centralization changes the relationship between the two parties. Moreover, the centralized party's property is expanded and the percentage held by controllers is reduced.

<u>Matrūkah property</u> literally means "left-over," and is defined as the land "which is owned by the state so no one can own it or possess it."[20] It is classified into two types:

1) The lands, such as roads, markets and squares in cities, that are left for the use of the public .

2) The lands, such as pasture lands, that are assigned to the inhabitants of a village or group of villages for collective use.[21] These lands cannot be sold or manipulated by inhabitants. In both types, no one could erect a building on it or even plant a tree "and whoever

does [erect a building or plant a tree], his building will be demolished and his tree will be extracted and such person will be prevented from using the space by the authority . . ."[22] Regarding roads the Majallah reads (Art. 927) "No one may remain in the main road or put things there without the authority's permission; and if any one does and such action causes damage [to others] then he will be liable for such damages, . . ."

Centralization is evident in the previous description, where a tone of regulation exists between the owner and the user. Roads, squares and forecourts of cities were traditionally considered to be owned by Muslims collectively; individuals could act if they did so without harming others; any person may question the actions of others; they fell under the unified form of submission.[23] More recently they come under the possessive form of submission. The same shift in form took place for pasture lands. Traditionally these were called ḥima and were owned, used and controlled by one party, the villagers collectively. Pasture lands were within the unified form of submission. In the Land Code of 1858, they were claimed by the state as its owner; since they were still controlled by the users, the arrangement was now the possessive form of submission. Here, as with miri lands, centralization reduced the percentage of the controlling parties in the environment by shifting the ḥima and the public spaces to the possessive form of submission. In fact, if those codes were fully implemented such that users were not allowed to plant trees, for example, we might even say that matrūkah properties fall into the permissive form of submission, where the state owns and controls while the user only uses. Even the nature of the relationship between the two parties changed in the permissive form. The

user did not have the choice of agreeing. He was compelled to live by the rules.

The Unified Form of Submission

Among the five categories of property recognized by the Land Code of 1858, Mumlūkah property is the only category which belongs to the unified form of submission. It is defined as the complete ownership of land in which the owner may even transfer the property to waqf.[24] Art. 2 of the Land Code recognizes the squares and open spaces inside the villages, not to exceed half a dunam, as property owned by the villagers. It also recognizes the kharāji land -- land that was conquered -- as of private ownership. However, if its owner is not capable of cultivating it and paying the kharāj tax, then the khāraji land will be given to others to be cultivated in order to pay the tax while avoiding transference of ownership[25] from the original holder. This land is then known as ḥawz land, which is a property previously under the unified form of submission but now shifted to the possessive form.

With respect to revivifications of dead-land the Majallah defines mawāt as "those lands which are not owned by anyone, which are not the pastures or wood-gathering places of villages, and which lie remote from inhabited areas. As mentioned, land is mawāt if a man calls out from a house at the [inhabited area's] border and he cannot be heard [at the border of the mawāt]."[26] Such a definition explicitly implies that lands adjacent to urbanized areas cannot be revived. Moreover, actions to revive mawāt land must be made only with the sovereign's permission. Even if he gives permission, he -- the sovereign -- or his representative may stipulate that the revivification will lead to the right of usufruct

and not ownership of the land.[27] Traditionally revivification leads to the unified form of submission, while now it can lead to the possessive form of submission if the authority so stipulates. The Majallah even defines what actions are considered revivification[28] and what is considered demarcation,[29] which was, traditionally, relatively open to local interpretation. The Land Code went even further. Art. 103 states that dead-lands can be revived by the permission of the authority, but the revived land will be owned by the state and not the reviver. Thereafter, all revived land would be owned by the state.[30] In 1874 a law was passed stating that "no one may possess land as mulk [private ownership] unless he holds a title deed which describes it as such or unless he is permitted to do so by a Firman of the Sultan."[31] The authority's intervention -- amounting to centralization -- reduced the increase of property of the unified form, while increasing the properties in the possessive form. Those revived lands within the possessive form followed the regulations of miri lands, which was explained previously.

Regarding ownerships within urbanized areas, few regulations were established by the Majallah. However, it does recognize private streets and defines them as the dead-end streets.[32] While Article 1223 reads that "the passersby in the main roads have the right to enter the private streets in cases of crowding. The owners of the dead-end street do not have the right to sell it even if they agree [to do so among themselves], nor can they divide it among themselves. They [the owners] can not block its mouth [by building a gate, for example]." Although the dead-end street belongs to the unified form of submission and is recognized by the authorities as one, even so it is regulated. The control of the users has been reduced by the central authority.

The Permissive Form of Submission

Here, we will use the same classification of the traditional permissive form of submission as it is recognized by Majallah.

1) A party utilizes a property without having the right to furnish elements, as in the right of passing through someone else's dwellings, i.e., an easement right.

2) A party utilizes the property and has the right to furnish elements, as does a tenant.

1) As we related in the previous chapter, the Ḥanafi and Zaydi schools of law do not consider the easement right as a material worth (māl); thus it may not be sold or leased to a third party. The Ḥanafi's opinion which expresses disapproval of compensation regarding easement rights is echoed in various Articles of the Majallah. Yet the Majallah gives the owner of servitude -- user -- complete protection from the dominant party -- the party that owns and controls -- by eliminating dominance between involved parties. Article 1225 reads that "if someone has the right to pass through another's open space [ᶜarṣah] the owner of the ᶜarṣah may not prevent him from passing or crossing [through]."[33] But the Majallah discourages the creation of such relationships between two parties. For example, Article 1231 reads that "no one should run his new dwelling's water-course through another's house." Those codifications, by eliminating compensation between the owners of the two properties, eliminates dialogue, as well. In short, the traditional principles of easement rights continued with the exception of eliminating the principle of allowing the establishment of new servitude rights. This will have great impact on the territorial structure of the built environment.

2) Regarding the second type of the permissive form, in which a party brings elements in order to utilize the property -- this is mainly leasing -- the authority does not intervene. It seems that the traditional model of relationship between the two parties was continued.[34] Notably, this type often succeeds the unified form of submission, i.e., the owner who controls property is often capable of using it; if he does not for any reason, then he can lease it. The leasing -- a permissive form -- is often the successor to the unified form. Logically, we would expect the least intervention by the authority in the permissive form, although, as we will see, this is not always guaranteed.

In summary, the effect of authority's intervention through codification, regulations and stipulations varied from one form of submission to another. Regarding the permissive form of submission it reduced communication between parties. In the possessive form of submission it changed the identity of parties. The change of the identity of the parties changed the relationship between those parties. The Miri lands, for example, became more regulated. Furthermore streets, squares, pasture lands -- ḥimā -- and ḥawz lands, shifted from the unified to the possessive form of submission. The mechanism of revivification became state-controlled and led to the possessive form. The amount of property belonging to the authority increased, consequently the percentage controlled by parties in the environment was reduced. Centralization changed the traditional identity of parties and also shifted elements from one form of submission to another.

ARAB WORLD

Historical Review

To review all the regulations issued in the nineteenth and twentieth century which affected the forms of submission is unnecessary. It suffices to describe the major stages of change. First, though, I will give a short historical summary of the major changes. We will begin with Egypt, because it was not ruled by the Ottoman Empire in the nineteenth century.

The first major change in the forms of submission in Egypt took place during Muḥammad ᶜAlis' reign, a regime fully recognized by the Ottoman Empire only in 1841. Most of the agricultural land in Egypt shifted from the unified form to the possessive form during this reign (1805-1848). How did the change take place? In 1808 Muḥammad ᶜAli requested the tax farmers (multazims) to report their annual profit. The tax farmers, fearing that M. ᶜAli intended to demand from them an increased contribution, estimated their income as low as possible.[35] In response he decreed the abolition of the taxing system and arranged for taxes to be collected directly by government agents. This process is very similar to that of the Ottomans in which the state was trying to bring the peasants into a direct relation with the state and eliminate the intermediaries. After the final defeat of the Mumluk pashaliks in 1226/1811, Muḥammad ᶜAli confiscated their private estates. He even invited all the feoffees into his palace for a banquet and massacred them as they were leaving.[36] Qureshi relates that "Muhammad ᶜAli thus became the owner of practically all the land in the country."[37] Then he gave each farmer between three to five acres of land under a "kind of

hereditary lease" arrangement retaining ownership for the state.[38] Qureshi relates that "[t]he farmers were given the ownership in the usufruct of the land -- the crops they produced -- and not the land itself. Thus they [the farmers] had no right to sell or mortgage the land, and the state retained the right to expropriate land without compensation."[39] In other words, most agricultural lands shifted to the possessive form of submission, in which the farmers controlled and used, while the state owned the lands. The rule, one of many such regulations, that the state could expropriate land without compensation indicates the extent of the regulation imposed by the state. Since then a series of decrees have been issued which were intended to increase revenues. For example, in 1846 a decree was issued to give the holder of land the right to mortgage it.[40] In 1871 Khideawi 'Ismā^cīl issued a decree called muqabalah law which gave the land-holders ownership of the property and at the same time a reduction by one-half of the land tax to which they were liable if they paid six years' tax in advance.[41] In short, in order to increase revenues, regulations fluctuated and over time became less numerous. The most radical changes were made by the Army Revolution of 1952, when regulations were tightened once again. For example, a decree was issued establishing a limit of 200 Faddan[42] as the maximum each person could own. Regarding leasing, it was decreed that "Land is not to be leased for less than three years. Only those who are to cultivate the land themselves can rent it. The rental charge shall not exceed seven times the original tax on the land rented . . . " Again, "Wages of agricultural workers in each agricultural district will be fixed every year by a committee appointed by the Minister of Agriculture . . . ."[43]

In short, regulations, since the revolution of 1952 limited owners' freedom.

Until World War I, Lebanon, Syria, Jordan and Iraq followed the Ottoman Land Codes and Majallah which are based on the Ḥanafi school of law. Although the Ottoman system was already centralized in comparison to the traditional system, it became even more centralized when those regulations were replaced or modified by a set of others influenced by the western system. In 1926, for example, Lebanon and Syria under the French Mandatory Government introduced a system of land survey and title registration.[44] In 1930 the French Commissioner established the Property Law (No. 3339) which abolished all the Ottoman Land Codes. While this law still pertains in Lebanon, it was modified in Syria in 1949 by what is known as the "Syrian Civil Code."[45] In fact, most, if not all, Arab states were influenced by western civil codes. It suffices to know that the Egyptian Civil Code was developed by the Egyptian jurist Dr. ᶜAbd ar-Razzaq as-Sanhuri, who was assisted by the French jurist E. Lambert. As-Sanhuri even developed the Syrian, Iraqi and Libyan Civil Code, "and on which the Jordanian authorities depended in formulating the Jordanian Civil Code."[46] Thus great similarities in property laws in those countries can be expected. We will now investigate the unified, possessive, and permissive forms of submission independently.

The Unified Form of Submission

As explained above, in the unified form of submission, property is used, controlled and owned by one party. Therefore, the change of the traditional unified form is affected mainly by the relationship between the outside parties, as neighbors or authority, and the party that owns,

controls and uses. There is not a great deal to investigate in this form unless we look at the relationship of the owner of the property with outsiders, which will be discussed in the second part. In the traditional unified form of submission, we have investigated primarily the mechanisms which brought this form into existence, such as revivification, and the levels of the unified form. In the Ottoman Empire, we saw how those mechanisms were controlled. Here we will again investigate the mechanisms, and the shifts of elements from the unified form to other forms. We will not investigate relationships with outside parties. However, one aspect of such relationships will be included because of its importance, that is, the shift of the party's relationship towards the authority. In our investigation we will rely on the Civil Codes for information.

Most Civil Codes do not define private ownership. Their claim is that codes do not define but rather codify ownership by referring to its limitation and the rights it entails.[47] The Egyptian Civil Code, for example, denotes that "the owner of a thing, by himself alone within the limits of the law, has the right to use, utilize and manipulate it." This Article (802) is the same in both the Syrian and Libyan Civil Codes. Dr. al-Badrāwi relates that this code derives from Article 544 of the French Civil Code.[48] In Lebanon Article 11 regarding private ownership reads, "It [private ownership] is the right to use a property, to enjoy it, and to manipulate it within the limits of the law, decrees and regulations." An immediate conclusion to be drawn from such definitions is that an owner can act in any way he likes so long as he follows the regulations of the authority. Thus, a party that owns, controls and uses a property is still subject to the higher authority. This is in contrast

to the traditional principle which states that an owner has complete freedom as long as he does no harm to others, an arrangement which concerns only the relationship of two adjoining parties.[49] The relationship of a party is legally shifted from the adjacent party--neighbor--to the authority. This shift will be explored in the second part and chapter eight, which concerns the relationship between the forms of submission.

In Syria, Article 86 of the Civil Code of 1949 classified land into five categories.[50] Mumlūkah, which is the only category belonging to this form of submission, is defined as "the property that can be owned and which is situated inside the built zones according to the limits set by the administration."[51] The built zones are the urbanized areas, and according to Article 86, what is inside them is considered privately owned. What is outside them is owned by the state. Regarding this Article, Ziadeh concludes that ". . .an orchard within such a zone is mulk [under private ownership]. Conversely, all real properties outside such zones in Syria are, by virtue of this provision, miri [owned by the state]. Thus former mulk lands and former ᶜushr lands in the countryside outside the towns and villages that have been defined as building zones are now miri."[52] A simple provision by the central authority shifted rural lands from the unified to the possessive form of submission.

With respect to revivification, the same article of the Syrian Civil Code considered dead-land a state domain. The fifth category of land classification defines empty and vacant lands as "miri land [and therefore owned by the state] but no one yet has the right of usufruct [indicating that the only difference between dead-land and miri land is that dead land is not yet utilized], and if the right of usufruct is

proved [for someone], then the land will become state property."[53] Dead-land is considered by this article to be the exclusive-property of the state.[54] The same process took place in Iraq in 1938.[55] During the Ottoman Empire dead-land had been recognized, and rules were developed for controlling its revivification, while here the mechanism of owning dead-land through revivification was totally abolished.

Furthermore, wrong-doing by an individual on dead-lands is considered an aggression against a exclusive-domain of the state and the aggressor is held liable.[56] As those lands are owned by the state, any person interested in revivifying those lands must get a license from the state. This license merely gives such a person the right of preference over others to acquire taṣarruf -- control-and-use.[57] The state has the power to revoke such a license. If the person holding the right of preference revivified the land by building or planting within the three year limit, or developed it according to the "specific stipulations of the regulations" of state property, then he can register the right of usufruct, but if he discontinues exercising his revivification activities for three successive years then his right of usufruct [taṣarruf] is rescinded.[58] It is important to compare this system of revivification with the traditional one. Now every action undertaken by the reviver must be reported to and checked by the state. The actions that are considered revivification are fully defined. Yet such actions do not lead to the unified form; rather they lead to the right of possession--taṣarruf, i.e. control-and-use. It leads to the possessive form of submission.

The same nullification of the revivification process took place in Egypt, albeit more gradually. Article 874 of the Civil Code states that

1) all uncultivated and unowned land belongs to the state, 2) these lands may not be owned or possessed by individuals unless so permitted by the state according to the decrees, 3) if an Egyptian cultivates or plants uncultivated land or builds on it, he will own the cultivated, planted or built portions of it, even without the state's permission, but if he does not use it for five consecutive years during the next fifteen, his ownership lapses. Later, in 1958, Decree No. 124 was issued, which limits revivification to a specific place in the desert areas.[59] In 1961 Decree 127 was added to limit the right of a person to own, through revivification, no more than 100 faddan (1 faddan = 1.038 acres) of agricultural land.[60] Then, in 1964, Decree No. 100 abolished revivification altogether, by invalidating Part Three of Article 874 of the Civil Code which formerly allowed Egyptians to revivify dead-land owned by the state without the state's permission. It even stated that all unowned land was the state's private domain.[61] It is clear that the policy regarding revivification in Egypt is very similar to that in Syria and in Jordan, for that matter.[62] The nullification of the system of revivification certainly reduces the percentage of property under the unified form of submission, thus reducing the number of parties with real control in the built environment.

The Possessive Form of Submission

We will not follow the classification we used in the traditional possessive form of submission: agricultural lands and appropriating places. As properties became regulated by the state, as civil codes codified and municipalities developed their own regulations, other classification became more appropriate. The interests of the owner will

establish a logical classification in contemporary environments. One extreme in terms of interests is the case in which the owner expects benefits from the possessor -- the party which uses-and-controls. Thus, logically, as in agricultural lands, he will tend to be cooperative. The other extreme is the case in which the owner does not expect much benefit from the possessor, but rather may have to serve him, as in streets. In such cases he is not obliged to be cooperative. The authority is the owner of most properties under the possessive form in the contemporary environment and its attitude towards possessors exemplifies both extremes.

Interest

We noted previously the obstacles put up by the state to dead-land revivification in contrast to the traditional principles, and that such revivification most often leads to the possessive form of submission and not the unified form. But if a person establishes such right, i.e., he or she revivifies a land and holds only the right of taṣarruf, control-and- use, what is the nature of the relationship with the owner, the state? As we reviewed this form of submission in the Ottoman Empire, we noted the many regulations established by the authority. An example is that of not allowing the usufructor to make bricks from the land's soil. Over time those regulations decreased, so much so that this form came to resemble the unified form of submission. The same process of regulation reduction took place in the Arab states. Some civil codes do not define taṣarruf.[63] Instead they delineate the rights of the possessor and the limits on manipulation. For example, the miri land, owned by the state, differs legally from mulk, owned by individuals,

according to the Syrian Codes (Art. 85) in three respects only: (1) the holder of taṣarruf may not dedicate the property as waqf, (2) the holder of taṣarruf loses his right if he does not utilize the property for five years, and (3) the property devolves upon the heirs according to the 'intiqāl (transmission) Law of the Amiriyyah property which is different from the Islamic Law of Succession.[64] Those differences reveal that in terms of controlling the property, the usufructory party has almost complete freedom within a system of authorization. This is even more clear in the Jordanian Civil Code which gives the usufructary party total control of the property, even though it is owned by the state.[65]

Such attitudes on the part of the various states may seem surprising. They discourage or even negate land revivification, yet impose no regulations on the parties that control and use. However, it is in an owner's interest to give a party that controls-and-uses this much freedom, hoping that it will result in greater revenues. This is clear from the historical review we made of the fluctuations of regulations regarding miri lands in Egypt during and after Muḥammad ᶜAli's reign and in the Ottoman Empire. Although the possessor enjoyed considerable control in the mentioned Arab states, the relationship with the owner was still a tug-of-war in regards to regulation. Consequently, a new type of regulation emerged, that of <u>bureaucratic</u> centralization. A quick review of the manuals developed by the states to tax, guide and monitor the actions of usufructaries, and the amount of paperwork that had to be done by them in case of any change, demonstrates the extent to which the new bureaucratic centralization contrasts with the traditional system. Every move made by the usufructary party had to be reported to the state. In Syria, for example, the right of taṣarruf,

control-and-use, will lapse if the usufructary party does not utilize the property for five successive years, even ten years after registration.[66] In theory, a possessor in these states has full control, in practice the possessive form became even more regulated than the one in the Ottoman Empire.

The authority's attitude regarding the nullification of revivification can be understood. It is in the state's interest to own dead-lands and consequently sell them or allot them to certain individuals according to their own purposes. In Egypt, for example, Decree 100 of 1964 claimed all desert and uncultivated lands as the state's exclusive property. Article 23 of the same decree, which invalidates revivification, gives the Ministry of Agriculture the right to sell uncultivated and desert lands to those who are interested in utilizing them. A series of regulations were developed for such transactions. For example, each transaction should not exceed twenty faddans of uncultivated land or fifty faddans of desert lands per buyer. The buyer must guarantee that he will develop the purchased land within seven years for uncultivated land and within ten years for desert lands. The implementation board is to decide the price of land, its stipulation, period limit, interest rate,[67] . . . The series of regulations were originated by a committee, implemented by a second, and checked by a third, with results evaluated by a fourth committee. Each committee's work depends on the other's findings. If a certain number of the committee's members do not attend a meeting, then the committee cannot make decisions.[68] These steps speak for themselves in terms of bureaucratic centralization. Certainly, were we to ask the committee why 50 faddans is the limit rather than 50¼ they would have justifications.

Our interest is not in the nature of the decisions and whether they are right or wrong, but in the consequences of centralization. In conclusion, the party that uses-and-controls a property which is owned by the state, theoretically has much control. Practically, bureaucratic centralization regulates the relationship between the two parties. The possessive form of submission consequently becomes regulated. The basic mechanism of revivification is abolished and the dead-land is owned by the state and shifted to the possessive form of submission.

Disinterest

In this type of possessive form the party which owns does not expect benefits from the possessor, as in pasture lands and dead-end streets. Those spaces traditionally belonged to the unified form. They were owned by a group of villagers or all Muslims collectively, not the state, and controlled and used by them. Now these properties are claimed by the state and consequently they have been shifted to other forms of submission.

Regarding ḥima, e.g., pasture lands, the Syrian Civil Code of 1949, names it as matrūkah murfaqah (left-over-for-servitude), which is the land that "belongs to the state but a group of people have the right to use it according to the administrative rules and local customs: Such as lands that have been left for the benefits of the villagers. It is part of the state's general property. It is called servitutive because the inhabitants of a village have the right of servitude from it."[69] According to this Article, the state claimed the ownership of such properties.[70] These properties legally shifted from the unified to the possessive form of submission where the villagers only use-and-control.

The state, as an owner, naturally regulated these properties. Regarding such regulations, Ziadeh states that "if a group deviates from the purpose for which the property was originally assigned, the Department of States Domain could have recourse to the courts to vitiate the right of usufruct enjoyed by the group."[71]

The Permissive Form of Submission

Two types of intervention took place in this form of submission. The first occurred when the authority claimed ownership and control of public spaces, thus shifting those elements to the permissive form of submission. The second occurred when the authority intervened between the parties sharing property, as with leasing. The authority's intervention between lessor and lessee pulled the leased property towards the dispersed form of submission. We will examine the two types of intervention.

Public Spaces

The authority's assumption of the right to intervene in such public spaces as streets and squares, pulled these spaces from the unified form in traditional environments to the permissive form of submission. First the state claimed these spaces as its own property, then regulated its use. Consequently, the state owns-and-controls the streets, while the public merely uses them. For example, the Syrian Civil Code of 1949 named public spaces as matrūkah maḥmiyyah (left-over-protected), "which belong to the state, provinces or municipalities and it is part of the state's general property and is designated for the public's benefit, such as roads."[72] Here, the state claimed the ownership of such spaces, and then as owner, regulated its properties. To name one example, the

Jordanian Civil Code of 1952 states that "no one shall [build] buildings, plant a tree or act in such way in the places left for [the use of] all people such as roads, public markets . . . if [anyone] does so, the building is to be demolished, the tree is to be uprooted and the person is to be constrained from further manipulation of [the place] under the authority's supervision."[73]

From the above information, and from our daily experience with contemporary public space, we perceive that such spaces are no longer unified. The street in the traditional environment belonged to the unified form, owned by all Muslims collectively and used-and-controlled by them as wel will see in chapter six. Moreover, with respect to the individual user, if he appropriated a place, that place belonged to the possessive form, so he could act freely as long as he did not harm others. He was a member of the party which owns-and-controls so he also had the right to question the actions of others.[74] In contemporary environments, the street shifted to the permissive form of submission, where the authority owns-and-controls while the individual only uses. Even the character of the permissive form changed. The user does not have a choice of agreeing; he or she is compelled to follow the rules.

Leasing

The authority's intervention between the party that owns-and-controls and the party that uses, shifted the property to other forms of submission. In the case of leasing, where the user brings elements in order to utilize the property, the authority's regulations shifted the property to the dispersed form of submission. Traditionally this form was characterized by its covenant relationship between the two

parties. The two parties had to reach an agreement with each other. Mutual cooperation was the sole issue, whereas now intervention by authority favored one party over the other. The autonomy of each party is lost, because of the emergence of a third party, i.e., the owner and the authority jointly as one party. How did this take place?

To explicate the previous conclusion, we will examine residential leasing in Egypt where a great deal of intervention took place. The situation in Egypt may not be the most centralized. However, Egypt is one of the countries in which leasing is regulated more than most other Arab countries.

Ostensibly, leasing is an issue in which authorities may not intervene, as it is always a relationship between lessor and lessee which will not affect the built environment from the authority's point of view. It should not make any difference to the authority whether the resident is the owner or not. It does matter, however, if tax collection or the question of the state's ideology is involved (such as a Socialist one). It matters, for example, if the authority acts as the body responsible for the equalization of resources. This means that, depending on the state's ideology, intervention sometimes took place. That is exactly what happened in the Arab states. In states that do not collect taxes and are not socialist in outlook, little or no intervention took place. On the other hand, socialist governments intervened frequently. Thus, among all forms of submission, the situation for this form varied from one state to another. Therefore, we will examine only Egypt.

As a result of the slow pace of building in Egypt between World War I and World War II there was a housing shortage.[75] A series of regulations was issued by the authority to regulate the relationship

between lessor and lessee. The first intervention in the leasing process was in 1920. In general, leasing is defined and codified in the Egyptian Civil Codes (Articles 558 to 634)[76] and those codifications were designed to be permanent. But the housing shortage, which inflated rents, resulted in decrees and an accumulation of regulations to control rent which were intended to last only until the housing shortage was resolved.[77] Thus two types of regulations were in use, the Civil Code, which was concerned with principles, and decrees some of which controlled rent. We will examine each of these in succession.

Decrees which controlled the rents of residential buildings resulted in inflation of the rent of the new unregulated building. That is, the same decrees which controlled rents in some buildings inflated the rents of others. For example, a major decree concerning rent control was issued in 1947 (Decree 121). It affected the rents of buildings built prior to January 1944. Those built after 1944 were not controlled so as to avoid discouraging investors and developers wanting to build new dwellings while at the same time controlling the rent of the already inhabited ones.[78] This decree naturally resulted in high rents for new buildings. Later, in 1952, another decree was issued (decree 199) reducing the rents of the buildings erected between January 1944 and September 18, 1952 by fifteen percent. What was built after that time was not regulated for the reason previously stated.[79] Since that time, during the Military Regime, a decree was issued more or less annually to modify previous rent control decrees.[80] Those decrees impelled the owners of new buildings to raise their rents, knowing that these rents would one day be reduced. Moreover, owners required lessees to sign a lease for an amount higher than the actual rent. In anticipation of

future percentage reductions, the tenant was paying less than the rent stated on the lease. Regarding this, the lawyer ᶜAnbar states: "[t]he authority noticed that owners of new buildings realized and were always expecting the passage of new decrees that would reduce their rents, so they [owners] exaggerated in assessing their rent levels prior to the issuance of the expected decrees."[81] To solve this problem, the authority devised a new method for controlling rents. Decree 46 of 1962 set the rent of new properties at five percent of the land value and eight percent of the building cost, and it provided for all the administrative steps necessary for such control. These decrees created tension between lessors and lessess. The lawyer Muḥammad ᶜAnbar states "It is natural that the application of the 1947 decree 121 articles and those of all successive modifying decrees would create disputes since it involved new principles and was difficult to understand . . . People tend to interpret the law, especially the law regarding money matters, in a manner that would serve their own interests. In addition, some of the articles of the previous decrees do not concord with the Socialist change . . . . Proof of this is the thousands of disputes that were appealed and will be appealed daily [in the future] associated with the noise as the result of [court] decisions in favor of or against involved parties."[82]

The tense relationship between the two parties, that was traditionally based on agreements, worsened when those properties that were leased under a rent control decree were later subject to more rent reduction under other decrees. For example, 1965 Decree 7, Article 1 reads, "The existing rents of the properties [leased] under 1952 Decree 199, 1958 Decree 55, and 1961 Decree 168 will be reduced by twenty

percent. Such reduction will be implemented starting of March 1965 . . ."[83] In fact, the series of successive decrees issued to control rents on properties already leased created a situation so complicated that books and booklets were published to clarify regulations for users. An example of the issues addressed for users is: "Question: Does the residential rent of a building erected after 1958 have to be reduced twice? Answer: yes, it will first be reduced by twenty percent starting in December. Then it will be reduced again, starting in January by the same percentage of the reduction of dwellings built prior to this date . . ."[84] The description of these decrees may seem needlessly detailed for our purposes. The reason for including them is to give the reader a glimpse of how the process of regulation developed.

Moreover, a careful chronological examination of the decrees will also describe the evolution of the relationship between owners, tenants and the state. The relationship is like a game whose object is the invention of strategies, especially between the authority and owners. The authority regulates, the owner then invents a solution to bypass the regulation; the authority closes that loophole; other doors are opened by owners and so on. The following are concrete examples of those hide-and-seek games which eventually resulted in turning the property into the dispersed form of submission.

The authority's intervention opened a door for corruption that did not exist in the traditional system. This took place as a result of the rent control that has to be estimated by a committee. The owner who desires to erect buildings for rental purposes must submit, with his building-permit request, the land value estimate, the probable building costs and the expected rent.[85] Those requirements, among others, allow

the investor to get a building-permit which will show all the costs that will later establish the rent,[86] at least temporarily until a committee can decide on the permanent rent level.[87] The committee's decision is arrived at through calculations based on many factors, such as building heights, ratio of built area to total area.[88] As explained earlier, these regulations can lead to tension between lessor, lessee and the authority. The owner may bribe the committee; or the committee or one of its members may even force the owner to tender a bribe by threatening to lower the rent value. Proving such corruption may be difficult. Any person familiar with Egypt will anticipate this, and it could be deduced from the decrees themselves in any case. The decrees usually have a section which delineates the kinds of punishment for those who violate the decrees or bribe officials.[89] Thereby admitting to bribery is a problem.

The rent level established by the committee, though characteristically in favor of the lessees in a socialist regime, resulted in violations of the rent control laws even by the favored tenants. For example, in a new building for lease with many applicants, the owner has a choice in selecting tenants. The applicant who pays most "under the table" will get the apartment. Legally the apartment is leased according to the authority's rent control laws, but in reality the tenant has subverted the law by bribing the owner and has therefore paid more than the established rate. The lessor and lessee have agreed between themselves and thereby over-ridden the authority's control. In this case the tenant pays more than is stated in the actual lease. This is in contrast to what took place in the late fifties and early sixties, when the tenant was apt to pay less than stated in the actual lease. As

explained, owners leased apartments to those who would agree to sign a second lease with a higher rental rate than stated in the actual lease. This tactic was a response to expecting subsequent rent-reducing decrees.[90] Between these two types of decrees the relationship between the party that uses and the party that owns-and-controls was reversed.

If no agreements, that is, bribes, are involved, then disputes can be expected. The owners may complain about the committee's decision on the rent level, or the tenants may complain about the rent after a period of residence. Naturally, the decrees contain articles that regulate the owners' and tenants' complaints. For example, the decision of the committees is considered final if not challenged within thirty days by the owner.[91]

Rent control associated with inflation made dwellings a valuable commodity to both owners and tenants. The owner seeks a higher rent, thus he will wait for the best offer. Consequently, the authority established a rule that no dwelling should remain vacant for more than three months if a tenant who could afford the rent control rate desired to lease the dwelling.[92] The owners bypassed this rule by failing to inform the authority of the date of vacancy, thus gaining time. Then the authority ruled that they must be informed within thirty days about vacancies.[93] Leased dwellings, as a valuable commodity, encouraged investors to lease apartments from owners and then sublet them to others. This is an outcome of the regulation which gives tenants the right to sublet their leased dwelling [ta'jīr min al-bāṭin] in case of extended travels, for instance.[94] The tenant may leave the dwelling for some reason, but the owner cannot cancel the lease if the dwelling is still occupied by at least "a third degree relative" who used to reside with

the tenant.[95] This resulted in reserving more than one vacant dwelling per tenant or owner. Thereupon the authority ruled that no one is permitted to reserve more than one dwelling within the same town without an adequate reason.[96] An example of an acceptable "reason" would be that the person supports two wives.[97]

The same game was played by tenants and owners with respect to leasing or subletting furnished dwellings. Subletting furnished dwellings does not follow the rules which apply to the leasing of unfurnished dwellings. Thus "many owners and tenants leased more than one furnished-dwelling, thereby reducing the number of available unfurnished-dwellings in the market, . . . Thereafter 1969 Article 26 limited the leasing of furnished dwellings, to the owners only, and to only one unit in each property."[98] Regarding this the lawyer ᶜAnbar relates that "the new decree curbed the owners' subterfuge of leasing unfurnished-dwellings as furnished ones . . . "[99] Later, in 1970, leasing furnished-dwellings was further regulated. 1970 Decree 486 limited the leasing of furnished dwellings to persons such as foreigners and government agencies.[100] Even the locations--towns, cities and quarters within towns--in which leasing furnished dwelling were permitted, was specified.[101]

All those regulations increased the conflict between owners and tenants. Consider the situation in which the owner cannot cancel the lease when it expires. The lease continues even if the tenant dies, to be inherited by the descendants. The owner can only terminate the lease if he indemnifies the tenant.[102] The situation became untenable with some owners trying assiduously to cancel a lease. A new game emerged in which the owners tried to evict the tenants who are paying low rents and

refusing to leave. However, if the lessee failed to pay the rent within fifteen days of due date, the lease could be cancelled.[103] Some owners refused to accept the rent, giving different excuses, so that they could cancel a lease. The lessees could not, under the circumstances, produce a receipt if sued by the owner. Consequently, a rule was passed that if an owner refused to accept the rent, the tenant could submit it to the authorities' representative in the community instead.[104] Another example of a game is one in which the owner, according to 1947 Decree 121, has the right to cancel the lease if the building is threatened with collapse. "When owners began exploiting cunningly this [excuse], especially in old buildings because of their low rents, a decree was issued which forbade demolishing buildings threatening to collapse unless otherwise permitted."[105] Permission to allow demolition must be obtained through a committee which again invites bribery by owners.

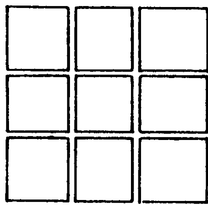
Authority's intervention inevitably favored one party over the other. The autonomy of the parties is lost. At the outset of the lease there were agreements between the owner and the tenant, whether solicited through bribery or not. As rents are reduced or control is assumed by authorities, and the owner is forced to lease, a third party emerges. Specifically, the owner and the authority jointly form a new single party. When decisions regarding leasing are regulated, the owner loses control. Theoretically, the owner controls the property, he can maintain it and improve it if he so wishes. But whether he maintains it or not does not affect his income because the rent is controlled; thus he has no reason to improve his property. In practice the party that controls is not acting and improving. Failing to improve the property will cause it to deteriorate, which in turn may force tenants to leave. Moreover, the

owner may forbid the tenant to change things in the dwelling, applying restrictions in the hope that he will leave. On the other hand, the party that uses the residence may choose not to invest in the property because it does not own it. Thus it can be said that the property is owned by a party which does not control it, or alternatively, we say that the property is shared by three parties: the first who owns it, the owner; the second who uses it, the tenant; and the third who controls it, the owner and the authorities jointly. If the interests of these parties are divergent, then the property is dissipated and has the dispersed form of submission. Centralization has shifted the property from one form of submission to another and the identity of the controlling party has changed.

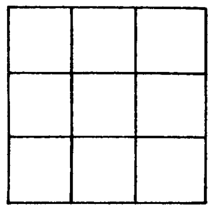
The conclusion we drew in the traditional dispersed form of submission, which states that any property shared by three divergent parties may spell disaster, took place in the rent-controlled dwelling in which the users refuse to leave and the owners refuse to make improvements. The situation became so acute that committees were formed to investigate the deteriorating buildings and to assess the needed repairs to be made by owners.[106] In this case, however, the committee's findings had to be submitted to the tenants and owners. Moreover, "If they were away or their addresses are not known or they refused to receive the findings, then a copy of it should be adhesived [posted] visibly on the property and [another copy] on the advertisement board of the police station in that community . . . "[107]

Finally, traditionally the tenant could change the function of the leased property as long as he did not damage the building physically. This principle might well encourage the tenants to maintain the property.

But in the Egyptian Civil Code, the tenant cannot change the function of the property without the owner's consent.[108] Certainly, this is an advantage to the owner; yet it encourages deterioration of the property , especially if the relationship between the two parties is not amiable.



AUTONOMOUS SYNTHESIS



HETERONOMOUS SYNTHESIS

Part B, Chapter 3

THE SYNTHESIS

Reminders

Again, what will follow is not hypothetical. It results from observing the forms of submission in both traditional and contemporary environments in the Muslim world. This part will also be presented in a reversed manner, i.e. as in the forms of submissions, the presentation is the reverse of the observation. This chapter is basically a theoretical framework for the second part of the thesis.

In the first part we developed the model, and used it to investigate the traditional built environment, tracing the parties' identity change and the shift of elements from one form of submission to another. The attempt was to understand the state of properties by observing the structure of each form of submission independently. This has made the model more familiar and usable, and now we can push it farther.

In this part, we will explore the coexistence of the different forms of submission in the traditional Muslim built environment. Then in the last chapter we will compare it with the contemporary built enviroment. Such a task can be difficult, and can be easily misunderstood, but this can be overcome if we adhere to one advice. That is, our prime task is to examine the physical state of properties. It is true that we are investigating relationships between parties. But these investigations are vehicles by which we trace the state of property. Because the state of the property is caused, primarily, by the party's

actions, these parties must be investigated. The method of this inquiry should never involve interrogation about the value held by parties. The party's norms, religion, cultural and traditional values are insignificant in the context of this work and will jumble our perspective. I ask that the reader free his mind from all factors such as economics, climate, geography, culture, tradition, etc., and concentrate on mechanisms. I am not underestimating those other factors. The forms of submission will be perspicuous if we train ourselves to observe each state of property from its own particular point of view. Then we can examine these factors, and their effects will be be much clearer. I realize that this is a strenuous task, as we architects are not trained for it. But, I believe, the result is worth the effort.

The Party

At the beginning of part A we defined the term "party"; here, we will examine it more closely. The importance of the owning party in our life is fundamental. The owner, it is usually believed, can do anything to the property that he may desire since he often exercises control. According to our model, this is a misleading perception. We often confuse ownership and control, and in using this model must be careful in making distinctions. If the controlling party makes all decisions, then what is the role of the owner? Consider decisions that would affect the built environment such as building a room, changing the facade, adding a second floor, changing a street and the like: it is the controlling party's task. Certainly, the owner can be the controller, i.e., one party can have two claims. In other words, the controlling party is operating in the owner's realm, and not beyond that. This point shows the strength of the owner.

The owner can often influence or even change the controlling party, as well as transferring ownership. If an owner who is not in control of a certain property buys adjacent property and assigns to control it the controlling party of the first property, he is expanding the territory of the controller. The same relationship applies to the user. The owner often has the power to replace the user, and the user uses the owner's property. Within our definition of ownership, the owner does not have any responsibilities other than those mentioned above.

Ownership and use can be expeditiously observed. It is only necessary to ask, who is the owner, or to identify the user who is unlike the owner and controller, using or occupying the property. From observing the three claims in the traditional environment, the users and owners may be spotted easily, which is not the case with the controlling party. It is most likely that we will be prone to a hasty identification of the controlling party. The primary method of identification is detecting change. If a party changes or manipulates an element, it means that this party controls the elements or has permission from the controlling party to do so. To me, this is where history is significant. By detecting change, we can identify the controlling party.

Additionally, the controlling party is distinct from the owner and user in being subject to regulation. Conceivably, regulation could prohibit the owner from selling his property. Likewise, the user could be ordered to use the property in a specific manner. But most, if not all, building regulations are aimed at reducing or limiting control. Think of any regulation. For example, the municipality may regulate: "owners should not exceed their buildings two stories in height . . ." Although this rule demands that the owner should not raise the building, it

implicitly assumes that owners are usually controllers. If the controlling party is not the owner, then the rule commands the controlling party.

In the first part of this thesis, I used the phrase "change of identity" with respect to parties. Identity informs us about change in the size or remoteness of the party. When the municipality claims ownership of dead-end streets, the owner and residents are no longer the same. The owner becomes an outsider and remote from the property. The same can be said of control: public housing built by the state and occupied by the needy, is also controlled by the state, and is therefore characterized by remoteness of control. As we will see, remoteness of the controlling or owning party will impoverish the property. Remoteness rarely applies to users, to use it one must occupy the property.

The size of the party is factor of changing identity. I will use the term "size of a party" to refer to the number of individuals composing a party. The number of participants in a party may increase (we will refer to this as "large party") or decrease ("small party"). A house owned by an individual may be bequeathed and owned jointly by the successors who live in it. An apartment building owned and controlled by an individual can be bought by a corporation. Often, there is a proportional relationship between the size and the remoteness of a party. The larger the party the more likely that it will be remote. Naturally large parties may not inhabit small properties. Successors of a small house may not all reside in that house. The state will not inhabit a housing project, and so on. This proportional relationship does not apply to the using party. If the user's number increases it does not mean that they are remote. These issues will be explored in chapter seven.

Another interesting proportional relationship exists between the size of property and the size or remoteness of parties. Ordinarily, a larger property implies a larger or more remote party. This is true for control and ownership. For example, a state which is a large and remote party owns a park or a street. However, exceptions to this proportional relationship do exist in the built environment. An individual may own a mansion, or conversely many individuals may own and control a small shop or a house jointly.

An unremote party may mean a residing party in case of a dwelling, or parties of abutting properties with respect to a dead-end street or all the residents of the quarter regarding a neighborhood. A decision of a party may be challenged by other parties. A decision made by a resident such as connecting two rooms in his house may not affect the neighbor. The neighbor's challenge of such a decision is clearly an intervention. However, if the decision of the resident to create a window in which he may overlook his neighbor's house is opposed by the affected neighbor, then this may not be an intervention, since this decision will affect both parties and it is <u>beyond</u> the residing party's realm, although it is within his property. The best term to describe this situation is "nigh party." Although "nigh" is a rarely used term, it is a precise yet general term that can be understood with little explanation throughout the second part. For example, if a party changed the function of its property to a tannery and such decision was opposed by a neighbor residing on another block because he is affected by the odor while other nearer parties did not object, then we may say that such party is an affected party. However the term "affected party" would not be sufficient if a person opened a door in the back of a dead-end street and a neighbor living near the dead-end

street's mouth objected. Although such party is not affected, it did object. Thus the term nigh party will be sufficient. Similarly, in such cases we cannot use the term "abutting party." Furthermore, proximity of a party does not mean affected party. Thus the term "nigh party" suggests all of or any of the residing, affected, near or abutting party, depending on the nature of the decision and the nature of the property whether it is a street, a house, etc.

Habitually, a party's initiative is related to its nighness. Nigh parties are most likely to initiate actions. Remote parties may not be cognizant of the property's needs. Thus they may not respond, or may act inappropriately. A house owner who resides in his property is more attentive to his property than an absentee landlord. A landlord pays more regard to his property than a housing agency.

The largest residing party is the one composed of the largest number of property users, and is most likely to take initiative. For example, a dead-end street or a corridor in a building can be controlled by one person. This one-person party may not respond like a party composed of all residents. It is possible that such a person is acting as representative; in such cases all the residents are, in fact, controlling if they have the power to influence that person's decisions. If the residents do not have the power to influence this person, then he may act according to his own interest, which may not match the residents' interests. Thus a small party is not necessarily praiseworthy. Similarly, a large party is one which is not residing in or using the property. Thus it is remote and may fail to take initiative since responsibility is dispersed among the members. Hence, it is not

praiseworthy either. Therefore, a large-remote party is ominous for the property, and conversely, a large-nigh party is commendable.

At the beginning of part A we deferred explaining the assumption that users are considered as one party regardless of their number. The size of the using party greatly influences the state of the property. A room used by one person may not depreciate as much as if it was used by ten persons. In this case we are comparing the state of property from the user's point of view which can be misleading. The state of the property depends on the forms of submission as well. A room used by one person who does not own or control it will be in a different state if it is used and controlled by the same person. The same applies to ten persons. The room that is used by ten individuals who do not own or control it will be consumed more quickly than if it is used by ten persons who own and control the room at the same time. In other words, the forms of submission do not tell us which room is in better condition, the one used, controlled and owned by ten persons _or_ the one used by one person but owned and controlled by outsiders. This means that the forms of submission inform us about the state of property within specific circumstances. This raises a basic question which can now be answered: what is the significance of the forms of submission as a model?

Significance of the Forms of Submission

A form of submission does not inform us about the physical nature of property, whether it is large or small, built or open. It does not indicate any function, whether residential, commercial or institutional. It does not explain whether it is public or private. Furthermore, any

object may fall into any form of submission. What, then, is the significance of the forms of submission and how useful are they?

By reviewing a few examples of research of architecture in the Muslim built environment, one can generalize that most studies investigate the influence or relationships of one or more factors on each other and on the built environment or vice versa, or even both. The factors are often clear in the title, in the form of key words such as economical, technological, climatic, social, cultural, historical and the like. The built environment is so complex that it is impossible to investigate as a whole. Thus any study selects some factors and skillfully and logically isolates them from the whole complex environment in order to avoid confusion. This makes it possible to investigate the impact of those factors on other factors and the environment. Most studies do not consider the question of responsibility as a basic one, but rather a factor like any other factor that can be investigated separately. Other studies, like this thesis, cut across those factors and are very specific on particular theoretical issues but use it to study the relation between numerous factors. Some possible topics are: What is the impact of economy or climate on the built environment or on the social environment? Does the social environment affect the physical environment or vice versa? How do they relate to culture, tradition, economy, etc.? What is the significance of industrialization and how does it relate to the economy and the physical form? Do people need housing and how can we go about providing it? In short, any research will deal with the physical built environment, and case studies are inevitable for realistic research. Researchers implicitly or explicitly derive conclusions from these case studies, or measure their hypotheses on them. The perplexity rests in

these case studies, as any case study involves human behavior, actions, motives, etc. and/or physical elements such as parcels, buildings, blocks, streets, furniture, infrastructure and the like.

Among human sources, any human may be a user, owner, controller or a member of a party that uses, controls, or owns property. Thus, there are instances in which human activities or relationships between individuals are influenced by their position as a party or a member of a party in the built environment. This means that the chance of misinterpreting these sources does exist. But most importantly, any physical element in a case study is in one form of submission or another. Consequently, it will reveal a specific state, and when it is observed it may be misinterpreted. To give a general example, in a squatter settlement or public housing, the residents may not choose to improve their environment, as they do not own it. The authority observes the state of the property as disastrous. Researchers will try to discern the factors behind it. Economists may see the economy as the main cause. Sociologists may attribute the problem to a social misunderstanding by the designers. The World Bank is concerned with infrastructure. The municipality or the mayor is worried about its appearance. Indeed, every attempt to improve the situation is external, and the question of responsibility is not raised. Years go by and nothing is changed since the problem is not identified. And if it is, it may not be solved. For example, if infrastructure is introduced, it will be used by the residents, owned by the state, and controlled by a housing agency or other third party. The infrastructure is in the dispersed form of submission and most likely in a dissipated state. Results will not be satisfactory.

Once again, researchers wonder what went wrong. Other researches are prepared to be launched to spot the problem.

Another example is the investigation of social interaction between neighbors. Neighbors of condominiums who own, control and use their circulation zones, which is in the unified form, would certainly behave differently from those leasing apartments or occupying public housing -- permissive or dispersed. The difference in behavior is the result of their relative position as parties towards property in the various forms of submission. There is chance of miscalculation.

A common misleading factor is poverty. Architects and policy makers often regard poor people's environments as disastrous and inadequate. Such environments that are controlled and owned by users, i.e. unified form, are the best that can be achieved by the users given their state of poverty. The issue in such cases is not an architectural one; it is one of poverty. To the contrary, a housing project built by the state, controlled by an agency and used by a certain class or profession, army officers for example, may be considered by some experts as an acceptable if not successful environment. This property is dispersed, but the state of the property is maintained by pouring in money constantly. The unstable state of the property is camouflaged by economic power, while in the first case -- poverty -- the unified state of property is covered by poverty. We cannot and should not compare the two environments. If we have to compare then we should bear in mind the difference between the forms of submission. Observers in the two cases will probably conclude that the housing project is in a much more stable state, although it is dispersed. The economic privilege had fooled them.

In other cases in which researchers focus on the economy, properties are compared in order to analyze the impact of the economy on preservation, for example. It is possible to compare elements from different forms of submission and this will confuse observers. They may compare well-to-do neighborhoods with poor ones. The well-to-do families may own and control their properties, which is the unified form. The poor may not own or control their properties -- dispersed. The impact of the economy on preservation is ascertained, but is very exaggerated as a result of comparing a wealthy unified property with a poor, dispersed one.

From this brief description one may conclude that each form of submission is a melting pot: all factors are combined in it and thus can be misinterpreted. Those factors cannot be detached unless the forms of submission are considered. To carry out meaningful research we must stand on logical ground. To compare the right elements of the right case studies for the right research, we should stand on the right platform. This misunderstanding and consequent misinterpretation of the built environment cause acute sorrow in the Muslim built environment. Knowledge of the forms of submission will help us to avoid such mistakes as given in the examples. I will confirm this tentative conclusion in the eighth chapter of this thesis.

Synthesis of the Forms of Submission

In the built environment, the coexistence of the five forms of submission is so consolidated, synchronized and assimilated that it is difficult to trace. As the built environment is diverse and complex in terms of physical elements, so are the forms of submission, since each physical element may have a different form of submission. For example,

let us explore the situation of one resident who owns an apartment in a condominium. He may own, with his downstairs neighbor, the floor that separates their dwellings. The floor is owned, controlled and used by one party, which is the two neighbors jointly, i.e. unified form. On the other hand, the party-wall can be owned by all the owners of the condominium. This means that this resident uses but does not control or own the party-wall; it is controlled and owned by another party in which he is only a member, which is the permissive form. He will use the mailbox which he does not own or control -- permissive or dispersed. He may park his car in a parking lot controlled by the condominium residents and rented from the owner of the adjacent property -- dispersed. Certainly, he will have furniture that he controls, owns and uses. He may even have a piece of furniture that he has leased, which he controls and uses but does not own -- possessive. This case is somewhat complicated, but the point is that wherever we look, we see a form of submission.

What makes the situation even more complicated is the different opinions on distinguishing the forms of submission. For instance, is a leased apartment possessive or permissive? With respect to the walls it is permissive; the tenant uses the walls only. Considering the space in the apartment it is possessive. The tenant uses and controls the space, but does not own it. Because of this complexity, we must develop a system which is mutually understandable in order to insure consistency of meaning throughout this thesis.

In the man-made built environment every space is composed, logically, from physical elements. A room is made of walls as is a dwelling. The street is formed by buildings, etc. Thus, if we refer to either one, we will imply the other. In our profession we often refer to

spaces by form of location such as a room, a basement or a street. Or we refer to uses which indicate functional spaces such as an entrance, a school and a theater. Therefore, I will often use spatial terms. Consequently, to identify the forms of submission we will investigate the physical elements which compose that space without referring directly to them. If the form of submission of a house is permissive, while the rooms are possessive, this means that the tenant only uses the external or party-walls, while he both uses and controls the walls inside the house. On the other hand, if the physical element cannot be indicated by a space, then I will use physical terms, such as a party-wall that has a different form of submission from that of the rest of the house.

Another word that we should not confuse is the term "property." Conventionally, the term "property" is linked to ownership only. People usually consider an apartment building owned by one party and used by different parties such as tenants for example, as one property regardless of the number of involved controlling or using parties. To avoid confusion in such cases we will use the term "territory" to indicate a part of the property which may have the same or different forms of submission. The using party of a house that does not control it, for example, will control elements of the lower level such as furniture, which results in a different form of submission. For example, a house owned and controlled by one family, while a second family is residing in parts of it, will be considered as two territories, since each part is used by a different party. Therefore, a property or territory is defined by the sameness of parties regarding claims. For instance, a controlling party can control two adjacent properties at the same time. These are considered two properties as long as they are owned by two different

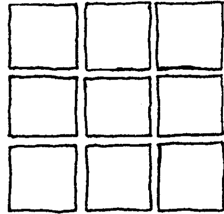
parties, even if they are used by the same parties . If a party owns and uses a building while it is controlled by two different parties, then it will be considered two territories as long as it is controlled by two parties. The same applies to use.

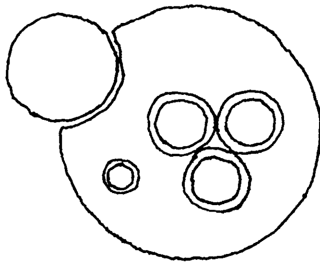
Rather than investigating the coexistence of the forms of submission in all levels such as furniture, rooms, dwellings, streets and urban elements, I will concentrate on the coexistence of the elements of which the form of submission is changed. For example, since the form of submission of furniture is the same now as in the traditional environment, we will not investigate it.

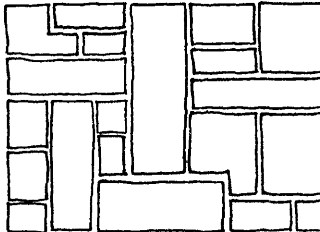
The main purpose of this investigation is not merely to understand the structure of each property or territory, but rather to explore the relationships between those properties. And since we understand the structure of each form of submission, we can analyze the relationship between the parties of those properties. This analysis will give us a comprehensive understanding of the parties' actions, which will affect the state of property. Therefore, this is a circular investigation. Investigating the coexistence of the forms of submission eventually leads us to the state of property, but most importantly to the role of parties of the different properties. This will give us a lucid and comprehensive picture to spot the problem or the difference between traditional and contemporary environments.

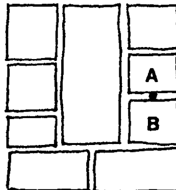
As mentioned above, the coexistence of the forms of submission in the built environment can be complicated. Yet the situation can always be described. I will try to explain the difference between two extremes of the coexistence of the forms of submission. We have seen in part A that in some traditional properties, the identity of the parties has changed,

AUTONOMOUS SYNTHESIS


D.7

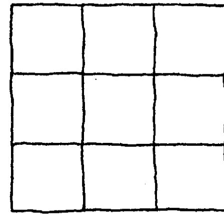

D.9

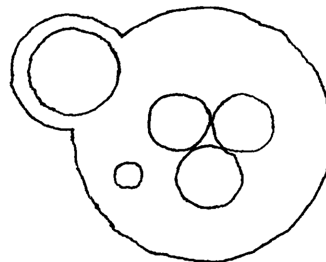

D.11

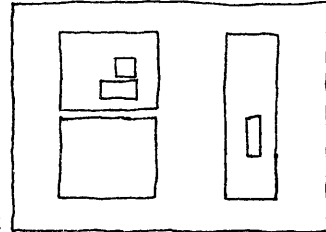


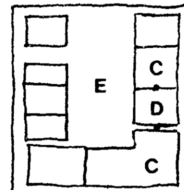
D.13

HETERONOMOUS SYNTHESIS


D.8


D.10


D.12



D.14

and some elements shifted from one form of submission to another. These two changes affected the coexistence of forms of submission, i.e., the coexistence of the forms of submissions in contemporary built environments differs from the traditional one. Thus, comparing the two coexistences will facilitate the characteristics of each type of coexistence. Furthermore, we have seen in the second chapter that intervention by an outside party was the main reason for a shift of property from one form of submission to another, and that the most affected and effectual claim is control. Therefore tracing control and intervention will be our threshold.

The coexistence of the forms of submission regarding control and intervention can be classified into two extremes from the user's point of view. The first is the one in which the users will have full control over their properties with no exogenous influence, and each user will own his own property. Each property is self-made and self-governed. The whole environment is a series of adjacent unified forms of submission. I will call this coexistence "autonomous synthesis" (D.7). The second extreme is the one in which the users will have no control whatsoever and do not own the properties, thus it is permissive or dispersed form. Paternalism and external control is the policy of the controlling and owning parties and the users have little or no responsibility. The environment is composed of permissive or dispersed forms of submission. I will call this coexistence "heteronomous synthesis" (D.8). According to this definition the autonomous synthesis is internally controlled and all decisions are made by the users, on the other hand heteronomous synthesis is externally controlled and most decisions are made by outsiders.

Most built environments will not be composed solely of one of the synthesis, but rather of a mixture of both. Yet it is possible to recognize the prevalence of one over the other. For example, in an autonomous synthesis some owners who control and use their dwellings may lease them to others. This may not affect the environment as much as if it is owned and controlled by one party as in housing projects in which the owner controls every urban and residential element.

The way elements are composed in the built environment may impose a relationship of intervention between the parties of the different properties, which will influence the coexistence of the forms of submission. The most common example is the case of dwellings and streets. The party that owns and controls the street may intervene in the owners' affairs. Because the dwellings are surrounded by streets, a certain type of relationship develops between the house owners and the street owners. This relationship may be characterized by intervention, especially if the owner of the dwelling has to follow some rules within his dwelling imposed by the street owner (D.10). (The single lines between properties indicate that one party, either internal or external, is dominant, i.e., the dominated parties have to follow the rules, which is heteronomous synthesis.) This is the case in our contemporary built environment, i.e. the street is permissive. But if the street is unified, that is owned and controlled by the residents or users of that street, and those users as one party cannot impose regulations on the house owners, then each property is independent and not controlled by other properties. The owner of a dwelling, for example, may be controlled by the street's party since it may block his right of way. This is a dominance relationship between parties which is often unavoidable. However, if a property such as a

dwelling cannot be controlled, i.e. its party does not have to follow rules by outsiders, then this means that the dwelling is merely inside or surrounded by streets and the potential intervention of the relative positions of elements between properties is eliminated (D.9). (The double lines between properties in diagram 9 indicate that each property is totally independent; some properties are merely positioned inside others with no external influence.) If this is true, then we can conceive of an environment composed of adjacent unified forms of submission; the streets are unified as dwellings (D.11). Even if some dwellings or other elements were not unified, as long as their parties do not impose regulations on others' property, the coexistence is still autonomous. On the contrary, some adjacent properties may be unified but subject to regulations of the surrounding properties' parties, then the coexistence is a heteronomous one (D.12). Therefore, dominance between parties is unavoidable; however, we will say that properties are autonomous if no regulations are imposed upon them by outsiders.

Autonomous synthesis means that each property, whether unified or not, is not subject to any rules. Parties have complete freedom within their property. Hence, the only burdens on the properties' parties are boundaries or interfaces with adjacent properties. Any dispute between two parties (A&B, as in diagram 13) is their own responsibility. On the other hand, any dispute between two properties or territories in the heteronomous synthesis (C&D, as in diagram 14) can be the responsibility of the dominant party (E). Therefore, extensive dialogues and agreements to settle disputes between parties should be expected in the autonomous synthesis. This is especially true if there are no mediators, rules or principles to settle disputes, as otherwise the built environment would be

chaotic. Agreements are the only means of avoiding chaotic environments. On the contrary, agreements are not needed in the heteronomous synthesis. The controlling party is creating its own organized environment. Autonomous synthesis also means an adaptable built environment for the users. In the unified form of submission the using party does not need permission from the controlling party; they are both one. The controlling party will try to adjust the physical environment to fit the using party's changing needs, unlike the situation in the heteronomous synthesis. This will be explored in detail in the last chapter of this study.

Finally, the two synthetic extremes demonstrate two distinct attitudes and ideologies. The autonomous synthesis is somewhat laissez-faire. The ideology is that each party knows and can accomplish what is best for itself. Thus nonintervention is the applied doctrine. On the other hand, heteronomous synthesis reveals a paternalistic attitude, in which the governing body distrusts the capabilities of parties. Thus intervention can be foreseen. Such interventions are most likely to take place at the outset in the properties (such as streets) of a large-size party, in which responsibility is dispersed among the members. Then, gradually, intervention moves towards the properties of a smaller-size party such as residential environments. Thus, the larger the size of the party, and the less responsibility per individual, the more likely it is that an agency such as a municipality will be established to represent the users. Unfortunately, over time, such agencies may become separate entities, resulting in paternalism. In the third part, other major differences and characteristics will be discussed.

Part B, Chapter 4

FORMATION OF TOWNS AND ORIGINAL GROWTH

This section aims to investigate the original laying out of towns in the early Islamic period. By tracing the role of the parties in the decision making process, we can sense the forms of submission and consequently their synthesis. We will then investigate the principles underlying the growth of those towns, to see whether or not those principles lead to the same type of synthesis of the towns' formations.

FORMATION OF TOWNS

In general, Muslim towns varied in terms of their decision-making processes from decentralized to well centralized formations during the early Islamic periods. G.E. Von Grunebaum, for example, suggests classifying Muslim towns into two types with respect to their evolution, namely "spontaneous" and "created" towns. Under the "created" type, the Muslims founded many towns which can be categorized as:

1) A military town-camp such as al-Kūfah and al-Baṣrah in Iraq, al-Fuṣṭāṭ in Egypt and al-Qayrawan in Tunisia.

2) A fortress town or ribāṭ such as ar-Rabāṭ in Morocco.

3) A capital or political town such as Baghdād, the political center of the Abbasids, and Fez which indicated the rise of the Idrīsids.

4) A princely town satisfying the ruler's desire to remove his residence from the capital to a nearby created town. For example, al-Muᶜtaṣim created Samarra about seventy miles north of Baghdād, and

Raqqāda was created by the Aghlabids six miles from Qayrawan.

Spontaneous towns are those developed without planning by a governmental body, such as Karbala and Mashhad. Also, the original settlements of the regions conquered by Muslims can be considered as spontaneous from the Muslims' point of view. The Muslims had no influence on the location or structure of these towns.[1]

As we concluded in the first part of this thesis, decentralization often leads to the unified form of submission. Therefore, it is logical to concentrate our investigation on the created towns as they are more centralized than the spontaneous ones. One reason for this is that, if the synthesis of the forms of submission in the created towns were autonomous, then it is most likely that the synthesis of spontaneous towns was also autonomous. Another reason is that the process of settling and the descriptions of the created towns are documented by historians, while spontaneous towns were only described. For these reasons I will investigate the created towns.

Many scholars concluded that military town-camps followed the same process of creation. A.R. Guest, for example, referring to the original laying out of al-Baṣra, al-Kūfah and al-Fusṭāṭ, concludes that "with some differences, the three towns were much alike in their general character; and what is wanting in the description of one may be filled up from the accounts of the others with some confidence."[2] The process of planning for these towns was less controlled or less centralized than the capital or princely towns such as the round city of Baghdād, as is evident from the historical descriptions. Yet all Muslim towns, even the spontaneous ones like Aleppo, and Cairo, resemble one another. S. al-Hathloul raises and skillfully handles some of the principles

underlying the following question: "Starting from two or more quite different urban patterns, how did Arab-Muslim society develop cities of a similar pattern and distinctly similar character?"[3]

The original laying out of towns is a good example to realize the significance of the forms of submission. A great misunderstanding among scholars resulted from their effort to understand the laying-out and growth of the city from various points of view without considering the role of parties and claims -- ownership, control and use. To the best of my limited knowledge most scholars reached premature conclusions. For example, Creswell's superficial understanding of the verb 'ikhtaṭṭa as "simply marked out"[4] led him to conclude that al-Baṣra, al-Kūfah and Fuṣṭāṭ are characterized by a "chaotic labyrinth of lanes and blind alleys, of tents and huts alternating with waste ground . . . ." He adds that "[a]t Kūfa the inhabitants of one quarter required a guide when they entered another."[5] These remarks reflect the scholar's romantic comparisons between Muslim towns and the classical (Roman or Hellenistic) towns which are regarded as highly ordered. For example, in exploring the structure of Muslim towns, von Grunebaum questions their lack of gymnasiums and theaters![6] Lammens referring to the early Muslim towns states that "[t]he variety of the terms employed by Arabic historians -- ḥīra, fuṣṭāṭ, qairawān -- suggest the picturesque disorder of a growing city, . . ."[7] Lapidus's analysis of Aleppo, Damascus and Cairo, during the Mamluk's reign, attributes and overemphasizes the social order as the underlying cause of the character of Muslim towns. Finally, J. Lassner, comparing the camp towns with Baghdād, relates that "[t]he early pattern of growth which was characteristic of such military colonies as al-Baṣrah and al-Kūfah was rapid and without real awareness of the formal elements

of city planning."[8] It seems that most scholars consider towns of orthogonal plans or any other geometric plan laid out by a central authority as an ordered town. I will call such towns "organized" towns; this will be seen to be different from "ordered" towns.

To investigate the synthesis of the forms of submission, I will not review the process of laying out each created town in detail. Although such a task is possible and may contain information beyond a mere mention of the facts, it will not add much to our knowledge other than repetition. The history of those towns is dealt with extensively by many scholars. Rather, I will concentrate on investigating the general mechanisms, such as the meaning of khaṭṭa, a verb that was used extensively by Arab historians and greatly misunderstood by scholars. Then I will concentrate on one town, al-Kūfah, representing a decentralized process of erection, and Baghdād, as an example of the centralized ones. Finally, I will explore the impact of the mechanisms underlying the expansion of those towns, such as revivification.

Terminology

Arabic terms usually have multiple referents and implicit connotations which were easily understood among Arabs in the past, to the extent that they did not bother documenting their definitions. Lingistically, in Arabic one can derive from one word many verbs and nouns that may have meanings totally different from the original word. The precise meaning of the derived terms is usually understood from the context. In some cases the hard core of those derived terms changed over time. Then scholars referred to the original word to recover the meaning. Unfortunately, this confusion took place with the word "khaṭṭ,"

literally, line. The terms derived from this word are key to our investigation, and I will therefore scrutinize it.

One way to grasp the precise meaning of a term is to review its usage by as many historians as possible; each usage may illuminate a different aspect of the term. To begin with, the linguistic historian Ibn Manẓūr (d. 711/1312) explains that al-khaṭṭu (noun) is the "rectangular method of a thing" such as a rectangular plot of land; it also means a road. Takhṭīṭ is the action of laying out straight lines [tasṭīr]. He adds that people usually say a person is marking [yakhuṭṭu, as a present continuous verb] on the land if he is cogitating and thinking out a decision. As a noun, al-khiṭṭu or al-khiṭṭatu is the land being settled which was not settled by others before.[9] The confusion of the Orientalists is not surprising as there is no immediate proper translation for the verb Khaṭṭa into English. This presents a dilemma: if I use the Arabic term and its derivatives the non-Arabic reader will be confused, but on the other hand using the verb "marked-out" does not indicate the precise meaning. Thus I will use both as I see fit; and when I use "marked-out" it should not be understood as merely marking on the land. Those who do not know Arabic or are not interested may skip the next few pages to the summary.

Ibn Manẓūr further elucidates that "marked it out for himself [khaṭṭaha li-nafsihi khaṭṭan] or 'ikhtaṭṭahā [he already marked it out for himself] means that [the land] was marked by a khaṭṭ [not necessarily lines] so it would be known that he <u>possessed it</u> ['aḥtāzahā], to be built as a dwelling. From this the khiṭaṭ of al-Kūfah and al-Baṣra [can be understood]. And [if it is said that a person] 'akhtaṭṭa [simple past] a khiṭṭah [noun] this means that he demarcated a place and lined [khaṭṭa]

it with a wall. Its plural is al-khitatu. And everything you possessed [hazartahu, i.e. prohibited others from possessing it][10] means that you marked out khatatta [past perfect] on it. While khittatu means the land. And a man [usually] demarcates a house [wa ad-daru yakhtattuhā ar-rajulu] on a land, which is not owned, in order to prevent others (from building for example, yatahajjaruhā) and to build on it, this, if the ruler allowed a group of Muslims to mark out dwellings [yakhtattū ad-dūr] on a specific location and make them as their residency [wa yattakhidhū masākina lahum]; as they did in al-Kūfah, al-Basra and Baghdād (emphasis added)."[11]

The above definitions indicate that two basic terms are derived from the word khat; one is the verb khatta and its derivatives of past or present, etc. such as yakhuttu, khattahu, 'ikhtattahā. The other is the noun khittah and its derivatives such as al-khittu,, al-khitatu, etc. on which the action is taking place. Regarding the verb form, the above definition connotes straight lines, rectangular things, a well thought-out action based on the acting party's judgments, lining or marking with lines or walls and a possessed land to be built as a dwelling. But most importantly, the word hazara was used by 'Ibn Manzūr to explain khatta which denotes the exercise of control. Hazara means preventing others. The noun hazīrah relates to spaces that are controlled; for example, hazīrah is used as animal fold which is derived from hazara and means preventing the animals from moving in or out.[12] 'Ibn Manzūr's usage of the word hazara among other explanations suggests control of the corresponding party. The ruler's permission is also needed, as explained previously. So far, the verb khatta denotes the action of controlling and possessing a land through the ruler's

permission by the residing party. These definitions certainly suggest the unified form of submission.

If, as Creswell claims, khaṭṭa means merely marking-out, then what is the difference between khaṭṭa and the verb 'aḥtajara which means demarcation in order to revivify a dead-land by the reviver? This was explored in Chapter 1. Moreover, if the ruler's permission is needed for 'ikhtiṭāṭ and the party has to make khiṭṭah in a specific location, then how does khiṭṭah differ from the bestowing of allotments by the ruler? Indeed, understanding the differences between 'iḥtijār (demarcation), 'ihyā' (revivification), 'iqtā^c (bestowing allotments) and 'ikhtiṭāṭ is the key to our inquiry.

How does khaṭṭa relate to the action of building? Al-Jawhari defines khiṭṭa (noun) as "the land which a man demarcated by marks of lines denoting the selection of the demarcator for building and possessing that demarcated site."[13] This definition implies that the action of building immediately follows khaṭṭa. All the cases suggest that the two mechanisms are often successive; if not the term 'iḥtijar (demarcation) will be used. All the cases reported by al-Ya^cqūbi, al-Balādhur; as-Samhūdi, Abu Yūsif, aṭ-Ṭabari and al-Maqrīzi implicitly or explicitly indicate that erection [binā'] follows khaṭṭa;[14] to the exclusion of few cases, for example, al-Balādhuri reports that "b. al-'Adra^c marked out ['ikhtaṭṭa] a mosque but did not build it, and he prayed in it while it was not built; then ^cUtbah did build it . . . "[15] Therefore, we may say that khaṭṭa means the action of possessing and controlling a land by marking-out through the ruler's permission and it often precedes the building activity.

Guest relates that "khittah seems to convey the idea of marking out with a line; its general meaning is ground occupied for the first time, a 'pitch' or holding; hence it comes to mean a site of any sort."[16] Such a definition clearly blends the verb khatta which denotes action and the noun khittah which is the site. This raises the question of what is the precise difference between them, and what is really meant by the verb khatta or marked-out? In one case, al-Balādhuri uses the verb khatta in describing the foundation of a mosque in al-Basra as: "he commanded the marking-out ['ikhtitāt] of the mosque by his hand."[17] The structure of the sentence in this usage suggests that khatta connotes marking the ground by the respective nigh party and not by a ruler or an outsider. Indeed if it is marked out by the ruler, then it is an allotment ['iqtā^c]. But this definition does not rule out the possibility of a party being helped by an outsider party. Yāqūt relates that when the Prophet came to Madīna, he "alloted the people the houses [dūr] and dwellings [ribā^c][18]; and he marked out [khatta] for Banī Zahrah [more than one family]; . . . and he alloted az-Zubayr b. al-^cAwwam..."[19] This usage suggests that khatta is a verb which denotes both bestowing and marking out a site, and it can be made by an outsider party. In this incident the Prophet bestowed and undertook the marking out of the land for Banī Zahrah, i.e. the marking out defines at least the boundaries of the land. It is also reported that the Prophet marked out [khatta] the house of ^cUthman, the third caliph.[20] Excluding these and a few other cases,[21] all the marking-out actions I came across are made by the inhabitants of the khittah (noun).[22] But most importantly, the structure of the sentence will tell us who is the acting party.

Yāqūt's statement above proposes the difference between khaṭṭa and 'aqṭa^ca (the act of bestowing allotment). Bestowing allotment, as defined in the first chapter, is the act of bestowing a specific site, whose boundaries are established by the ruler to a party; the party should revivify it within a limited time, and it may not be owned unless revivified. Khaṭṭa is the act of marking out a land by the party itself, within a specific site through the ruler's permission, i.e., the party decides on the boundary and not the ruler. Moreover, the allotee may not revivify the allotment immediately, while the verb khaṭṭa indicates the threshold of erection. The use of these two verbs by historians are manifested in the "created" towns. Khaṭṭa is used to describe al-Qayrawān, al-Kūfah, al-Baṣrah and al-Fuṣṭāṭ, while 'aqṭa^ca (bestowed allotments) is used in describing the more centralized system of creation as in Baghdād.[23] Thus the major difference between 'aqṭa^ca and khaṭṭa lies in the way decisions are made. If the party decides for itself, then the process is khaṭṭa; if decisions were made by others, especially a centralized party, then it is 'aqṭa^ca. This is very clear in al-Ya^cqūbi's description of al-Qāṭūl's creation by al-Mu^ctaṣim (220/835), in which he states that al-Mu^ctaṣim "marked-out ['akhtaṭṭa] the location of the town that he built; and he bestowed ['aqṭa^ca] the people allotments, and he started to build, then [or until] the people built palaces and houses; [consequently] the markets were established; then he [al-Mu^ctaṣim] travelled from Qāṭūl to Surra-man-ra'ā."[24] 'Ibn Durayd explains that Khiṭṭun is the name of the place that was marked out by a person <u>for himself</u> [yakhtaṭṭuhu li-nafsihi].[25] Thus khaṭṭa is always undertaken by the stated party of the sentence, the reverse of 'aqṭa^ca,

and khittah always suggests a unified form of submission, while 'aqta[c]a often leads to a unified form but not always.

Does the verb khatta indicate marking out the boundaries only, or does it also imply design? Most usages of khatta by historians suggest that it indicates the definition of the boundaries and not designing what is inside. Al-Ya[c]qūbi, for example, reports that during Abu al-[c]Abbas's reign (d.136/754), Abū Ja[c]far marked out ['akhtatta] ar-Rāfiqah on the bank of the Euphrates and it was designed by [wa handasahā lahu] 'Adham b. Mihriz.[26] Furthermore, khattah as verb denotes the size of the party and the site. If it is used with an individual it refers to a dwelling and a person or a family, but if it is used with reference to a tribe, for example, it indicates the tribe members as one party and the site as collective ownership of that party. In investigating al-Fustāt, Guest concludes that "[t]he areas occupied by individuals among the founders for their houses were known as their khittahs . . . . The term applies equally to collective holdings. Where the dwellings of bodies, such as tribes or sub-tribes, were grouped within a common boundary, the ground included was called the khittah [noun] of the group. It is to be noticed that a khittah of this kind might be a part of another, as, for instance, the khittah of a tribe might contain khittah of sections and these in turn khittah of families."[27] Guest's keen conclusion is of great importance to our investigation of submission. The verb khatta and the noun khittah may not be lucidly understood unless the party referred to is stated. In Arabic, the sentence often gives the reference of the noun which can be a male person [khittatuhu], female [khittatuhā], or clan, subtribe or tribe or even a group of families or individuals with no blood ties [khittatuhum]. As to the verb khatta, it <u>must</u> refer to a

party, for a male individual, in the past tense, for example, khaṭṭa, for a female khaṭṭat, for a tribe, khaṭṭū or 'ikhtaṭṭū, etc. In short, the party can be easily defined from the structure of a sentence. If the party referred to is a tribe, then the tribe collectively as one large nigh party marks out and claims the khiṭṭah. This khiṭṭah may include other khiṭṭahs for sub-tribes which may contain khiṭṭahs of various families. Each khiṭṭah is claimed by the largest residing party.

Can the verb khaṭṭa mean claiming without marking the ground or walling it? It is reported that the Prophet David planned to build a house for God in Jerusalem; David marked out [khaṭṭa] a khiṭṭah (noun); "but the khiṭṭa's square-corner [tarbīᶜatuhā] was on the corner of a house that belongs to a man from Israel."[28] The usage of the verb khaṭṭa in this incident implies that it does not necessarily mean marking out on the ground. Excluding a few other similar cases, khaṭṭa is always related to marking out by lines, walls, etc. Thus khaṭṭa is essentially claiming and not merely marking out.

In summary, khaṭṭa in the early Islamic period meant the act of claiming a property, often by marking out lines or physical elements to establish the boundary of the property by the inhabiting party or the largest nigh party through the ruler's permission on a designated site. Khaṭṭa is the first step toward building and it does not necessarily mean marking out the internal organization of the property. Khaṭṭa always refers to a party; the party can be a person, a family, a tribe or any other group of people who jointly form one party. Khiṭṭah is the established property of that party. Each khiṭṭah may include other smaller khiṭṭahs in which each khiṭṭah is controlled by the corresponding inhabiting party. The major difference between khaṭṭa and 'aqṭaᶜa

(bestowing allotment) is in the way of establishing the boundary. Khaṭṭa means that the party stated in the sentence, often a large nigh party, has decided upon the boundary; 'aqṭaᶜa implies that the boundary is decided upon by an external party which is often the authority. This means that the only relationship between the authority and the party of a khiṭṭah is the permission of the authority. 'Aḥtajara means demarcation on dead-land and not in a specific site like khaṭṭa and it does not need the ruler's permission. The demarcated dead-land can be revivified by other parties than the demarcator, while the khiṭṭah denotes a recognized property that may not be violated by others. In short, khiṭṭah means a property in the unified form of submission, while khaṭṭa (verb) means establishing a property in the unified form of submission. Thus, combining this information, one may suggest that the closest appropriate English term for khiṭṭah is "territory," while the verb khaṭṭa is "territorialize." We can now proceed to investigate the original laying out of al-Kūfah and comment on other towns as well, to establish the synthesis of the forms of submission in those towns.

<u>Al-Kūfah</u>

Al-Kūfah's foundation is described mainly by al-Balādhuri, aṭ-Ṭabari and al-Yaᶜqūbi and a recent dissertation by al-Janabi. In general, these descriptive data are sufficient to draw a picture of this town regarding the location of such different elements as the mosques and the markets within the town, the size of the town and the like; but they are not sufficient to establish a clear understanding of the forms of submission. Therefore, I will concentrate on al-Kūfah and rely on other

towns such as al-Fusṭāṭ for additional information. First, I will give a brief description of the original laying out of the town.

Al-Kūfah was founded during the fourth year of ᶜUmar b. al-Khaṭṭāb's reign (13/634-23/644) as a camp town. Al-Balādhuri (d.279/892) stated that when the Muslims in al-Madā'in were attacked by mosquitoes, Saᶜd 'Ibn Abi Waqqās wrote to ᶜUmar informing him that they were badly affected by them.[29] According to aṭ-Ṭabari (d. 310/923) ᶜUmar replied to Saᶜd ordering him to adopt for the Muslims a habitable place to which they could migrate, provided that between him (ᶜUmar) and the Muslims, no sea should intervene. Accordingly, Saᶜd chose al-'Anbār, but there were so many flies that he had to select another site. Then Saᶜd sent Ḥudhayfa and Salmān to search for a site, and they found al-Kūfah.[30] Al-Balādhuri stated that Ibn Buqaylah presented himself before Saᶜd and said to him, "I can point out to thee a site which is outside the waterless desert and higher than the muddy places."[31] Saying this, he pointed out the site of al-Kūfah. Aṭ-Ṭabari related that Saᶜd charged the laying out of the city to Abu al-Hayyāj and according to ᶜUmar's advice, main roads [al-manāhij] were to be forty cubits, those following the main roads were thirty cubits, and those in between twenty, lanes [aziqqah] seven, and the fiefs sixty cubits, except those of Banī Ḍabbah. Consequently, aṭ-Ṭabari alludes that 'ahl ar-Ra'y -- a group of men who have a distinguished knowledge and opinion -- gathered to estimate, and then, <u>if they agreed</u>, [ḥattā 'idhā 'aqāmū ᶜalā shay'] and decided upon something, Abu al-Hayyāj would decide accordingly.[32] Aṭ-Ṭabari also stated that the first element to be laid out and built was the mosque. Al-Balādhuri relates that when Saᶜd arrived at the place destined to be the site of the mosque, he ordered a man to shoot an arrow toward Mecca

[the qiblah], another arrow toward the north, a third to the south, and a fourth to the east, and then marked the spots where each arrow had fallen. Sa^c^d established the mosque and the governor's residence on the spot where the archer had stood.[33] Aṭ-Ṭabari relates that these shots formed a square in the center of which the mosque was to be located. Sa^c^d then ordered those who desired to build, to do so outside the square. They also dug a ditch [khandaq] around the square [ṣaḥn] "so no one could intrude it with buildings." From the square to the north, five roads [manāhij] were marked, to the qiblah four, to the east three and to the west also three.[34]

Although the above description regarding al-Kūfah's foundation is quite fragmentary and details are lacking, a careful examination bearing in mind the way decisions were made would clarify a simple decision-making process. The first decision was the foundation of the town and its location, which was undertaken by Sa^c^d himself, with ^c^Umar's permission and his request that no sea should come between the town and where he was, in al-Madīna. Although Sa^c^d had the power to decide by himself on the town's location, he still consulted others. The second group of decisions about the location of the mosque, the governor's residence, the market and the square were made by Sa^c^d and others. Up to this point it appeared that the dwellers did not influence these decisions, which were beyond their realm or interest.

In general, as to settling the inhabitants, each tribe had its khiṭṭah or territory. Tribes were the major recognized institutional units before Islam; this seems to have continued somewhat after Islam, and khiṭṭahs were affected by them. The primary question is: did the tribes themselves decide on the location and boundaries of their khiṭṭah,

or were they assigned a location and decide on the boundary with adjacent tribes? Or were they assigned fiefs, i.e. they did not influence the decisions regarding the fief's boundary and were obliged to accept a layout planned by outsiders as the authority? To answer this question, we must review the planning of other towns like al-Basrah and al-Fusṭāṭ and then return to al-Kūfah.

The claim of orientalists that early Muslim towns were chaotic provoked Muslim scholars to present those towns as planned or ordered. Unfortunately, ordered towns were perceived by these scholars as those laid out by the authority or its representative, i.e. those for which decisions were thought out and not made randomly by the dwellers, since any environment developed by the people without planning by a central party, such as an authority, was considered a disordered environment. Thus, those scholars' efforts were aimed at presenting every bit of evidence to support their counter-claim that these towns were planned. By going back to the data used by these scholars we can see how it was misinterpreted, especially with the use of the verb khaṭṭa. To give one example, Dr. al-Janābi established a hypothetical lay-out of al-Kūfah in which he conceived the town to be very orthogonal and well-designed, as in fig. 1.

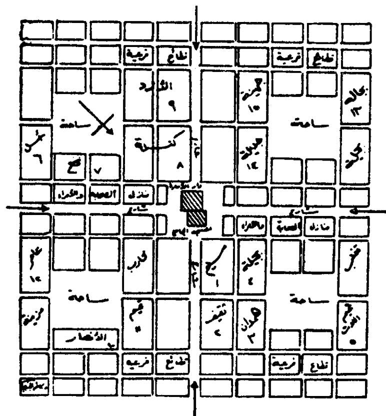


Figure 1. al-Janabi's interpretation of al-Kūfah, op. cit., p. 77.

Regarding al-Basrah, which was founded in the year 17/638 by ᶜUtbah b. Ghazwān, al-Balādhuri (d.279/892) relates that the "people territorialized [or marked out, 'ikhtaṭṭū] and built [their] dwellings."[34] He does not refer to any authority. Al-Māwardi elaborates that "the companions [of the Prophet] had settled in al-Baṣrah during ᶜUmar's reign and made it as khiṭṭahs [noun] for their inhabiting tribes [qabā'ili 'ahlihā]; so they made the width of its major streets which is its mirbad [the place in which their horses were kept][36] sixty cubits; they made the other streets twenty cubits, and they made the width of each lane [zuqāq] seven cubits. They also established in the center of each khiṭṭah a wide raḥbah [forecourt] for their horses' stations and for their cemetery. Their dwellings abutted each other. They did not do this without an opinion in which they agreed upon [wa-lam yafᶜalū dhālika 'illā ᶜan ra'yin attafaqū ᶜalayhi]"[37]

The first sentence of the above quotation refers to the companions and not the authority, a companion meaning any individual who talked with or even saw the Prophet. Al-Baṣrah was founded just six years after the Prophet's death. Additionally, the final sentence suggests that the layout of the khiṭṭah, as well as all other decisions, was influenced by the inhabitants if not made by them. The quotation above by al-Māwardi (d. 450/1058) is also reported by 'Abu Yaᶜlā al-Ḥanbali (d.458/1066) of the same generation.[38] This may imply that both of them quoted an earlier reliable source. Thus, the khiṭaṭ are most likely laid out by the inhabitants and not by the authority as interpreted by others.[39] If any khiṭṭah were marked out by a non-inhabiting party it would be clear from the text. For example, a case is reported by al-Balādhuri regarding a group of people, possibly

Persian and known as al-'Asāwirah, who accepted Islam and moved to al-Baṣrah after its foundation. Al-Balādhuri relates that "their khiṭṭah were marked out [khuṭṭat, or territorialized] for them; then they settled and dug their stream which is known as the 'Asāwirah stream [or river]." This usage of the word khaṭṭa denotes that someone else has established for them their khiṭṭah or territory.[40]

Regarding <u>al-Fusṭāṭ</u> which was founded in the year 20/641 or 21/642 by ᶜAmr bin al-ᶜĀṣ,[41] scholars provide two contradictory conclusions. On the one hand, al-Hathloul concludes that "[i]nformation from al-Fuṣṭaṭ suggests two issues that were certainly applicable in the other newly-founded amṣar towns [al-Kūfah and al-Baṣrah]: the khiṭṭah as a system of planning; and the actual process of physical development within the city, including the formation of the street patterns. Regarding the first, the report of al-Maqrizi about the three khiṭaṭ, ahl al-rayah, ahl al-zahir, and al-lafif, suggests that the khiṭṭah was used as a unit of planning and that it represented a system that was repeated in all three towns. This system was based on the tribe as an already existing institution. However, this institution was flexible enough to expand or shrink to suit the standard number of inhabitants that seem to have been established for the khiṭṭah."[42] On the other hand, describing the foundation of al-Fuṣṭāṭ, Guest asserts that "if ᶜAmr [the general] had conceived the idea of assigning places to the founders of Fuṣṭāṭ and arranging for building on any kind of regular scheme, of laying out the town on a definite plan, he would not have been in a position to carry out his project. There is some evidence that he did not make the attempt."[43] Furthermore, he concludes that "[t]he arrangement of khiṭṭahs with intervals would have enabled regular roads to be dispensed

with at first. The plan of later Fusṭāṭ shows no trace of even one direct main thoroughfare that may have dated from the foundation, and its tortuous streets and ways are just such as would have been formed if left to produce themselves as the town grew up."[44] The first conclusion claims that tribes were adjusting themselves to fit a pre-planned system of units, i.e. they were assigned khiṭṭahs and did not possess them or decide upon their boundaries. On the other hand, the second conclusion implies that tribes possessed and established their khiṭṭahs. My evidence supports the second conclusion.

To begin with, when a person camped on a piece of land, it was recognized and respected as a property of that person. This is clear from a case in which Qaysabah b. Kulthūm possessed a site that became later the site of the grand mosque in al-Fusṭāṭ (the mosque of ᶜAmr b. al-ᶜĀṣ). Al-Maqrīzi relates that when the Muslims decided that Qaysabah's camp was the proper site for the grand mosque, ᶜAmr asked Qaysabah to give the site for the Muslims and promised Qaysabah that he would designate a site for him wherever he desired. Qaysabah answered, "you, Muslims, knew [or recognized] that I possessed [ḥuztu] this site and owned it, and I am giving it as charity to the Muslims."[45] This case illustrates that even the general himself had no power to compel a person to relinquish a possessed property. Al-Qaḍḍaᶜi, describing the settling of the tribes, stated that "the tribes conjoined in on one another and they competed for places; then ᶜAmr assigned Muᶜāwiyyah b. Khadīj and . . . [three other persons] to take charge of the khiṭṭahs, and they abode the people and settled disputes between the tribes, this was in the year twenty one (642)."[46] This statement can have two interpretations, first, the Khiṭṭahs were already marked out and the tribes competed in selecting

the khiṭṭahs. Second, the tribes competed in possessing sites and those four individuals assigned by ᶜAmr were in charge of settling the disputes. But the term "the tribes conjoined in one another" implies that the tribes occupied places by themselves; if the khiṭṭahs were already marked out, then the heads of the tribes would be informed about their khiṭṭahs and no disputes would be raised.[47] To clear the picture we will investigate the khiṭṭahs themselves.

Guest cited forty-nine khiṭṭahs in the foundation of al-Fusṭāṭ.[48] With the exception of four khiṭṭahs, it seems that all khiṭṭahs were named after tribes or individuals who were usually prominent figures or heads of the tribes or subtribes. In one section, al-Maqrīzi describes the location and the inhabitants of twenty-one khiṭṭahs in al-Fusṭāṭ.[49] From his description, again with the exception of the four khiṭṭahs, all khiṭṭahs were settled by the tribe members. In other words the tribes did not shrink or expand to suit a standard number of inhabitants for a khiṭṭah but the khiṭṭah shrank or expanded according to the group size. Furthermore, from the structure of the sentences which describes the formation of these khiṭṭahs one can easily conclude that these khiṭṭahs were possessed by the tribes. For example, regarding the khiṭṭah of Lakhm b. ᶜAdiy, al-Maqrīzi states that "Lakhm started its khiṭṭah from where ar-Rāya's khiṭṭah has ended, and pushed-up ['aṣᶜadat] towards the north, . . . " Regarding the khiṭaṭ of the Persians, he states that the Persians "came with ᶜAmr b. al-ᶜĀṣ to Egypt, then they territorialized in it [in al-Fusṭāṭ], and they took the foot of the mountain which is called Bāb al-Būn mountain, . . ."[50] Moreover, it seems that some tribes had selected better sites than other tribes such as the tribe of Banī Wā'il, al-Qabbaḍ, Ray-yah and Rāshidah. Interestingly, Al-Maqrīzi explains that

the reason for such selection is that these tribes were among the first to come with ᶜAmr to al-Fusṭāṭ, thus "they settled before other people and possessed these places, . . ."[51] In fact, most of the khiṭṭahs have such descriptions which allude one way or another that the tribes themselves territorialized their khiṭṭas. One tribe even had two khiṭṭahs at the same time, and they used both khiṭṭahs alternatively. The tribe of Mahrah had a khiṭṭah to the southeast (qibliy) of the ar-Raya's khiṭṭah in which "they possessed it to station their horses on Fridays"; they also had another khiṭṭah on the foot of Yashkar mountain in which they resided. Al-Maqrīzi relates that the tribe of Mahrah ultimately resided in the khiṭṭah near ar-Rāya's khiṭṭah and abandoned their houses in the khiṭṭah of Yashkar mountain.[52] Indeed, this case implies that the process underlying khiṭṭahs was mainly possessing and not assigning, otherwise a tribe could never enjoy two khiṭṭahs at the same time, especially the one near khiṭṭat ar-Rāya in the center of al-Fusṭāṭ which was used as way station by the tribe. This is especially true when other tribes could not find a site to occupy, as is clear from the case of khiṭaṭ 'ahl aẓ-Ẓāhir. To further clear the picture, we will now investigate the four khiṭṭahs which were not named after tribes, three of which were used by Guest and al-Hathloul to reach their conclusions -- khiṭṭat 'ahl aẓ-Ẓāhir, al-Lafīf and ar-Rāya or 'ahl ar-Rāya.

Guest concludes that there is a relationship between a khiṭṭah and a muster in the diwān. It seems the army was composed of musters, each muster is represented in the diwān which is the army's archives, according to ''Ibn Manẓūr. Guest's conclusion is based on the fact that some tribes were subdivided while others were obliged to combine to form

a khiṭṭah.[53] This conclusion results from observing the formation of three khiṭṭahs, namely khiṭṭat'ahl ar-Rāya, al-Lafīf and aẓ-Ẓahir. But the source he referred to -- al-Maqrīzi -- does not support his conclusion. The reason, possibly, is that he did not give much attention to the distinction between khiṭṭah (singular) and khiṭaṭ (plural) which is skillfully made by al-Maqrīzi. Indeed there is no relationship between a muster in the diwān and the khiṭṭah, while there is a relationship between a tribe, or subtribe and the khiṭṭah.

Regarding khiṭaṭ al-Lafīf, al-Maqrīzi uses the term khiṭaṭ (plural), as it is composed of eight subtribes. The inhabitants of those khiṭaṭ voluntarily detached from their tribes for the purpose of following a particular chief -- ᶜUmar b. Jumālah. The inhabitants asked the general ᶜAmr for a separate muster in the dīwān, but the request was refused because the kinsmen of their tribes objected. Thus these subtribes mustered with their own folk while residing in different khiṭṭahs and not with their tribes.[54] As to the khiṭaṭ (plural) of 'ahl aẓ-Ẓāhir, al-Maqrīzi explains that the site of these khiṭaṭ was named aẓ-Ẓāhir (outsider) because the tribes which settled there arrived late to find the places occupied. The name aẓ-Ẓāhir relates to a site and has no relationship with a muster. This is clear from khiṭṭat (singular) al-ᶜUtaqā' which is in the center of the site of aẓ-Ẓāhir, and its inhabitant mustered with the inhabitants of khiṭṭat 'ahl ar-Rāya which is in the center of al-Fusṭāṭ. In other words, the inhabitants of two khiṭṭas at some distance from each other mustered together. As to the khiṭṭah of 'ahl ar-Rāya (the people of the flag), according to al-Maqrīzi, it is simply the case that there were many tribes, each having too few individuals to justify a separate muster in the diwān; and

these tribes didn't like to be joined with and named after other tribes. "Thus ᶜAmr made a flag [rāyah] for them and did not ascribe it to anyone and said, 'you should muster beneath it' so it [the flag] was their common lineage."[55] As mentioned above, the individuals of 'ahl ar-Rāya and the inhabitants of khiṭṭat al-ᶜUtaqā' who came late and resided outside al-Fusṭāṭ shared the same muster. From these three khiṭṭahs one can conclude that there is no relationship between a khiṭṭah and a muster.

The khiṭṭah of 'ahl ar-Rāya was indeed occupied by the inhabitants and was not assigned to them. Al-Maqrīzi reports that 'ahl ar-Rāya started their khiṭṭah from the spot where they camped when they besieged the fortress known as Bāb al-Ḥiṣn -- the gate of the fortress. "Then, they pushed their khiṭṭah to Ḥammam al-Far and carried on to the west up to the Nile [river], . . . " He adds that "this khiṭṭah surrounds the great mosque from all sides,"[56] denoting a khiṭṭah that is not orthogonal.

The fourth khiṭṭah which was not named after a tribe is the three khiṭaṭ of al-Ḥamrāwāt which literally means the reddish khiṭṭahs. The interesting fact about these khiṭaṭ (plural) is that each khiṭṭah contained many khiṭṭahs that belonged to different tribes. The majority of these tribes were non-Arabs who came with ᶜAmr from ash-Shām. For example, the khiṭṭah of Banī Rūbīl were for approximately one thousand Jews who became Muslims; the khiṭṭah of Banī al-'Azraq were for four hundred Romans who became Muslims. These khiṭṭahs were also possessed and were not assigned.[57]

The khiṭṭahs of al-Jīzah, which is a part of al-Fusṭāṭ on the western side of the Nile, will peremptorily finish this argument. The

description given by al-Maqrīzi definitely implies that the tribes territorialized their khiṭṭahs and decided by themselves upon their boundaries. Moreover, because the khiṭṭahs of al-Jīzah were on the west side of the Nile, and according to the caliph ᶜUmar's request, the general ᶜAmr asked these tribes to move back to the eastern side for strategic reaons, but the tribes refused and ᶜAmr did not compel them.[58] In conclusion, al-Fusṭāṭ was not planned by an authority or its representative and the khiṭṭah was never used as a planning unit; rather, each tribe territorialized its khiṭṭah and established its own boundaries. If each tribe was capable of establishing its boundary, certainly it controlled it, owned it and obviously used it. There was no centralization whatsoever.

By understanding the situation in al-Fusṭāṭ, al-Baṣrah and the precise meaning of the term khaṭṭa, we can now investigate al-Kūfah, which is not as detailed as al-Fusṭāṭ and somewhat different. The major difference is that al-Fusṭāṭ was gradually occupied, while al-Kūfah was occupied at once. The residents were in al-Madā'in temporarily, and when the site of al-Kūfah was selected they moved. This may be why a committee was formed to mark down the roads in al-Kūfah, which did not take place in al-Fusṭāṭ.

As previously mentioned, 'Abū al-Hayyāj and a group of men of distinguished knowledge ['ahl ar-ra'y] were given the task of deciding on the main roads of al-Kūfah which radiate from the square; they were to follow the caliph ᶜUmar's advice on the width of those roads. Unfortunately, I could find no information on the identity or number of committee members. However, it is most likely that they were from different tribes and represented their tribal interests. According to

at-Tabari's report, the decisions were made by 'Abū al-Hayyāj after agreements were reached among those representatives. This implies that 'Abū al-Hayyāj was not a decision maker, but rather an organizer or even mediator between the committee members.

Little is known of the process of locating the tribes in the town. However, at-Tabari relates that the tribes were located between those main marked roads. He also states the names of those tribes and their locations. In some cases more than one tribe shared the site between two roads depending on the sizes of the tribes. For example, the tribe of Juhaynah shared with a group of people who did not belong to a tribe ['akhlāt] the area between two roads or the road itself. His description is clear and does not imply that tribes shared khittahs as interpreted,[59] but they shared the main road or the area between those roads. In other words, the khittah was not used as a planning unit and the size of the khittah decreased or expanded according to the tribe's size. This is clear from al-Balādhuri who reported that Nizar's khittah was sited on the west side of the marked square and contained eight thousand individuals, while 'ahl al-Yaman, with a khittah on the east side of the square, had twelve thousand people.[60] Furthermore, as mentioned above, the roads radiating from the square varied in number in different directions. Towards the north, five roads were marked, to the south four, and to the east and west three. This suggests that the areas in between these roads were not equal. Other than those khittahs which varied in size, one may acknowledge that there were few allotments of a uniform size given to individuals according to ᶜUmar's advice.[61]

At-Tabari adds that "[the tribes] built [did not mark] secondary roads, which were narrower, running parallel and in between the main

roads, and ultimately meeting [not intersecting] with them."[62] Thus, the main roads were marked initially, but the narrower secondary streets were built, which means that they emerged as a result of incremental development of dwellings. Or they may have been designated either by adjoining tribes as a boundary between their khiṭṭahs, or by members of the same tribe within the tribe's khiṭṭah. On the other hand, according to aṭ-Ṭabari, those streets did not intersect and cross the main roads, but rather met the main roads, which reinforces the argument that streets were decided upon by different tribes or the same tribe members, and not by a higher authority.

As to the khiṭṭah itself, it seems that each khiṭṭah was quite large in area, and according to the size of the tribe. Aṭ-Ṭabari's description includes twenty tribes and suggests that he listed all the tribes which originally inhabited al-Kūfah. On the other hand, al-Janabi stated that the residents of al-Kūfah at its foundation included approximately one hundred thousand combatants, and the grand mosque was built to hold forty thousand persons.[63] This suggests that the inhabitants of those khiṭṭahs were in the thousands. Indeed, each khiṭṭah was so large that each tribe had its own cemetery and a mosque in its own khiṭṭah.[64] All sources agree that each tribe subdivided its own khiṭṭah.[65] This is certainly true; if the authority did not intervene in assigning the khiṭṭahs in al-Fusṭāṭ, or deciding on its boundaries in al-Fusṭāṭ, al-Kūfah and al-Baṣrah, logically it would not intervene in the tribe's internal territorializations. A situation of large khiṭṭahs with no intervention means complete autonomy for each tribe. As to the dwelling, the only regulation imposed on the inhabitants was ᶜUmar's

request that the building should not exceed three stories high for the sake of privacy.[66]

From the connotation of the noun khiṭṭah we can conceive that each khiṭṭah holds many khiṭṭahs which also may contain other smaller khiṭṭahs. Also a khiṭṭah is not necessarily completely built, but may contain unbuilt spaces which are owned by the nigh party, which is clear from the description of al-Jīzah and al-Kūfah. In al-Jīzah, it is reported that the khiṭṭahs contained open spaces, so that later, when reinforcements arrived and the population increased, each group made a room for its relatives, "till the building so increased that the khiṭṭahs of Jīzah closed in to one."[67] In al-Kūfah, two interesting mechanisms took place. Aṭ-Ṭabari reports that when a new group of people [ar-rawādif] arrived later, the inhabitants of a dwelling or a khiṭṭah would either make room for their comers if they were few, or some inhabitants would move to join their lineage in a new territory if the comers were numerous.[68] This implies that a khiṭṭah, whether a dwelling or a tribal territory, did include unbuilt spaces. Furthermore, the tribe members as one party admitted the newcomers of their tribe to occupy parts of their unbuilt spaces within their khiṭṭah. This means the tribe collectively controlled the spaces within their khiṭṭah that were not yet possessed by individuals. Each family or group of families admitted their relatives into their unbuilt territory, indicating that they controlled their unbuilt spaces.

Pulling all those pieces together, we can say that each decision in these towns was made by the inhabiting party. I have shown that a khiṭṭah as well as the unbuilt spaces within it was owned, controlled and used by its inhabitants. The authority did not intervene. A logical

result of the fact that a khiṭṭah is in the unified form of submission is that streets and shared elements such as forecourts and squares within a khiṭṭah were collectively owned, controlled and used by the inhabiting nigh party. Each dwelling was controlled and often used by the owner. The majority of the dwellings are in the unified form of submission. The major part of the built environment is a series of adjacent properties in the unified form of submission, which is autonomous synthesis. Finally and most importantly, the morphology of these towns is the outcome of many small scale decisions by the users, i.e. the decisions were made from "bottom up." The users occupied properties that formed lanes and dead-end streets, the streets were formed by quarters' boundaries, and so on. Now we will investigate a centralized-created town in which many decisions are made by the authority, i.e. from "top-down."

Baghdād

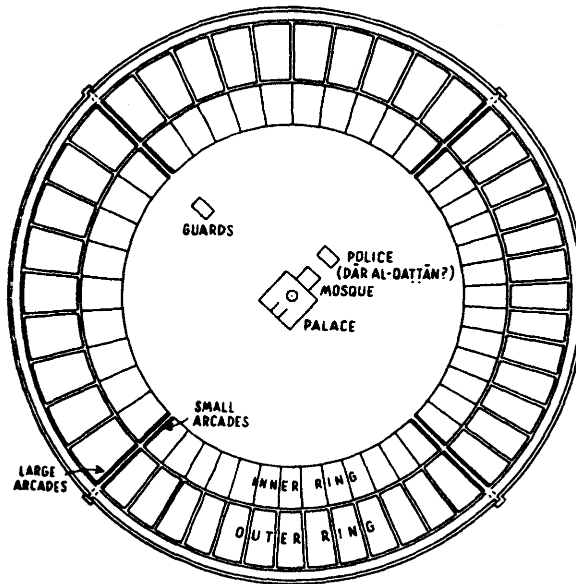
As to the centralized-created towns such as Baghdād and Samarra, the authority decided on the major elements, such as main roads, and the location of mosques and markets, and erected the city wall and the like. The authorty did not intervene in small-scale decisions relating to dwellings, for example. The major mechanism in erecting these towns was the concept of allotments. To individuals, as heads of clans or chiefs in the army, the ruler alloted fiefs to be developed by them. In other words, the party did not possess a site and did not decide on its boundaries. The synthesis of the forms of submission in these towns was also autonomous. To elucidate this conclusion, we will investigate the round city of Baghdād, known then as Madīnat as-Salām, as it seems to be the most centralized erected town.

When the Caliph al-Mansūr decided on the site of the city in 145/762, he asked for engineers, builders, mensurations, etc. from other cities. According to at-Tabarī (d.311/923), the Caliph then selected "people of virtuous, justice, jurisdictional knowledge [fiqh], honest, and acquainted with building experience [handasah]"[69] to participate in the city erection. Among those was Abū Hanīfah, the founder of the Hanafi rite. According to al-Khatīb al-Baghdādi (d.463/1071), the workmen numbered in the thousands;[70] at-Tabari explains that al-Mansūr wished to see the actual form of the city so he ordered that the plan be traced on the ground with lines of ashes; he then entered the city from its gates and walked around. He adds that they placed seeds of cotton on the traced lines and then saturated the seeds with naphtha and set fire to it. This enabled the caliph to see and sense the city, hence, he ordered them to dig the foundation on the lines.[71]

According to al-Baghdādi, the plan was conceived by al-Mansūr himself and was circular.[72] At-Tabari explains that the city had four equidistant gateways named after the city or region toward which they were directed: the al-Kūfah, al-Basrah, ash-Sham and Khurasān gate. These gateways were the market of Baghdād and were known as taqāt. Many scholars have relied on the descriptions of al-Baghdādi, at-Tabari and al-Ya^{c}qūbi, to interpret the original plan of Baghdād as no excavations have been undertaken on the presumed site. Their general concepts of the city are somewhat similar with the exception of its dimensions , as Arab historians gave varying information regarding dimensions. Although their interpretations vary in some aspects, such variations do not affect our investigation since we are examining the forms of submission. In general, according to Lassner's interpretation, the city was divided into

three zones, as in fig. 2. The central zone, ar-raḥbah, is open space that accommodated the palace of al-Manṣūr, the congregational mosque and other buildings for the chief of police and the chief of guards. In the inner ring the younger sons of al-Manṣūr and his servants resided as well as the different government agencies. In the outer ring, the army's chiefs and their supporters resided.[73] According to Creswell's and Herzfeld's interpretation and in terms of physical organization the city is surrounded from the outside by a ditch, then a wall, open space--first fāṣil or intervallum--second fāṣil, residential area, third fāṣil and the main raḥbah or inner court, as in fig. 3.[74]

The residential zone was divided into four equal quadrants by four vaulted galleries which ran from the second or main gate to the gate of the palace area. Each residential quadrant was bounded by external and internal ring streets and two vaulted galleries. From al-Yaᶜqūbi's description each residential quadrant contained eight to twelve sikkahs (small streets). These sikkahs within the quadrants had strong gates which opened to the ring street and not the main court. The ring streets had a strong gate at each end that opened onto the diagonal gateways.[75] Each quarter was assigned to individuals as chiefs [ra'īs] or commanders [qa'id] as an allotment to be developed. The sikkahs of the quarters were named after the individuals residing in them. Interestingly, al-Yaᶜqubi in his description of the sikkahs located between the gates of Khurasān and ash-Shām says, "[and there is] a sikkah known these days as al-Qawarīri, but I have forgotten the name of its owner [ṣaḥbahā]"; this indicates individual or collective ownership of the sikkahs. The jurist Abu Ḥanifah also had a sikkah named after him.[76] Al-Baghdādi describes the buildings as being connected and the dwellings abutting each other;



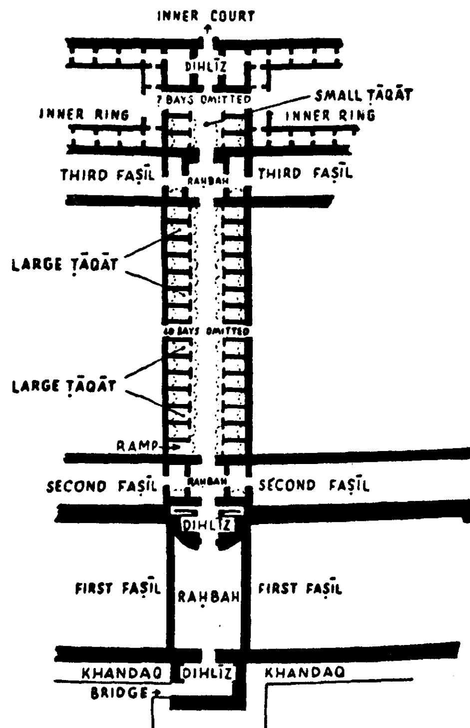


Figure 2. Lassner's Interpretation of Baghdād
(upper) plan of the round city
(lower) plan of a gateway, op. cit. p 207, 208.

he adds that al-Manṣūr ordered that no one should build beneath the internal wall.[77] Al-Yaʿqūbi and al-Balādhuri reported that individuals were assigned allotments <u>outside</u> the round city, allotments so large that each contained internal streets and lanes. Those streets and lanes were also named after the individuals to whom they had been allotted.[78] Al-Yaʿqūbi explains that those allotments ['arbāḍ] were divided into four groups. Each group or quarter was assigned to an architect [muhandis] who was given expenses to be distributed among allotees. The caliph instructed that each quarter should have a market, roads, and dead-end streets, and the width of the streets should be fifty cubits while lanes should be sixteen cubits. Furthermore, each quarter should be self-contained, erecting its own mosques and baths.[79]

Other than this information which mainly refers to the major features of the quarters, I know nothing about the decision-making process for the residential quarters. If the decision-making process in these quarters was unique or differed from the customs familiar to those historians, it would be reported. Since it is not reported, it suggests that the principles of Islamic Shariʿah were used in these quarters. The participation of Abū Ḥanifah in the building process supports this conclusion. The caliph al-Manṣūr insisted on Abū Ḥanīfah's participation in the building process of Baghdād and on appointing him as its judge, but Abū Ḥanifah strongly refused.[80] This may suggest that Abū Ḥanīfah's disagreement with the planning in general, however, regarding the small scale decisions related to dwellings or the quarters it seems that the Islamic legal system was used. It is worth mentioning here that the judge Abū Yūsif who wrote the book of al-Kharāj was a student of Abū Ḥanifah. The book of al-Kharāj, which I used in the first chapter,

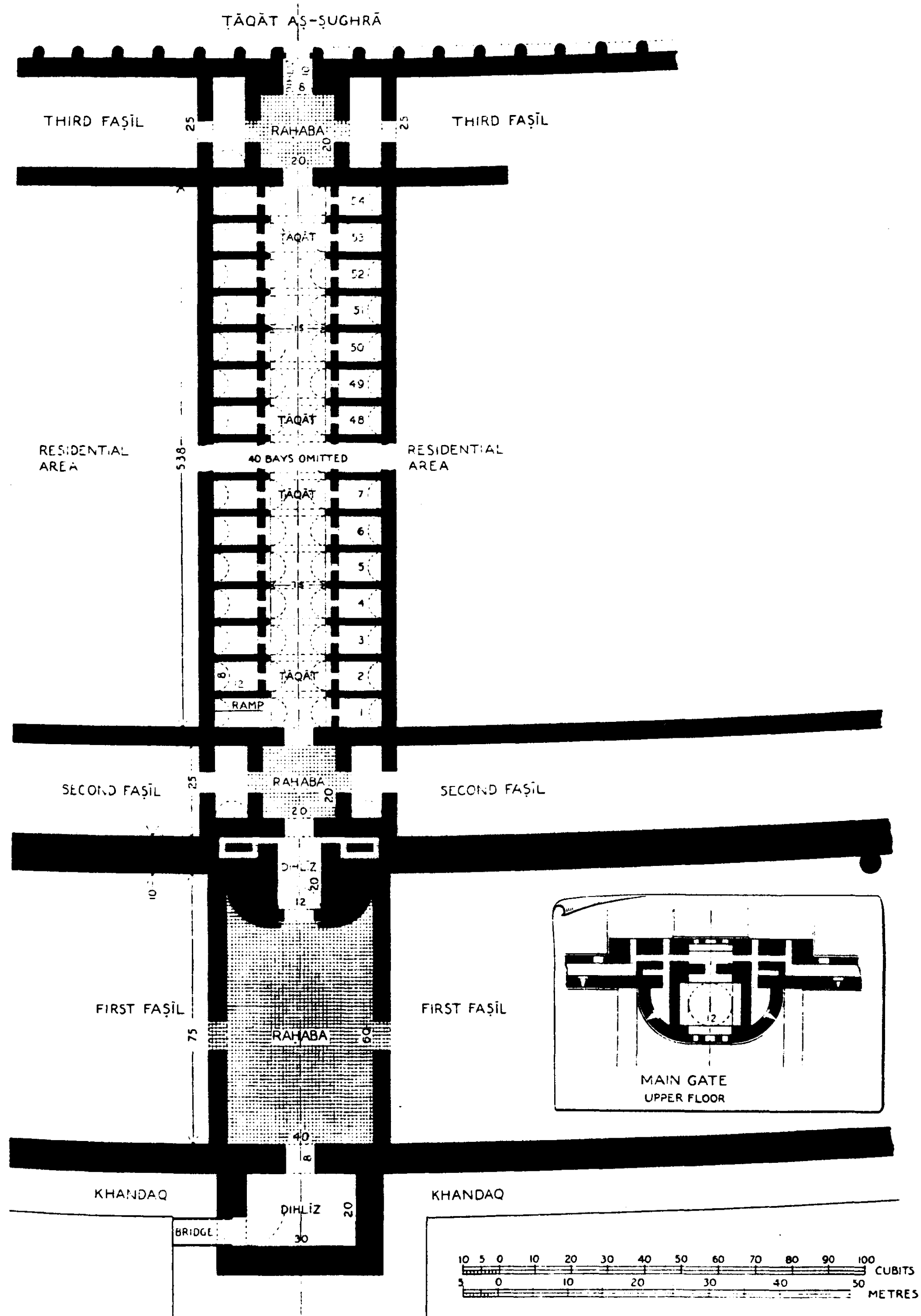


Figure 3. Creswell's interpretation of Baghdād; plan of a gateway showing the residential quadrants and the ring streets, third and second fāsils. Op. Cit., V.II, p. 13.

provided valuable information regarding the principles of allotments, revivification and demarcations. This book was written in response to the caliph Harūn ar-Rashīd's (170/786-193/809) request and was used as a guideline then. Those principles, as explained in the first chapter, are based on non-intervention by the authority. Therefore, it is most likely that the authority did not intervene in decisions within the quarters. The request of the caliph to see the city's outlines on fire suggests that the main lines were observed and not the internal organization within the quadrants or the quarters outside the round city. Moreover, the size of each allotment within the residential zone, according to Creswell's interpretation, was 538 by 250 to 350 cubits (280 X 130 to 180 m.)[81], i.e., the average size of an allotment was 40,000 sq. meters. Although the boundaries of these allotments were decided on by the authority, their size suggests that no intervention took place. This is logical: if allotments were small, it is most likely that an external party made decisions for the inhabitants as in contemporary schemes. In other words, the larger the size of an allotment the less intervention probably took place. The allotments in Baghdād were so large that the inhabitants laid out the streets according to the Caliph's dimensional request. Even the gates of the sikkahs suggest autonomous quarters. As to the quarters outside the round city, al-Yaᶜqūbi's description leaves no doubt that each quarter was divided into large allotments. By counting the allotments beyond and between the gates of al-Kūfah and al-Baṣrah, which is the largest quarter and contains twenty-two allotments, and from the number of the roads and dead-end streets in all quarters (six thousand), we can conceive the enormity of each allotment; some of the allotments even contained markets, mosques, palaces, etc.

For example, the allotment of Waḍḍaḥ contained his palace and over one hundred stationery shops; the allotment of ar-Rabīᶜ contained the tailors' shops.[82] The size of the allotments suggests that minimum intervention took place. Other than the specific requests of the caliphs, which were stated previously, the role of the assigned individuals was possibly to parcel out the allotments and confirm the caliph's requests. This is clear from al-Yaᶜqūbi's description, which emphasizes the diversity of function and building elements within each allotment, showing that each allotment was developed individually and not by the same architects. Finally, al-Yaᶜqūbi's description undoubtedly emphasizes the homogeneity of the residents of each road or lane as well as the gates which are signs of autonomy. This conclusion may not be defensible, but it will become clearer when we investigate the streets in the sixth chapter and the gates in the last chapter.

The above description suggests that the residential quarters were an autonomous synthesis, while the ring streets, the vaulted galleries, the markets and the inner court were not in the unified from of submission as they were controlled by the authority and used by the people. This centralized situation did not last. According to al-Khawārizmi, in the year 156/773 al-Manṣūr built al-Khuld palace outside the round city of Baghdād.[83] Le Strange relates that "it is evident that the innermost wall, surrounding the Palace Enclosure, must have disappeared fairly early owing to the encroachment of the houses on the latter."[84] In fact, Creswell and Lassner cited a series of changes that ultimately led to a total transformation of the city because of the users' actions. It is very interesting to see that the centralized created city could not prevail.[85]

Baghdād, as any other Islamic city, gradually changed due to the actions of the residing parties, which will be explored in the sixth chapter. Al-Kūfah was mainly developed by the residents and not a central authority. The towns' form in the early Islamic periods were formed by the small scall decisions of the residents.

ORIGINAL GROWTH

In the first chapter, under the unified form, I discussed the principles of revivification and allotments as they are the main mechanisms for establishing ownership in most areas around expanding towns and villages. We concluded that those principles are based on incentives; parties are provoked to act in order to own properties without the authorities' permission. We also concluded that the exercise of the claims of control and use brings the claim of ownership, i.e. property shifts from the category of dead-land to the unified form of submission. On the other hand, I discussed the parties' natural tendency to expand. These issues, along with non-intervention by the authorities, resulted in disputes among parties. Overlapping of efforts occurred between parties. In order to have a stable environment with no intervention by the authority, such disputes have to be resolved. The parties have to communicate and engage in dialogue, and agreements have to be concluded. This conclusion can be further asserted in this section about growth of the urban environment.

In the traditional Muslim built environment, do the buildings define the streets? That is, are the streets the leftover spaces between the buildings? In the created centralized towns like Baghdād, the main streets unquestionably form the built zone; yet this organization changed

over time due to mechanisms that will be discussed in chapter six. But in all towns, expansion is inevitable. A town may expand in one or many directions for some reason as they did in Tunis and Medina; or a new town will be established near an old one, following which both towns grow up and connect to form one town as in al-Fusṭāṭ and Cairo. One need not investigate all towns in the Muslim world, to draw the conclusion that town expansion is generally not planned by a central authority. Other mechanisms were at work. The city of Medina, for example, is surrounded by palm orchards that have gradually been transformed into built areas and continue to change in the present day. These orchards were once dead-lands and were revivified by individuals or alloted by rulers. There is ample evidence to support this; some companions of the Prophet revivified lands, while others were allotted fiefs by the Prophet. The point is, we rarely come across a town that has expanded according to a scheme planned by the authority. Rather, any expansion is made over time by the inhabiting party, not randomly but according to certain principles. In other words, the form resulting from the town's growth is caused by the small scale decisions made by the users.

It is only logical that the primary interest of an inhabiting party is in private property, with secondary interest going to outside property such as streets and squares. To understand this we have to remember the aspects of revivification and allotment discussed in the first chapter, namely negligence, time limitation, effort, and authorities' permission. If these aspects of individual action are the true forces that produce growth, then the streets are the spaces left over from buildings, and not, as seen by many scholars, the cause of the fabric. The principle behind this organic fabric of crooked and dead-end

streets can produce environments that are very different in architectural terms. Consider, for example, the low density residential fabric in Sfax, in which the dwellings are free-standing in private gardens, and compare it with Tunis (fig. 4 & 5) where courtyard buildings make a high density fabric. Although the relationships between built and open spaces in both environments are exactly the opposite, they are identical in their structure; both are characterized by an irregular plan of narrow crooked streets and dead-end streets. The unified form of submission is dominant in both environments. The basic principle that a person may change things within his property as long as he does not damage others, generated both environments. In neither Sfax nor Tunis there was intervention by an outsider authority, yet we have two very different built environments resulting from the same decision-making process. The difference lies in the type of building adopted by the users. The type in one area is the freestanding dwellings, while the other area has compact buildings with a courtyard. However, in both cases decisions were made from the bottom up, as is the case with revivification in which individuals revivify dead-lands and the street will emerge gradually. This means that what our inquiry really relates to is private versus public ownership and not built versus open spaces. Therefore, the question in both extremes is whether the public domain is the leftover space from private ownership?

The principle of need and controllability in ownership, as discussed in the first chapter, suggests that lands which are not utilized are dead-lands. Those lands can be owned by a reviver through revivification. Al-Māwardi (d. 450/1058) argues, interestingly, that Abu Yūsif's definition of dead-lands--which stipulates that land is

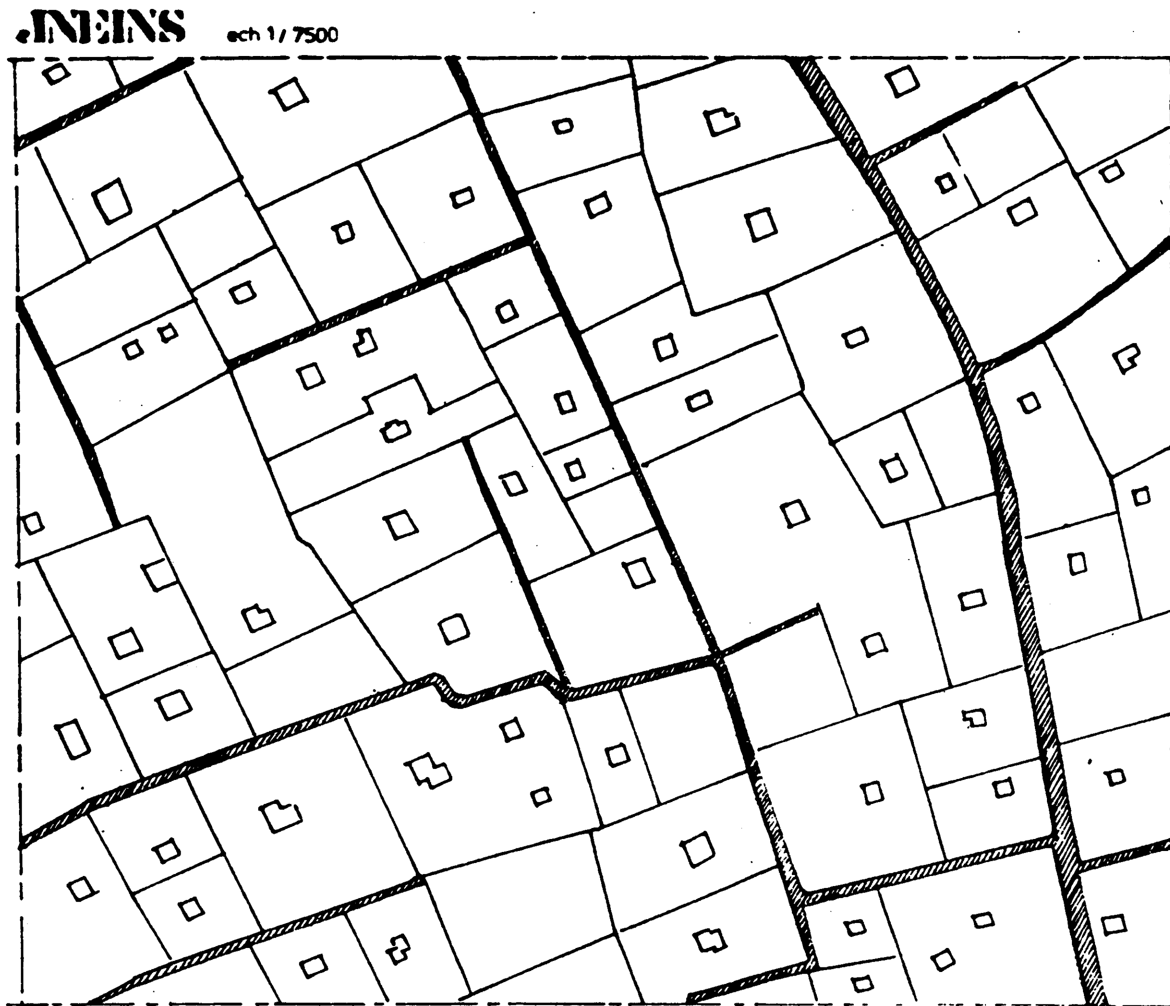


Figure 4. Sfax
A residential tissue in Sfax showing free standing dwellings; source: S. Yaiche & S. Dammak, Analyse Typologique et Morphologique des J'neins a Sfax, (Institute Technologique d'Art d'Architecture et d'Urbanisme de Tunis, 1980), p. 43.

Figure 5. Tunis
Plan of block no. 200 showing buildings abutting each other.
Source: Association Sauvegarde de la Medina, Tunis, 1968.

considered dead if it is distant from urbanized areas--is, in reality, not a valid or practical definition. He adds: "otherwise how come buildings abut each other? It is the custom that any unutilized or unowned land can be revived whether it is abutting urbanized areas or not, and in such cases the neighbors abutting dead-lands and all other people are alike in sharing the right to revive it" (emphasis added).[86] In fact most, if not all, opinions by jurists assert the possibility of reviving dead-land abutting urbanized areas.[87] 'Aḥmad b. Ḥanbal (d.241/855) was asked about a case in which a man revived a dead-land, while a second person revived another dead-land, and a third person revived the small remaining piece of land between them. Can they interfere with the third reviver? 'Aḥmad answered, "They could not bother him unless [the land had been] revived by them"[88] Al-Maqrīzi (d. 845/1441) in describing al-Fusṭāṭ relates that the people "gradually one by one built" the bank of the Nile, which is known as al-Maᶜārīj.[89] Al-Wansharīsi (d. 914/1508) reports a case in which a person revived a land abutting urbanized land and fifty years later, 706/1306, a dispute was raised between inheritors.[90] Indeed, revivification was well known and actively practiced mechanism and was only nullified in the later periods of the Ottoman empire and was totally abolished at the beginning of this century, as explained in the second chapter. Since revived dead-land is owned by the party that controls and uses, then every revived dead-land is in a unified form of submission and the forms of submission coexist as autonomous syntheses.

If every party revives the site it desires, then properties may block each other's pathways, i.e. the built environment will be composed of compact properties abutting each other with no circulation zones. The

term ḥarīm, meaning the zone that is prohibited for others or impregnable, is always associated with revivification. 'Ibn Manẓūr (d.711/1312) defines the ḥarīm of a dwelling as "what is added to [the property] and its rights and servitudes."[91] He also defines it as the finā'--the external space on the street abutting the dwelling and used exclusively by the residents--and as the inside of a dwelling. In fact, this definition brings the internal parts of a dwelling and its outside to the same level of inviolability. al-Ḥanbali (d.458/1066) relates, "the ḥarīm, of what is revived [by a reviver] from dead-lands for residence or cultivation, is what a revived land cannot function without, as its road and finā', . . . "[92] The consensus among <u>all rites</u> is that the ḥarīm may <u>not</u> be revived by others.[93] To name one example, as-Shāfiᶜi considers the ḥarīm, which is necessary for a revived land to function like the pathways or finā' in residence or its source of water in case of tilled lands, as a right which belongs to the revived land, and it may not be revived by others.[94] Other than that, any unutilized and unowned land can be revived.

The rules of revivification can help us to understand the reason behind the fabrics of adjacent properties with minimal public areas that we find in the traditional built environment. We now also understand how pathways and finā's may not be revived because as ḥarīm they serve the dwellers, unless the dwellers allow others to revive their ḥarīm. This suggests that extensive debates must have taken place between parties to decide what was a pathway and what was not. This is evident from the many instances of disputes about the ḥarīm reported by historians and jurists. For example, Suḥnūn (who served as a judge in Qairouan, d. 240/854) was asked about a case in which a person demarcated a piece of

land and planted it and claimed that he owned it, while other people residing behind his plot claimed that a part of the land was their road. The owner prevented the residents from passing. The residents presented witnesses to confirm that they had used the road for twenty years, while the owner presented witnesses to say that it was used as a road only recently. Which witnesses should they believe? Suḥnūn answered that this is a common case among dwellers, as some owners are away from their lands. He judged that if the land is in a rural area and the man proves his ownership of the land then he may prevent passage, unless the passers prove that they have used the pathway for fifty to sixty years. But if the land is within an urban area, then the owner's witnesses will be accepted regardless of the time involved.[95] In this case, the owner possibly owned the land before the residents used the path, thus blocking their right of way which will result in an agreement, either to compensate the owner or to find another path. In either case, the users' dispute and agreement defines the path. In other cases, a dweller or group of dwellers established the right of passage, and then other person(s) revived a piece of land while allowing the predecessor to pass through the land, thus establishing a road within the revived lands which would later raise disputes. For example, 'Ibn ar-Rāmi (d. 734/1334) reports a case in which two pieces of land were separated by a pathway used by a group of people; the owners of the two lands wanted to change the position of the pathway in order to plant. Although such a change does not harm the using party--passers--the answer was that the owners should not change the pathway's position without the users' consent. Moreover, 'Ibn Ḥabīb (d. 328/940) relates a case in which a pathway penetrated through a parcel owned by one person; the owner wanted to

change the pathway, which would be to the user's advantage --possibly a shorter cut, for example. The answer was that no one should change the pathway from its position without the consent of the "owners of the road" ['ahl aṭ-ṭarīq]. 'Ibn al-Mājishūn's (d. 213/828) opinion was that the authority may intervene if the change is very slight, one or two cubits, for example, and if such a change is in the user's favor.[96]

By reviewing the principles of revivification and ḥarīm, one can understand the sophisticated principles of easement or servitude right and the need for such principles to resolve disputes and territorial overlapping. No wonder the easement right is a major issue in Islamic sharīᶜah. Individuals gave, sold and rented the right of servitude, as discussed in the first chapter, under the permissive form of submission. We have seen that the overlapping domain between two properties--the dominant and dominated--can be controlled and owned by one party while used by a second; which is the permissive form. Or it can be owned by a party and used and controlled by a second party; which is the possessive form. The cases we reviewed suggest that the possessive form takes place when the using party of the overlapping domain precedes the second party in reviving; thus it establishes the right of servitude and then the second party has to revive while respecting this right. On the other hand, the permissive form takes place when the using party revives after the second party, thus having to buy, rent or be granted the right of servitude. For example, a group of individuals may revive pieces of land while one piece of dead-land remains unrevived in the center with no access. The party that wants to revive the central piece has to buy or rent the right of passage; it must accept the permissive form. However, in all these cases parties are not necessarily contending; they may be

relatives, friends or just neighbors and agreements are often achieved without dispute. A third possibility is that a group of individuals may own, control, and use a pathway, while other revivers have to respect this right and avoid reviving such pathways which are under the unified form of submission. This is certainly not a case of servitude; the pathway is property owned, controlled, and used by one party but positioned within others' properties. The important issue here is that in the three possibilities the parties that use, control and own are always nigh and residing parties and never remote from the site, which is the essence of the autonomous synthesis.

The arguments above suggest that the residing nigh parties must decide on the road's position and width. This is indeed generally the case. The residents must decide the road's width. 'Ibn ar-Rāmi, in the section of "deciding the road's width and the disputes (related) to it," explains that the custom of deciding the road's width is based on the Prophet's tradition," if the people disagreed [or had disputes, 'idha 'akhtalafa an-nās] on the road, it should be seven cubits."[97] In fact, there are many other similar traditions in all the books of law which assert the validity and continuity of executing this principle. For example the Prophet said, "if you have a dispute about the limits of the road make it seven cubits and then build (beyond)."[98] Interestingly, ᶜUbādah b. aṣ-Ṣāmit relates that the Prophet judged that seven cubits should be left in cases of disputes between the forecourt's or square's [raḥbah] residents or owners ['ahlahā] who want to build; "and such road, usually, was called maytā' [literally, the already dead]."[99] This implies that the residents themselves decided on the width of the roads. The term maytā' prescribed that this seven cubit width of the roads was

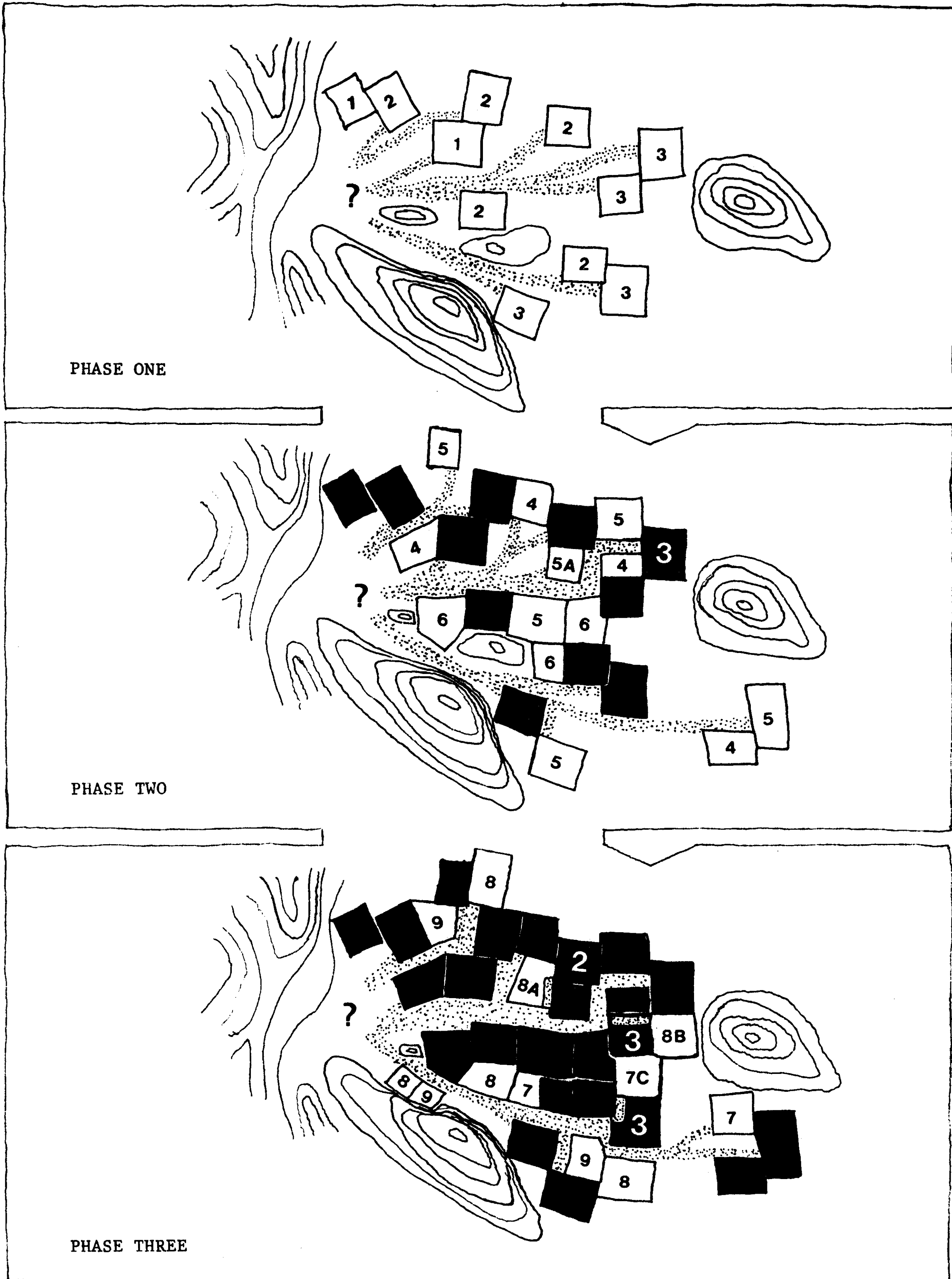
the minimum to be left over, and it could not be revived at all in case of disputes. 'Aḥmad b. Ḥanbal added, "If a path was used by the people and became [over time] a road, then no one can take anything away from it whether it is little or much."[100] This suggests that when a street is defined by buildings and used extensively then it may not be revived because it is ḥarīm. This is clear in al-Qarāfi's (d. 684/1285) opinion about the projection of cantilevers over the main roads. He states that such projections are permissible because the roads are, in fact, the remains of the dead-lands that could have been revived in the past and reviving it now is prohibited because of the people's movement, which is not the case for the upper floors. Thus cantilevers projecting over the main roads are permissible.[101]

By considering all of these principles together, we can see that the paths used by people in revived areas influence the relative position, direction, and shape of the roads, and such roads are left over from revived properties. In other words, the decisions made by nigh parties individually or collectively shaped the physical environment. Certainly, each decision made by a party was based on diverse constraints such as topography, sources of water, social relationships, availability of materials, etc. Each decision can be seen as an answer to complicated and integrated factors or constraints experienced by the nigh party. But an important constraint on any party is the decisions made by preceding parties. Indeed, the principles of revivification mean "an accretion of decision." Every decision made freely by a party will represent a constraint with which future parties must deal. We will explore this phenomenon in detail in the fifth and sixth chapters.

To clarify the formulation of streets and easement rights I will develop a hypothetical case. In figure 6 a focal point (?), possibly a source of water, is considered, as well as hills, as a constraint. The numbers on properties indicate "priorityship." The higher the number the later the revivification. Therefore the locations of properties and pathways in phase 1 are considered as constraints for the revivers in phase 2, the same is true for phase 3. For example, party 5A in phase 2 will block the path of parties 4 and 3; thus party 5A has to negotiate with parties 3 and 4; or it is possible that parties 3 and 4 may not object or that they may even be related to party 5A. In short, disputes are not necessarily to be expected. In phase three, party 8B has to establish the easement right through party 3 to minimize the walking distance. The same is true for party 7C, while party 8A should provide the right of servitude to party 2 and so on. But in reality the situation is certainly much more complicated than it is presented here. The attraction points are numerous, and the constraints are complicated. Here, we only assumed pathways; in reality there are water sources, door locations on the street, social preferences, economic aspects, etc. Moreover, in this hypothetical case we assumed one function which is residency. In reality, properties may be revived as orchards and gradually may change to residential, commercial, etc. The situation in reality is indeed very complicated.

Thus the main mechanism underlying the organic fabric is revivification. Yet other mechanisms will further affect and refine this fabric, such as encroachment by a party on a wide street, etc., which will be explored later.

Figure 6 A hypothetical illustration of original growth of towns



In conclusion, we will say that intervention by the authorities was minimal among expanding parties where disputes established dialogues by forcing parties to communicate. All the principles are not codified but are open to interpretation, which activates the dialogues between parties. "An action is considered revivification if it leads to the conventional use of the intended revivification" is one such principle. Such dialogues resulted in agreements which shaped the physical environment. The organic fabric of the Muslim traditional environment is the outcome of the many small decisions made by nigh parties, the parties that use, control and own, and not by the central party. Decentralization not only provided a stimulation for parties to act, but also forced communication on them. Decentralization resulted in an autonomous synthesis. Bearing this statement in mind, we will now consider its validity by examining the principles and the main elements of the traditional Muslim urban setting, the topic of the next two chapters.

PART B, CHAPTER 5

PRINCIPLES OF THE AUTONOMOUS SYNTHESIS

In this chapter, we will trace principles underlying the formation of the autonomous synthesis in the traditional Muslim built environment. This does not necessarily imply that these principles are the only ones that lead to autonomous synthesis; there can be others. Tracing them will explain why the main elements in the traditional built environment, such as streets, are in the unified form of submission. These principles are the main mechanisms of transforming the physical environment over time and it is not like revivification. Revivification and allotments were the underlying mechanisms in the original growth of towns, while the principles that will be discussed in this chapter are related to everyday change by the users. Revivification and allotment established the boundaries between properties, while this and the next chapter will investigate mechanisms of a different level. It concentrates on the boundaries between properties. What will happen, for example, if someone extended his upper floor into the street? This chapter will explore the relationship between parties of different properties. In such situations, disputes are expected. In other words, this chapter elaborates on the principles which manipulated the form of the built environment. These principles are the main devices used by jurists to resolve disputes among contending parties regarding the built environment. Without the principles in this and the next chapter one can never understand the structure of the traditional Muslim built

environment, especially the issue of responsibility. This chapter will illustrate these principles while chapter six will investigate the main elements, such as dead-end streets, in order to eventually explain the relationship between the parties in the traditional built environment. In this chapter, we will concentrate on the most important principle, which is damage or harm.

Neither Ḍarar Nor Ḍirār

This title is a tradition expressed by the Prophet and translated as, "[t]here should be neither harming nor reciprocating harm"; or "[t]here is no injury nor return of injury."[1] According to Abū Dāwūd (d. 275/887), this is one of five principal traditions on which jurisprudence [fiqh] is based.[2] This tradition as a principle was used constantly by Muslim jurists as a decisive resource in evaluating the legality of the parties' actions in the physical environment. Parties might initiate actions, such as changing the function of a property or adding elements to it, which would disturb or even vex the parties of adjacent properties. Since this tradition was used to judge the validity of such actions, it will inform us about the ability of parties to control and about the limits of "the claim of control." Hence, this tradition needs a careful examination and not merely translation.

There are slight differences among jurists regarding the exact meaning of the tradition and consequently in using it as a tool. 'Ibn Ḥabīb (d. 328/940) explains the tradition of neither ḍarar nor ḍirār, as: ḍarar and ḍirār "are two words of the same meaning and were repeated to affirm preventing such [harming] actions." He adds that the difference between them is that ḍarar is the noun while ḍirār is the verb; no ḍarar

means that no person should harm another person, while no ḍirār means no person should be harmed by others.[3] Al-Qurṭubi explains that ḍarar is what an individual benefits from, at the expense of damaging others; on the other hand, ḍirār means the action which harms others only. He adds that the tradition may imply preventing the person from harming his neighbor (ḍarar) and the reciprocating harm between neighbors (ḍirār). 'Ibn ᶜAbd ar-Rafīᶜ (the judge of Tunis, d. 733/1333) relates that ḍirār is "to harm yourself, so others will be harmed."[4] 'Ibn ᶜĀbdīn (d. 1252/1836) clarifies this tradition thus: "a person should not harm his brother [neighbor] in the outset nor as retribution [for his neighbor's harm]."[5] All the above explanations draw the broad limits of the party's action, which suggests complete freedom if others are not damaged. They also implicitly connote refusal of intervention by any outsider party in the party's decisions regarding internal organization. A party may act as it wishes as long as it does not harm others. Then, the only actions that a party may not execute are those which affect the other's property physically, such as knocking or hammering on the neighbor's wall, or those which affect the party of the adjacent property, for example, an intrusion on the neighbor's privacy which is not necessarily a physical action. The tradition implies moral control as well as control of decisions affecting the built environment.

'Ibn ar-Rāmi (d. 734/1334) summarizes the opinions of jurists and classifies damage into two types, new and pre-existing or old.[6] An example of <u>a new damage</u> is party changing the function of a property in a manner that can annoy neighboring parties. The approval of such an action, in case of dispute, will be judged by referring to this tradition. It is possible to classify the actions of pre-existing damage

into two types. The first is an action taken in the past which will inevitably damage other properties or parties later on. The party was allowed to take such action because it preceded others and no one objected. One example is a tannery where the odor would harm future parties. I will call this a damaging precedent. Jurists' opinions varied regarding the legality of allowing such damage to continue. The second type of pre-existing damage is an action which may, or can potentially, damage other properties or parties in the future, but not inevitably so. An example is the creation of a window that may overlook future properties. All jurists agree that such damage has the right to continue. I will call this a damaging act. This classification will help us in clarifying the concept of "accretion of decisions" in the traditional built environment.

A well-known principle derived from the Prophet's tradition is that "if two damages are concurrent, then the lesser (or less severe) should lapse for the greater."[7] 'Ashhāb (d. 204/819) explains that the greater damage means preventing a person from manipulating or doing something that benefits him in his property, while lesser damage means the objection of the neighbor as a result of the damage caused by the action.[8] In one case, a person raised an edifice and blocked the neighbors' openings, thus darkening their dwellings and impeding their fresh air. 'Ibn al-Qāsim--from the Māliki rite--had the opinion that a person has the right to raise his edifice as he likes, since preventing him from doing so is a damage to him greater than that caused to the neighbors. 'Ibn ar-Rāmi reports many similar cases in Tunis; for example, he relates that he himself raised his dwelling and blocked his neighbor's window. His neighbor then sued him. The judge ruled that

'Ibn ar-Rāmi's action could continue.[9] 'Ibn ᶜAbd Rabbuh was asked about a case in which a man established a flour mill in one room of his house, while his neighbor objected that such an action generated noise. His ruling was based on this principle and allowed the milling to continue, since the harm caused by preventing the flour mill is greater than that caused by the noise.[10]

An interesting aspect to the principle of damage is damage is not well defined; it can be felt and consequently interpreted differently by various parties. A party may not feel the damage caused to an adjacent party, dispute will occur and thus dialogue will intensify among parties while jurists may give different opinions. To grasp this theme, we will explore the relationship between two properties and the damage caused by openings.

Pre-existing openings are considered a damaging act. According to 'Ibn ar-Rāmi, all but one jurist agreed that people have the right to retain such openings in their buildings.[11] 'Ibn ar-Rāmi adds that the custom in Tunis is not to seal such openings, but instead, for example, for the damaged party to adjust by raising the parapet of its building.[12] As for new openings that damage neighbors-- new damage--some opinions advocate sealing those openings if the damaged party protests.[13] This opinion is largely based on the Caliph ᶜUmar's ruling on a case in which a man built a room on the upper floor of his dwelling and opened a window that overlooked his neighbor's property. ᶜUmar requested that someone step on a bed and look through the window; if he saw what was in the neighbor's house, the window should be sealed. Al-Lakhmi (d. 478/1085) adds that "the man who looks should have strong vision."[14] 'Ibn al-Hindi, from Cordoba, states that the doors of the rooms in the upper

floor ['abwāb al-ghuraf] cause more damage than the doors of the house on the street, since the rooms are always occupied; thus they should be prevented.[15] The opinions which advocate sealing the opening are based on determining the degree of damage done to the neighbor, which is open to interpretation and will intensify dialogue among parties. But, most importantly, it suggests protecting the overlooked property from damage which is not necessarily physical. Protecting the overlooked property means recognizing the rights of that property. For example, 'Ibn al-Ḥāj (d. 529/1135) reports an instance in which a high opening which one could see out from only while standing on a chair was sealed because the resident used to step on a chair and look into the neighboring bath and house of al-Hammāni.[15.1]

On the other hand, other opinions do not advocate sealing new openings. 'Ibn aẓ-Ẓābiṭ was asked about a case in which a person created an opening [kuwwah] in his upper floor towards his own house and did not raise his wall high enough--this possibly refers to the wall of the courtyard. The neighbors on the other side objected that the opening would intrude on the privacy of their roof terrace, and that the builder should therefore raise the wall. The builder claimed that he kept the wall as it was to minimize the load on the wall rather than to cause his neighbors any damage by viewing their roof terrace. 'Ibn aẓ-Ẓābiṭ ruled that since the builder could not view the rooms of the house, then the neighbors' objection would not be accepted.[16] 'Ibn ar-Rāmi reports a case in which a screen on the roof fell down and consequently the residents of that house could view the neighbors' house. The neighbor asked the screen owner to reposition that screen [sitārah], and the request was disputed. The judge ruled that the roof user was not

compelled to reposition the screen, but would be punished if he used the roof without it.[17] On this question of intruding upon others' privacy by using the roof terrace, A.Y. al-Ḥanbali stated that "those who raise their building should be compelled to wall their roofs. But if someone argues that such an individual should not be compelled to wall his roof, rather he should be prevented from using it, the reply should be that such a person may unintentionally and inadvertently forget and intrude upon his neighbor's privacy by using his roof. The only way to prevent such harm [he said] is by walling the roof."[18] Comparing doors and windows on the upper floors, 'Ibn al-Ghammāz (appointed as a judge in Tunis in 718/1318) explains that doors are made for movement in and out, and may not do much harm, while windows are more harmful, since the resident may sit and view his neighbors' houses without being seen. He used to give permission to open doors but not windows. He called unacceptable the argument of the exposed neighbor, who claimed that the user of the upper floor's room door could view his house unintentionally while passing.[19] 'Ibn Wahb (d. 197/813) related that if the door was positioned in such a way that the user would inevitably view the neighbor's house, then the door would not be permitted.[20] 'Ibn ar-Rāmi explained that the damage could be discovered by standing beside the door or behind the window and looking at the neighbor's house; if the person cannot see what is in the house, then there is no damage.[21] The opinions of 'Ashhāb, al-Makhzūmi and 'Ibn al-Mājishūn were that "no one should be prevented from opening doors or windows in his upper floor room [ghurfah], and he who could cause damage [to his neighbor] should be told to screen himself."[22] Finally, 'Ibn Nāfi^{c} (d. 212/827) was asked about the person who opened a high window to let in light in his <u>own</u> wall on the neighbor's side. This window could

be reached only by a ladder, but the neighbor opposed his action. He answered that if there were no damage to the neighbor, the action should be approved. A similar case took place in Tunis. A party protested that their neighbor's new window would allow the residents who created the window to overhear them talking at home. 'Ibn ar-Rāmi tells of the differences raised between the jurists regarding this case; some considered that overhearing the neighbors was damage, while others did not, and it was ruled that the opening would not be sealed.[23] These cases exemplify the diverse perceptions of damage among various parties. A decision made by one party which is considered to be a needed change may be perceived by other parties as a damaging decision, leading to dialogue and eventually agreement. The jurists ruling that allowed the openings to remain did not violate the right of the over-viewed properties, as the acting party was asked to eliminate damage while keeping the opening. Indeed, the principle of damage is simple, yet very logical in avoiding dominance among parties of different properties and generating agreements. Then, the agreement will dominate both parties. The controlling party, who is often the user, had complete control over its property, which means it is in the unified form of submission, and the essence of autonomous synthesis.

The previous cases occurred in urban areas; there are also many similar cases of dispute among orchard owners. The same principle applies in both urban and rural environments, or compactly built and free-standing dwellings within orchards. For example, 'Ibn al-Ghammāz's opinion regarding openings of buildings within orchards ['abrāj] is that if the over-viewed orchard contains a residence then the created openings must be sealed.[24] Al-Wansharīsi (d. 914/1508) reports a case in which a

merchant who had good ties with the ruling class in Tunis created a window [ṭāqah] in his orchard-dwelling [burju jinānihi] that overlooked from its side the roof terrace of the matrimony judge's [qāḍi al-'ankiḥah] orchard-dwelling. A dispute took place. Al-Wansharīsi reports that the window was screened from the side, but he could not tell whether the screening resulted from their agreement or the ruling of the judge.[25]

Freedom and Damage

Sources of damage between two properties, as previously explained, are those which affect a property or a party. Regarding the party, the damage can be visual, for example, by intruding on privacy; or audible, as changing the function of one's property from residential to that of a blacksmith; or olfactory, as when the functions introduced create dust, odor, or smoke. Regarding the property, the source of damage can be direct, by hammering on the neighbor's wall or burning things near it; or indirect, as by introducing a function which vibrates the neighbor's property. According to this classification and excluding the visual damage, almost all damages caused to a party or a property result from changing the function of the property or continuing a damaging function which already exists. Thus to carry out a comprehensive investigation, we will concentrate on: 1) the exact meaning of damage caused to parties with relation to the senses--audible, olfactory and visual; and 2) the ability to change function in general and its direct or indirect effects on property.

First, what is the exact meaning of damage regarding the senses? Audible damage in general is not considered damage among Muslim jurists.

Describing the damage of querns and mills, 'Ibn ar-Rāmi states that these may cause damage to the walls by vibration and/or harm to the neighboring residents through noise; the damage caused to the walls will be considered, but not the damage caused by the sound.[26] 'Ibn Zarab was asked about a case in which a man installed a mill in one room of his house, with the room abutting onto the street and one of the room's walls--possibly the party wall--owned by the neighbor, who protested this action. 'Ibn Zarab's opinion was that if the wall was not damaged, the noise of the mill would not be considered as damage, because of Mālik's ruling regarding the blacksmith, who hammered iron day and night while his neighbor, separated from him by only a wall, could find no peace. Regarding this blacksmith, Mālik said "he should not be prevented from doing this; he is working in his house and does not intend damaging [neighbors]."[27] 'Ibn Mukhlad related that since the complaint of the neighbor regarded the sound and not the damage to his wall, the mill owner should not be prevented from doing his work.[28] 'Ibn Rushd (the judge of Cordoba, d. 520/1126) stated, "it is well known that sounds should not be prevented such as [the sound of] the blacksmiths, the tailors [kammādīn[29]] and the cotton carders [naddāfīn]."[30] According to 'Ibn ar-Rāmi, however, the jurists of Toledo used to prevent the kammādīn from working if the neighbors protested.[31] In conclusion, generally audible damage is not considered damage and is allowed to continue whether it is pre-existing or new. Comparing audible with olfactory damage, 'Ibn ᶜAbd al-Ghafūr (d. 440/1048) states that sound does not rend the ears and damage the human body. On the other hand, repulsive odor rends the gills, reaches the intestines, and offends human beings.[32]

Among Muslim jurists <u>olfactory</u> damage is considered severe. This damage is mainly caused by odor or smoke. 'Ibn Qudāmah states that the smoke of kitchens or baking ovens necessary for living is permitted,[33] while smoke from bath-fires or the dust of threshing should not continue if protested by neighbors.[34] Jurists were asked about the person who wanted to establish bath-fires in his house. They responded that this person could not act without the consent of the damaged neighbors; 'Ibn ar-Rāmi related that this was the consensus among all jurists[35] and reported a case in which the neighbors complained to the judge about the smoke of frying barley in a mill. When the judge asked 'Ibn ar-Rāmi and other individuals to estimate the damage and they reported that the smoke was severe, the judge ordered the cessation of the smoke.[36] As to the damage of odor, jurists also agree that the odor from a tannery, should be prevented if it is protested by neighbors. And people should be prevented from locating latrines or uncovered canals, or any other source of repulsive odor near the homes of their neighbors.[37]

We have explored the relationship between two properties and the damage caused by creating new openings in order to show how hard it is to define damage with respect to contending parties. We will now investigate the <u>visual</u> damage in general. This damage differs from other damages as it involves the behavior of parties and not mainly changing functions. This met slightly different opinions among the schools of law. The Shāfi^c^i rite, for example, did not compel the owner of a roof terrace that is higher than his neighbors' roof terrace to build a parapet. Al-'Asfarāyīni related that an individual was allowed to create an opening overlooking his neighbor's house. He explained that the reason was that since such an individual has the right to eliminate the

whole wall, he can eliminate parts of it to create an opening, and thus the neighbors should not prevent him.[38] The Hanbali rite compelled the owner of such a roof terrace to wall it. 'Ahmad b. Hanbal said that if the person used his roof terrace, he would inevitably view his neighbor's house.[39] Al-Lakhmi of the Māliki rite was asked about a case in which a person told his neighbor that they both should not use the roof terrace unless the neighbor built a screening wall, but the neighbor refused to build such a wall. He answered that the one who asked his neighbor to build a screen has the right to prevent the neighbor from using the roof terrace unless the screen is built.[40]

Individual behavior was also controlled to eliminate damage which would consequently affect the physical environment. As-Saqati reports that in al-Kūfah there was a muhtasib who would not allow any mu'adhin (summoner to prayer) to call for prayer from a minaret without banding his eyes. He added that in Granada a woman flirted with a mu'adhin, and he confused the summons.[41] 'Ibn Rushd (d. 520/1126) was asked about a minaret about which the neighbors protested because it overlooked their houses. He answered that the minaret should be screened by building walls from the sides that overlooked the houses. He added that "this is what we do in Cordoba in the majority of minarets".[42] 'Ibn al-Hāj (d. 529/1135) reported the demolition of a built-bench [mansabah] in front of a shop. Some men used to sit on this bench, which was next to a path, and they flirted with women leaving the path.[42.1]

Under visual damage we may also include the rights to light and air. Can an owner raise the height of his building and block his neighbor's openings? Most opinions upheld the individuals' right to raise their edifice even if they blocked all openings.[43] 'Ibn ar-Rāmi

emphasized that this was the custom in Tunis unless it could be proved that a party was raising his building essentially to damage his neighbor and not to benefit himself.[44] From the Ḥanafi rite, Abu as-Suᶜūd had the opinion that if the person raising the edifice did not block all the neighbor's openings but rather left a small opening that would admit sufficient light for writing, he should not be prevented from doing so; also, light entering through the door would not be counted, since the door might be closed during the winter.[45]

Thus considering damage regarding the senses varied; audible damage was not considered as severe and the party could change the function of its property, while olfactory and visual damage were considered severe and parties were not permitted to establish a new source of such damage without the consent of the affected parties. In all the above cases one common theme was persistent, that is, in principle, any change was made with the consent of the affected parties and not through the authority's pre-stated rules. This means that any decision affecting the neighborhood, such as a party's action that would increase the smoke, was the responsibility of and under the control of the affected neighbors, i.e. the largest nigh residing party.

The second point to consider is the ability to change the function of a property. In general, any party can undertake any function if it does not harm others. For example, Suḥnūn asked about a man who had built a mosque and then built his home on the upper floor. 'Ibn al-Qāsim answered that he did not favor this and he heard Mālik say that ᶜUmar b. ᶜAbdul-ᶜAzīz (d. 101/720) used to live in the top of a mosque during the summer in Medina, and women did not feel comfortable in the house. 'Ibn al-Qāsim felt that Mālik meant to say, "How can a man make

love to his wife on top of a mosque?"[46] Viewing this case in terms of freedom, the parties had complete freedom to the extent of building on top of a mosque, although it was not preferred. It may sound naive, but within the Islamic context it indicates the degree of freedom that parties enjoyed.

However, we have two extremes on the issue of establishing a function that will cause damage to other parties or properties, i.e. "new damage." A. Y. Ḥanbali relates that if such a change caused damage and consequently neighbors objected, then the neighbors would have the right to prevent such action.[47] On the other extreme, al-Māwardi from the Shāfiᶜi rite, wrote that the owner of a house had the right to change functions even if its neighbors were damaged and objected.[48] 'Ibn Qudāma's listing of the opinions of various rites suggests that the majority of opinions do not prevent the person from changing the function unless the damage is considered very severe, such as irrigating the land with an excessive amount of water so as to damage the neighbor's wall, or burning things that could ignite the neighbor's wall.[49] Regarding orchards, similar actions are permitted according to Abū Yūsif who was asked by the caliph Hārūn (d. 193/809) about the liability of the person whose water damaged the adjacent orchard. Abū Yūsif answered that such a person would not be liable as long as he did not intend damaging his neighbor; the owner of the adjacent property has to protect himself. He also said that if a man burned herbage on his land, and the fire moved and ignited other people's property, the man would not be liable since he has the right to burn on his property.[50] But these are incidental cases which differ from an action that can cause constant damage. For example, referring to digging water wells that affect neighbors' wells, Sufyān

says "a man can do whatever he desires in his property, even if it damages his neighbor."[51] This brief description indicates the variety of opinions on the subject of freedom versus damage. All these opinions imply that control was in the hands of the residing party and not an outside authority. Yet, with respect to continuous damage, and from actual instances of disputes, it seems that the prevailing practice was to prevent severe damage if it was protested by affected neighbors, while allowing all other changes to continue.

Most of the cases that we discussed here and will come across later suggest that the acting party did not ask for permission. The party changed something and then the neighbors felt the damage. They would protest the damage and then the change would be judged as to whether or not it should continue. For example, 'Assuyūri was asked about a case in which a person brought a cow into his house and then pounded grain to feed the cow. The neighbor protested; he asked that the pounding stop as it would damage the walls through vibration, but the cow could remain.[52] 'Ibn ar-Rāmi reported another case in which a person bred chickens in his house and then set them free to eat what was on the street. The chickens started scratching and digging into the foundation of the neighbor's wall. It was ruled that the chickens must be restricted to the house.[53] These cases suggest that a party acted and then its actions were judged as to whether they could continue or not. This brings us to the next topic.

Counteracting Damages

When 'Ibn ᶜAbd ar-Rafīᶜ (appointed as judge in Tunis in 699/1300) was asked about the newly established bath-fires or tanneries, he

answered that the initiators of such functions had either to eliminate the damage [yaḥtālūna ᶜalayhi] or have their activities forbidden.[54] In other words, the party's action can continue if the damage is counteracted. Naturally, parties will try to act prophylactically to eliminate damage. All jurists agree on this.[55] But some damages can be counteracted while others can not, as with odor, for example. We will review some of the cases under both possibilities.

Regarding the failure to eliminate damage al-Wansharīsi (d. 914/1508) reported a case in Tunis in which a person dug a water well near his party wall, while his neighbor on the other side had a cistern. The cistern owner objected that such well would damage his cistern. The judge asked the experts ['ahl al-biṣārah] to investigate the damage. They reported that the cistern and the well were so close that the cistern would leak; the only way to prevent damage was to fill up the well, which the judge ordered the well's owner to do.[56] Al-Wansharīsi also reported a case in which a person installed a water spout on a narrow street. The owner of the facing wall protested that the rain water would damage his wall. The experts upheld the protest, and the judge ruled for the removal of the water spout.[57] A.B. ᶜAbd ar-Raḥmān offered an opinion regarding the person who established a vinegar factory in his house following which the neighbors protested the smell and the damage to their walls; he said such usage should be prevented. A. al-ᶜAṭṭār's opinion was that he should be allowed to continue if he built walls to counteract the damage to their walls.[58] Finally, 'Ibn ar-Rāmi reported a case in which a person planted a fig tree in his yard; the neighbor had a cistern on the other side of the party wall. The roots of the tree gradually penetrated the wall of the cistern and damaged it.

The neighbor protested and the judge ruled that the roots should be cut to eliminate damage. But he was told that the only way to prevent damage was to uproot the tree, since the roots of a fig tree, unlike those of other trees, can penetrate walls as long as water is there; so the fig tree was uprooted.[59]

The above cases draw limits on the parties' control. An action or decision that cannot be counteracted is not permitted. This limitation of control will eliminate dominance among adjacent properties. In other words, the guiding principle with regard to damage was to give the party maximum freedom meanwhile ordering the relationship between two adjacent parties. A party knows its limits of control,yet it is not controlled. If both parties agreed, the sensitive relationship between two neighbors is ordered with no external intervention. If they did not agree, the dispute was resolved by counteracting the damage. The party that used the property which it owned was not controlled, but rather prevented from harming others. This means that the built environment is composed of a series of adjacent unified forms of submission in full exchange with each other, not restrained by a larger framework.

The expert 'Ibn ar-Rāmi addressed the question of whether one can successfully counteract damage, and how to set limits. To counteract the vibration of an animal rotating a millstone there should be eight hand-spans between the neighbor's party wall and the edge of the animal's rotation circle, according to 'Ibn ar-Rāmi. He added that such space should be occupied by buildings such as rooms, storages or at least passageways.[60] He defined the damage caused by vibration by asking the judge 'Ibn ᶜAbd ar-Rafīᶜ about the man protesting the vibration damage to his party wall by the neighbor's new mill. The judge told him to take a

rectangular dish of paper [ṭabaqan min kāghīd], connect threads to its four corners, and hang it on the ceiling which rests on the party wall between the mill and the house. He should then put one dried coriander (which is round) into the paper and observe the seed while the mill is operating. If the seed moves, the mill will not be allowed; if the seed is still, then the neighbor's objection will be rejected. 'Ibn ar-Rāmi asked, if the party wall has no wooden beams or ceiling, where should they hang the paper? The judge instructed 'Ibn ar-Rāmi to dig a hole half a hand's width in the party wall and insert a thick stalk in it and hang the paper on it. But in all cases if the party wall is owned by the mill owner then the neighbor's protest will not be accepted unless the damage can be demonstrated on a wall owned by the protesting party.[61]

There are many instances of this issue of counteracting damage which suggest its commonness. 'Ibn ar-Rāmi reported a case in which a person wanted to establish a stable ['arwa][62] in a ruined area which he owned. One neighbor objected and the judge asked 'Ibn ar-Rāmi and others to investigate. 'Ibn ar-Rāmi stated that the area was quite large, bounded by streets on two sides, a stable on a third and the poretsting neighbor on the fourth, the eastern side. The owner of the stable did not mind, but the owner of the house refused. The owner of the ruined area was asked to build a room [bayt] nine handspans in width with a wall two handspans thick, to prevent damage.[63] In a similar case in which a person built an 'arwa for his small beast over the neighbor's protest, the person was ordered to remove the animal and eliminate the 'arwa. The owner of the animal appealed the judge's ruling and was consequently ordered to relieve the damage to his neighbor by building a wall parallel to his neighbor's party wall. The wall's foundation was to be one qāmah

(a person's height) deep; between the two walls there should be half a hand-span of space [tarwīḥ]. This space should extend from five hand-spans below ground level up to the ceiling, with walls of two hand-spans in width. The judge was told that this wall would compensate for the damage.[64] The previous cases suggest that the degree of success in eliminating the damage will broaden the limits of the parties' control. Yet, this success will not affect the adjacent property. Meanwhile, success in alleviating damage will cost the party in terms of decisions regarding internal organization, which is the price of eliminating dominance between properties. This principle reinforces the built environment as a series of adjacent unified forms of submission and all changes are in the hands of the largest affected party.

<u>Pre-existing Damage</u>

Unquestionably, "damaging acts" had the right to continue even if they damaged neighbors. For example, 'Ibn Taymiyyah (d. 728/1328) was asked about two houses in which the water spout of one house was directly above the entrance of the other house, and had been installed before the second house was built. Did the owner of the latter house have the right to prevent the damage caused by the water spout? 'Ibn Taymiyyah answered that since the water spout had been installed first, it had the right to continue.[65]

As to "damaging precedents," jurists' opinions varied depending on the damage caused to neighbors. For example, Suḥnūn was asked about the damage caused by the smoke of a potter' fire. He answered that what was pre-existing had the right to continue.[66] The judge 'Ibn al-Qaṭṭān (appointed as judge in Tunis in 761/1360) was asked about a ruined house

that previously was a bakery [or oven, furun]. The heirs wanted to renovate the house to start a bakery. The abutting neighbor stopped them, claiming he did not know about any such previous function and that the right to use the house as a bakery had lapsed. He also wanted a wall built inside the ruined house and abutting his house in order to strengthen his walls and counteract the damage of the bakery. 'Ibn al-Qaṭṭān answered that since the house had not been used as a bakery for a long time, during which time the neighbor had built his house, and the renovation would damage the neighbor's walls, then the heirs could not re-introduce such functions unless they built a second wall to protect the neighbor's wall. If the house had been used as a bakery quite recently or if the neighbor's house existed while the bakery was functioning, then the heirs would have the right to reinstate the function even if the neighbor did not know about it.[67] The damaging odor was also allowed to continue.

The tannery represented another form of damaging precedent. 'Az-Zāwi was asked about houses inside Qairouan city which had been used as tanneries, but some places for tanners were built outside the city and they were forced to move out.[68] Thirty years later some tanners wanted to renovate the houses as tanneries but the neighbors protested on the grounds that they had not functioned as such for thirty years. 'Az-Zāwi answered that the tanners were forced to move out and no one should prevent them from moving back.[69] However, if the damaging odor affected a mosque then it had to be stopped. 'Ibn Zaytūn was asked about an ancient mosque surrounded by houses that fell into ruins. These houses were later transformed into tanneries, and a few years later the muḥtasib moved them outside the city. Now, some tanners wanted to move back, but

those who prayed in the mosque protested the odor. 'Ibn Zaytūn answered that the tanners did not have the right to return since they were damaging a waqf.[70] Some jurists' will not allow a damaging precedent to continue whatever amount of time is involved. For example, bin ᶜAbdur-Rahmān was asked about shops for pounding kernel [daq an-nawā] in the market which had houses above them. The pounding had continued for ten years, and later the pounders were forced to move outside the city, but now they had come back. He answered that since they cause damage they should be moved into a place in which they could not harm anyone.[71]

Although opinions varied regarding "damaging precedents," all initiative and control were still in the hands of the affected parties. All previous cases revealed the awareness of the parties regarding damage. A good example of such awareness is the case reported by al-Wansharīsi in which a lime-kiln owner who had one fireplace and decided to establish another fireplace using the same chimney; the neighbors protested on the grounds that this caused additional smoke, and the judge 'Ibn al-Ghammāz ordered the new fireplace banned. 'Ibn ar-Rāmi reported a very similar case in Tunis.[72] These cases suggest that a party may damage other parties if its action precedes them. In other words, there was a well-established theme regarding the right to damage others, which is the topic of the next session.

Right of Precedence

The above discussed issues concentrated on parties action. The principle of damage related to parties' actions over time resulted in a well ordered relationship between properties (not necessarily parties). In the third chapter I have argued that dominance tends to be eliminated

between properties in the traditional environment. However, elimination of dominance and the ordered relationship between properties was achieved by the concept of "right of precedence." The term "ḥiyāzat aḍ-ḍarar" which is literally possessing damage means the right enjoyed by a property to damage other properties because its party preceded other parties in action. Relating possessing damage to a property and not to a party may sound illogical, yet all the cases suggest such a conclusion, although Muslim jurists refer to parties they give such right to a property. Let us call the right of possessing damage as the "right of precedence." In this seciton I will explain how the right or precedence resulted in a well ordered relationship between properties and not dominance relationship as the term may suggest.

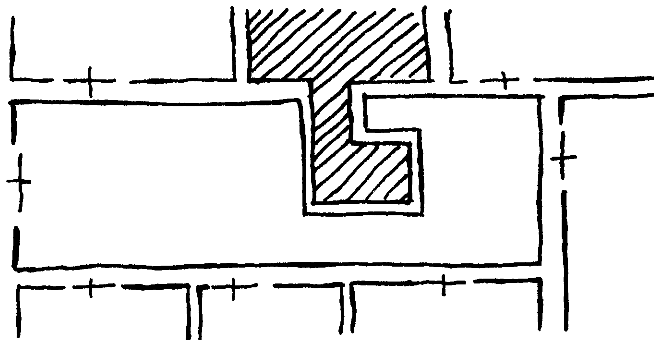
The freedom of a party to act without harming others led to the very interesting theme of the right of precedence. A property can possess the right to damage other properties within limits, without being damaged itself. We can consider two adjacent properties A and B in which A has the right to damage B, but B does not have the same right. For example, 'Ibn ar-Rāmi presented the case of the person who built his house and opened a window that did not overlook other houses. Later the neighbor built a house and wanted the first person's window sealed. The window can remain because the first person preceded the second and had the right of using the window while the second person had to adjust.[73] Then does this situation imply dominance between the parties of the two properties, and what is the implication of such a relationship? In other words, does the right of precedence lead to autonomous or heteronomous synthesis? To answer this question, we must explore various situations regarding the right of precedence and its consequences.

The first situation is whether the party which precedes other parties in possessing a "right of precedence" has the right to continue. For example, regarding the right of precedence between two individually owned adjacent properties, 'Ibn al-Qāsim related that if the damage was caused by preceding others then it could not to be violated. 'Ibn ar-Rāmi reported a case in Tunis in which a person had a canal adjacent to a party wall owned by the neighbor and the neighbor had a water well on the other side of the party wall. The canal leaked into the well, and the neighbors fell into a dispute. 'Ibn ar-Rāmi was ordered to investigate the damage. He stated that the canal was leaking and damaging the well and that it had been built before the well. The judge ruled that the well owner should fix his well or counteract the damage.[74]

Regarding the right of precedence between individually and collectively owned property, Suhnūn was asked about the case of a dead-end street owned by the residents who have access to their dwellings from it. The back of one of the houses abutted the dead-end street and did not have access to it. The house had a small, old septic tank with a channel from the house which had not been used for a long time and was covered. The owner of the house wanted to reuse his septic tank [kanīf] but the owners of the dead-end street [zanqah] refused. Suḥnun answered that they could not prevent him from using it as he preceded them, which imply that the septic tank preceded the dead-end street.[75]

With respect to the right of precedence between collectively owned and publicly owned property, 'Ibn Zarb was asked about an uncovered canal owned by residents of a dead-end street and running along a through street. The canal did not cause damage, but later the neighbors (possibly the residents of the through street) built shops and benches

that narrowed the street. They covered the canal, stopping the flow of water, and the canal became swampy. 'Ibn Zarb answered that if this proved that the residents preceded in using the canal first, all the new elements built on the street should be demolished and the canal uncovered.[76] The three previous cases may suggest intervention between parties of properties. This is not the case in reality. For example, the septic tank and its canal preceded the dead-end street and were, in fact, an extension of a unified property within other unified property as illustrated. The same is true for the other cases, that is the parties who acted later had to act within the previous "damaging acts" as constraints.



The second situation is whether if party (A) preceded another party (B) in building its property, do Party B has the right to initiate damaging acts? According to the principle of damage, it can act and it will have the right of precedence. For example, if two properties are on opposite sides of a through street and one party (B), whether or not it preceded (A) in building the house, opened a door that could damage A in the future by limiting A's choices of selection, then B will have the right of precedence.[77] This issue will be explored further in chapter six. A party may also initiate a change similar to the damages of other parties. 'Ibn ^{c}Abdīn stated that if a person wanted to introduce a

function such as a furnace that caused damage while all or most of the adjacent properties caused similar damage, he should not be prevented on the condition that such damage should not exceed the damage caused by neighbors.[78]

The third situation is whether, if a party initiates an action that is damaging someone else's property--a damaging precedent--but for some reason the action is not protested or not counteracted for a long period of time, the acting party will then have the right of precedence. For example al-Wansharīsi reported a case in which a narrow dead-end street had three doors for three houses, two of which were converted to hotels. These hotels were the only ones in the town. For some reason the third party did not protest the conversion and gradually the hotels became active and the street became so crowded that the third house was no longer used as a residence. The distance between the doors of the hotels and that of the house was three cubits. B. al-Makwī answered that the house owner did not have the right to protest if the change was made a long time ago; but if it was recent, then he could stop it.[79] To determine the time needed to gain right of precedence, the judges referred to the Prophets' tradition, "he who possessed a thing over his opponent for ten years, is more rightful [if the opponent does not protest]."[80] 'Ibn al-Qāsim stated that Mālik used to resolve each case independently and did not necessarily use ten years as a required period, while 'Ibn al-Qāsim himself used to consider seven or eight years a sufficient period.[81] Al-Wansharīsi reported the opinion of many jurists, that if a party did not protest the damage caused by other parties, for ten years, with no excuses, its right of protestation would lapse.[82] 'Ibn ᶜĀṣim related that if a person saw his neighbor initiating an action

that would damage him or his property and did not protest until his neighbor finished the action, such as creating a door or building a bench, then he could not protest, because his reticence was considered consent.[83] Most jurists agreed that damaging precedents which increase over time, such as latrines or tanneries, may not be gained as right of precedence, regardless of the years involved, unless the acting party preceded the damaged party.[84]

It will be useful now to review some cases. Regarding the situation between two adjacent properties, 'Ibn Zarb was asked about a case in which ᶜAbdul-Lāh created a window that overlooked his neighbor, but the neighbor did not protest because he was busy, yet he informed witnesses that he did not accept ᶜAbdul-Lāh's action. Ten years later he protested. 'Ibn Zarb answered that if it was proven that the neighbor did not accept such new damage, then the damage had to be eliminated.[85] M. 'Ibn Sīrīn stated that if a person created openings, shelves, water spouts, or canals in his neighbor's direction and the neighbor did not protest, but later swore that he was tolerating his neighbor's action to be neighborly, then the action would be eliminated.[86] Yet al-Wansharīsi reported a case in which a person created an opening looking towards his sister's house, and twenty years later the sister protested, saying she tolerated the action because of the relationship. Her protest was not accepted on the grounds that twenty years is a long period of time and her brother acquired the right of precedence.[87] All these cases denote common phenomena; that is, the user's awareness of their rights. The party residing nearby is aware of its rights and often acts. The possibility of creating the right of precedence is an incentive to parties who feel that their rights are violated to react quickly. It

also means that all cases may be resolved by the parties involved. In other words, decisions are in the hands of nigh residing parties.

With respect to dominance, if the party protested, then dominance would be eliminated between neighbors. For example, al-Madyūni was asked about two houses separated by a through street, one of which had a window. The neighbor on the other side of the street opened a new window in front of the old window. The party with the old window protested and demanded that the new window be sealed on the grounds that it would invade his privacy. The owner of the new window swore that the new window was in fact an old one that had been there for four or five years, but he had not opened it because of the neighborly relationship. It was ruled that both windows should be sealed.[88]

In the case above, the party which initiated an action claimed that it had the right of precedence over the other party, but it had not used its right. Such a case is to be expected. Some parties may claim that they have a right of precedence and they will find ways to prove such a claim. For example, 'Ibn ar-Rami reports a case in which a person opened a sealed window that overlooked the roof terrace of some houses on a dead-end street. The overlooked residents protested. The person who opened the window presented witnesses that the window was preexisting and that he had the right to reopen it. His claim was supported by the frame and the lintel of the pre-existing window. The judge ruled that the window be reopened.[89] It seems that many similar cases took place. A party may open a door and may be ordered to seal it; a few years later it may reopen the same door on the grounds that it was preexisting. 'Ibn Zarb relates that if a person opened a door that damaged others and subsequently was ordered to seal it, the sealing would not be done by

closing the door and nailing it, but rather by destroying the threshold and the frame and eliminating all traces of the door by filling in the opening in the building. Otherwise the traces of the opening could be used as evidence in the future.[90] 'Ibn 'Abī Zimnīn (d. 399/1008) adds that such openings should be sealed with the same building materials and the brick or the stones and the filling should interconnect with the wall.[91] The same is true for all other damage.[92] When a person made a stable in his house and the damage of the vibration was counteracted by building a secondary wall, witnesses were brought and the stable owner was informed that he did not have the right to use the house as a stable, so he could not claim the right to such a function in the future and could not eliminate the secondary wall or transform all the house into a stable.[93]

What are the consequences of the right of precedence? Although there is no clear dominance between the parties of two properties, one property may enjoy some rights over the other. This made parties aware of their rights. Each party realized its responsibility and limits of control towards other parties. Furthermore, all decisions were in the hands of the "largest-size" residing party. To illustrate this, we will review some examples of ownership transfer from one party to another. When a person bought a house, the seller informed him that the rainwater running off his neighbor's house could drain through his new house. Later, the buyer prevented his neighbor from draining water on the grounds that he was draining ablution water, too. The buyer's protest was accepted since rain water is occasional while ablution water is constant. The neighbor only had the right to drain rainwater.[94] A person opened a door in a dead-end street and used it. Later he sealed

the door and gave the house to another person as a gift. The new owner wanted to reopen the door, but the residents of the dead-end street objected. 'Ibn Rushd (d. 520/1126) ruled against the reopening of the door, since ownership was transferred while the door was sealed.[95] On the other hand, a somewhat similar case was judged differently. 'Ibn al-Ḥāj (d. 529/1135) was asked about a case in which a person opened a door on a dead-end street and the neighbor did not object. Later he sealed the door and gave the house to his daughter. 'Ibn al-Ḥāj answered that the daughter had the right to open the door, as the original owner enjoyed such a right. However, if the door had been sealed for a long time then the neighbor had the right to object to its opening since he had the right not to be damaged by the door. Also, if traces of the door still existed, then this suggested that the owner had not given up his right to open the door, and his daughter would therefore have the right to open it.[96] A third similar case is the one in which 'Ibn ᶜItāb was asked (444/1052) about a house which had its back on a dead-end street. The owner of the house opened a door and the residents of the dead-end street did not object. Three years later, some residents sold their houses. The buyer[97] wanted the door sealed. He claimed that as the previous owners had the right of protest, he should also enjoy this right. 'Ibn ᶜItāb answered that the buyer did not have this right, since the previous owners had not objected. 'Asbāgh (d. 225/840) adds that if the previous owners had objected and then sold their houses the buyer would have the right to protest.[98] A careful examination of all the above cases suggests that agreements are the basics of the right of precedence in cases of transfer of ownership, and that each party realizes its responsibility and rights in the physical environment. The

physical environment is shaped by the responsible parties. The right of precedence ordered the relationship between parties as a series of constraints. These principles may not result in an organized built environment, but rather it will produce what I will call an ordered environment, which is one in which responsibility is clear and in the hands of the largest residing party. The relationships between parties of different properties (not the same property) are ordered by the physical environment as constraints, yet the physical environment is shaped by the responsible parties.

To grasp the awareness of parties regarding responsibility towards each other we will review some cases. 'Ibn Ḥabīb (d. 328/940) states that if a person buys a house and this house is damaged by adjacent property (for example, by being overlooked by a neighbor's window), and the buyer has not been informed about this damage prior to the purchase but discovers it later, in such a case he does not have the right of protesting against the neighbor. If, however, the vendor or previous owner disputed the damage, then the purchaser has the right to continue the dispute.[99] 'Ibn ar-Rami reports a case in which a person bought a house and lived in it. After a period of time, his back neighbor requested permission to enter the house in order to clean his canal, which ran through the house in question. The new owner refused to allow his neighbor to enter on the grounds that he had not been informed about this right of precedence by the back neighbor. They appealed their case to the judge 'Ibn ᶜAbd ar-Rafīᶜ, who ruled that the neighbor had the right to clean the canal and the purchaser had the right to return the house to its previous owner. This was done and the judge ordered the previous owner to return the purchase price to the buyer. 'Ibn ar-Rami

added that this dispute is common and is judged similarly.[100] He also reports a common case of dispute between vertical neighbors, in which rainwater from the upper house drained through the roof of the lower house into a cistern owned by the residents of the lower house. The owner of the upper house wanted to change the rainwater drainage, while the owner of the lower house objected on the grounds that this water should, by right, drain into his cistern. In such disputes, if the drainage is recent, the drain may be changed, but if it is old, then it will not be changed.[101]

Autonomy of a property

The principle of damage established the limits of the claim of control regarding acting parties. But if a party's right was violated and the party could not defend its property, then the situation is not autonomous. Furthermore, if a party has to follow rules, then the property is not in the unified form of submission. For example, if the authority can confiscate an individual's property using eminent domain, or any physical change in the street would affect the individuals' properties then the street's party intervened in the adjacent properties. This means the property is not autonomous. We will now investigate the degree of autonomy enjoyed by properties in order to clarify the issue of nonintervention between properties in the traditional built environment. To do this we have to investigate the degree of autonomy of a property against another privately owned property as in diagram 7, and trace such autonomy against publicly owned property like a street, as in diagram 9.

The first issue is autonomy between privately owned properties. 'Ibn Sābiṭ invoked that "the Prophet cursed he who steal al-manār." 'Ibn

Sābiṭ asked, "What is stealing al-manār?" The Prophet answered, "the man takes a land from his neighbor's land." Al-manār is defined as the marks or boundary between two adjacent properties.[102] 'Ibn al Qāsim was asked about the man who built a house which encroached on his neighbor's air or upper territory and later the neighbor wanted to expand his house but could not because the encroaching part hindered him. The judge answered that the encroaching parts had to be demolished. 'Ibn ar-Rāmi added that this has often happened in Tunis. He reported a dramatic case in which a person raised his edifice one story and roofed it; later he added another floor and roofed it, and finally he added a third floor and roofed it. He explained that the raised building could not be described in terms of money being spent on such a building. 'Ibn ar-Rāmi's description suggests that the owner raised his house gradually over years in such a way that the encroachment on the neighbor's air property was not noticed. Years later, the neighbor raised his wall till he reached the encroaching part. He asked the owner of the four-storied building to correct the encroachment; the owner answered that such a thing was impossible. They disputed and it was ruled that the owner should demolish the encroaching parts.[103] Another interesting sign of autonomy is maintaining one's own wall. Al-Wansharīsi reports that a person has the right to enter his neighbor's house to check the condition of his party wall. Yiḥya b. ᶜUmar adds that if such a wall needs maintenance the owner of the wall has the right to bring stones, bricks and plastering materials into the neighbor's house.[104] Even if the owner of the adjacent property is a powerful party, in principle, it still cannot intervene in others properties. For example, describing the origin of Yazīd's river or stream, Makḥūl related that the caliph Yazīd (d. 64/683) decided to

enlarge the stream which led to his land through peasants' lands; but the peasants did not allow him to do so. Finally, they reached an agreement in which the caliph would guarantee and pay their land's tax [kharāj] to the state for that year.[105]

With respect to two properties which overtop each other, the upper and lower properties are both autonomous. For example if the walls of the lower floor were ruined and the wood was putrified because of the usage of water by the owner of the upper floor, then the owner of the upper floor should repair the damage.[106] In another case, when the owner of the upper floor wanted to transform it into a mosque and the owner of the lower floor objected, the owner of the upper floor was prevented from doing so.[107] In these cases the owner of the lower floor is autonomous. The reverse is also true. As-Suyūri was asked about the lower floor owner who wanted to add a necessary latrine, but the owner of the upper floor objected on the grounds that it would ruin the walls of the ground floor through saturation which would inevitably damage his wall. He answered that the upper floor owner has the right to prevent the lower floor owner from such usage.[108]

The strongest form of dominance of the authority over private ownership is in the area of eminent domain, in which the public's interest demands confiscating private properties. From the examples so far we concluded that the public authority did not intervene or impose regulations upon parties of private properties. To find out, whether this is generally true, we have to investigate the question of eminent domain.

All jurists agree that a property cannot be confiscated as long as the property is not causing damage to the public, such as threatening

to collapse.[109] But if the public's interest is involved in such a property, such as with the extension of a mosque, and the private owner refuses to sell his property, then should the authority compel the owner to sell? According to the Prophet's tradition, "the property of a Muslim person is not lawful without his (the owner's) conciliative consent,"[110] and al-ʿAbbās's incident with ʿUmar seems to determine this issue. When the caliph ʿUmar enlarged the Prophet's mosque in Medina (17/638) he bought the surrounding houses except for the house of al-ʿAbbās, who refused to sell. Al-ʿAbbās was given three choices: to sell the house at any price he desired, which would be paid out of the public treasury; to be given a parcel to build on from the public treasury on any site in Medina; or to give the house as a charitable donation. Al-ʿAbbās refused all choices, following which they arbitrated under 'Ubay b. Kaʿb who favored[111] al-ʿAbbās's position; then al-ʿAbbās gave his house as a charity to the Muslim community.[112] This incident is always referred to by jurists in resolving disputes of eminent domain and it seems that it established a custom of not confiscating private property. For example, al-Balādhuri reports a case in al-Baṣrah in which the great mosque was enlarged with the exception of the northern corner which protruded because of the house of Nāfiʿ which stood there. The son of Nāfiʿ refused to sell his father's house. The governor of al-Baṣrah (during Muʿawiyah's reign, 41-60/661-680) told his friends to inform him if the son left town to go to his orchard. When the son did so, the governor demolished the protruding part to square the mosque evenly. When the son came back he became repined; the governor satisfied him by indemnifying him five square cubits of land for each square cubit that had been taken from him, and by creating a door that led directly from the remaining

part of the house to the mosque.[113] Lapidus, describing cities during the Mumluk's reign, traces interesting disputes between the authority and those who appropriated parts of the street. He relates that "property owners and managers of waqfs were consulted about street-widening projects, and compensation was agreed upon."[114] However, cases in which private properties were confiscated by the regime took place, although it was illegal. For example, in 690/1201, in order to extend al-Maydān al-'Akhḍar or the Green Hippodrome of Damascus, some buildings were torn down with no compensation to the owners.[115]

In general, most jurists were totally opposed to confiscation without proper compensation and consent of the owners. This is the position taken by the Shafiᶜi jurists, for example.[116] The Māliki jurists approved eminent domain in cases of desperate public need. Therefore, we have to examine some jurists' opinions and cases of eminent domain as ruled by the Māliki jurists, as it is the rite that may invite dominance between properties.

The public's desperate need seems to be considered in cases of public circulation, extension of a mosque and public security. As to the need for public circulation, 'Ibn ar-Rāmi raises the question of a road used by the public and obstructed for some reason. Can the authority confiscate sections of a person's land? He answers that if such a road is dispensable, for example if it provides short cuts or is easier to travel on than another substituting road, the Sultan cannot compel the land owner to sell. He adds that if such a road was the only access for the people, then two opinions are practiced by jurists. The first opinion, that of Suḥnūn, compels the owners to sell. He was asked about a road on a flood plain where the river hindered circulation; can the

Sultan compel the land owner to sell? Suḥnūn (d. 240/854) answered that if the road is not dispensable, then the sultan may compel the owner.[117] Regarding this case Muṭraf's (d. 220/835) opinion is that the people should not pass through any person's land without his consent, until the Sultan buys the land from the owner.[118] Secondly, it is the opinion of the majority of jurists, such as 'Asbāgh, 'Ibn al-Majishūn and 'Ibn Ḥabīb, that nothing can be taken from the land's owner without his conciliative consent. Furthermore, if the owner has the power he should prevent those who are violating his right. The jurists were asked, where do the people go, if this is the only access for them? They answered that the Imam or ruler should find a way and they should try any other alternatives.[119]

As to extending a mosque Mālik and his colleagues viewed al-ᶜAbbās's case as a precedent and do not encourage confiscating properties to extend a mosque. Yet, ᶜAbd al-Malik's opinion is that the ruler may use the right of eminent domain to extend the Great Mosque [al-jāmiᶜ] and widen the roads leading to it, but not ordinary mosques.[120] 'Ar-Rammaḥ was asked about a case in which a man refused to sell his land that abutted the place of ablution. He answered that he should not be compelled to sell.[121] As to the question of public security, 'Ibn al-Ḥāj (d. 529/1135) was asked about an orchard near the city wall that could be used as an access by the enemy to attack the city: can the 'Imām compel the orchard owner to sell? He answered that the 'Imām may compel and compensate the orchard owners in such cases.[122]

In summary, privately owned properties were totally autonomous against other private properties. Against publicly owned property, the same can be said with few exceptions in cases of public need and through

compensation. In other words it is a compelling transfer of ownership. Legally, the authority cannot and did not impose regulation upon owners. Eminent domain suggests a transfer of ownership and not intervention in parties' affairs. Even if it is viewed as intervention, it was often rejected and it is, indeed, very rare to change the structure of the built environment from autonomous to heteronomous synthesis. I have used eminent domain in this section to demonstrate the nonintervention between various parties in the traditional built environment. Thus properties' rights are not violated and its parties are not subjected to regulations. The party that owns, controls its property. The composition of the traditional built environment is autonomous synthesis.

PART B, CHAPTER 6

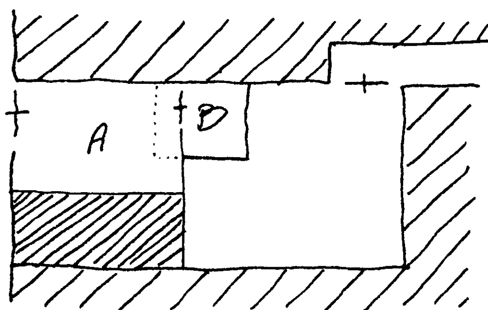
ELEMENTS OF THE AUTONOMOUS SYNTHESIS

So far, we have discussed private property as an element in the inified form of submission. All decisions regarding the party's internal organization are in the hands of the party. All decisions made by a party which affect adjacent properties are in the hands of the largest affected residing party. However, we did not investigate collectively or publicly-owned properties, although we have touched upon streets or dead-end streets from the private owners' point of view. Now, we will carefully investigate these elements. For our purposes, the major elements in the public realm which will complete the picture of the traditional built environment are streets, dead-end streets and finā'. We will deal with such questions as, what is the relationship between these properties and the adjacent private properties? Who owns, controls and uses such properties? What is the form of submission of these properties? How can we define control in such situations? Answering such questions will inform us about the forms of submission of these properties and the relationship between the parties of the differently owned properties which will elucidate the state of these properties.

FINĀ'

Generally, finā' is defined by scholars as the space on the street abutting one's property and used exclusively by residents of abutting

properties. Superficially, it appears as a well-defined and observable element, but in fact its nature is quite the most complicated. A private property or a dead-end street is quite clear in terms of the responsibilities of the parties regardless of its location, but with the finā' responsibility differs depending on its location, i.e., whether it is on a wide, narrow or dead-end street or whether or not it is demarcated by the owners. The rulings of the jurists may seem in first sight contradictory regarding finā', but if we bear in mind that each finā' presents a different case depending on its location, the ruling of jurists may become clearer. For example, Miṣbāḥ was asked about a case in which a father donated to his son a house that was connected to the yard (A) of his own house. The donated house had a room (B) with two doors of which the smaller opened onto the yard. The room had a cantilever towards the yard [tashrībah]. The owner of the room wanted to use the space in the yard abutting his room, as illustrated. He also wanted to use the small door to go outside through the yard. The legal



document accompanying the gift or donation [^{c}aqd al-hibah] did not specify such usage, but rather stated that the donation of the house included all its internal and external rights. Miṣbāḥ answered that the recipient had the right to use what was beneath his roof (cantilever) and also the right to exit and enter through the small door every now and

then; but he could not use it constantly such that the yard would resemble the street.[1] In this case the finā' was on another party's property and the right of the using party was limited. Also, it is not known whether the controlling party was the owner, a user, or both jointly. Similarly, all other finā's have unique histories. Since the finā' played a major role in refining the shape of the streets, it deserves careful investigation.

What is the limit to the area of the finā'? 'Ibn Taymiyyah (d. 728/1328) states that the finā' is not only the space around the gate or the door of the house, but includes all the areas abutting the house on all sides.[2] 'Ibn ar-Rāmi, refuting the notion that the width of the finā' is determined by the spot where the water spout pours on the ground, states that its width should be four to six hand-spans depending on the width of the street.[3] These stipulations suggest that the area of the finā' is not well defined by any external party, but rather has the potential of being defined by the residing party.

As to the claim of use regarding the finā', all jurists agree that a party may use it for trading, disposal or storing such possessions as querns, herding their cattle and the like. As long as the using party behaves according to the Prophet's tradition[4] and does not damage neighbors or passers-by, for example by flirting with women, the party may use the finā' as it wishes.

Ownership

Does the using party own the finā' or does it only have the right to use it? According to the Shāfiᶜi rite, the finā' is owned by the property owner who abuts it. 'Ibn Taymiyyah adds that this is also the opinion of Mālik, as Mālik approved the leasing of the wide finā' but not

the narrow one, thus implying that he (Mālik) considered the finā' as being owned by the abutting property owner.[5] 'Ibn ar-Rāmi relates that the second caliph ᶜUmar proclaimed that the finā' belonged to the house owners whether it was on the front or the back of a property.[6] However, 'Abū Ḥanīfah considers the finā' as owned collectively by all Muslims, just like the street.[7] 'Ibn ᶜAqīl of the Ḥanbali rite states that the owner owns the land of the finā' and has the right to manipulate it but does not own the road [al-arḍu tumlaku dūna aṭ-ṭarīq], which may mean that a person should not prevent passers-by from entering the finā'.[8] It seems that there is a consensus among jurists that even if a party owns the finā' it should not be allowed to sell it separately from the property.[9] Al-Wansharīsi states that he observed the selling transactions made by many jurists and that they all considered selling the property with its finā's.[10] There is also a difference of opinion regarding subdividing a finā' among abutting neighbors. 'Ibn al-Mājishūh (d. 213/828) relates that Mālik's opinion is that the finā' in front of the houses should not be subdivided, and consequently should not be demarcated by the residents, even if they did agree among themselves to do so, since this could narrow the road. 'Asbāgh (d. 225/840) explains that if the residents have already subdivided such space among themselves, they should not be prevented from doing so since this is their right.[11]

Control

The above opinions regarding ownership of the finā' suggest that this space is viewed differently by the various schools of law. Thus the form of submission will change from a unified to a possessive form depending on the parties' position regarding ownership and control.

However, all contradictory opinions regarding ownership of a finā' suggest that considerable control over the finā' is enjoyed by the party in control of the abutting property. Logically, the highest form of control is the ability of the party to build on the finā', and also its capability to prevent others from using it. Regarding the capability of the party to prevent others, all rites agree that no individual should revivify someone else's finā'. For example, 'Abū Ḥanīfah explains that an individual may use his finā' in the future by creating a door or he may store building materials to use in maintaining his walls and the like, thus others should be prevented from revivifying people's finā's.[12] 'Ibn ᶜAqīl adds that one should not even be allowed to dig a well in another's finā'.[13] It seems that digging a well was costly and desirable for the community, but must still be prevented if it has to be done in another's finā'. As to the possibility of using another's finā', for example sitting in its shaded area, most schools of law approve such actions by passers-by. However, 'Ibn Taymiyyah adds that if the finā' is demarcated by the owner of the abutting property, then this space is prohibited to others and requires the permission of the abutting property owner to be used.[14] Thus a party has the right to prevent others from steady use of its finā', but not for a simple, short-term use such as walking through it, if the finā' is not demarcated.

As to the party's ability to build on the finā', jurists' opinions vary. However, such variation of opinion was related implicitly to the location of the finā' and to the width of the street, with the exception of Abū Ḥanīfa who asserts preventing people from building on their finā's. 'Ibn Taymiyyah from the Ḥanbali rite approves parties building on their finā' if they do not damage others, building for example on

inactive streets.[15] The Māliki rite's opinion is mainly related to the principle of damage. If no damage is done, the party's action will continue.[16] However, as to building towers ['abrāj] on the street which abuts the property wall, Muṭraf (d. 220/835) says they should not be allowed, while 'Aṣbagh (d. 225/840) states that if the road is wide then the action should not be prevented. He adds that if a person rebuilds his house, taking part of his wide fināʾ, he should not be stopped. He explains that the fināʾ belongs to the property [al-'afniyah dūr al-dūr], and although we may dislike the owner's demarcation or appropriation of such spaces, we should not prevent them. He ('Aṣbagh) reports a case in which a man demolished the sitting area on his fināʾ and incorporated it into his house. The sultan asked 'Aṣbagh for his opinion. He saw that the street was wide and therefore advised the sultan to approve the action, which the sultan did. 'Ibn Ḥabīb (d. 328/940) and other jurists strongly oppose 'Aṣbagh's opinion.[17] Al-Lakhmi (d. 478/1085) explains the reason underlying the different opinions among jurists. He states that those who disapprove of residents encroaching on the fināʾ consider such action as confiscating public property; on the other hand, those who approve such encroachment consider the Prophet's tradition, "if the people disagreed on the road it should be seven cubits." He adds that this tradition is applicable to the process of the original erection, and thus depends on the people's intention. If the abutting owners originally left the fināʾ unbuilt because of their own usage, then they may build on it, but if they left the space for the public to circulate, then the public has the right to pass and the abutting owners may not build on it.[18] As to erecting simple structures such as benches or sheds

or planting a tree in the finā', most jurists did not object as long as the neighbors did not complain.[19]

Thus a finā' was used and controlled by the residents, while some finā's were owned by the using party with considerable control over it. Therefore any finā' can be in the unified or possessive form of submission depending on ownership. If a party does not own the finā' -- possessive form -- then its actions such as building on the finā' may be prevented if the neighbors object. Hence, the relationship between the using party and the owning party is characterized by regulations. In such cases, however, the relationship is often determined by the affected residing party. Since the finā' abuts dead-end streets and through streets, it will have a great impact on such places.

STREETS

So far, we have dealt briefly with streets in different chapters. In examining the possessive form of submission in chapter one, we elaborated upon the notion of appropriating places in the markets in which "priorityship" was the underlying principle. We noted that the relationship between the owner and the party that uses and controls these places is characterized by a tug-of-war of regulations. In examining the original growth of towns in chapter four, we concluded that the irregular pattern of streets was greatly influenced by the principle of revivification, and that is it is formed by the decisions made by the residing party according to certain constraints such as easement rights, while regulations are avoided. We will now examine the street in general

and its morphological transformation over time and whether it is left over space or not. In other words, even the streets that were planned by an authority may have been encroached upon by abutting property. That is, streets were a very susceptible form of property. Regarding markets, for example, Lapidus relates that "shopkeepers constantly encroached on the streets, occupying strategic positions closer and closer to the center as they pushed out their wares to catch the attention of the passersby, and crowded bridges and gates just at the points of highest density of circulation."[20] Regarding residential streets he also relates that "(i)n the flimsily built Muslim city of medieval days, shops and houses quickly grew over all available public spaces -- squares, streets, mosques, and school facades, walls and bridges. Governors sporadically exercised a right of eminent domain, seizing properties which encroached on public spaces, removing nuisances and dangers, and widening the streets."[21] Another example of confiscating such encroaching elements by the authority took place in Cairo in 882/1478: the roads were widened according to the judges' ruling that every illegally erected bench, cantilever, shop or building on the streets be removed.[22] These descriptions suggest that unlike other properties the street was very susceptible, and was refined and transformed over time. The question is then why the street is so susceptible.

The ruling of judges on appropriating parts of a street varied. For example, al-Hathloul reports a case from Medina (1268/1852) in which a group of people sued a neighbor who closed their lane by extending part of his house across it, thus transforming the passageway into two dead-end streets. The neighbors lost the case.[23] In another similar case in Sabtah, 'Ibn Rushd (d. 520/1126) ordered the demolition of an

encroaching edifice that blocked a narrow through road.[24] In the first case, the appropriating party claimed that when he bought the house the previous owner told him that the lane had originally been blocked by his house: Hence, he was only rebuilding his property on the street. He won his case.[25] In the second case, the group that was suing emphasized that the road, although narrow, was well-known as a through street and was used extensively by the people. They presented witensses to prove their claim. Although these cases were resolved differently, both were in fact based on an examination of the previous condition of the street. In other words, each new decision will be judged by examining the historical situation of the street. This means that any simple action by a party, such as building a bench on one's own finā', may play a role in determining the future form of the street.

I will now give a conclusive summary of the principles implemented and affecting the form of the street, and then investigate them in more detail. The main principle applied to through streets is that preceding actions may continue while every new action is immediately questionable. This suggests that various streets will have different rulings in cases of any change made by abutting parties. The more publicly active and well-defined the street is, the less likely the action will be approved. The less active and the less publicly used the street is, the more likely that the action of the abutting parties will not be objected to, and will continue and consequently, over time, will be considered as a part of the abutting property. When abutting properties expand the expanded part may be in the possessive form of submission depending on the street, since it is not yet owned by the appropriator. Years later, the appropriator legally will claim ownership of the encroaching segment, thus changing

its form of submission to the unified and consequently affecting the morphology of the street. In other words, the form of the street results from many small scale decisions made by the residing parties. The street changes over time from a very susceptible to a well-defined property following to the acts of the abutting owners. Investigating this claim that the street develops gradually through the actions of its residents will address the issue of the susceptibility of the street as well as its form of submission. To begin, we will trace the claim of ownership and control of the street.

Ownership

The first question is, who owns the street? It seems that the consensus among all jurists is that the street or any other public space is owned by all Muslims collectively and not by the authority. For example, when 'Aḥmad b. Ḥanbal (d. 241/855) was asked about appropriating part of a wide street, he answered that such action was worse than taking from one's own neighbor, since taking from the neighbor's property is an appropriation from one person, while taking from the street is an appropriation from all Muslims.[26] 'Ibn Taymiyyah (d. 728/1328) was asked about a man who bought a house that he wanted to extend; he bought from the public treasurer part of the street since some individuals testified that the land belonged to the public treasury. He answered that no one has the right to sell any part of the Muslim's road; the public treasurer does not have such a right unless it is proven that such land is owned by the public treasury, for example, if it was owned by a person who transferred the ownership to the public treasury. He recommended

punishment for those who testified that the land was owned by the public treasury simply because it was within the road.[27]

The second question, how to define a street that is owned by all Muslims collectively? 'Ibn ᶜĀbdīn defines the public's way as the road upon which the passersby are countless.[28] This means that inaccessible streets that are isolated or on outskirts of towns are not yet well-defined as public ways; thus they will follow different rulings regarding appropriation by abutting parties.

Control

If the street is owned by all Muslims collectively, and cannot be sold or transferred, then this notion of ownership will increase the importance of the claim of control as a major determinant of the state of the street and its form. The party that owns the street, which is all Muslims collectively, is not like other parties, it chose to freeze ownership; logically, the controlling party will have a greater role. Although all Muslims as one party are supposed to control the streets collectively, there are cases in large towns such as Cairo and Damascus where the authority may claim the responsibility of controlling the street. In other words, the more active the street is, in major cities, the more intervention by the authority is expected. In practice, however, all Muslims collectively controlled the majority of the streets. Certainly, the users do not all have to meet and decide if one individual desires to plant a tree or remove his bench from the street. Therefore, there must be a system or principle for such collective control. The principle applying to main through streets is that any individual may act and change elements in the street as long as no one objects. If the

community or passersby do not object, this implies a tacit agreement of approving the action. However, if one individual objects, then the action will not be allowed. The objection of one individual means that all individuals of the controlling party have objected. I will explain this further in the following few pages.

As-Sinām states that whoever acts so as to affect the public may be prevented from doing so by any individual. Abū Hanīfah's (d. 150/767) opinion is that any Muslim has the right to object to and prevent an action before it starts or shortly after it is completed.[29] 'Ibn ᶜAbdīn (d. 1252/1836) relates that even a dhummi (Christian or Jew) has the right to object to an action made by a Muslim on a through street.[30] To name one case, 'Ibn ar-Rāmi reports that a person appropriated two cubits from the street to add on to a room in his house; when he had completed building the room the neighbors opposite him objected and wanted to demolish the encroaching part. The street's width after encroachment was eight cubits. 'Ashhab (d. 204/819) ruled that the neighbors had such a right.[31] Thus, each individual has the right to object to and stop others from changing morphology of the streets. However, before examining other cases to clarify the principle of collective control, we must analyze the role of the muḥtasib or, as scholars call him, the market inspector.

The Muḥtasib

In the first chapter we briefly mentioned the role of the muḥtasib in the markets -- appropriating places in the market; possessive form of submission. The muḥtasib's responsibility was ḥisbah, "to promote good and forbid evil".[32] According to al-Māwardi (d. 450/1058), the role of

the muḥtasib was mainly derived from the Qur'anic verse, "and let there be among you a body of men who should invite to goodness, and enjoin equity and forbid evil."[33] From this verse, many jurists concluded that every single Muslim has the right to be a volunteer muḥtasib.[34] The muḥtasib as a role among Muslims was viewed as farḍ kifāyah, a collective duty, the performance of which is obligatory for the community or the family as a whole; if a sufficient number of people fulfill the duty, the rest are relieved of it.[35] This definition suggests that, first, the muḥtasib may not intervene in disputes between individuals unless asked to do so; and second, that the muḥtasib may represent a community.

Regarding the first situation, al-Ḥanbali and al-Māwardi emphasize that the muḥtasib does not have the right to intervene between disputing parties. His intervention between two disputing neighbors, for example, is contingent upon a request to do so by one of them. The reason given is that each person has the right to forgive or demand retribution on his own,[36] which is notably true. For example, in all disputes reported by jurists or experts, the term muḥtasib was never used nor was the role ever mentioned. When parties disputed and sued each other, experts such as 'Ibn ar-Rāmi investigated the case and the judge ruled on it.

Regarding the second situation, in which the muḥtasib represented the community, his role involved supervising and preventing the actions of some individuals to which the controlling party -- all Muslims -- might not pay attention as responsibility was dispersed among the members of the controlling party. For example, jurists at Cordoba were asked about a mu'adhin (announcer of prayer) who used to call for prayers and pray and glorify God in the middle of the night on the roof terrace of a

mosque. The muḥtasib sued him before the judge 'Abi ᶜAli on the ground that he was annoying the neighbors. Many jurists were asked to give their opinion on this case.[37] 'Ibn ᶜItāb said that the muḥtasib should not sue the mu'adhin unless asked to do so by the neighbors.[38] Indeed, the muḥtasib's role as a representative of the Muslim community mainly involved inspecting and organizing markets, industries and controlling the religious behavior of individuals such as urging them to pray. Their role of inspecting the market is derived from many verses of the Qur'ān such as: "Woe to those that deal in fraud * Those who, when they have to receive by measure from men, exact full measure * But when they have to give by measure or weight to men give less than due * Do they not think that they will be called to account * On a mighty day."[39] Describing their role during the Mamluk period, Lapidus states that "(t)he market inspectors were responsible for upholding fair and honest business practices. They supervised the quality of manufacturers, eliminating frauds and unfair competition, regulated the grain markets . . . Moreover, they had an important part in the collection of market taxes."[40] Furthermore, all manuals[41] of ḥisbah emphasize the muḥtasib's duty, among others, of controlling craftsmen and the building industry. It was their responsibility to protect customers from deceptive manufacturers and builders. According to as-Saqaṭi (who was the muḥtasib of Malaga at the end of the 11th and the beginning of the 12th century) this duty is derived from the Prophet's tradition: "Thee who deceived us is not one of us."[42] In other words, they intervened in controlling the quality of building materials and their technical assembly but never intervened in controlling their organization on the site to form a building. Thus far, the muḥtasib had no official role that would

influence the morphology of the street, with the exception of the market, where he influenced certain traders to gather in particular sections of the market.

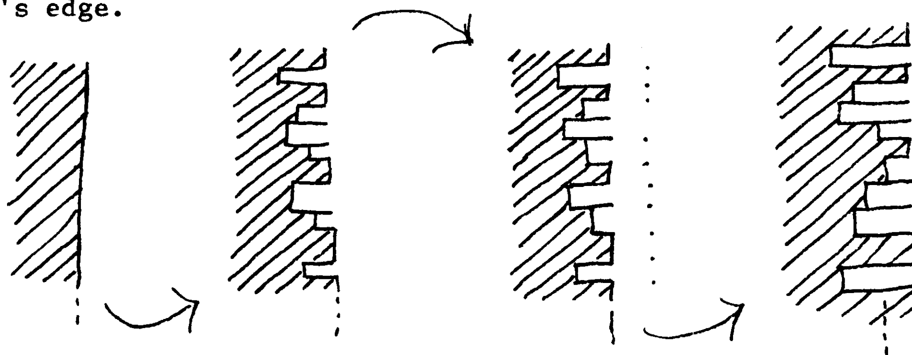
The only responsibility that muḥtasibs enjoyed which affected the street was representing the community to prevent the public from misusing the street. Manuals of ḥisbah are full[43] of such detailed tasks; for example, 'Ibn ᶜAbd ar-Ra'ūf states that the muḥtasib's responsibility (in Spain) was to prohibit people from throwing dirt into the street, etc. The muḥtasibs also had the right, like any other individual, to stop people from adding or changing elements on the street such as installing a water-spout that would drop water on passers-by or building a bench that would narrow the street.[44] In conclusion, the role of Muḥtasibs regarding streets did not reduce the street's susceptibility.

Encroachments on the Street

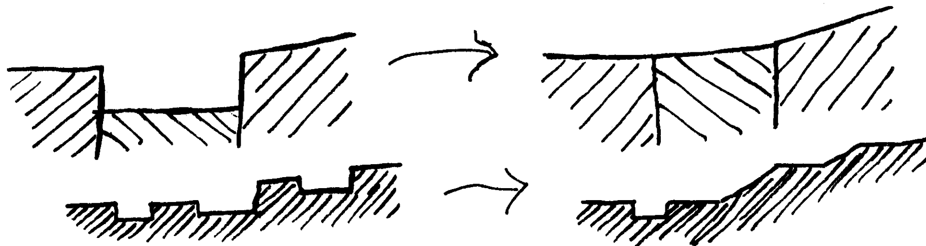
Here we will examine, first, encroachment by abutting properties on the ground floor such as expanding a building; and second, encroachment from upper floors such as overpasses or cantilevers. This investigation will help us to understand the gradual evolution of the street and clarify the relationships between the members of the controlling party.

As streets varied in their degree of publicness from a main, heavily used thoroughfare to an isolated street with limited use, so the ruling of the judges varied. First, regarding encroachment by abutting ground floor properties on main streets, all jurists agree that no individual is allowed to appropriate any property from the street. 'Ibn Qudāmah, of the Ḥanbali school of law, states that no one is permitted to appropriate part of or build a shop on a through street whether the street is narrow

or wide.[45] Al-Marwazi of Ḥanafi rite states that when 'Abū Ḥanifah plastered his wall that abutted the street, he would tear down the old plastering so not to appropriate a part of the Muslim's road.[46] As-Sinām̄i reports that 'Aḥmad b. Ḥanbal rejected one of his students because he plastered his wall around the street door without scratching down the previous plastering, and thus appropriated the thickness of one finger from the through street.[47] This is the opinion and the practice of the jurists themselves, but individuals could appropriate parts of through streets. For instance, al-Wansharīsi (d. 914/1508) reports a case in which a person included part of the Muslim's through street in his house. Twenty years later, the neighbors objected and it was ruled that the appropriated part should be demolished.[48] 'Ibn ar-Rāmi relates that it was common for people to appropriate parts of the streets. He added that some people transformed rooms of their houses which abutted the street into shops. They erected columns on the street and roofed the new space. The judge asked him to demolish any built element on the street whether it damaged passersby or did not.[49] If these columns were not demolished, a few years later the owners might try to include the space between the columns and the shops in their houses. A similar situation took place in the market where shopowners tried to build a wall to connect the columns and their shops, thus transforming the street.[50] These two cases are illustrated below, showing the transformation of a street's edge.



However, if the street was wide and the action of the abutting party did not cause any damage to the public and, most importantly, no one objected, then this was considered as tacit approval of the action by the controlling party. In explaining the finā', I explained that if appropriation of the finā' aroused no objections, it might continue in wide streets. 'Ibn ar-Rāmi relates that if the street was more than seven cubits, it would be considered wide and some jurists did not object to the action as long as no individual objected.[51] He adds that roads used by cattle should not be less than twenty cubits wide. 'Ibn Kinānah (d. 186/802) says that the people should leave a width sufficient for circulation of the heaviest and largest possible loads along the street, such as loaded camels.[52] To name a few cases, 'Ibn Zayd was asked about a house owner who appropriated one and one half cubits from the main street of the town to use as a latrine, while a mosque was located on the opposite side of the street. He answered that if no damage was caused, the action might continue.[53] Furthermore, if a person's two adjacent properties have already encroached upon the street or were originally beyond his property line, then, according to 'Ibn Taymiyyah, the middle property owner may extend his property line since he does not damage passers-by.[54] This principle might be the reason behind the crooked continuous edge of the streets. The case is illustrated here:



On the other hand, if an individual changed or added things on

through streets for the community interest, then his action might continue. 'Ibn Qudāmah (d. 620/1223) states that if an individual dug a well or built a cistern for public use on a wide street in such a way that it would not damage others, such as building walls around it, then the action would be approved.[55] 'Ibn Taymiyyah of the Ḥanbali rite states that enlarging a mosque by taking from the street without damaging passers-by is approved even without the authorities' permission.[56] As-Sināmi of the Ḥanafi rite relates that the residents of a community may build a mosque in the street if it was wide enough and does not damage the road.[57] In conclusion, any objection by a passer-by regarding any changes in the street will suffice to prevent the action, so this is collective control. If there are no objections and no damage is incurred, the action of an individual may continue in wide streets or isolated streets. Actions that benefit the community will continue if they do not cause damage to the public. Under these principles, some parts of the edges of streets will change from the possessive form to the unified form of submission, thus changing the street form.

The second form of encroachment is from upper floors, such as cantilevered parts [rūshan, janāḥ, ẓullah, or khārijah] or overpasses [sabāṭ or ṣābbah]. I will use the term overpass to refer to any built element that connects two sides of a street such as a room or rooms that belong to one or both properties. In these, the abutting property had more freedom, but the principles applied were similar to those pertaining to encroachment on ground floors. In general, all jurists agree that if the action caused a damage it should not be allowed.[58] However, jurists' opinion varies in cases that do not damage passers-by. 'Ibn Qudāmah's opinion (from the Ḥanbali school of law) is that cantilevers and

overpasses should not be allowed on through streets even if they did not damage others, and the acting party owned the walls on both sides of the street, even if the Imām approved it. His reason is that it would eventually cause damage, for example, street level could gradually rise, causing people to hit their heads on these overpasses. He adds, "we have seen these (overpasses) quite often," and they are a damage to the public.[59] 'Ibn ᶜAqīl says that permission from the Imām in cases of no damage to the public was accepted and the acting party should not be prevented, since the Imām's approval represents the Muslims' approval. The Shafiᶜis do not approve the Imām's permission: they reason that if the Imām would not compensate individuals for an action that will damage the public, and the action would not cause damage, then this right should be enjoyed by the abutting property.[60] Abū Ḥanīfah's opinion (the founder of the Ḥanafi rite) is that if one individual from the public objected, the encroached part should be demolished; otherwise a person may extend his upper floors. However, Mālik (the founder of the Māliki rite), ash-Shāfiᶜi (founder of the ash-Shāfiᶜi rite) and many other jurists allow intrusion by upper floors regardless of objections raised by others as long as the extension does not damage the public.[61] Their reason is that the acting individual has preceded others in benefitting from upper spaces. This illustration of different rites denotes the streets' susceptibility in upper floors. Unlike ground floors, the abutting properties enjoyed more freedom in appropriating space as long as no damage was caused. The street's morphology vis a vis upper floors was determined mainly by the actions of the residing party. If an action caused damage, the objections of the public and neighbors were taken into account, denoting collective control. The only rite that prohibited

erecting overpasses was the Ḥanbali rite, yet 'Ibn Qudāmah's statement "we have seen these (overpasses) quite often" and the existence of overpasses in the traditional Muslim built environment suggest that the opinions of the other rites were prevailing. (See for example, photograph no. 3 of Tunis of block no. 44.)

These overpasses are very common in the traditional Muslim built environment; however, their evolution was not documented unless a dispute took place. For example, 'Ibn aẓ-Ẓābiṭ relates a case in which a person owned two houses on opposite sides of a street and built a room across it. After the owner died the two houses passed to two different owners (A&B) and the room belonged to house (A). A dispute took place between the two owners regarding the wall that supported A's room in B's house. A, the owner of the room, claimed that the wall should be owned by both of them since it carried his room.[62] 'Ibn ar-Rāmi states that if the neighbors on both sides of the street disputed the appropriation of the space above the street, it should be divided equally between them; and that the height of such an overpass should be the height of the largest loaded camel with sufficient space on top of the rider's head.[63]

It seems that the main damage to be expected from overpasses and cantilevers regards their height. Over time, the clearance of an overpass may diminish, thus causing damage to the public. In such cases, the overpass or cantilever should be demolished according to as-Sināmi and 'Ibn ar-Rāmi.[64] 'Ibn al-Ghammāz's answer regarding a low clearance that interferes with riders is to either lower the road surface or elevate the overpass or the cantilever.[65] From this, it may be argued that this is a relationship in which the party that controls the street may compel the party of the abutting property to adjust. Although the

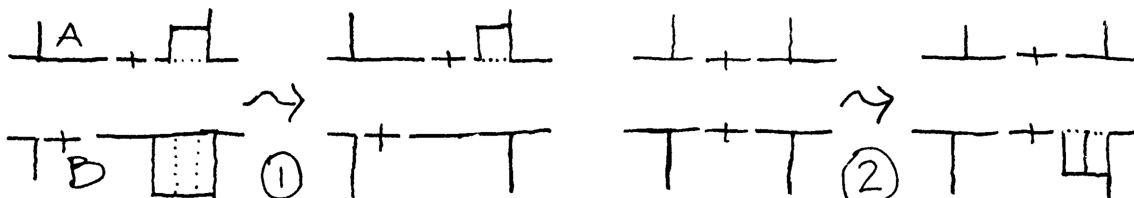
abutting party did not cause the damage it has to follow the rules. In fact, this is not a relationship between differently owned properties, but rather a relationship between parties sharing the same property. The air space occupied by the overpass is not owned by the abutting party. The abutting party controls and uses such space, and this is the possessive form of submission. The majority of jurists agree that if someone demolished his cantilever or overpass, and his neighbor then appropriated the same space, this neighbor is more rightful in occupying it, since the first appropriator did not own the space but only preceded others in using it.[66] Thus overpasses are in the possessive form of submission, characterized by regulation between the party that owns and the party that controls and uses.

The Street as a Medial

The street's morphology influenced the way judges ruled between two disputing parties. The same dispute could be judged differently depending on the street's width, for example. This does not mean , however, that the party of the street relates to the party of the abutting private property, since the same ruling will take place if the medial property between two disputing parties is not a street. This is because the same principles of damage that we explored in chapter five were used in resolving disputes. The street as an element separates two properties as does any other property with no involvement of intervention. To clarify this, we will investigate how change in one property will affect another property in which the street is a medial. Because privacy is a major concern in the Muslim world, we will investigate cases in which change made by one party that provoked another

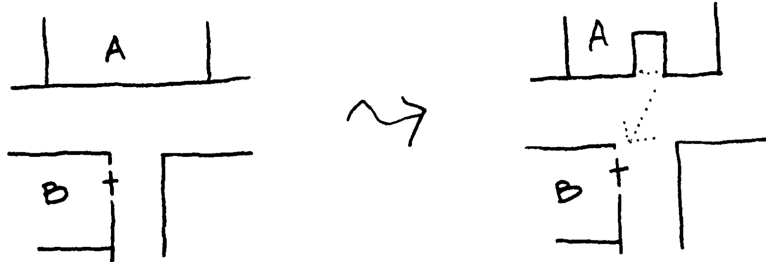
party to protect its privacy, in cases of establishing a shop and opening a door in front of another's property.

Let us first look at shops. The damage caused by establishing shops is considered severe compared to opening doors, as people will sit in them and affect their neighbors' privacy. Transforming a sector of a house into a shop seems to be a very common practice, and 'Ibn Wahb (d. 197/813) states that in cases of wide and intensively used streets, an owner may open shops as much as he likes, since passers-by are exposing other properties in any event.[67] However, al-Qarawi was asked about a house owner (A) who had a shop on the left side of his house (illustration 1). The owner on the opposite side (B) wanted to transform a room on the right side of his house into three shops. The owner of the first house (A) objected on the grounds that the damage caused by a person working in the shop would be severe. The other owner (B) argued that the street was wide, intensively used and one of the main streets in the town. By assessing the damage, it was proved that collectively the angles of the three shops severely exposed the entrance to A's house. Al-Qarawi answered that the new shops would cause great damage and thus should be closed. His reason was that a person sitting in a shop is unlike passers-by because he can see much more, while the owner of the first shop (A) had the right of damaging act.[68] In a similar case in which two houses have their doors in front of each other and one house owner opened two shops, 'Ibn Rashed ruled that the shops could continue if the shop owner could not swerve his shops[69] (illustration 2).



On the issue of streets used less intensively, the ruling of the judges also varied depending on the measure of damage. The jurists of Cordoba were asked about a case in which 'Aḥmad b. ᶜAbdullāh sued ᶜAbd ar-Raḥmān al-Wassād who was opening a shop in front of 'Aḥmad's door. The judge stopped the opening since 'Aḥmad claimed that a person sitting in the shop would view his entrance hall. It seems the street in this case was quite wide. Most jurists allowed al-Wassād to continue with his shop. 'Ibn al-Ḥāj's (d. 529/1135) opinion was to order al-Wassād to swerve his shop.[70] In a similar case, 'Aṣbagh said that the shop owner should be advised to swerve his shop from the doorway, but if he refuses -- not if he was unable -- he should not be compelled to do so.[71] 'Ibn ar-Rāmi emphasizes that if the shopkeeper can see what is in the house, the shop should be sealed. He tells of a case in which a person (A) opened a shop in a through street and the shop was positioned in front of a dead-end street, as illustrated. On the left-hand side of the dead-end street, and towards the east, there was a door, whose owner (B) objected to the shop. 'Ibn ar-Rāmi investigated the case and reported to the judge that a person sitting in the shop would not see inside the house, but could see who was standing within the door. The judge ruled for continuation of the shop.[72] The interesting fact in these cases is that each one was judged differently. That is why we see doors swerved from or in front of shops in the traditional Muslim built environment. Almost any combination is possible depending on the condition of the street as a medial and the "damaging acts" enjoyed by properties abutting it. The street's morphology may influence abutting properties, but its party does not relate to or intervene in the abutting parties' affairs, suggesting autonomous properties that are not intervened upon by the street's party,

which is autonomous synthesis. There is, in these cases, no public intervention: the shops which contribute in determining the street's morphology are decided upon by the affected parties, and not the codes of the authority.



Next, let us consider the role of doors. The damage caused by opening a door onto a through street is considered less severe than the damage caused by shops. 'Ibn ar-Rāmi summarizes all the opinions of jurists and the possible locations of a new door opposite a pre-existing door on another property. He states that opening a door in front of a neighbor's door on a through street is permissible according to many[73] jurists such as Mālik (d. 179/795). 'Ibn Wahb (d. 197/813) states that it is permissible in the case of a very wide and intensively used street. 'Ibn Suḥnūn (d. 256/870) relates that on a through street, the person desiring to open a door should be ordered to eliminate damage by repositioning his door one or two cubits or even more if needed. A fourth opinion is that if the damage is proved, the door may not be opened.[74] 'Ibn ar-Rāmi adds that in Tunis, regardless of the opinions practiced in other places, if the street is more than seven cubits wide,[75] the new door will be allowed. This is how the judge 'Ibn ᶜAbd ar-Rafīᶜ (d. 733/1333) ruled a case in which a person complained that his neighbor opposite opened a door and then enlarged it. The judge said that even if the neighbor opened all of his wall as a door, he should not

be prevented.[76] 'Al-Qarawi relates that in Medina, if the damage is proved, the new door will not be allowed even in wide streets. He adds that damage is ascertained by having someone stand on the internal threshold [al-'uskuffah]; if he can be seen from the new door, the door will be considered damaging.[77] On the other extreme, 'Ibn Zarb states that the creator of a new door in a narrow street should be advised to swerve his door; but if he cannot do so, he should not be prevented from creating a door. He reported that one of his neighbors had a problem with his family or his wife ['ahlihi] because his door was located in front of another's door in a narrow street.[78] Although jurists' opinions and the implementation of these opinions varied in different towns, the judges ruled after a complaint by the affected party was presented. The form of the street was decided upon by the affected residing party.

An interesting theme arises from all these cases of conflicts regarding doors, shops, cantilevers, overpasses, finā', and encroachment on the street by buildings as well as the cases of disputes we discussed in chapter five (right of precedence). This theme is that the resolution of such conflicts never considers the damage caused by the ruling of the judge towards the new action. For example, if a created door is proved to cause damage, the owner of the door should seal it or change its position. How he does it or how it will affect the internal organization of his house is his problem. Even an overpass will be demolished if it damages the public: this is the problem of the owner. Later, we will explore this theme.

In summary, the street is owned by Muslims collectively and controlled by them according to certain principles. Since they are the users, the street is in the unified form of submission. As

responsibility was dispersed among the controlling party's members, the street became very susceptible. The susceptibility of streets meant that the morphology was basically determined by the actions of the controlling party, i.e. the nigh residing party. The street changed over time through the users' actions from ill-defined to a well-defined street by transforming its edges from the unified form to a finā' that is demarcated, which is possessive form, to a private property in the unified form of submission and ultimately to a point in which the street could no longer be possessed. Decisions regarding streets were made from the bottom up. Certainly, this susceptibility of streets suggests non-dominance towards adjacent properties.

DEAD-END STREETS

A dead-end street can be created in two ways. First, it may be planned, if a group of individuals subdivides a large piece of land and designates part of it as a dead-end street. On the other extreme, it may emerge over time, through incremental growth by abutting properties space necessary for circulation or other uses. In resolving disputes related to a dead-end street or in explaining its rights very few jurists consider the street's process of evolution. Jurists often use the term "ghayr nāfidh" (not penetrable) with the terms zanqah, zā'ighah, rā'ighah, darb, zuqāq, sikkah or ṭarīq, to refer to a dead-end street. Their description is purely physical regardless of its evolution, with the exception of some jurists from the Ḥanafi rite like Abū Ḥanīfah and as-Sināmi,[79] who often deal with a dead-end street that was developed through incremental growth as a through street. All other rites, and

some jurists from the Hanafi rite treat a dead-end street differently, and not as a through street: They see it as privately owned by the residents of the dead-end street. There are well-developed principles regarding ownership and control of such space. These principles can be clarified through examining many cases of conflict between owners, as we did in investigating finā' and streets. Identifying change will help us to trace the responsibility of the controlling party as well as that of the owners. We will begin with ownership.

Ownership

'Ibn Taymiyyah of the Hanbali rite states that no individual is allowed to make any change in a dead-end street without the consent of all the partners (those who own the properties abutting it) of that dead-end street. He was asked about a person who bought an upper floor dwelling on a dead-end street and desired to project a wooden cantilever [rūshan] over the dead-end street, claiming that he should be allowed to do so because the street had a school's (the school's name is az-Zāhiriyyah) door in it. 'Ibn Taymiyyah answered that as long as it is a dead-end street he is not permitted to project anything without the partners consent.[80] 'Ibn Qudāmah relates that a person may not open a shop, or project a cantilever or overpass or dig a water well whether it is for his use or for all residents on a dead-end street [darb ghayr nāfidh] without the owner's consent, and if he compensates them, it is as lawful as if all partners were one owner.[81] On the other hand, the Shāfi^cis agreed that a person may not make any change if he does not have access to a dead-end street,[82] i.e., his property abuts a dead-end street but he has no door on it. However, the Shāfi^cis had two opinions

regarding the projection of a cantilever by an individual who has a door on the dead-end street. Al-'Asfarāyīnī states that if the person has the right to use the dead-end street, he should be able to project his cantilever. Judge 'Abi aṭ-Ṭayib's opinion is that the space that will be occupied by the projecting element is owned by the partners of the dead-end street, and thus it is not legal to build the cantilever without their agreement, exactly as if someone were to project an element onto his neighbor's house. In general, the Shāfiᶜis do not approve compensation regarding cantilevers since they consider it equivalent to selling the air without the ground.[83] As to the Mālikis, Yūsif b. Yiḥya states that the benefits of ar-rawā'igh (pl. of rā'ighah) and ad-durūb (pl. of darb) that are dead-end should be shared by its residents; no one of them has the right to make any kind of change without the owners' consent, and the residents are partners just as in the case of the owners of one house.[84] When ᶜĀṣim projected a small wooden box [tābūt][85] from his window over a dead-end street, he was asked to remove it according to 'ibn Zarb's ruling.[86] Abū Yūsif (d. 182/798) from the Ḥanafi rite, uses the term "private lane" [sikkah khāṣṣah] which is not a physical description of the dead-end street. In such lanes, he states, the principle of damage will not be applicable, but the acting party should get permission from his partners.[87] From this description we may conclude that a dead-end street is owned by the abutting residents and controlled by them collectively. It is considered private property in which an action by any partner will be permitted if all partners agree and the principle of damage does not hold within the dead-end street. For example, as-Sināmi states that if an overpass above a dead-end street damages the residents, it should not be demolished; the reverse is true

of an overpass on a through street.[88] However, any action that is not within a dead-end street will be judged using the principles of damage. For example, most jurists agree that an individual may open a window in his wall towards a dead-end street as long as he does not damage others, since it is within his own property.[89]

Regarding the use of a dead-end street, it seems that the concept of finā' holds in terms of use, but not control, for example with the building of a bench. According to 'Ibn ᶜĀbdīn, a resident may station his cattle near his door, or may store things to use in maintaining his house, as long as he does not hinder circulation. He adds that the situation of usage of a dead-end street is just like that of the partners of a house who reside in it; they use it, but no one is allowed to build in it without the consent of the others.[90]

Collective Control

So far, we have used the term "control" to refer to a party composed of one or many individuals, since the term was sufficient for our purposes. However, when a party is composed of many individuals having different interests, as in the case of the controlling party of a dead-end street, more clarification is needed. This should not imply that collective control is different from any other control. I did not use the term "collective control" because it was not necessary: any control is collective control. To clarify the principles underlying collective control by the residents of a dead-end street we have to trace it by examining some cases of disputes since these principles were not explicitly stated by jurists. To do so, we will first trace the principles in general, and then examine the opinions and instances of

disputes between the members of the controlling party by concentrating in detail on one element as an example: opening a new door towards a dead-end street.

In general, two main principles were used. The first was that if one member of the controlling party made a change and the others did not object, it was considered to be tacit approval of the action. For example, a person opened a door on a dead-end street that had fifteen dwellings and no one objected. Eight years later, some of the residents objected. ᶜAbd al-Ḥamīd ordered the continuation of the door; he added that during the residents' silence their right to object had lapsed; even if the period of their silence was less than eight years, he said, their objections would not be considered.[91] In another case in which a person built an overpass in a dead-end street, 'Ibn Ziyādah stated that if the acting party built the overpass while the residents were there and they initially had no excuse for failing to object, then they do not have the right to object later.[92] Thus, non-objection by any member of the controlling party was considered as tacit agreement.

The second main principle was that the existing morphology of the dead-end street would be the basis of control. Any new change had to be made through agreements by <u>all</u> members. For example, how do we define control if five members of the controlling party agreed on a change while the sixth refused? If the five did not implement the desired change, they may not control; and if they managed to change, the sixth member is not in control. In such cases, we must look at the existing morphology of the property; if some members desired a change and all agreed to it while one refused, then in order to have a collective control the action should not continue. If the action continued, the control is not

collective; rather the majority of members controlled. That is, collective control is not a system like voting, where the action is approved if more than fifty percent of the members approve it. This because when each member joined the controlling party, he accepted the existing condition. If the majority's desire continue, then we may use the term "majority control." Furthermore, if an action by one member did not cause damage but it affected some members and not others, for example, building a bench in the dead-end street which affected the closest neighbors but did not harm all residents. In a case like this, the objection of nearer neighbors will have more weight than that of others, and we will use the term "majority control."

Most opinions of jurists and ruling of cases are based on collective control. For example, the judge 'Ibn ᶜAbd ar-Rafīᶜ ruled on a case in which a man owned all but one of the houses on a dead-end street. The owner of the houses built a gate [darb] in the mouth of the dead-end street. The owner of the one house objected with no reason, i.e., the gate does not damage him. The judge ruled that the gate be demolished by the houses' owner. The judge was informed that the owner was out of town, possibly on purpose. He ordered the demolishing and sale of the gate to cover the expenses of labor.[93] 'Ibn Hishām relates that if the owners of a dead-end street wanted to build a gate they could not do so unless all the residents agreed.[94] However, in another case, al-ᶜUmrānī was asked about houses in a dead-end street owned by several individuals: later all the houses were owned by one person with the exception of one yard [ᶜarṣah] that had a door at the back end of the dead-end street. In the threshold of the dead-end street, there is an overpass [ṣābbah]; the owner of the houses wanted to extend the overpass all the way to the back

of the dead-end street. Could he do it if the yard's owner objected? Al-ᶜUmrānī's answer was that if the extension of the overpass did not cause damage, i.e., have a low clearance or darken the way, the owner of the houses should not be prevented. This answer clearly favors majority control. Commenting on this case, al-Wansharīsi reports many opinions by other jurists that disapprove of the house owner's action whether it causes damage or not, which indicates collective control.[95] To clarify collective control, we will now investigate one element in detail: opening a door onto a dead-end street.

Opening a new door onto a dead-end street seems to have been the most important issue among residents of a dead-end street. Superficially, it may be seen as merely passing through such a space. However, the opening of a door by a house owner without previous access to the dead-end street is the threshold at which this owner will gain the right to participate in using, controlling, and owning the space. In fact, it is almost as if a group of people own a property and another individual is trying to share the property for free, a concept which is illogical. Indeed, a house that has access to two dead-end streets will have a strategic location. When I visited Tunis in summer 1983, I entered house no. 9 (fig. 8) from impasse de la Paysanne and exited from the other door on impasse Bou Hachem. I felt that I was on the other side of the town, since I entered from a residential street and exited to a commercial one, although I did not walk far. The daughter of the house owner told me proudly that their house has two doors.[96] Moreover, having access to a dead-end street will increase the value of the property, for example. To name one case, the owner of a house abutting a dead-end street but with no access to that street had a shop that opened to it; he

tried to open a door from his shop to his house. The residents of the dead-end street prevented him from doing so and he later sold the house. The new owner attempted to open the same door but was informed that he did not have a right to. 'Ibn Ziyādah from Fez ruled that the new owner should be compensated by the previous owner if he wished, but he could not open the door.[97]

Not having access to a dead-end street affects not only the value of a property, but also determines the members of the controlling party. For example, 'Ibn al-Qaṭṭān was asked about a case in which a house owner abutting a dead-end street but with no access to it objected when one of the neighbors opened a door to the dead-end street. He answered that as long as he had no access to the dead-end street, he had no right to object. 'Ibn ar-Rāmi relates that this custom was known in Tunis.[98] During my visit to Tunis, the resident of house no. 32 opened a new door in the early sixties towards his back dead-end street. The owner of house no. 31 was complaining that such owner opened the door immediately after the demolition of the dead-end street's gate by the Municapility of Tunis (figure 8; I will elaborate on this in chapter eight under gates). Thus opening a door to a dead-end street involved more than just passing through it. Furthermore, what made the door unique for tracing collective control was that it was the only element which an individual could change within his property without encroaching on the dead-end street. If a person projected a cantilever, for example, the owners of the dead-end street could object on the grounds that the action was an encroachment; this was not the case with a door, where a person could proclaim that he would not pass through to the street and that he was

free to do whatever he liked on his own property. Thus we should expect different opinions regarding doors.

We will now examine three issues regarding a door in a dead-end street. The first is opening a new door; the second is repositioning one's own door; and the third is increasing the users of one door. For example, a person who has a door to a dead-end street and may open another door from the other side of his house, allowing other people to pass through his house to the dead-end street, i.e., transforming his house and the dead-end street to somehow a through street. These three issues will overlap somewhat.

Regarding the first, which is the opening of a new door, jurists of the Ḥanafi school of law stated that a person should not be prevented from opening a door in his wall, because he had the right to demolish the whole wall and thus could open parts of it. Still, he should not be allowed to pass through to the dead-end street. But who would watch him day and night, to see whether he passed through? Furthermore, over time, he might claim the right to use the door since it had been there for years; thus they argued, it was more appropriate to prevent him from opening a door in the first place.[99] Physically, how could one define a dead-end street if it was not a deep rectangular street, but rather a forecourt or semi-circle or half circle? 'Ibn ᶜĀbdīn from the Ḥanafi rite defines it as a space which is wider inside than at the entrance. If the situation is reversed, then it is not a dead-end street, but rather a forecourt [ṣāḥah].[100] As to the Ḥanbali rite, we have seen previously that any new action in a dead-end street should be made with the partners' consent. The Shafiᶜis believe that if a person had no access to a dead-end street, though his house had access to and abutted a

through street, he is not permitted to open a door towards the dead-end street. But if the owner of such a house argued that he is opening, as his right, a door in his own property, and guaranteed that he would not use it, then he should close and nail it. Then, according to the Shafi^{c}is, two possibilities could be considered depending on the exact situation. In the first, the door would continue since he had the right to elevate his wall, and thus also the right to open a door in it. However, he would not have the right to use it. The second possibility is that the door is a sign of circulation, and thus he would not be permitted to open one.[101] Certainly, all these opinions arose in cases of disputes between neighbors; if all the residents of the dead-end street allowed him to do so, he could open the door. All opinions so far are based on collective control.

Regarding the second issue, relocating a door or opening a new one by an individual who has one in the dead-end street, Māliki's opinion regarding opening a new door considers both collective and majority control. 'Ibn ar-Rāmi summarizes the different opinions. He relates that if the new door caused damage, then it unquestionably would not be allowed if any resident objected. However, if the new door did not cause damage, then there are three possibilities. First, if all the owners (controlling party) did not object, he would be allowed to open the door and the owners could not reverse their decision later. Second, if some owners allowed him to open a door but others refused, two further situations must be considered. The first situation was that the owners who did not object lived at the back end of the dead-end street and would pass by the door. In such a case, two opinions are possible. According to Saḥnun (d. 240/854) and others, such a person should not open any door

if any resident objected, which is collective control. On the other hand, 'Ibn ᶜĀt (d. 609/1212) and other jurists believed that since those who did not object lived at the end of the dead-end street and would be affected by the new door, then the new door should be allowed. This is majority control. The third possibility is the objection by all residents against the neighbor who wants to open a new door. In such cases, 'Ibn ar-Rāmi derives two opinions. The first is that according to 'Ibn al-Qāsim the action will continue if it causes no harm. The second opinion, that of the majority of jurists such as Mālik, was that the action should not be allowed. 'Ibn ar-Rāmi relates that this was the common practice and that he came across many cases where people wanted to open a door or change the position of their door in a dead-end street, but if any resident objected the judges prevented the action and no judge has ruled differently.[102]

To generalize from all this, most opinions advocated collective control, while few opinions considered the majority control if the affected members of the party agreed. However, in a unique case where the affected party objected, it was ruled differently. 'Ibn Ziyādat al-Lah was asked about a dead-end street in which the houses on both sides were owned by orphans who wanted to open a door on one side of the dead-end street in front of their door on the other side. One house at the back end of the dead-end street was owned by a person who objected to the orphans' action. The distance between the objecting person's door and the new door was forty cubits. 'Ibn Ziyādat al-Lah stated that although the dead-end street is shared collectively by all residents and no action should be made without the partner's consent, in this case it is a minimal damage and the door could be opened.[103]

As we saw previously, the concept of majority control is influenced by the affected member. According to some jurists, if the affected member of the controlling party did not object to another member's action, the action could continue regardless of the objection of the unaffected members. This notion seems to have been the main determinant of changing the position of a door. If a member wanted to open a new door and seal the previous door without harming others, although others objected, could he do it? All schools of law seem to have agreed on this question.[104] We will illustrate only the Ḥanbali rite. 'Ahmad b. Ḥanbal illustrates the different possibilities in a simple principle, which was that if someone objected although the relocation would cause no damage, then the door could be relocated only in a position closer to the entrance of the dead-end street. Since relocating the door further from the entrance would mean that the relocating member could have the right of constantly penetrating deeper into the dead-end street, [ḥaq al-'istiṭrāq], it could not be allowed as it would affect the members living deeper in the dead-end street. These rulings were based on majority control since the objection of the affected member would be considered and not the objections of others.

All schools of law have similar opinions on the third issue which was increasing the users of one door by opening another door on the other side of the house to a through street, dead-end street or another house.[105] For example, the Shafi^{c}is opinion is that such an owner can open a door to the through street since he already has the right of using the dead-end street.[106] 'Ibn Qudāmah from the Ḥanbali rite relates that if someone argued that such an action could damage the residents of the dead-end street by transforming the dead-end street into a through

street, it should be replied that the dead-end street would not be transformed to a through street, rather the house with two doors would resemble a through street.[107]

These opinions suggest that control is closely related to physical change. In such situations, although the action by a member of the controlling party affected the street, his action still continued since he did not make any physical change to the dead-end street. Furthermore, if an individual owned two houses back to back, each house having access to a dead-end street, and the owner transformed the two houses into one, then it is legal for him to use both dead-end streets. However, it is illegal for the owner to build a passageway between the two houses so that he could reach one of the houses from both dead-end streets. This was illegal because the action would give the residents of each house the right to pass through a dead-end street that it did not provide access for, which may establish over time the right of pre-emption to a house not served originally by that street.[108]

In summary, regardless of its evolution, a dead-end street was considered as privately owned by the abutting residents who had access to it. The residents controlled the space and since they were the users, the dead-end street was in the unified form of submission. Any action within the dead-end street was judged through agreements and not on the principle of damage. If the members of the controlling party did not object at a member's action, it was considered a tacit agreement. Most opinions of jurists and most rulings on cases were based on collective control, with the exception of the door, since it is unique and some jurists consider majority control in cases of relocating a door. Collective control was mainly based on agreement between the residing

parties and never on intervention by an outside party. We should expect intensive dialogue between the members of the controlling party in cases of disputes. Both, the dead-end street and the properties abutting it are in the unified form of submission, which is autonomous synthesis. To name one case, 'Ibn ar-Rāmi and al-Wansharīsī report that residents of a dead-end street had built in the entrance of their street a gate whose door opened against a wall of a property whose upper floor was owned by another person. The constant opening and closing of the door caused some damage to the owner of the upper floor through vibration, and he sued the residents of the dead-end street. The judge ruled to demolish the gate. From the description of the case, it seems that the objecting individual did not use the dead-end street. In any event, this case illustrates that although the controlling party of the dead-end street is larger in number and uses a dead-end street, yet a party composed of one member who used the house managed to eliminate intervention towards its property.[109]

PART B CHAPTER 7

SIZE OF PARTY VERSUS SIZE OF PROPERTY

As explained in the third chapter, a small size party is composed of few individuals, to the contrary a large size party is composed of many individuals in which responsibility is most likely to be dispersed among them. In general, in any form of submission, the size of the party has a great impact on the state of a property. A small property owned by a large size party will be in a different state than if it is owned by a small party. The same is true for a large property. A house in the unified form of submission owned by one person will be in different state if it is owned by ten persons since responsibility will be dispersed among them. This house that is owned, used and controlled by ten persons and in the unified form of submission will be in a different state if it is divided into ten parts, each part in the unified form, owned, controlled and used by one person, as a small party. The same is true for all other forms of submission. Also, we often refer to a house if owned, controlled and used by one family as a house in the unified form of submission: but in reality a room that is used by a married son, for example, is not in the unified form. The son uses a room owned by his father. In order for the room to be in the unified form it should be owned by the son. In other words, the smaller the properties owned and controlled by the using party in all levels with no intervention, the more autonomous is the synthesis. Thus the question of the relationship

between the size of the property and the party is a basic one regarding responsibility. In this chapter, we will investigate the main mechanisms which had an affect on the sizes of the party and property and their mutual effects in the traditional Muslim built environment. However, we will not discuss each or both (the size of the party and the size of the property) independently but in their relation. To do so, we will examine the mechanisms that influenced the relationship, such as inheritance and their effects on both size of party and size of property.

From the historical data it seems that the size of the party often changes. In the traditional environment the controlling party is often the owner. Consequently, most documented cases in the law deal with owners. Thus the owning party is the essential party to be investigated in terms of its size. Many mechanisms affected the size of a party, such as the gift of part of a property or the inheritance of a property by more than one person. The owning party thus changed from one individual to many. I will elaborate, first, on such mechanisms in general, namely, charitable gift, donation, mushāᶜ, inheritance and pre-emption. Second, I will examine issues such as disputes among members and change in the property size, by examining what is divisible and what is not. Finally, I will illustrate the consequences of such changes in size of parties and properties.

Ṣadaqah. One of the major mechanisms that affected the size of a party is ṣadaqah. Ṣadaqah is giving money or property as a charitable gift and is highly recommended in Islam. But some individuals gave away parts of their property as Ṣadaqah, thus increasing the number of individuals per owning party. Al-Wansharīsi reports many such cases. For example, he reports a case of dispute in which a person gave his

three sons the lower floor of his house as a ṣadaqah; a few years later he gave the second floor to two of them and kept one room for himself. Before he died, he sold parts of the house to pay his debt. After his death, the sons wanted to cancel the sale on the grounds that their father sold a property that had been given to them.[1] In cases like these the property is divisible: the disputing parties may subdivide the property. In other words, one property in the unified form is transformed into more than one property in the unified form of submission. But if the ṣadaqah is part of an indivisible property, then the size of the party increases. For example, al-Marwazi was asked about a man who gave his grandchild a room, a quarter of a water well, the latrine and the passageways of the house as a ṣadaqah in the month of Rajab of 514 (1120). There are witnesses from the month of Jumād I of 515 H. that this man was so old that he was doting. Is this charity valid or not? Al-Marwazi answered that the charity is valid.[2] In this case, the passageways, the latrine and possibly the room shifted from the unified form to other forms, but the owning party of the water well increased in size; it is owned by more than one person.

Hiba. Another mechanism that affected the size of the party and property is hiba or donation. According to J. Schacht the major difference between ṣadaqah and hiba is that "[t]he charitable gift (ṣadaqah) is treated as a donation, except that it cannot be revoked."[2.1] Hiba is defined as "the transfer of the right of the property in the substance by one person to another without return (ᶜiwad)."[3] The gift of a property will not be valid unless it is handed over to the donee. This means that a divisible property has to be divided in order to complete the hiba procedure. For example, 'Ibn Zarb was asked about a man who

gave half his house as a donation while the donee continued to live with him. He answered that the donation would not be valid unless they divided the house through agreements [bi al-murāḍāh].[4] This ruling implies that a property owned by one person and resided in by two must be changed into two properties in the unified form of submission. In another case, al-Lu'lu'iy was asked about a man who gave away half of his house as a donation while he resided in it. Later the donee moved and resided with him and possessed the right to use the facilities of the house [marāfiq] such as the kitchen and the bathroom. The judge answered that since the donee had the right of using the facilities [dhālika ḥawzun tām] the donation was valid.[5] In the first case the property was divided into two properties: however, in the second case, the property was also divided but parts of the house, e.g.,the facilities were not, and the party owning and using these facilities increased in size. From this illustration, it is clear that the donor was often compelled to divide the donated property, i.e. the principle of hiba often led to a smaller size party and smaller property in the unified form of submission. Furthermore, according to Muslim law, it is not recommended for the donor to change his mind; this stems from the Prophet's tradition: "he who takes back his present is like him who swallows his vomit."[6]

Mushāᶜ. The property that is divisible as a land or indivisible as a water well that is owned by more than one person and not divided is known as mushāᶜ. Mushāᶜ has been defined as joint undivided property subject to the right of more than one individual, no one of whom can declare that his interest is attached to any specific portion of the property.[7] If the mushāᶜ property is indivisible, as in the case of

bathrooms, then it can be donated without dividing the property.[8] Since these properties are not divisible, we should expect a change in the size of the party and not the size of the property, that is, the members of the owning party are changing or its size is increasing.

Inheritance. Finally and most importantly, inheritance was a major mechanism which changed the sizes of parties and properties. Many scholars are disturbed by the Islamic law of inheritance. Regarding the size of the property, J. Brugman, for example, states that "the Islamic law of inheritance is characterized by an excessive fragmentation of the estate . . . In the past, in a rural economy as was prevalent in the Islamic empire, its effect seems to have been unfavorable because it led to the fragmentation of land into plots of uneconomical size, . . ."[9] G. Heyworth-Dunne states that "[t]he laws of inheritance are the worst enemy as it is impossible to introduce any system of land distribution into the Muslim world while the Muslims retain the method of dividing up estates and lands on the death of the owner. One of the main reasons for the very small holdings and the existence of fragmentation is due to this sacred system of the Shari^{c}ah method of division. An allotment or allocation of several acres is completely unrecognizable within two generations. One of the advantages of the waqf system was that it kept estates together."[10] On the other hand, regarding the size of the party S.D. Goitein concludes from the Geniza documents,[11] "With very few exceptions, all documents coming from Egypt, whether issued by Muslims or by Jewish authorities, describe the houses concerned as being held in joint, undivided, ownership. This means that the parts of a house, which normally formed the object of a contract, were units of account, not real segment of a building. A house was divided into twenty-four nominal

shares, a division modeled on the twenty-four qīrāts, or parts of the dinar. The same division, as is well known, was also adopted in the apportioning of an inheritance in Islamic law. The shares transferred by sale or gift could be very small . . . The majority of the transaction recorded concerned portions of a house amounting to 1/6 or more, which means that they normally were large enough to form separate apartments . . . When one or several partners in a house were absent for prolonged periods -- for example, on a business trip to India or Spain -- or were unable or unwilling to contribute to its maintenance, the house decayed and soon parts of it became uninhabitable."[12] This conclusion was also supported by Fernea from his observations in both Iraq and Nubia. Referring to the co-owners, he states that "(t)hey are unable to agree either upon a price for selling it or how to share the costs of repairs, and often it seems best to forget about it altogether and let the whole thing go to ruin."[13] Indeed, responsibility is dispersed.

The previous quotation suggests two contradictory conclusions. Quotations regarding the property claim that the law of inheritance always subdivides a property into a useless portion, while quotations regarding the party claim that inheritance increases the number of owners, thus leading to irresponsibility which ultimately will ruin the property. Both claims may be correct but they overemphasized the negative side of the system. To clarify this issue we have to examine the possible relationships between the members of the owning party and the question of division.

The above mentioned mechanisms -- ṣadaqah, hiba, inheritance, and, obviously, the selling transaction -- interacted over time and led to a great mobility between properties and parties and a complex relationship

between the members of the owning party. For example, 'Ibn Rushd (d. 520/1126) was asked about a man who bought two thirds of a house and lived in it with his wife for more than six years; later he bought the remaining third in his wife's name. Then he documented the house as belonging to his wife. Years later he died and his wife married another man, only to die herself one year later. A dispute took place between the successors of the first husband and the successors of the wife regarding the ownership of the house and the consequent inheritance.[14]

Another interesting and complicated case is the one in which a man gave one of his sons a piece of land as a hiba. The father delivered the land to his son in order to complete the hiba procedure and held it for him as a trusteeship, since the son was very young. Five years later, the father died. The older brother, who had adjacent land, became the trustee of his brother's land. The younger brother -- the donee -- got married, had three daughters and died. The older brother again became the trustee and inherited the land with the daughters. The older brother gave his share of the land to the three daughters as a charity and then died. The uncle inherited the older brother's properties and sold it. The daughters grew up and sued the uncle on the grounds of the original hiba by their grandfather and the charity of their uncle.[15] From these cases one can understand the impact of these mechanisms collectively which will result in changing the size of the party and of the property.

Pre-emption

In some cases, the previously described mechanisms such as charity and inheritance resulted in a larger owning party with consequently dispersed responsibility. Thus we should expect a reversed mechanism

which would unify or reduce the number of the party members. All books of Islamic law give considerable attention to the right of pre-emption, denoting its importance and prevalence among Muslims. Within our model of forms of submission, pre-emption is basically a mechanism that reduces the size of the party. According to 'Ibn Qudāmah, shuf^cah or pre-emption is defined as the right of the co-owner to substitute himself for the purchaser if the other co-owner(s) decide to sell his or their share. That is, in all respects the pre-emptor stands in the shoes of the purchaser and takes the immovable property subject to prior equities,[16] thus reducing the number in the owning party. Pre-emption derives from the Prophet's tradition that "the right of pre-emption is valid in every joint property, but when the property is divided and the way is demarcated, then there is no right of pre-emption."[17] Regarding this, Mālik adds that "[p]re-emption is in houses and land and it is only between partners."[18] All jurists approve the right of pre-emption in cases of undivided joint ownership. However, different opinions were raised with respect to a property owned by more than one person where the boundary was known. For example, in the case of a party wall between two neighbors in which a specific part of it is owned by one of them and other parts by the other, does either neighbor have the right of pre-emption in the party wall if one of them decides to sell his house? Or does a person have the right of pre-emption if his neighbor decides to sell his house with a well-known boundary between them? Jurists are evenly divided on this issue. 'Ash-Shafi^ci, b. al-Musayyab and many others rely on the Prophet's tradition mentioned above and do not give the neighbor the right of pre-emption. However, a second opposing opinion approves pre-emption to the neighbors. Abū Ḥanīfan argues that

the first pre-emptor will be the partner; then if the house is on a dead-end street where all residents are partners, all residents will have the right of pre-emption, depending on their proximity. If the closest neighbor does not take the right of pre-emption, then the closest neighbor from another road will have the right of pre-emption and so on. The jurists who advocate this opinion rely on the Prophet's tradition that "the neighbor of a house is more rightful in that house." This is especially true if neighbors share a dead-end street as a private access.[19] Thus, in general, pre-emption reduces the size of a party and may enlarge the size of a property owned by a party according to the second opinion which gives the neighbors the right of pre-emption. When a person buys his neighbor's house, he is enlarging his property. The Ḥanifi school of law advocates giving neighbors the right of pre-emption and classifies those entitled into three types.

1. Sharīk, literally "partner" of a co-sharer in which the members of a party own an undivided property.

2. Khalīt, literally a "mix," in which the members participate in appendages and immunities. The member who is entitled to such easements as the right of way in a dead-end street or the discharge of water will have the right of pre-emption.

3. 'Al-jār, literally, "the neighbor." The neighbor of an adjacent property will have the right of pre-emption.[20]

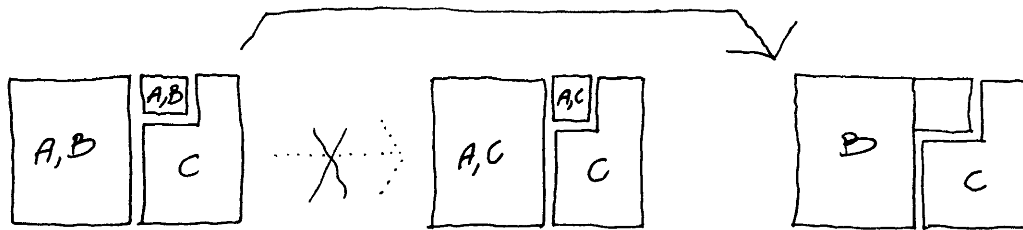
The above three classes will be considered in this order. For example, the first person to have the right of pre-emption in a house on a dead-end street will be the co-owner, then the residents of the dead-end street and finally the abutting neighbor who does not have access through the dead-end street.[21] Furthermore, according to the

Ḥanafi rite, the person who owns a party wall with his neighbor is viewed as a co-owner of the house in terms of pre-emption rights. However, if his wooden beams rest on the party wall, then he will have the right of pre-emption as a neighbor only.[22] These opinions of the Ḥanafi school of law reduce the size of a party while enlarging the size of a property enjoyed by a party. This opinion may move some properties from the unified form of submission to another form. For example, a person may buy his neighbor's house and lease it, which is the permissive form of submission.

On the other hand, the Ḥanbali and Māliki schools of law which do not give the right of pre-emption except to partners,[23] reduces the size of a party without enlarging the size of the property. To name a few examples, there can be no pre-emption between upper and lower story neighbors.[24] The partners of a dead-end street will not have the right of pre-emption if one of them decides to sell his house.[25] Ibn ar-Rāmi relates that if a person has the right of servitude through a house he will not have the right of pre-emption in that house.[26] As to a jointly owned party wall between two neighbors, a neighbor will have only the right of pre-emption in the wall and not the house.[27] According to Ibn ar-Rami the purchaser of a house may buy the house without the party wall, since the neighbor will have the right of pre-emption.[28] This opinion will reduce the size of the party that owns the party-wall, while the neighbor may not have a chance to enlarge the size of his property, since the house can be sold to an outsider. Thus this opinion leads to smaller size parties and properties which are often in the unified form of submission.

With a few exceptions, most jurists agree that the right of a pre-emptor in a property owned by more than two members is proportionate to his share in the property.[29] From the Ḥanbali rite, 'Ibn Qudāmah describes a house owned by three individuals, one of which has half the house, one has one third and the third has one sixth. If one of them decides to sell, the other two will pre-empt proportionally according to their shares.[30] From the Māliki school of law, Mālik states, "Pre-emption is shared between partners according to their existing shares. Each of them takes according to his portion. If it is small, he has little. If it is great, it is according to that. That is if they are tenacious and contend with each other about it."[30.1] Indeed, this opinion not only reduces the number of the members of the owning party but also further increases the share of the member who holds a larger share. This may encourage the owners of the larger share to buy the remaining share from the other holder who will most likely sell his share. Hypothetically, over time, the owning party will be composed of one individual in whom responsibility will be unified.

We will review one case. 'Ibn Rushd (the judge of Cordoba, d. 520/1126) was asked about a yard [ᶜarṣah] owned by two individuals (A & B). A room in the neighbor's (C) house abutted the yard. The space on top of the room is owned jointly by the owners (A & B) of the yard as illustrated. One of those who co-owned the yard and the space on top of the room (A) sold his share to the neighbor (C). One year later, the other co-owner (B) requested his right of pre-emption, although he lived thirteen miles from the yard. Did he have the right of pre-emption? 'Ibn Rushd answered that he did have the right of pre-emption in both the yard and the space above the room.[31]



Pre-emption, inheritance, hiba, and ṣadaqah are mechanisms that affected both the size of a party and the size of a property by increasing or reducing them. This should have a great impact on the transformation of the physical environment. In the remaining part of this chapter, I will argue that most opinions and rulings by jurists, whether intentionally or intuitively, aimed at reducing the size of a party and the size of a property, as well as placing the property in the unified form of submission. This resulted in an autonomous synthesis and great territorial shifts with minimum physical change. In other words, the boundary between properties changed dramatically over time as compared to the physical change in which every change resulted in a property in the unified form of submission. To document this argument, we will investigate several issues: disputes among members of the owning party; divisibility of elements; the way properties were divided among members of the owning party; and change of territorial boundary. We will leave to the next chapter the consequences of these changes.

Disputes Among Members

A party that owns a property and is composed of more than one individual in which responsibility will be dispersed among them is a very susceptible to disputes, since each member has his own interest. For

example, one may desire to sell the property while a second wants to improve or lease it and a third may wish to subdivide it. Whether they decide to subdivide it, sell it, or maintain it, it is one decision that they have to agree upon. Their agreement to maintain the property would improve it, while not reaching an agreement would impoverish the property over time. It would, however, remain in the unified form with no external intervention. On the other hand, if the property was leased to others, their decision to sell the property would transfer ownership only without changing the form of submission. However, if they resided in it, they would shift the property from the unified form to the permissive form of submission, which would not affect the synthesis of the forms of submission since there would be no external intervention. In short, any decision they will take which does not involve external intervention will not affect the structure of the built environment in terms of the synthesis of the forms of submission. What really affects the structure of the built environment is the owners' decision to subdivide the property, thus reducing the size of the party and the size of the property.

All the principles and rulings by jurists aimed at subdividing a property and reducing the party's size. The first principle was that the collective owners of a property could subdivide their property without any authoritative intervention as long as they were in accord with one another.[32] According to the Ḥanafi rite, for example, subdivision by the judge would not take place unless one of the successors in the case of inherited property required it.[33] Furthermore, in the process of subdividing a property, an individual could compensate others in order to have a better share of a property.[34] For example, 'Ibn ar-Rāmi from the

Māliki rite states that if a house is owned by two individuals who decide to subdivide it, while one of the co-owners also owns a property adjacent to the jointly owned house and he desires to claim as his share the portion adjacent to his property by compensating the other co-owner in order to open a door between his property and his share in the house, it should not be prevented if they both agreed. However, if the other co-owner refused his compensation, then they should subdivide the property equally and cast it among themselves.[35] In this case, there is a chance that the property owner would not receive the share of the house adjacent to his property, which would lead to a dialogue between the partners in order to reach an agreement. If they did not reach an agreement, then there would be a chance that one party would have two small properties instead of one large property. The Islamic legal system in this case positioned partners in a situation of dialogue. In any case, the subdivision resulted in a breakdown of one property owned by a large party into smaller properties owned by smaller sized parties. The jurists' concern in such cases was not the result of the subdivision, e.g. whether it is subdivided geometrically and functionally or not. Their main concern was the agreement among parties which would lead to the unified form of submission. This theme is consistent in all cases.

The second principle was that if the partners could not agree on a non-divisional issue that could affect the result of the subdivision, the principles of subdivision should continue. For example, Ibn Zarb was asked about a house owned by two individuals (A & B) in which one of the co-owners (A) had built in parts of the house. The partners decided to subdivide the house. Did the partner who built (A) have the right to claim his share in the built-in part? 'Ibn Zarb answered that if they

could not agree, they should subdivide the house and cast the shares among themselves. If the built element was in the other partner's (B) share, then he (B) should compensate the builder (A) only for the materials used in the built element.[36] In another case, 'Ibn Rushd was asked about a house owned by two individuals, in which one of them resided. The non-resident partner wanted to subdivide the house and asked the resident partner to move out his belongings so they could subdivide it; the residing partner refused to move out his belongings. 'Ibn Rushd ruled that if the subdivision was possible without moving furniture, they should divide the house at once.[37] In these cases, the main objective was to subdivide the property, which is the third principle.

If any member of the owning party desired subdivision, the property should be subdivided if that could be done without damage to the property. From the Ḥanafi rite, 'Ibn ᶜĀbdīn states that the wide yard [al-ᶜarṣah al-ᶜarīḍah] or courtyard between two partners who share a house should be divided if one of them asks for subdivision.[38] From the Māliki rite, 'Ibn Lub was asked about a one story hotel in a village owned equally by two men, which was bordered on four sides by orchards and a road. One of the partners wanted to subdivide while the other refused on the grounds that any subdivision would damage the hotel. 'Ibn Lub answered that the one who refused to subdivide should be compelled to unless it could be proved that the subdivision would damage the hotel.[39] Jurists from Cordoba were asked about cases of jointly-owned properties in which the co-owner who refused to subdivide the property intentionally went away. They answered that the judge should then subdivide the property and appoint a representative to accept the missing partner's

share.[40] This ruling supports the co-owners who wish to subdivide a jointly-owned property which will transform large jointly owned properties to smaller individually owned properties where responsibility is more clear and settled.

If some elements such as a latrine or a room are owned by an individual within a jointly owned property and the partners decide to subdivide or sell the property, will the owner of these elements be compelled to sell? Al-Māzirī was asked about a person who, before he died, gave his daughter a room with its access and finā' and portions of the water well, the cistern, and the latrine of his house. If the successors wanted to sell the house, would she be compelled to sell? Al-Māzirī answered that she would not be compelled to sell the room and its finā'.[41] Later we will explore in detail the ruling regarding the cistern, latrine and water well as they are indivisible jointly owned elements. This ruling is quite interesting, since it will result in a small element owned by one person within the property of others. The ruling did not question the functioning of the large property, but rather satisfied the desire of the small element's owner, and led to a unified form of submission which might disturb the owner of the larger property, thus inviting dialogue.

The final principle is muhāya'ah, which is defined as subdividing through agreements among partners the usufructs of a property,[42] such as a house owned by two persons in which each of them will reside alternately for a specific period of time. Or one will reside in the upper floor and the second on the lower floor without subdividing the property. However, if one of the partners wanted muhāya'ah but the second asked for subdivision, the property would be subdivided between

them.[43] Again, this ruling leads to smaller properties owned by smaller sized-parties. Since the co-owner could ask to subdivide the property if the other co-owner refused, thus this principle gave an edge to the co-owner who desired to make any change in the property. To name one case of dispute in muhāy'ah, 'Ibn ar-Rāmi reports that Saḥnūn was asked about a large house owned jointly by two individuals. Each partner lived in one half and between the two halves there was a dead-end street used exclusively by one of the partners. The co-owner who had no access to the dead-end street wanted to open a door into it which could be used by both of them. The second co-owner (the user of the dead-end street) refused. Suḥnūn answered that the door could be opened and used by both of them [mushā^c] while they could continue residing under muhāya'ah.[44] In this case, the opening of the door was permitted because of the joint ownership of all the house including the dead-end street. However, if the partner who opened the door did not co-own the property, he would not be allowed to open such a door. This was explained earlier in the section on dead-end streets. This case indicates how susceptible jointly owned and used property is to subdivision.

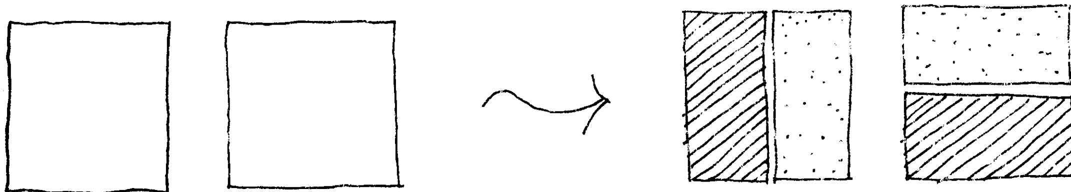
If a dispute took place between the owners after the subdivision process, then they would be critically positioned to reach agreement. Suḥnūn asked about the dispute over a room in a house that was subdivided between the two partners, each partner claiming the room for himself. Ibn al-Qāsim answered that if none of them had evidence of the room's ownership, they both should take an oath, and if they did, the subdivision should be cancelled.[45] According to Mālik, if the partners agreed and subdivided the property, they could not change their minds and cancel the subdivision agreement without reason even if the subdivision

boundaries had not yet been demarcated. He considers it just like a sales transaction.[46] In conclusion, it can be seen that most principles for resolving disputes between co-owners of a property led to smaller size parties owning properties in the unified form of submission.

Divisibility of Elements

Elements vary in terms of divisibility. Some, such as a large house, are divisible; others are divisible but may not function properly if divided, such as a small room or a small shop. A third group of elements, such as a mill, are indivisible. With respect to subdividing a property the ruling of jurists varied according to the divisibility of the elements. In general, a large property could be divided among the co-owners if all partners agreed. 'Ibn Rushd was asked about the validity of subdividing pasture lands. The residents of a few villages agreed among themselves and subdivided their communal pasture land proportionately according to their shares; each individual in each village knew exactly his portion of the pasture land. 'Ibn Rushd answered that if it was clear that the pasture land was for their exclusive use, then the subdivision would be valid since they all agreed.[47] In this case the large property of a large-size party in the unified form was transformed into smaller properties for smaller-size parties in the unified form of submission. This is illustrated here.

Another issue regarding subdivision involves successors. If a dispute took place between the successors of many properties in different locations, would each individual receive his share in one property or would they have to divide each property into portions with each individual taking a portion from each property? Most jurists support subdivision of each property if one successor desired it. For example, Suḥnūn asked about a group of people who inherited many houses and were in dispute; one of them demanded his share in one house, while the others preferred to divide each house. 'Ibn al-Qāsim's response was that if these houses were equal in terms of location and value -- which is rarely the case -- then each would have his share in one unit. If, however, the houses were different and one of the inheritors demanded subdivision, then each house should be divided among them.[48] According to the Ḥanafi rite if some individuals inherited shops and houses and could not reach an agreement, the shops and houses would have to be divided.[49] These rulings, indeed, must have forced inheritors to reach agreements; otherwise, they could find themselves in the crucial position of not being able to benefit from their shares. These rulings would certainly result in smaller-size parties and smaller properties in cases of disputes, as illustrated.



As to the indivisible elements and the elements that may not be useful if divided, the Ḥanafi, Shāfiᶜi and Ḥanbali schools of law do not

approve of subdividing such elements by compelling the co-owner to do so; on the contrary the Maliki rite would compel co-owners to subdivide indivisible property if one partner requested the division.[50] For example, the Ḥanafi rite states that elements that need breaking or cutting in order to be divided should not be divided among partners, even if one of the partners desired it, since this subdivision would harm all partners. Some of these elements include a mill, a latrine, a water well, a canal, a small room and the wall between neighbors. Accordingly, private access such as a dead-end street or an entrance hall between two houses should not be divided if one of the partners would not have access after division.[51] From the Hanbali rite, 'Ibn Quadamah argues that subdividing a party wall by cutting it would damage both owners. Thus, the co-owners' request to subdivide the wall would not be considered. They could, however, divide the wall vertically by marking it. In this case, there would be no damage. Division of a small open space in a way that would not benefit any one of the partners was not allowed.[52] This opinion, that of the majority of rites, in which individible property will not be divided, has the advantage of preventing damage to the partners and is thus a logical ruling. However, in some cases the members of the owning party may present obstacles to one another and ruin the property over time through their irresponsibility.

On the other hand, the Maliki school of law expresses varying opinions regarding the division of indivisible elements. In general, al-Qarāfi states that subdividing a small house or a bath is possible if the partners agree, even if one partner does not benefit from his portion, since it is his own problem.[53] However, if one partner asked to subdivide indivisible property while the others refused, according to 'Ibn

al-Qāsim and 'Ibn ar-Rāmi it should be divided even if some partners would not benefit from their portions. Suḥnūn asked about a hypothetical case of many individuals who inherited a small house or a shop. If it is divided, no one will benefit from his share, so do they have to divide it? 'Ibn al-Qāsim answered that if any partner should demand division, they must divide it and give him his share even if the share is not useful.[54] Ibn ar-Rāmi relates, according to the Qur'anic verse, "For men is a share of that which parents and near relations leave; and for women is a share of that which parents and near relations leave whether it be little or much, a determined share,"[55] Malik had the opinion that one should subdivide any element that contains a usable space such as a bath, a room or a small shop if any partner requires it; even if some portions will be useless.[56] 'Ibn ar-Rāmi adds that this is done in Medina City. Another opinion for 'Ibn al-Qāsim believes that in disputed cases the indivisible elements should be sold and the proceeds distributed among the partners.[57] 'Ibn ar-Rāmi himself argues that the Qur'anic verse refers to what is divisible; indivisible elements must be sold to prevent damaging the partners according to the Prophet's tradition which states that "there should be neither harming nor reciprocating harm".[58] 'Ibn Zarb was asked about a small house that could not be divided. If one of the partners wanted to sell the house, was the second partner compelled to sell? 'Ibn Zarb answered that the second partner has the right to buy his partner's share according to the market value -- i.e., under pre-emption -- and if he refused they should sell the property together.[59] So far, the Malikis all believe the indivisible property should be sold, thereby transferring ownership from a large-size party to another small-size party; or that indivisible elements should be subdivided,

which will stimulate partners to communicate and reach agreements. If not, their property will be divided into unusable portions. These unusable portions could potentially join adjacent properties, which we will explore later.

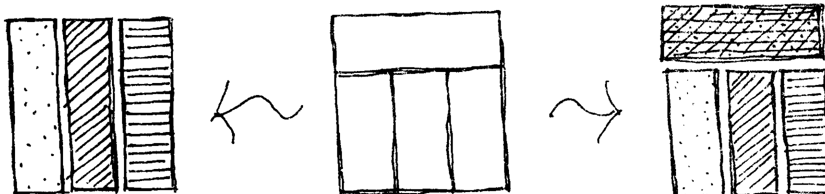
Finally, the Malikis oppose the subdividing of a few elements in which damage would be severe for all partners, such as a water well. There are other elements whose division would severely damage some partners and not others, such as circulation zones. For example, if an entrance hall is divided, one member may not be able to exit from his portion, making his portion useless. 'Ibn al-Qasim's (d. 191/807) opinion is that the passageway used by the partners in the house should not be subdivided if any partner refuses; the same is true for cisterns. However, Malik (d. 179/795) approves subdividing cisterns.[60] Regarding water wells, 'Ibn al-Ḥāj (d. 529/1135) was asked about compelling a partner to accept subdividing a water well. He answered that it should not be divided without agreements. He adds that the customary way to divide a well is to erect a diagonal wall in its upper part, so that each partner will have one side of the well in his house. 'Ibn Lubābah relates that any element in a house may be divided except a water well, as dividing it could cause great damage. He adds that in such disputes he ruled the building of a round wall around the well in which each partner has a door from his side to be closed after using the well.[61] The water well is almost the only element in which all jurists disapprove its division because of its unique nature. As it has to be used by a large-size party, however, it is still in the unified form of submission.

The Principles of Subdivision

Having understood the jurists' rulings regarding the divisibility of elements, the principles of resolving disputes among the members of the owning party and the impact of the various mechanisms such as pre-emption and inheritance, we can now discuss the main principle followed by jurists in resolving subdivisional entailments. The main entailment and the main concern of the jurists is the easements of one property through the other. For example, if a house is divided into two houses, there are three possible conditions. First, both owners could own and use jointly the entrance hall, which is the unified form of submission. Second, one owner could own the entrance hall, giving the other the right of servitude in it, which is the permissive form. Third, one of the owners would have to create a new entrance hall, which would avoid any relationship between the two owners. In other words, most subdivisions will create a relationship between the parties of adjacent properties that would not have existed otherwise. To clarify the principles of subdivision which will explain the relationship between the parties involved, we will first examine one element in the unified form of submission, namely the courtyard. Second, we will use the passageway as an element in the permissive form of submission. Conversely the courtyard can be in the permissive form of submission and the passageway may be in the unified form of submission if owned and used by neighbors and they can be investigated. However, it will not add much to our inquiry.

First: If dividing the courtyard or the yard [sāḥah] of a house will result in damaging some partners the courtyard should be considered as indivisible element. 'Ibn ar-Rāmī relates that in dividing a house

that has rooms and sāḥah the partners may divide these elements if each person would benefit equally from the rooms and the open space. However, if dividing the courtyard damages one partner by denying him access to his share of storage space or a place to station his cattle, then the sāḥah should not be divided. On the other hand, rooms may still be divided.[62] This suggests that the main concern of jurists in dividing a courtyard is the right of easement. For example an open space on the upper floor is dealt with as a room, since the owner of the lower floor will have no way through it after division. Ibn al-Qāsim relates that in dividing a house with no rooms and sāḥah in the ground floor, and rooms and a roof terrace in the upper floor, the roof terrace may be treated just like a built space or a room since the lower floor owner will not use it. However, the owners of the upper floor may use the courtyard if it is not divided.[63] From the previous description we may conclude that if the rooms and the sāḥah of a property are divided the subdivision will result in transforming a large property of a large-size party into smaller properties of smaller-size parties as illustrated. On the other hand, if the rooms are divided and the sāḥah is not, then the subdivision will transform one large property of a large-size party into many small properties of small size parties which are the rooms. The transformation will also result in one small property, the courtyard, which is controlled, owned and used by a large-size party composed of the adjacent residing members as one party collectively as illustrated.

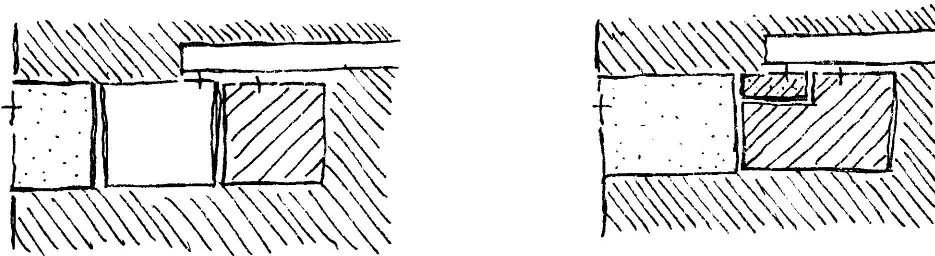


This organization of a courtyard that is controlled and owned by the surrounding residents is just like a dead-end street that is controlled and owned by the residents of the dead-end street. We should expect the same relationship between the members of the owning party in terms of responsibility. To name a few examples, Ibn ar-Rāmi relates that if the sāḥah was not divided and was designated for the partners' use, then the members could prevent any partner from building anything even near his own room.[64] According to 'Ibn al-Qāsim no partner should place firewood or provender near the other's door if they object.[65] These opinions denote the controlability of the owning party agains the individual user as a member of the using party. However, is the claim of control in such a space collective or majority-control? 'Ibn ar-Rāmi states that if a sāḥah is shared by two individuals and one of them has a larger share, he may own more rooms for example, and if he wants to use the sāḥah more than the other, while the other partner claims that they should both use it equally, then they should use it equally.[66] Ibn ᶜAbdīn relates that if a house was owned by two individuals, one of them owning ten rooms while the other owned one room, and years later they disputed in subdividing their collective sāḥah and neither had evidence, then the sāḥah should be divided equally between them. Regarding another case in which a dispute took place between the upper floor and the lower floor owners in which both claimed the ownership of the ground floor's sāḥah, and neither had evidence but both took an oath that they own the sāḥah, two rulings were possible. The first was that the sāḥah would be owned by the ground floor owner while the upper floor owner will have the right of way and the right of using such space, which is the permissive form of submission. The second and prevailing opinion, according to 'Ibn

ᶜAbdīn, was that the sāḥah should be divided among them equally regardless of their quantitative shares, since they both had the same privileges of using the sāḥah such as passing through it, cutting firewood in it and the like.[67] These opinions suggest that the sāḥah, if not divided, is a property in the unified form of submission and is collectively controlled by the adjacent properties' parties just like a dead-end street, in which dominance is eliminated between the sāḥah and the adjacent properties.

Second: The passageway as an entailment resulting in a property in the permissive form of submission. The easement right as an entailment of subdivision was the major concern of jurists. I have discussed the right of servitude in general in chapter one under the permissive form of submission where we concluded that three domains are involved in establishing such a right. The three domains are the property which provides the servitude, the property which needs the servitude and the overlapping part that is owned and controlled by one party while used by another party. We also concluded that because of the properties' relative position from each other one party may dominate the other. In this case the law gave the dominated party the right of enjoying such use to ease dominance. In chapter four, under the original growth of towns, I explained that the mechanism of revivification resulted in creating the right of servitude between two parties. One party may revivify before others and establish its path while other parties have to deal with such a path as a constraint, or the party that would revivify later should compensate the first revivers for the right of servitude. Conversely, we will now examine the evolution of the right of servitude as a subdivisional entailment.

In general, it is possible to subdivide a property on the condition that an entrance hall or a passageway will be owned by one partner while the other partner(s) will have the right of servitude.[68] 'Ibn al-Qāsim was asked about a house located between two neighbors and owned by them; they later decided to subdivide the house in such a way that one of them would own the passageway while the other would have the right of servitude. 'Ibn al-Qāsim answered that it was allowed according to Mālik. The case is hypothetically illustrated.[69]



'Ibn al-Rami addresses the situation of two partners who agree on a certain subdivision that will deny access to a partner such as an upper floor owner who will be unable to reach his upper floor because the division will not allow him to move through the ground floor. In this case the subdivision is illegal unless the owner of the upper floor finds an access for himself, thereby resolving his access problem. He examines the case of partners who divided their property and for some reason, possibly friendship, did not resolve questions of servitude such as the rainwater gully, canals of waste water and the right of way. After the division these servitudes were in the portion of one owner who later prevented the others from using them. On this situation, there are three different opinions. 'Ibn al-Qāsim's (d. 191/807) opinion is that the subdivision will be considered legal and the owner of the portion that

contains the entrance hall will own it, while the others will have the right of servitude in it. 'Ibn Habīb (d. 328/940) would cancel the subdivision transaction. The third opinion is that of ᶜĪsā b. Dīnār (d. 212/836); he feels that the partners who have no access should find a way to exit, and if they cannot, the subdivision should be cancelled.[70]

The discussion above suggests that most cases of subdivision will result in an overlapping domain under the permissive form of submission. What then is the nature of the relationship between the party that controls and owns and the party that uses? The relative positions of the involved properties invite dominance. However, the law tries to eliminate such dominance between the properties, in two ways. First, the owner may not hinder the user's right of way, and second, the user cannot make any change in the passageway without the owner's consent. Regarding the first, according to the Ḥanafī rite, if a house was located within a parcel whose owners desired to subdivide their property, they should give the houseowner the right of way and develop a passageway for him.[71] If a house was owned by two partners who desired to subdivide it and a third person had the right to pass through the house, the subdivision should not touch or hinder the passageway.[72] 'Ibn ar-Rāmī relates that if a house was located within or in back of another house so that the internal owners had the right of way through the external one, and the external owners wanted to relocate the street door into a position that would make the passageway <u>shorter</u> for the internal owners, then there were two opinions. According to 'Ibn al-Qāsim, the external owners should be allowed to proceed, since no damage would be caused to the internal owners. Suḥnūn states that such change should be made only if the users agreed. 'Ibn ar-Rāmī adds that the internal owners have the right to

prevent the external owners from narrowing the door.[73] These opinions may suggest that the using party participates with the owners in controlling the passageway. In fact, they do not, but any action by the owners that will touch the users' right of way will be challenged. The owners may make any change in the entrance hall or passageway as long as the right of way is not hindered.

Regarding the second relationship, in which the user cannot make any change without the owner's consent, 'Ibn ar-Rāmi relates that if the owners of the internal house subdivided it into two dwellings and wanted to open another door into the passageway within their own wall, the external owner has the right to prevent them. However, 'Ibn Habīb's opinion is that if the wall in which the door will be opened is owned by the internal owners then they should be allowed to proceed since the action is within their property.[74] Thus the relationship between the owner who controls and the user of the overlapping domain is always settled and responsibility is clear with no dominance between properties. The easement right is a constraint on the owners of such property, and the users may not make any changes without the owner's consent. This relationship is very similar to that between two neighbors which is based on "accretion of decisions." Let us not forget that we were dealing with parties of one property, which is the overlapping domain, and not with parties of adjacent properties. This means that if a dominance relationship exists between the parties then it is between the parties of the same property and not adjacent properties.

Territorial Transformations

As we discussed previously, inheritance as a mechanism among others divided properties into smaller ones. Hypothetically speaking, if the same mechanisms continued those smaller properties would, over time, be further subdivided into even smaller properties. Consequently, the built environment would end up being composed of small, possibly unusable, sectors owned by independent parties. However, some reversal mechanisms did operate in assembling those sectors such as pre-emption, selling and buying transactions, or even hiba or giving a property to a neighbor as a charity. From the divisibility of elements we have seen that some properties were divided into smaller portions if the partners requested it, which may have resulted in useless shares. These small hard-to-use properties, in fact, had the potential of being joined to other larger ones. Thus, over time, the boundaries between properties must have shifted a great deal.

Combining all this information regarding change of size in properties and parties, one can understand the irregular layout of properties in the traditional Muslim built environment. It was not planned by one decision maker or even all the residents collectively. Rather it resulted from many independent agreements between neighbors or the owners of one property. It is the outcome of the decisions and the actions of the residing parties. The residing party's action may not take into account the orthogonality of the quarter's layout, rather its main objectives may center on self-interest, resulting in a property owned, controlled and used by itself. Although the built environment is not orthogonal and therefore does not seem organized to superficial observers, for the residents it is very clear since responsibility is

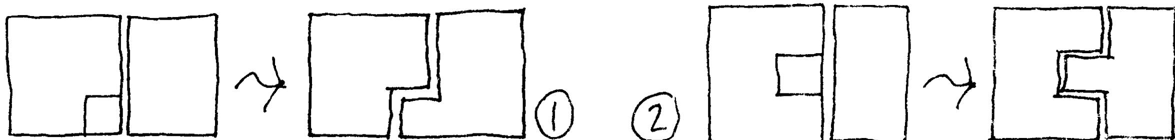
well defined. Most, if not all elements are in the unified form of submission: the street, the dead-end street, the collective courtyard and the neighbors' properties. There can be other elements in the permissive form such as a leased property or a passageway; however, in these properties there is no intervention by an outsider, and responsibility is also clear. The built environment is an autonomous synthesis. Perhaps it is not an organized environment but it is an ordered one.

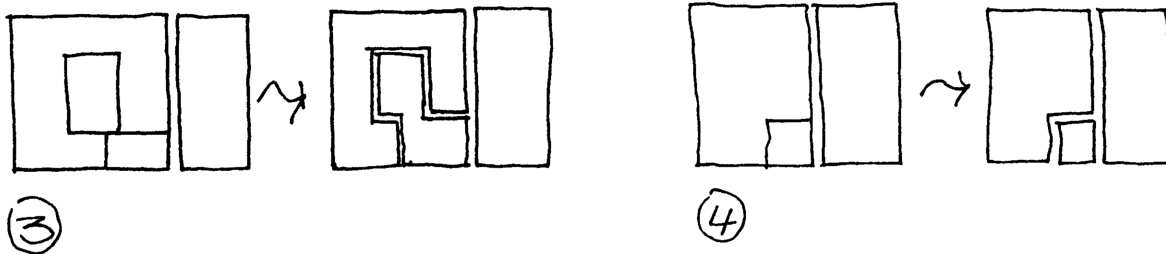
The major characteristic of an ordered environment is that it is owned and controlled by the users. The users' needs change over time. A family expands and needs larger property, others break down to more than one family where some members may move out and the property is larger than needed. If an owner is in financial difficulty he may sell part of his house. Another owner needs an additional room because he has transformed one of his rooms into a shop, and so on. In short, the constant change in users' needs will affect the internal organization of a property as well as its size. We will now examine and give some examples of the territorial transformation of properties. This is an essential characteristic of an ordered environment which may not take place in an organized environment controlled by an outside party.

In general, it is possible to classify territorial transformation into the mechanism of subdivision where a property will be subdivided and the mechanism of joining where part of a property will join adjacent property. We have dealt with both of them in different sections of this thesis, mainly in this chapter. However, I will now give examples of both. First, we will review cases of sectors or parts of a property that join other properties as well as cases of subdivisions and then we will

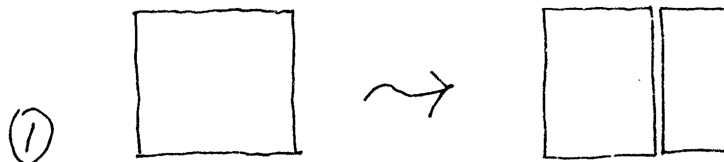
examine one block of the traditional fabric in Tunis to identify examples of the territorial transformations discussed above.

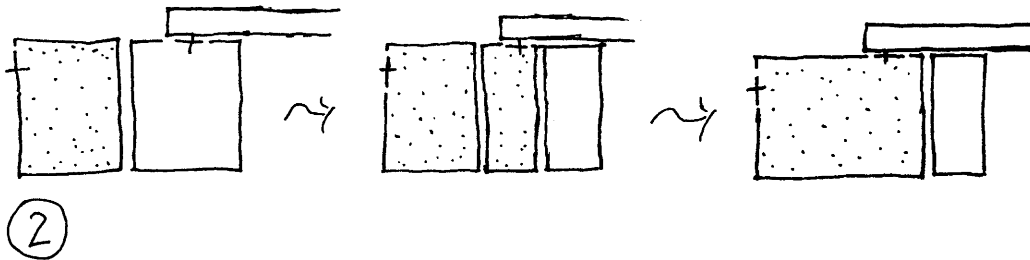
Certainly, the majority of transformations have not been documented since they were based on agreements but traces of them are clear in any plan of a traditional fabric. See, for example, block No. 44 of Tunis (figs. 7, 8). However, some transformations were documented in cases of dispute. In reviewing them I will not emphasize the ruling of the jurists, but will only mention the dispute. For example, al-Māzirī was asked about a case in which a woman sold a shop on her property to her neighbor; later they disputed over the rainwater gulley that ran on the shop's roof and belonged to the woman. The buyer wanted to stop it[75] (illustration 1). Abū Ṣāliḥ was asked about two similar cases. The first was that of a person who sold a room of his house, possibly to his neighbor, and they disputed on the canal that ran from the room where the seller wanted to end it (illustration 2). The second case was that of an individual who bought a room and half the ṣāḥah (courtyard) where a dispute took place regarding the water collected in the ṣāḥah.[76] (illustration 3). Finally, Ibn ᶜItāb was asked about a person who had sold his house which had a shop with two doors, one leading to the house and the other to the street. A dispute took place; the buyer claimed that the shop was included in the selling transaction while the original owner argued that the shop did not belong to the house. The original owner won the case[77] (illustration 4). These four cases as illustrated demonstrate some of the many possible transformations of sectors or portions of properties.





As to subdividing a property into two portions, 'Ibn ar-Rāmi reports a dispute between two neighbors over a party-wall that with one door in it; each neighbor claimed the party wall for himself. To resolve the dispute the judge 'Ibn al-Qaṭṭan asked 'Ibn ar-Rāmi to investigate the case, and he stated that the two houses were originally one house divided by the original owner and then sold to the present disputing neighbors[78] (illustration 1). 'Ibn ar-Rāmi also reports 'Ibn al-Qāsim's ruling regarding a house that was inherited and divided into two parts where the adjacent neighbor bought the part abutting his property and opened a door to it, thus having access to a private road, possibly a dead-end street. 'Ibn al-Qāsim's opinion was that the neighbor should not be prevented from using the private road, since he and the residents of his property were using it and not outsiders[79] (illustration 2). These two cases are examples of the territorial transformations in which one property, in the first case, was transformed into two, while in the second, the property was transformed into two and then one part joined the adjacent property.

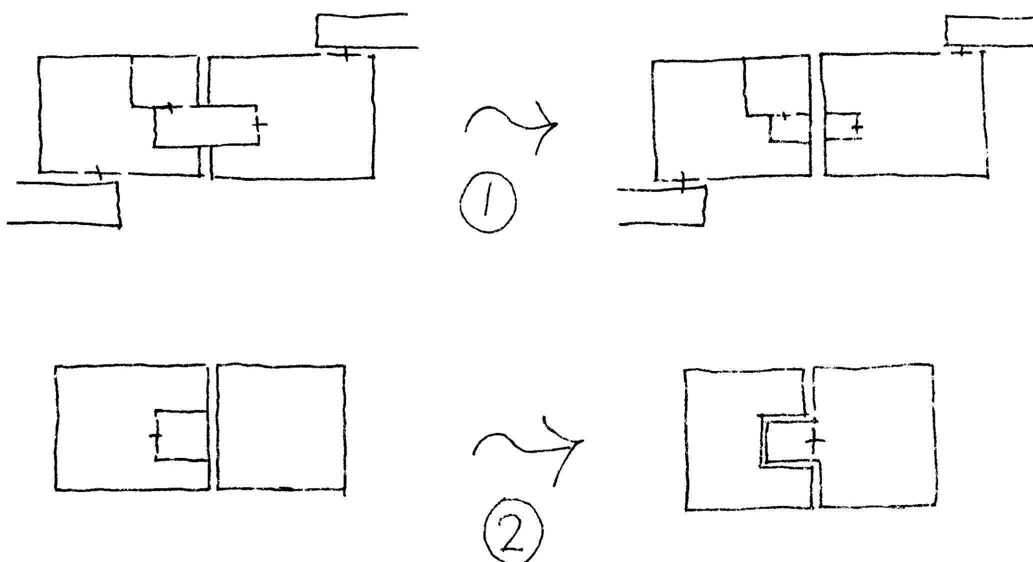




A sector, such as a room or a passageway, between two properties may also cause disputes between parties resulting in dividing that sector. For example, 'Ibn ar-Rāmi reports a very unique case of a passageway between two houses that were back to back (illustration 1). Each house had access to a different dead-end street. The covered passageway had two doors; the east door opened into the center of the house on the east, possibly to the courtyard. It was a very old door and had a lock which could be locked only by that house owner. The western door opened into a room in the western side house and it was also a very old door with a lock controlled by the owner of the western house. The neighbors disputed, each claiming the passageway for himself. They both took an oath that they owned it but neither of them had proof. The judge ruled that it should be subdivided equally among them. 'Ibn ar-Rāmi relates that they built a wall in the middle of the passageway, thus transforming the eastern part of the passageway into a small room in the center of the eastern house and the western part was transformed into a small storage space [khuzānah] inside the room.[80] In this case, the two houses were possibly originally owned by one person and resided in by two related families each of which had the freedom of exiting from either dead-end street with the other's permission; or the two houses may have

originally been owned by two neighbors who agreed to develop the passageway in order to have access to both dead-end streets, thus shortening their trips. The judge's ruling in this case resolved the ambiguous responsibility of the parties.

'Ibn Lub was asked about two brothers who jointly owned two houses; one of them better than the other. One of the brothers had transformed one room of the better house to the other house by opening a new door and sealing the opening of the original door (illustration 2). The better house was leased, then resided in by both brothers for less than a year. Later, they were separated and agreed that each one would own a house. In their dispute, the owner of the better house claimed the transformed room for himself, while the other brother objected on the grounds that he accepted the worse house because of the transformed room. 'Ibn Lub ruled that since the subdivision took place while the door was opened to the worse house, the room should belong to that house.[81]



A glance at the ground floor plan of a block in the traditional tissue of Tunis will reveal many possible territorial transformations

(fig. 8). For example, it is clear that house no. 11 and no. 12 were originally one house divided into two, house no. 11 taking a sector from house no. 10 to create an entrance hall to the dead-end street. Between house no. 9 and house no. 5 there was a territorial shift, as well as between houses no. 1 and no. 39. House no. 2 may also have expanded and taken two rooms from house no. 3. A part of house no. 18 may have been lost to house no. 17. Most, if not all of the shops in the periphery of the block have been transformed. Indeed, there are endless examples. As to the upper floors (fig. 9) the owner of house no. 9 has transformed his upper floor into three units (9a, 9b, 9c). All it takes is to transform a sector into a staircase from the street, which is what the owner of house no. 13 possibly did to create an upper unit (13b). House no. 30 on the upper floor was originally two houses connected by a staircase to resolve the difference in levels of the original two houses as in Fig. 10. According to the maps of 1968 of the Association to Preserve the Medina of Tunis, the upper floor of house no. 31 belonged to the ground floor owner. When I visited the site in June 1983, it was transformed and joined the abutting upper floor unit as in fig. 10. In the last chapter we will elaborate on the impact of these transformations on the built environment in the last chapter.

I have argued in chapter four on the original growth of towns that although a compact built environment in which buildings abut each other is exactly the opposite of an environment composed of free standing dwellings in terms of built-open relationship, they are indeed very similar. The similarly non-orthogonal character of crooked and dead-end streets implies a specific relationship between spaces as a result of the decisions made by the residing parties and not by a central party. The

same principles of resolving disputes and non-intervention by the authority applied in the traditional abutting-buildings environments were also used in the traditional free-standing building environments, thus resulting in a similarity of properties within the forms of submission.

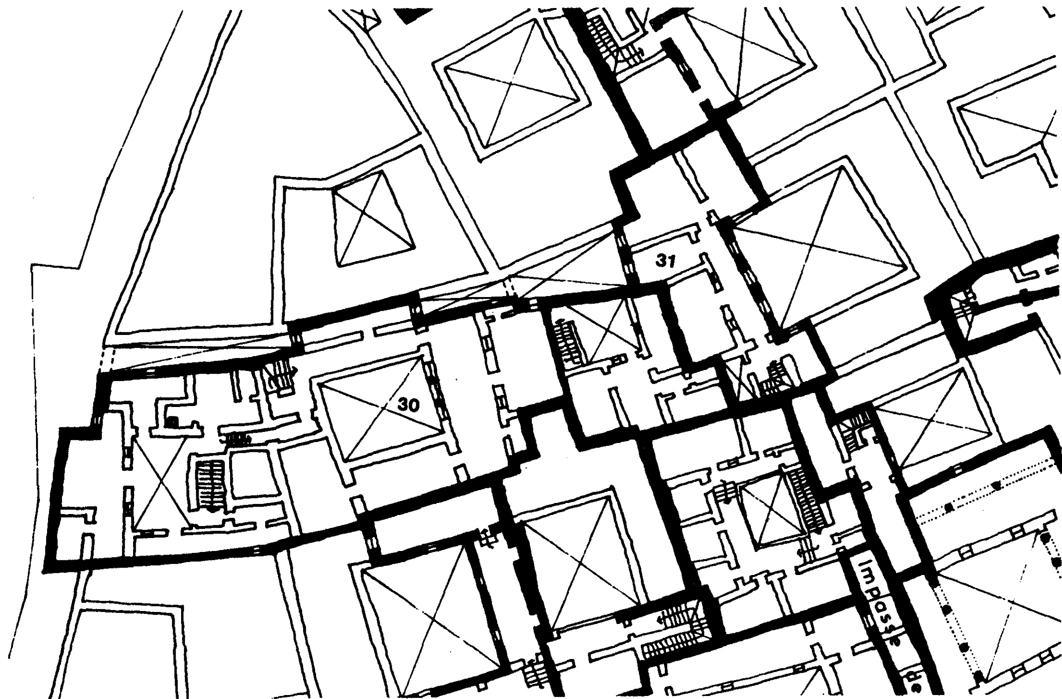
In an environment of free standing dwellings where buildings do not abut each other, logically there will not be a shift of sectors between adjacent properties. However, the subdivision as a mechanism that was practiced in dividing buildings was also used in free-standing dwelling environments with some differences because of the nature of the properties. To give one example, al-ᶜAbdūsi was asked about a jinān (an orchard that often contains a building such as the jinān of Sfax that contains houses or burjs) owned jointly by a woman and a man. The woman's share was three and a half sixths, while the man's share was two and a half sixths. The partners divided the jinān into two halves between them according to the land area, on the condition that they would cast the remaining half sixth. When they did, the woman's portion had a lot of fig trees. The man objected but was informed that he could not change the subdivision agreement; so he compensated the woman for the exchange. Ten days later when the grapes ripened, the man changed his mind and a dispute took place.[82] Although the basic concern of the partners in this situation was the crop, and in buildings it was the rights of servitude for example, the same principles of damage and agreements were used. In this instance, the woman won the case because the man had accepted the subdivision in the first place. In their thesis S. Yaiche and S. Dammak traced the process of subdividing a large jinān[83] (or jnein as it is pronounced in Sfax; fig. 11). Describing the subdivision they relate that the subdivision was affected by the process

of inheritance and selling transactions. In 1786, the large jnein had two borjs (borj is generally two-story building and free-standing within the orchard). In 1873, the jnein was inherited and divided into three portions while the central borj was split in two. In 1932, the second portion was again subdivided into three parts through a sale in which one of the owners erected a borj. The third small parcel was also divided into two. In 1948 the first portion was subdivided into four parcels and a new zanqah or lane was formed to provide access for the new parcels. In 1980, a dead-end street emerged.[84] The process of transformation in this jnein was made by the residing parties. Although the layout of the jnein may not seem organized, it is, however, ordered.[85]

Figure 7. Tunis
Layout of the Medina of Tunis
locations of selected blocks
in figures 5 and 8.
Source: Association Sauvegarde
de la Medina, Tunis.

Figure 8. Tunis
Ground floor plan of block no. 44 showing the territorial transformations.
Source: Association Sauvegarde de la Medina, Tunis, 1968.

Figure 9. Tunis
Upper floor plan of block no. 44, showing territorial transformations.
Source: Association Sauvegarde de la Medina, Tunis, 1968.



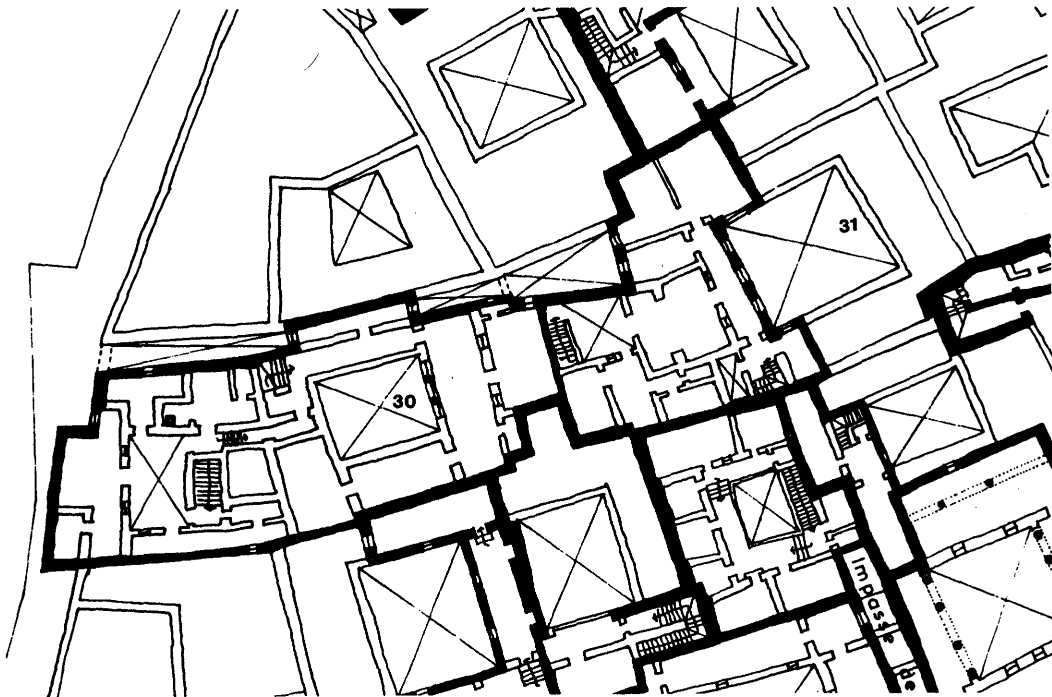


Figure 10. Tunis
(upper) Upper floor plan of house no. 31 in 1968.
Source: Association Sauvegarde de la Medina Tunis.
(lower) Upper floor plan of house no. 31, which was transformed to join the adjacent property with some modification in the internal organization.
Source: Field survey by the author in June 1983.

Figure 11. Sfax
Plans showing the site of the selected jnein and the process of subdividing it.
Source: S. Yaiche & S. Dammak, Analyse Typologique et Morphologique des J'neins a Sfax, Institute Technologique d'Art d'Architecture et d'Urbanisme de Tunis, 1980, pp. 39-41.

PART C, CHAPTER 8

CONSEQUENCES OF THE SHIFT OF RESPONSIBILITY

This concluding chapter will explore some of the effects of the change of identity of parties in the contemporary built environment as well as the shift of elements from one form of submission to another. Moreover, it will elaborate on the characteristics of both traditional and contemporary built environments in the light of responsibility. In some cases, I will assume that the reader will draw his own conclusions on the existing environment without any elaboration on my part. I will concentrate more on the traditional environment since the contemporary environments can be understood by the reader through his own comparison and experience.

Because there are many consequences resulting from the change of the model of responsibility, this chapter will be open-ended. It will be a series of comments on the characteristics of traditional and contemporary environments. Among other issues, we will explore the relationship between responsibility and the potential of the physical environment, the conventions among parties, and the territorial aspects of both traditional and contemporary environments. These explorations will raise questions for further investigations which is the prime task of this concluding chapter. First, I will give a brief description of

the situation in the contemporary environment, so that the difference between the traditional and the contemporary environment can be grasped.

Contemporary Regulations

Logically, the history of the way existing regulations were esyablished would be an important subject as well as the nature of those regulations and many other issues. But within our topic, a brief summary must be sufficient since present day regulations are well known and similar in many ways throughout the Islamic world. As was explained in the second chapter, these regulations have one thing in common, namely the control of the built environment by the central authority. This resulted in shifting elements from one form of submission to another; for example, the dead-end street shifted from the unified to the permissive form of submission. It also resulted in changing the identity of parties as when the state intervened in leasing properties which changed the identity of the controlling party and ultimately affected the physical state of properties.

In traditional environments, there were certainly some interventions by the authority, but they were ad-hoc for political or other reasons and not by way of regulations to be followed by all users. One example is al-Walīd's (d. 96/715) confiscation of Ḥasan b. Ḥasan's room that abutted the grand mosque in Medina.[1] Another is the order given by al-Ma'mūn (d. 218/833) in Cairo to compel the owners of ruined properties to rebuild them or lease them to others to be developed.[2] Eventually, many regulations were developed by the Ottoman Empire. For example, Article 1195 of al-Majallah which was codified in 1869,

prohibited a person from projecting any elements towards his neighbor's property; this had traditionally been based on local agreements. Another article allows any individual to open a door towards a through street which was traditionally based on the principle of damage.[3] The municipalities guaranteed the application of these regulations. However, during the Ottoman Empire, municipalities were established fairly late. In 1272/1856 an edict was passed to establish municipal-committees [al-majālis al-baladiyyah]; In 1284/1868, it was decided that these committees should be composed of six members as well as a president, assistant to the president, the town's medical doctor, and an engineer or architect [muhandis]. The president was to be assigned by the governor and the committee members were to serve for free. This group had only minor responsibilities mainly related to public spaces such as controlling market affairs, widening some narrow roads, illuminating streets and cleaning the town. In 1294/1877 another edict expanded the size of the committee and increased its responsibility, requiring more employees and thus finding new opportunities to collect fees to cover expenses. This edict established regulations regarding fees, such as that for building permits and the like. In 1296/1879 a decree gave the municipalities the right to confiscate private properties in order to solve such town problems as opening new streets according to modern planning principles [asālib al-ᶜumrān al-ḥadīth] and architectural basics [qawāᶜid al-ḥandasah wa al-fann].[4]

The above description suggests that the main purpose in establishing municipalities was to organize the towns with little or no intervention in the decisions of users. Fees were collected to cover expenses; as long as the developer paid the fee, he could get a building

permit. This point is important to our inquiry as it will be seen that later these permits were coupled with regulations. Gradually, the municipalities became more and more powerful and started to intervene. They began with public spaces, forcing users to adjust to the improvements in public spaces. Moreover, the first types of intervention were technical, such as asking people to use bricks or stones in their buildings; the municipalities in Syria did this in 1925.[5] Thereafter, in order to protect one user from other users, more and more regulations were developed. For example, Article 807 of the Egyptian Civil Code reads:

> (1) The owner must not exercise his rights in an excessive manner detrimental to his neighbor's property. (2) The neighbor has no right of action against his neighbor for the usual unavoidable inconveniences resulting from neighborhood, but he may claim the suppression of such inconveniences if they exceed the usual limits, taking into consideration in this connection custom, the nature of the properties, their respective situations and the use for which they are intended. A licence issued by a competent authority is not a bar to the exercise of such a right of action.

This article is the same as Article 776 of the Syrian Civil Code.[6] The regulations went even further in determining the limits of eliminating damage. Article 819 of the Egyptian Code, for example, states that a neighbor is not allowed to have a direct view (window) over his neighbor's property at a distance of less than one meter, the distance being measured from the external surface of the wall, unless the view was acquired by prescription, in which case the latter neighbor cannot create a window opposite.[7] Dr. al-Badrāwi comments that this article limited the owners' choices regardless of the function of the overlooked property and regardless of the opening size: as long as the distance is more than one meter, the owner can open a window of any size. But if the view was oblique, the required distance should not be less

than half a meter. In either case if the distance is less than required, the neighbor will have the right to request that the opening be sealed.[8] In other words, if the distance is 99 cm, the neighbor could protest, but not if it was 100 cm. In the Syrian Civil Code, the required distance is two meters![9]

Another interesting example is the finā'. Dr. A. Salamah explains that the authorities decided that a building should have three types of finā' to ventilate and illuminate the building: an external finā', an internal finā' and a finā' for the facilities. The finā' of facilities [finā' al-marāfiq] is the undeveloped space within the property left for illuminating and ventilating such facilities of the property as kitchens, bathrooms and stairwells. Its area depends on the building height: in any case its width should not be less than two and a half meters. The area of the internal finā', which is a courtyard, should not be less than ten square meters; This is one requirement among others that are decided proportionately to the building's height. The external finā' is the finā' outside a building <u>within</u> a property and it should not be less than a half meter in width.[10]

These regulations are indeed interventions and limit the users' choices of selection regardless of what the authority intended. This paternalistic attitude will certainly annoy users. For example, each room or facility should have openings that look into a finā' and each finā' should be within the property. This means that the user will have unbuilt spaces within his or her property in order to satisfy regulations. The finā' traditionally was outside a property line and it was in the unified or possessive form of submission. When it was under the unified form, it was autonomous, meaning that the user could

manipulate it even by building in it. The same is true when it was in the possessive form; however, in such a case the user who controls (possessor) has to follow the regulations of the owning party which is all Muslims collectively. Most important, the finā' was outside the property line. In contemporary environments it is within one's property. The owner uses it but does not control it; he cannot build in it. It is in the trusteeship form of submission if the resident is the owner or in the dispersed form if the owner does not reside there. A simple rule could disperse a property.

There was an interesting argument recently between the mayor of Riyadh and some readers of the al-Jazeerah newspaper regarding the setback regulation of a building which was to be within one fifth of the street's width and between 3 and 6 meters. A reader said that such a space would not be useful for the owners, and thus the owners should be compensated by the municipality. The mayor asked, how the municipality could compensate an owner for a property that it did not take; such a setback is still owned by the owners, and this regulation (passed in 1392/1972) is to the users' advantage. He added that such a space would be needed as parking space if the building were transformed into commercial use. Moreover, if individuals are allowed to build in it, we are firstly, violating the rule; secondly, allowing a commercial building to exist with no parking space; and thirdly, are approving the use of parts of the street by the owners of commercial buildings.[11]

An interesting attitude of most officials and decision makers is that they develop regulations and then refer to them as principles that should not be changed regardless of their validity. In this case, because of the commercial buildings, all residential buildings were

required to have setbacks. It is true that this rule has the advantage of providing parking spaces, but what are the disadvantages of such rules climatically or economically? For example, the side setbacks for ventilation between buildings will separate these buildings from each other, thus increasing the wall surface exposed to the sun and consequently transforming the concrete buildings into ovens in the summer. Furthermore, any person familiar with Riyadh knows that these side windows are always closed for the sake of air conditioning and privacy. Moreover, the side setbacks will have economical effects for the society in the long run: by increasing the size needed for plots, they will enlarge the area to be provided with infrastructures.

Regarding the front finā' or setbacks, let us imagine that the traditional principles of damage were applied. The owner of a building will be allowed to transform it into a commercial one, if the street accommodates his customers' cars. If the street is narrow or heavily used, then his customers' cars will hinder the circulation and the conversion will be forbidden on the grounds that he is damaging the public. In such situations, the rest of the owners of residential buildings are not compelled to implement a rule that will damage them. Traditionally, the residents of the street had the responsibility. In this case, if they enjoy such a responsibility, they will act and inform the commercial building owner to resolve the parking problem for his customers. Even the customers will know from experience that it is hard to find a parking space in front of these shops and will not shop in them. Because the street could not accommodate such a function, the owner will try to provide parking space to attract customers. Even those who want to lease a shop, will pay more for a shop with parking space,

thus owners will try to provide space. Users will develop a convention to solve such problems. This is far more logical than a blind rule made by the authorities.

Users often find solutions. For example, the residents of the Fākhiriyyah neighborhood in Riyadh were annoyed by the width of the streets. Their streets are ten meters wide. The sidewalks built by the municipality are two meters wide on each side, leaving six meters for vehicles. Any parallel parking hinders circulation and in some cases the residents park temporarily on both sides which blocks the street. On the sidewalks, there are columns carrying street lights. One resident (A. al-Wiheabi) asked that the municipality remove the sidewalk between the columns, leaving just enough to protect the columns, in order to provide parking space.[12] In this case, the resident who experienced constraints in the site provided a solution.

Traditionally, an owner could raise his edifice as long as he did not damage others, but contemporary rules have regulated building heights. In Egypt, for example, the building height should not exceed one and one half the street's width if the area is not regulated.[13] Most districts are regulated by two or three stores depending on the function of the neighborhood (whether it is commercial, residential etc.) The mayor of Riyadh city was asked by W. an-Naṣir about a case of two adjacent plots owned by one owner, each plot being subject to different regulations. The owner wanted to build one large apartment building on both plots. The regulation of one plot allowed him to do so, since it abutted a major street, on the condition that he should not exceed three stories. On the other plot, he should build a villa type of house, two stories high, since it was within a residential zone. The mayor answered

that the regulation should be applied and that the municipality would make sure it was applied.[14] I have a relative (Ya^{c}qub Marghalāni) who wanted to build a three story high villa but could not under the Regulations. Yet the regulation allowed him to have a basement, so he spent a fortune in order to have a basement of sufficient height to be used as a dwelling in the future.

How do authorities control owners? Simply through building permits. For example, Decree No. 45 of 1962 in Egypt states that no one is allowed to build, maintain, enlarge, raise, change or demolish a building without a permit. Decree 169 of 1962 states that the permit may be obtained if the designs presented follow the building regulations.[15] The presented design should contain floor plans, sections, elevations, foundations, lay out etc. In addition, during building, the owner should not make any changes from what was granted permission. If the owner wants to make a simple change, such as relocating a window, he may do so with the authorities' approval, but if the change is major, a new permit should be obtained.[16] This rule may discourage users from improving their designs. Users often see errors in design when they see the building on site in three dimensions. Finally, the building permit does not mean complete freedom within building regulations. The authority will always have the right to cancel a permit or make changes to it. The authority will have the right to check whether the building accords with the permitted design.[17] To give one example, in Jeddah, the municipality of the district of Northern 'Ubḥur gave eighteen final warnings for those who walled their properties without permits. The municipality declared that any building erected without a permit would be demolished and that owners should post their permits clearly to avoid having their buildings

demolished.[18] Some of these regulations certainly would be bypassed by owners; however, this description denotes limiting the users' choices of selection.

Ordered Versus Organized

Contemporary codes, rules and planning by authorities are mainly aimed at producing an organized built environment. This is done in two ways: (1) the authority itself paved sidewalks and the like; (2) the authority instructed others through regulation as explained in the previous section.

Regarding the first form of organization, municipalities are often proud of their own achievements, and keep on improving the town's streets and squares: We have all seen sidewalks on long streets paved for miles where there are no pedestrians. Most roads leading to airports in Muslim cities are paved, planted, and lighted. These streets are certainly dispersed since they are controlled by municipalities and used by the public. Even poor states plan for beautiful cities, but in wealthy states, the situation is worse. The mayor of Riyadh has signed a contract for 120 million riyals to beautify streets of a total length of less than ten km in as-Siweady neighborhood. This beautification includes paving, illuminating and planting the streets.[19] In fact, the term beautification is well known among officials. The mayor of Jeddah is famous for his hard work because he made the city very organized; there are many sculptures, very wide sidewalks, marble seats on the streets and so on. What is happening here, especially in poor states, is that the wealth of the society is spent on space which is not inhabited

like dwellings. Certainly, municipalities can have positive achievements like building tunnels, overpasses, highways, etc.

States have also redeveloped certain areas, such as central Baghdad and the center of Riyadh. In these projects, the government buys the land from the owners, demolishes some buildings, and hires companies to make analyses, studies and proposals for improvements. In some cases, the contractors even build the majority of the central areas. During these studies great efforts are made by officials and companies to discuss the smallest detail of a project, yet on the question of responsibility it is taken for granted that the state is responsible or else the question is never raised. When the state bought the land, the form of submission changed. The main job of the authorities is to organize the environment. All previous cases of intervention regarding the streets means heteronomous synthesis. The street is never unified.

In the second method used by the state to achieve organized environments, the authority tells others what to do. Contemporary regulations are often prescriptive (what to do), and would ultimately decrease the control of a party. An accumulation of more rules will change the identity of the controlling party and thus shift the property from the unified to other forms of submission. Moreover, prescriptive rules will eliminate communication between parties. To give an extreme example, a municipality may develop a complete set of rules regarding party walls or fences between neighbors which states that the eastern side resident should build the front half of the party wall with specific materials, colors, height, etc. while the western side neighbor should do the same for the other half. In this case, the neighbors do not have to communicate to build a wall, because responsibility is decided upon by an

outsider. In other words, the more prescriptive the rules, the less communication between parties, the less control a party will share with others, and the more heteronomous is the built environment. On the other hand, fewer proscriptive principles mean more communication between parties. In the above example of the party wall between the neighbors, the first decision to be agreed upon is whether or not to have a party wall. Proscriptive principles which tell parties what not to do, implying that other action is allowed, in fact, increase the parties' control and establish relationships between neighbors through agreements.

Throughout this study, I have argued that in traditional environments any decision beyond the parties' realm was resolved by the nigh residing party. Parties of different properties communicated to resolve disputes through dialogue. Most elements in the traditional environment are the result of agreements. All elements are in the unified form of submission. The small scale decisions made by users have shaped the physical environment. Streets, for example, are the result of revivification. The relative position, direction and shape of roads is influenced by the path people used. Each decision made by nigh parties that affected the street was based on diverse constraints which only the residing party could experience. Through the actions of users over time, the street became more defined as its edges were transformed from finā''s to private properties. Decisions regarding streets were made from the bottom up. This means the street was decided upon by the members of society and not by a central decision maker. Let us call this an ecological evolution of the street.

Holling and Goldberg advise planners that "rather than asking project directors to substantiate the ultimate success of their projects,

they should be asked to ensure that unexpected and disastrous consequences be minimized. This is turning things around 180 degrees,..."[20] This advice may be better understood by considering the following human intervention in an ecosystem. In order to kill the mosquito that carries the plasmodiam of malaria in Borneo, the World Health Organization sprayed village huts with DDT. Although the spraying improved the health standards, there were interesting ecological consequences. The thatched huts of the villages were occupied by a small community of organisms -- cats, cockroaches and small lizards. The cockroaches that picked up DDT were eaten by the lizards. DDT became concentrated in the lizards which were then eaten by cats and gradually the cats died. When the cats disappeared from the villages, woodland rats increased. It was realized that the cats had been performing a hidden function of controlling the rat population. Thereafter, with the rat came new organisms such as fleas, lice and parasites which presented a new health hazard. The problem became so serious that living cats were parachuted into these villages in order to control the rats. The DDT also killed the parasites and predators of small caterpillars that cause minor damage to thatched roofs, so the population of caterpillar is now uncontrolled, causing the roofs of the huts to collapse.

Commenting on the above intervention in the ecosystem, Holling and Goldberg argue that most interventions are characterized by three conditions. First, the problem is isolated from the whole; second, the objective is narrowly defined; and third, the simplest and most direct intervention is selected.[21] Indeed these three conditions were evident in Egypt when the state intervened with rent control. This had adverse effects and eventually resulted in the unexpected problems of housing

shortages and a dispersed state of properties. The same can be said regarding setbacks. It may be argued that the reason for these unexpected results is that built environments are complex urban systems. The systems are interdependant; they depend on a succession of historical events which may not be linear. These systems have considerable internal resilience within a certain domain of stability. A feature of the resilience of ecological systems is that incremental changes can be absorbed. However, when a massive intervention or series of incremental changes accumulates, so that the resilience of the system is inadequate, dramatic and unexpected signals of change are generated.

The above analogical attempt suggests that accepting the built environment as a complex urban systems means that any massive intervention should result in unexpected changes. In the contemporary built environment, intervention resulted in the organized environment which is not necessarily ordered. What, then are the signals of unexpected change? For the rest of this study I will try to answer this question.

In the case of Borneo, those who intervened did not understand the hidden function of the cats. The same is true in the built environment. When we architects see a thing that we do not like or understand we often misjudge it. Many things have hidden functions and we may not always be able to see them. However, for some elements, the differences between traditional and existing environments reveal few hidden functions.

For example, it may not be acceptable that rainwater flows through the water spout of one house into a room inside the house next to it. Saḥnūn was asked about a case of a waterspout pointed towards a neighbor's yard. The neighbor wanted to build a room in his yard in such

a way that the water spout would be inside the room. Since the owner of the water spout had the right of precedence, he objected on the ground that the owner of the room might remove the waterspout some day. Suḥnūn answered that the water spout owner could not prevent his neighbor from building the room; however, he could bring witnesses inside the room to look at the spout. Many similar cases took place.[22] 'Ibn ar-Rāmi for example reports a case in Quairouan in which a person tried to stop water coming into his house from his neighbor's water spout. The judge, 'Ibn Talīd, prevented him.[23] What are the social roles of these waterspouts as a hidden function? I will elaborate on them later.

Another common example that we often do not understand is the irregular layout of some rooms in many traditional buildings. An architect would never design rooms like these, even if constrained by the site. He would try to solve the problem logically and geometrically even at the expense of other rooms. However, for the user there are a series of preferences. Certain rooms should take certain forms, but not all rooms. The user who knows the site modifies its constraints to suit his exact needs. The houses of al-Fusṭāṭ (Fig. 12) are a good example. For the acting party an irregular room may be used as storage while the courtyard or the reception room has a much more important function. Thus, when we see an element that is irregular or when we see an unusual relationship between elements such as a kitchen with no window or a latrine opening into a room, this often means that such an arrangement is insignificant for the user. Or the user is forced into it in order to satisfy his other preferences. When a party acts or makes a change, the action is based on its needs and it should enjoy complete freedom within the constraints. In the cases of the waterspouts, the preceding party

Figure 12. Al-Fustāt
Traditional dwellings showing the users' preferences in having certain elements in certain forms but not all elements depending on the constraints of the site.
Source: Creswell, The Muslim Architecture of Egypt (Hacker Art Books, New York, 1978), V. 1, pp. 122-126.

had complete freedom while the second should deal with the waterspout as a constraint. That is to say, in order to have an ecological evolution in the built environment in which each party will have full freedom with no external intervention, the environment should be seen as a series of constraints. This is how we defined an ordered environment in Part B, in which the relationships between parties of different properties are ordered by the physical environment as constraints. Meanwhile, the physical environment is shaped by the responsible parties and thus responsibility is clear. Damaging acts and damaging precedents resulted in the right of precedence which ordered the relationship between parties. In other words, although properties were totally independent when under the unified form of submission, the parties of these properties always had relationships with each other because of the right of precedence. There were also elements between properties that brought the parties together, for example, the waterspout, the party wall, the passageway between two neighbors (right of servitude) and the overpass. These elements were often under the permissive or possessive form of submission and established relationships between parties. Now, I will argue that a major change which resulted from the authorities' intervention is the elimination of these relationships between parties. But first let us explore these relationships in the traditional environment.

If properties were independent and parties had freedom of action within their properties, then the only place for conflict between different parties would be the interface between private and private, public and private, individual and communal, and movement and place; at these interfaces the conflicts and resolutions between parties are played

out. They are the boundaries where conventional, personal, deviant and aberrant behaviors came to the surface; the undesirable movement of one party towards another triggers a situation of conflict which is often resolved through agreements.

The most common form of boundary between dwellings is the party wall, a physical element which dominates both neighbors. For example, the traveler Nāsir Khasṛu who visited Cairo in 439/1047 describes a neighborhood of free standing dwellings: "[these dwellings] are isolated from each other so the trees of one house do not grow over the wall of another house. Each owner can do the needed repairs to his house at any time without annoying his neighbor."[24] The description suggests that this is unusual. It also indicates the burden of party walls on the residents, since they have to ask their neighbors if they want to make any change in the party wall. The reason for this is that some party walls are not in the unified form of submission. How was this relationship established?

The Prophet proclaimed that "no one should prevent his neighbor from fixing a wooden peg in his wall."[25] Differences developed between schools of law in interpreting this tradition: is a person compelled to allow his neighbor to fix a wooden beam in his wall? Ash-Shāfiᶜi and Aḥmad b. Ḥanbal had the opinion that one should, while Mālik considers this tradition as advice from the Prophet.[26] However, most opinions approve leasing the party wall to neighbors, with the exception of Abū Ḥanīfah. For example, 'Ibn Qudāmah explains that as long as the quantity of the wooden beams are known as well as the period of leasing, then it is legal to lease parts of the party wall. It is just like leasing a roof for others to sleep on.[27] Al-Mutīᶜi from the Shāfiᶜi rite relates

that if a person desires to build an overpass by resting his wooden beams on the opposite neighbor's wall, he may not do so unless the neighbor agrees, because he is resting a load on another person's property.[28] These opinions suggest that a person may buy or lease part of a party wall; this will change the party wall from the unified to the permissive or to the unified form in which the owning and controlling and using party is composed of both neighbors jointly. For example, Suḥnūn from the Māliki rite asked, "Can a person rent a party wall which is owned by his neighbor, to nail wooden beams in it or hang things from it or support wood on it, for one dirham [unit of currency] per month?" 'Ibn al-Qāsim answered yes.[29] These opinions suggest that most party walls are single party walls (see for example fig. 8). The same is true for ceilings which are horizontal party walls between upstairs and downstairs neighbors.

The single party wall has always forced the two adjoining parties to communicate. For example, if the owner of a party wall wants to plaster it he may enter his neighbor's house to do so. On the other hand, jurists were asked about a case in which a man wanted to plaster the walls in his reception room and some walls were owned by neighbors who prevented him doing so. 'Asbāgh answered that they could not stop him, because doing so would not damage them.[29.1] In 456/1063 a dispute took place between two neighbors (A and B) in which the party wall was owned by A, while B has a shelf in the party wall with boards projecting out from it. The neighbor wanted to build a room, resting part of the wall on the projecting boards, but neighbor A objected.[30]

A single party wall shared by two neighbors will have the potential for conflict. Over time, if ownership is transferred or later

generations were not informed about the ownership of the party wall, disputes can be expected. It seems that this was such a common source of dispute that principles are developed to resolve them.[31] 'Ibn ar-Rāmi, for example, relates that disputes regarding the ownership of the party wall can be resolved by investigating the wooden beams, doors, shelves, the upper part of the wall such as parapets and the corners; by examining the joints it can be determined to which side of the wall they are connected. Most opinions give ownership of a disputed wall to the neighbor who has the joint connected into his wall, since this will imply that his house was built first. If the joint is interconnected to both houses, this may imply that the two houses were originally one house, or that the original owners built the two houses together. In this case, either it will be owned by both of them, or they will investigate other elements like the wooden beams. They will also consider other evidence such as doors if any, and to which side they open, and even shelves. 'Ibn ar Rāmi relates that from the way shelves are built, one can tell whether they were built originally with the wall or added later. The same is true for wooden beams: are they resting on the wall or nailed onto it? Certainly these investigations will be made if no documentary evidence is presented.[32] 'Ibn ar Rāmi reports a variety of cases which indicate that this dispute was common. This will certainly have social implications.

Another interesting element that established a relationship between neighbors was the cistern. To give one case, 'Ibn al-Barrā' was asked about a dispute in al-Mahdiyyah, where a man bought the ground floor of a house on the condition that for twenty years he could collect the water from the gulley in the upper floor in his cistern. Years later he sold

the house. When the time lapsed the upper owner wanted to change the direction of the gully but the owner of the ground floor stopped him.[33]

I would argue that it would be possible to form one line or a network in which the owners of properties in Tunis city stand one after the other and each owner in the line has a relationship with the adjacent owners. Certainly, the owners of properties in one block relate to each other through water spouts, party walls and the right of servitude. Each block relates to others through windows or doors or even overpasses as a right of precedence. Although this may be a naive description, the point is that such a line certainly cannot be formed by owners in contemporary environments. To give one example, we often see double party walls in our environments. Perhaps modern technology contributed to the emergence of double party walls; however, technology should not stand against single party walls. Every double party wall within contemporary Muslim environments stands as a reminder of poor communication among discrete parties as a result of regulations imposed by a central authority. In contemporary environments, there are some single party walls such as the walls between units in a housing project, but these are not supposed to be touched by users as they are controlled by the central party. Also there are single party walls between neighbors or friends if they agree on them. For example it is becoming a convention among owners of free standing dwellings in Riyadh not to build a second wall, but rather to plaster the neighbor's wall if he does not object (see photo. no. 5). In traditional environments, society paid attention to the sensitive interface between parties: far from erecting conflicts they rpoduced bonds among neighbors. A sophisticated system of agreements was generated by the single party walls. Every single party wall within traditional

environments stands as a monument to human relations and understandings among parties. Thus, although properties in traditional environments were autonomous, there were relationships between the parties. On the other hand, relationships between parties in contemporary environments are reduced if not eliminated, and properties are not autonomous, which is characteristic of heteronomous synthesis.

This discussion raises a question regarding the nature of traditional proscriptive versus contemporary prescriptive regulations. Traditional proscriptive principles reflect the humanistic approach of dealing with built environments. Resolutions among parties were dealt with--in each individual case--through ad hoc judgments by those involved in the conflicts. They emphasized the human relationships between parties and rarely dealt with artifacts. Thus each resolution of conflict resulted in a separate agreement or ruling which was manifested in a unique physical arrangement depending on the nature of the dispute. That is why we see in the streets doors which do not meet while others do meet. Almost any compensation between elements of <u>different</u> properties is possible. The traditional proscriptive principles satisfied different needs. On the other hand contemporary prescriptive rules deal with qualities and quantities of artifacts, fixed ranges of numbers for dimensions and densities, zones for functions, etc. that are mass produced. Prescriptive rules deal with artifacts and not the diverse human requirements--although based on human needs--that is, one regulation provides for all. To state this simply, the traditional attitude was one-to-one, while the contemporary is one-for-all. Furthermore, traditional one-to-one proscriptives were applied on all levels of the physical form. A chair, for example, cannot be used by

stepping on it. Intruding upon a neighbor's privacy damages him, the same as transforming ones dwelling into a tannery. On the other hand, contemporary one-for-all regulations control the physical form equally up to a certain level; every decision lower than that is left open. For example, in some cases every decision beyond the parcel level such as street's morphology is controlled by the state, but other decisions are not. How do traditional principles compare to contemporary regulations regarding changes of the society's norms?

If we define tradition as the sum of the similar individual actions over a certain period of time then, we will recognize tradition when we observe individuals acting similarly. People are changing, life styles are changing, the attitudes of parties are changing and, in turn, tradition is changing; this results in the change of conventions among parties. Thus we cannot derive rules, explicit canons or patterns of use from tradition as some founders of contemporary regulations argue. If regulations are derived from tradition, then they have to be revised and changed constantly. However, if parties themselves develop their own regulations through consensus, then we will have a gradual and continuous change in agreements over time.

Traditional Muslim environments changed gradually and in harmony because consensus among parties was achieved, since the party in control of convention was composed of the members that were subjected to it, such as the residents of a dead end street. The result was a transformation that led to durable and valid solutions since the users realized the potential of the environment. However, in contemporary environments, there is no consensus needed. The regulations developed by a central authority, according to its norms and values reduce the influence of the

nigh parties who are the real inhabitants of the site. In fact, those regulations may encourage parties to harm others, since they can act in any way they like as long as they follow those regulations. This means that those regulations by reducing the role of parties are eliminating agreements. In turn, parties are isolated through the minimizing of communications and this results in weak conventions. Each party has its own way of doing things. On the other hand, within traditional environments, when regulations did not exist, parties had to settle disputes by communicating. Agreements resulted and conventions were reinforced. This is the only explanation I have for the strong, coherent convention among parties in traditional environments, which are characterized by similar facades for example. In this town, no ground floors have windows, and there are a few small ones on upper floors; all the facades in that town have large openings with wooden screens. Thus, although the nature of conventions may differ totally from one region to another, yet the degree of coherence of convention is very similar in all traditional environments. In contrast, existing environments reveal weak conventions. Every party has its own way of doing things, which can be called eclecticism. In short, <u>the more that regulations are imposed by a central authority where responsibility will be dispersed, the weaker the convention; the fewer regulations imposed by outsiders where responsibility will be unified, the stronger the convention</u>.

Traditionally, the party that controlled the convention was the collective of the parties that controlled the local properties. On the other hand, in contemporary environments, those conventions are controlled by outside entities (municipalities). Thus, contemporary environments reflect the different values and norms of those decision

makers on certain levels. For example, I was informed that the latest appointed mayor of Taif holds a degree in landscaping. He bought and transformed most of the undeveloped spaces in the city into parks. In Jeddah, the municipality ordered the merchants to put wooden Islamic decorations in their shops. Later, the ministry of interior stopped them on the grounds that fire regulations prohibited these decorations. To whom should the merchants listen?[34] This notion that the existing environment reflects the decision-makers norms, along with the phenomenon of eclecticism among users resulted in radical differences in the environment, which is antithetical to traditional environments. The organic fabric of the traditional Muslim built environment reveals the activity of several independent parties on all scales. The contemporary grid fabric reveals the rigidity of a central authority.

Contemporary regulations explicitly codify the conventions (rules), while the traditional Muslim environment is based on agreements. Changes of tradition resulted in changes of agreements. As explained in the second part of this study, the convention among parties in the traditional environment was not to harm others; however, the water spouts of the early twentieth century dwellings in Riyadh drop water into the streets even in narrow streets, which could harm passersby. This action is accepted as an agreement among residents, since they all benefit from it. That is to say, although conventions and traditions changed, the achieved consensus managed to serve such changes.

The master plan of Riyadh has recently been revised and the regulations have been changed. For example, side and rear setback requirements in some residential areas have been abolished. Officials and architects perceive this change as an improvement and a growth in

consciousness. This change in the regulations will eventually give the residing parties more options and freedom which will increase their responsibility. The growth in consciousness also concerned privacy; new regulations now established the minimum distance for unobstructed window openings. This minimum distance is not stated specifically but rather has to be calculated by a mathematical formula. Furthermore, different types of sections of windows were introduced to be accepted and used by people.[35] Although these regulations may seem like improvements, I think they are only one set of regulations replacing another. The residing parties are more concerned about their privacy than regulations are; and they will find better and more valid solutions, as they have for centuries. Nigh parties act to improve the site for themselves; regulations cannot do that. Regulations may protect parties to some extent, but parties are more capable of finding ways to protect themselves while lifestyles and traditions are changing. Of course, regulations can be changed, but they are a series of constant rigid rules that have to be revised as the culture changes. Meanwhile the changes in parties actions and their approval by the collective party are gradual and continuous; this is parallel to the cultural change. Replacing regulations with others will not help, unless they are meant to recognize nigh parties as responsible parties who experience the site.

A final issue is the impact of experiencing the site. As I argued before, contemporary environments demonstrate the lack of coherence among parties regarding conventions, as a result of shifting responsibility. An extreme variety of configurations, elements and patterns borrowed from other cultures reflects the value of the central authority (eclecticism). Traditional Muslim environments, on the other hand, reflect strong

coherence among parties with respect to conventions due to the absence of regulations. The selection and distribution of elements by different parties is relatively similar; courtyard houses, overpasses, solid facades in ground floors, bent entrances, mashrabiyyah etc. Over time, each region has developed a certain model of dwellings. For example, the qāʿa a type of house in Medina has a very specific relationship between elements that repeat itself in all houses and the model adjusts itself within the site (fig. no. 13). The qāʿa a a itself (fig. no. 14) is always divided into three bays (1,2,3). The central bay (1) known as a jila extends vertically up to the roof and is shielded by movable covers that are always controlled from the ground floor. The qāʿa a is always abutted by the diwān which is composed of two bays (4,5), one of which (4) is always uncovered just like a courtyard. In short, most elements relate specifically to one another.[36] This is true in most, if not all, regions; the traditional dwellings of Tunis, Baghdād, Ṣanʿā', Fez, Riyadh, etc. all have their own specific models.[37] I would argue that this model is the result of living on and experiencing the site. Those who constantly lived on the site generated the models over time, through trial and error. The responsible parties usually do not reinvent the wheel, but rather they try different alternatives and solutions and improve them over the course of generations. This shows most clearly in the traditional climatic solutions in different towns. The same climatic principles may be used, but each town has its own well adjusted climatic solution to meet its exact cultural and environmental needs.

It is doubtful that a central authority will be able to generate such solutions. Traditional principles of proscription contributed to the development of alternatives by the nigh parties. We have seen that

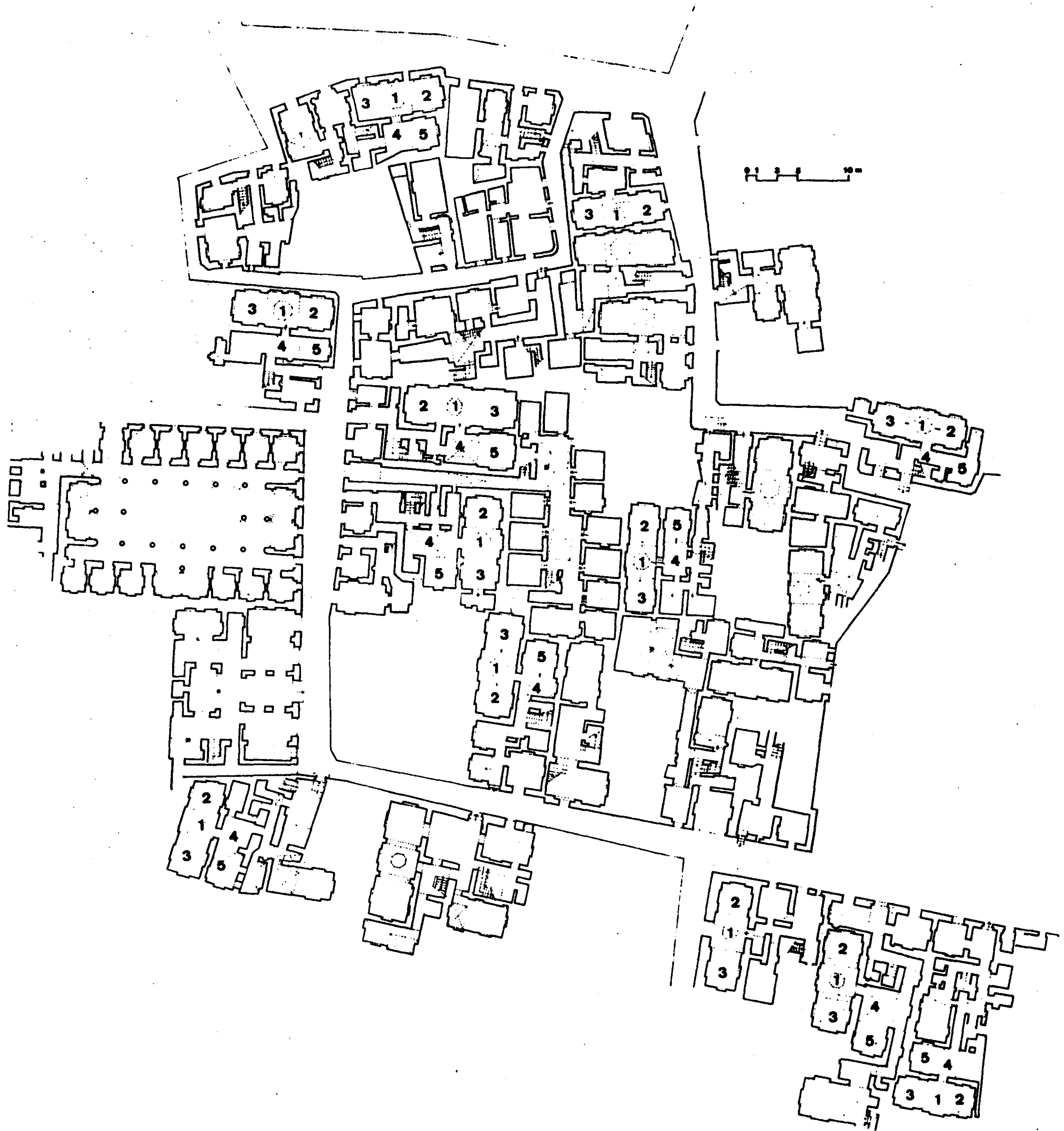


Figure 13. Al-Medina
The qā^{c}a traditional dwellings showing the adjustment of the model to fit diverse sizes and sites.
Source: The Center of Pilgrimage Research, King Abdul Aziz University, Jeddah, Saudi Arabia. Obtained through the courtesy of S. Khashugjee.

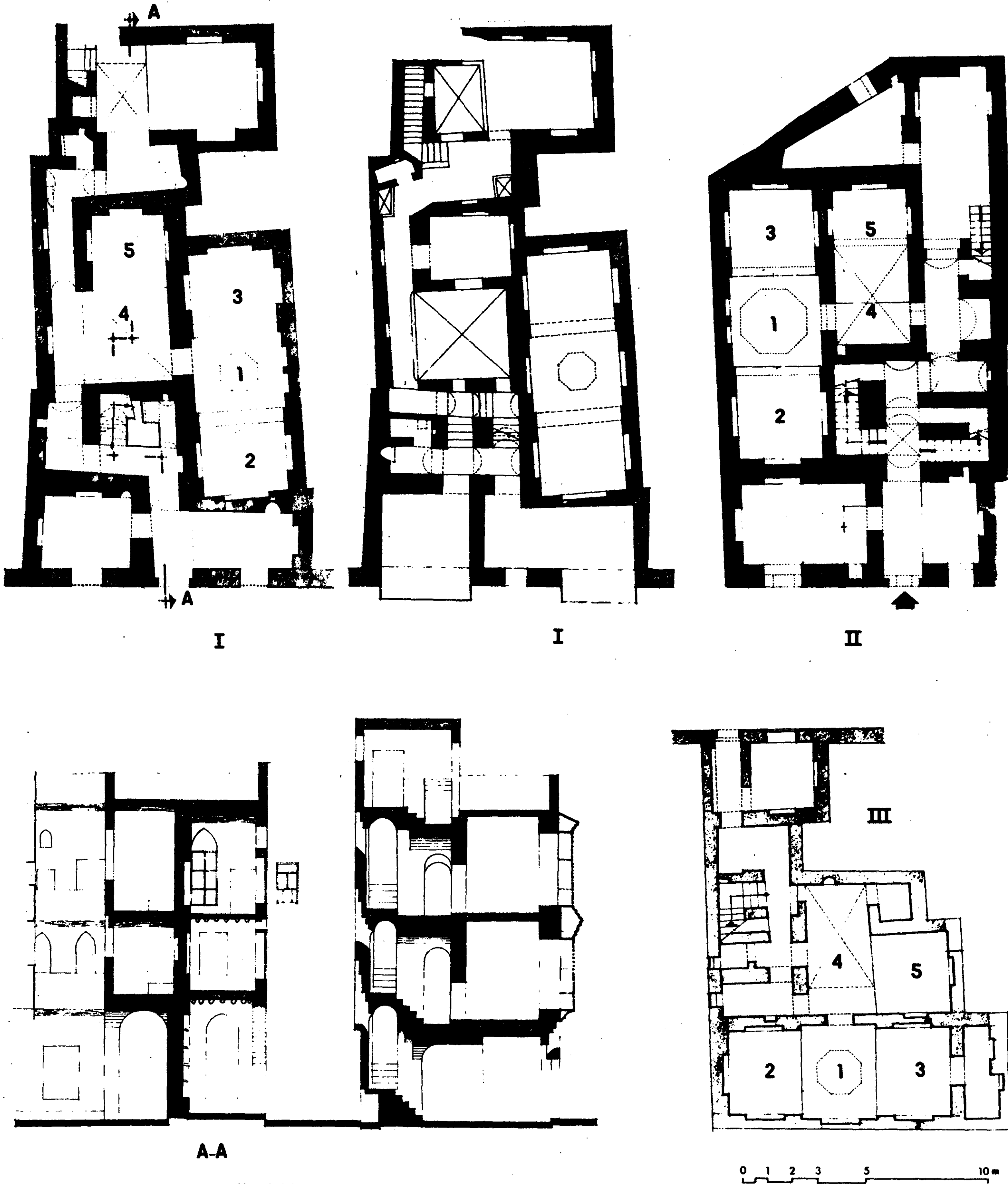


Figure 14. Al-Madina
Floor plans of qāᶜa type houses showing the specific realtionships between different elements.
Source: The center of Pilgrimage Research, King Abdul Aziz University, Jeddah, Saudi Arabia.

in disputes regarding doors, shops, encroachment on the streets, etc., the resolution did not consider the damage that the acting party caused itself. For example, if a newly created door is proved to cause damage, the acting party should seal it or change its position. How the party does this is its problem. Certainly, different responsible parties will gain different experiences from such critical situations. Each party has to deal with its unique constraints, not with rules, and this widens the range of the society's experience. On the other hand, one-for-all contemporary regulations make for similar the experiences among parties, thus narrowing the range of experiences. Furthermore, in traditional environments the acting party did not ask for permission. They changed something and when the neighbors felt the damage, there was a judgement as to whether the change should be permitted. This gave society a chance to test different solutions. For example, if a person changes the function of his property into a mill but his neighbors object, he may try to continue functioning as a mill if the site is very suitable for that use. He may try to counteract the damage or convince the neighbors to let him continue because this site is better for him than others; for example, it may be close to another industries that he depends upon. That is to say, there are positive or negative aspects about the site that he as a miller can see and experience. If these aspects are worth fighting for, he may win and other millers may join him, gradually transforming the neighborhood over time. In this case, the decisions were made from the bottom up by those who experienced the site and decided the locations of industries within the town, not by the authority's planners with their statistics, charts and predictions. In part B, we have seen many cases in which certain owners of industries'

owners tried to move back to properties from which they had been moved out, and in some cases they managed to do so. We might say that there is an ecological evolution in industries, as well as in all other aspects of the traditional environment. However, if the miller could not transform the property, then the site may be more suitable as a residence, and this could be why the residents stood firmly against such a transformation. In other words, the forces between the nigh parties' interests often decided the morphology and the functions of the traditional environment. Indeed, the shift of responsibility through intervention transformed an ordered environment into an organized one, and inverted the structure of the built environment.

Territories

In this section, I will argue that territorial organization changed as a result of the shift of responsibility. This change affected other aspects such as social relationships and initiatives of responsibility. Ecologically speaking, in this section we will examine another unexpected result of change which came from massive intervention in the complex urban systems. This intervention changed the territorial organization, which in turn caused other changes.

In the second part of this study, we saw that most elements of the urban fabric in traditional environments are in the unified form of submission. This suggests that the nigh residing parties of a traditional quarter often communicated to control and use their quarter. The shared responsibility brought them together. This may mean that the territorial organization or the physical environment affected the social environment. Sociologists and anthropologists may argue that in

traditional environments the social organization affects the physical organization. For example, are the residents of a dead-end street relatives because they share the street, or is it that a group of relatives gathered in the same street? This question cannot be settled historically and it will not be since both scenarios are possible.

The traditional quarter is a good place to explore the impact of this issue. The quarter is believed to function as a unit since the residents are united, being of the same tribe or profession, etc. This may suggest that the social organization resulted in the quarters which is very possible. However, almost all combinations of residents in a quarter are possible too. For example, let us concentrate on Lapidus's description of a quarter during the reign of the Mamlūks'. He relates:

> In Aleppo and Damascus the basic units of society were quarters, which were social solidarities as well as geo-graphical entities. Small groups of people who believed themselves bound together by the most fundamental ties -- family, clientage, common village origin, ethnic or ectarian religious identity, perhaps in some cases fortified by common occupation -- lived in these neighborhoods. (38)
>
> The fundamental elements of Mamlūk period social organization -- the quarter, the fraternity, the religious community,and the state -- seem to have prevailed throughout the Muslim world, from Egypt to Central Asia, from the eleventh to the fifteenth centuries. Almost universally, Muslim cities contained socially homogeneous quarters. Such quarters were found in cities created by a coalescence of villagers, by the settlement of different tribes, or by the founding of new ethnic or governmental districts. Quarters based on the clienteles of important political or religious leaders, religious sects,Muslim and non-Muslim ethnic minorities, and specialized crafts, were also found in cities throughout the Muslim world. Even such tiny minorities as foreign merchants might have their own quarter, in the form of a fundūq or caravansary set aside for their residence and business...Religious groups such as theHanbalīs, Shī'is, and of course Christians, were also identified with distinct parts of the city. Though less coherently or less exclusively organized elements may have been present in city populations, neighborhood communities seem everywhere to have been the keystone of Muslim urban life. (39)

> The solidarity of some Muslim quarters depended on sectarian religious affiliations. For example, al-Sālihiyyah in Damascus was affiliated with the Hanbali law school while most of the rest of the city was Shāfiʿi.....There were also economic bases for the homogenity of particular quarters. Some were named after a market or craft. (40)
>
> Economic, religious and social life were not so differenttiated from each other as to create the basis for any radical separation of classes by quarters. Quarters were communities of both rich and poor. (41)

The quotation above indicates that almost any combination of residents is possible in a quarter, which suggests that the territorial organization affected the social organization. These territorial organizations do not exist in contemporary environments. We have seen in the second chapter that urban elements of the traditional environment shifted from the unified form of submission to another form. The quarter as a territorial or social organization was broken down through intervention; for example, streets became owned and controlled by centralized parties. This may mean that the breakdown of the territorial organization of a quarter ended the shared responsibility among the nigh parties which reduced communications and affected the social organization and rather than reverse.

Another notable effect of territorial intervention is the names of places. Traditionally, quarters, markets, squares, streets and dead-end streets were often named after occupations, residents or owners. They indicated territories unlike contemporary names which often relate to symbols, for example. All the names in al-Balādhuri's (d. 279-892) documentary are territorial. He gives the name of the dead-end street and then the owner after which it was named, and does the same with all elements.[42] Al-Maqrīzi (d. 845/1414), for example, says that darb (street or dead-end street) al-'Aswāni is named for [yunsab] the judge

Abi Muḥammad al-'Aswānī, and so on.[43] Furthermore, the names were also positional, such as the street of mā bayn al-qāᶜaṣrayn (what is in between the two palaces). Interestingly, these names survived for centuries even though their original owners died. From the Geniza documents Goitein, describing Cairo, concludes: "Our documents reveal the interesting facts that six hundred years after the Muslims' conquest, the main quarters were still being called by the names of those ancient Arab groups such as Banū Wā'il, Khawlān,..."[44] The names also lasted even though the morphology of the space changed. Al-Maqrīzi states: "[the raḥbah] is the large space; its plural is riḥāb. You should know that the riḥāb are too many and they do not change unless they are built. [In such a case] it goes away and its name remains or it is built and the name passes on,..."[45] However, states have intervened and changed the territorial names to a network system. In 1262/1847 a decree changed the territorial names of Cairo by numbering and naming properties in order to make it easier for an outsider to find his way.[46] For example, Article Twenty-three states, "the road between the gate of darb 'Abi al-Līf and the street of ash-shīkh Riḥāh should be named as Ḥarat as-Saqqāyīn street."[47] Recently, in 1403/1983 a few officials in Riyadh met and decided to name some streets after thinkers and erudite individuals of Saudi Arabia.[48]

One of the major characteristics of autonomous synthesis is gates. The gate a very important sign of autonomy between territories of different parties if the parties are independent. Gates also play a major role in controlling what goes in or out of a territory. Thus, if a traditional environment is composed of autonomous territories, we should expect the gate to be a major element. The following historical case

will illustrate the importance of the gate to the principle of autonomy. Al-Balādhuri (d. 279/892) reports a conflict between the soldiers of Anūshirwān and the king of the Turks. Trying to avoid it, Anūshirwān grumbled to the king of the Turks, saying, "The men were on the point of destroying my camp; and thou rewardest me by throwing suspicion upon me!" The Turk swore that he knew no reason for the act, saying,

> "Brother, thy troops and mine look with disfavor on the peace we made, because they have thereby lost the booty depending on razzias and wars that might be carried out between us. I fear they undertake things to corrupt our hearts after our mutual agreement of sincerity, so that we may once more have recourse to enmity after our new blood relationship and our friendship. I deem it wise, therefore, that thou allowest me to build a wall between thee and me with one gate through which none from us will go to you and from you to us, except the ones thou wishest and we wish." (49)

The above gate separated two territories of the same level; it is just like a door between two houses which is controlled from both sides. However, most if not all gates are controlled from one side such as doors of dwelling quarters and dead-end streets. Al-Maqrīzi reports an interesting story which shows the importance of such gates. The gate [khūkhah] of Prince Ḥusayn in the city wall of Cairo was opened by the prince Ḥusayn ar-Rūmi when he built his great mosque. When the prince decided to open the gate so that the residents of Cairo could pass though the street of bayn as-sūrayn (literally, between the two walls) to his great mosque, the governor of Cairo (ᶜAlam ad-Dīn Sanjar) prevented him, telling him to consult the sultan (an-Nāṣir b. Qalawūn); he did so and opened a large gate. Later the prince met the governor and jested with him, saying that he opened the gate in spite of his teeth. This made the governor angry; he told the sultan that he had permitted the prince to open a small gate [khūkhah], but that the prince had opened a gate as large as the gate of Zuwaylah. The sultan became so mad that he ordered the prince deported to Damascus on that same day.[50] These

stories illustrate the importance of gates as indicators of control of movement and of autonomy. If the traditional environment was composed of independent territories (diagram 11) we should expect different kinds of gates between different territories as well as a greater number of gates.

Traditional gates that are controlled from one side are found in city walls, markets, quarters, and dead-end streets. For example, some market gates still exist in Tunis which separated the different sections of the market (see photographs no. 6 & 7). Other gates can be located by identifying the traces that still remain of them. The most common is the upper part of the wooden frame which has holes on both sides (see photographs no. 8 & 9). I would argue that all gates in Tunis can be located by looking for these wooden frames. Other gates separated the residential quarters from the markets (see photographs no. 10 & 11 of Tunis).

In residential areas, two types of gates were common, first, gates of quarters, and second, gates of sub-quarters such as dead-end streets. Any intervention logically would begin with gates of quarters and then proceed to those of the sub-quarters. The reason is that gates of quarters, where responsibility is dispersed among larger number of residents, are more likely to disappear than gates of dead-end streets in which responsibility is more concentrated. This is in fact the case. I managed to trace gates of quarters in the literature, while some gates of dead-end streets still exist as well as their physical trace.

I think what makes it difficult to investige gates is that they were so common and well-known that historians did not document them in detail. For example, in describing the towns he visited, the traveler Nāṣiri Khoṣro reports the existence of gates. Describing his visit to Isfahan in 444/1052 he states, "...I saw the markets of money exchangers in which there were two

hundred exchangers; and each market had a wall and a very strong gate [bawwabah muḥkamah] as well as the quarters and streets."[51] Furthermore, the terminology regarding gates varied from one region to another, in several ways. First, the same gate for the same space could have different names. For example, 'Ibn Taymiyyah (d. 728/1328) who lived in Damascus, used the word mashra[c] to refer to the gate of a dead-end street, while 'Ibn ar-Rāmi used the word darb to refer to the same gate in Tunis.[52] Second, the same word was used to describe different gates. 'Ibn [c]Ābdīn (d. 1252/1836) states that, "al-bawwābah is known customarily these days as the large gate located on the head [ra's, i.e. entrance] of dead-end streets or quarters [maḥallah]."[53] Third, the same word was used to describe different elements relating to territory or gate. 'Ibn ar-Rāmi used darb to indicate a gate, al-Wansharīsi used it to refer to the frame of the gate, and al-Maqrīzi used it to indicate a territory. He states, "and I used to live in the darb of al-'Atrāk."[54] 'Ibn Manẓūr defines darb as the gate of a dead-end street while daraba is the gate of a through street.[55]

We will first survey the literature to review gates of quarters, and then study one block in Tunis to focus on the gates of dead-end streets. The first type of gates -- those of quarters -- were erected by the people personally or at the request the authorities. Al-[c]Abdūsi was asked about a case in Tāza in which the gates of some quarters were demolished because of a conflict between two groups: it seems the gates were the target in the fight. The people wanted to rebuild the gates that led to the market from the revenues of some shops donated as waqf. Was that possible? Al-[c]Abdūsi answered that if rebuilding the gates would make the shops safer it would be allowed.[56] In 864/1459 there were many thefts that a group of rich people built gates for the new quarters of Cairo. In 903/1497 the governor of Cairo

ordered those who do not have gates in their quarters to build them for security reasons and the residents did so.[57] Unlike gates of dead-end streets, gates of quarters were often erected for security reasons and although they were not always closed during the day, they usually were at night. The Geniza documents reveal that in a festival in al-Fusṭāṭ in 302/941 where most of the population participated; it is mentioned as exceptional that the streets were not closed during that night.[58] Gates used to be closed after ᶜishā' prayer (usually two hours after sunset) and other gates were closed just after sunset.[59] However, during insecure times, when thieves, civil war, or invasion threatened, gates were closed for defensive purposes. During the civil war in Cairo (791/1389) the gates were guarded and armed.[60] During the political instability in Cairo in 923/1517 the same thing happened.[61] Those gates often had watchmen or guards. Manuals of ḥisbah usually have sections elaborating on the duties of the guard. For example, he should open the gate as early as possible and close it as late as possible depending on the type of the gate whether it is a city or a quarter gate.[62] If someone arrives late, he can enter only if he gives the password. The guard should not divulge the secrets of the residents.[63]

Intervention has eliminated the gates in order to control the quarters. In Cairo in 1213/1798, French soldiers demolished some gates of quarters and through streets. The residents of dead-end streets resisted the demolition. Later the same year, more gates and some gates of dead-end streets were demolished, and their wood was sold as fire-wood. In the early nineteenth century, all but a few of the remaining gates were removed by order of the authority, since it was claimed that the city was very safe.[64]

To study the gates of dead-end streets, we will review the same block (44) we used in exploring territorial shift (fig. 8). In this block, there

are seven dead-end streets with no gates. However, the traces of the gates--the upper wooden frame--still exist in four of them (dead-end streets nos. 2, 3, 4 and 5), while one still has its gate (dead-end street no. 1, see photo no. 12). Probably this gate was not demolished because the street did not look like a dead-end street; it looks more like a communal space between three houses. The gate of dead-end street no. 2 was demolished, but a trace is there (see photo no. 13, looking into the gate from inside). The drawings of the Association for Preserving the Medina of Tunis which were made in 1968 show the gate of dead-end street no. 3. Although the gate itself has been taken away by the municipality, its trace is very clear (photos no. 14 and 15 show the entrance to the street from both sides).

This space is interesting because its inner part is so clean, while the outer part is the extreme opposite (photos no. 16 and 17 showing the inner side, while photos no 18 and 19 are views looking to the entrance of the street). I asked the resident of house no. 9 about the maintenance of their street. She complained that before the gate was removed all the residents used to clean the areas in front of their entrances; however, now that the gate has been removed, the municipality is supposed to clean it. She said, "the municipality never washed [tighsil] the space," and continued that the reason that part of the street is unclean is that the owners of the dwellings in the front part of the street leased it to others who did not care. However, her family and their adjacent neighbors, (houses no. 9 and 5) clean the street. They have a system of washing their houses on different days and whoever washes his house also washes the back part of the dead-end street.[65] In this case, the municipality removing the gate and claiming ownership led the residents to rely on the authorities to clean their space. Furthermore, the fact that the tenants who leased the dwellings do not own or control the

dead-end street as well as their poverty resulted in the sad state of the street.

Dead-end street no. 4 is composed of two streets, one behind the other. The internal street is notably cleaner than the external one. Standing in the middle of the external street, photo no. 20 shows the location of the gate, while photo no. 21 shows the second entrance of house no. 9. Photos no. 22 and 23 show the location of the second gate). Dead-end street no. 5 is also composed of two streets. Although there is no wooden frame, the drawings of the Association for Preserving the Medina indicate the existence of the external gate (photo no. 24 shows the entrance to the street, while photo no. 25 looks back at the same entrance). The internal dead-end street was shared by two dwellings; one of them is on the ground floor (house no. 31) and the other is on the upper floor. The owners who still reside in them are brothers. The owner of the upper floor informed me that in the early sixties when the municipality of Tunis implemented a sewage system and placed a manhole in their space, they demolished their gate. Later, the owner of house no. 32 opened a door to their space. He complained that they had lost their own space. Photo no. 26 looks downwards to the space and shows the location of the demolished gate. On the left side of photo no. 27, the new door of house no. 32, which has been transformed into storage for a shoe merchant is shown).[66]

As signs of the unified form of submission, these gates were there for centuries. 'Ibn ar-Rāmi (d. 734/1334) states that it is customary to have gates on streets, and no one usually objected as long as no damage was involved. The only objection was from the owners of the abutting walls if their walls were damaged by the vibration of closing and opening the gates.[67] The existence of gates up to the beginning of this century implies that most

if not all of the spaces within the traditional environment were in the unified form of submission, which is autonomous synthesis. The dwellings, sub quarters and quarters were controlled by the nigh residing party. This indicates the minimum existence of spaces controlled by the central authority. From the Geniza documents Goitain, referring to al-Fusṭāṭ, concludes that "the documents does not contain a word for public square which can only mean that there was none."[68] In conclusion, there are minimal or no public places within residential quarters in traditional environments. Responsibility is clear in all spaces and in the hands of the residents. The environment is ordered. To the contrary, contemporary environments reflect the strong dominance of the authority over the territories. All outside spaces are owned and controlled by the dominant central authority. All outside spaces are public, with wide streets, no gates, no dead-end streets and a high percentage of public spaces. Indeed, it is an organized environment, but not necessarily ordered. How did this affect the initiatives of responsibility among parties?

Initiative of Responsibility

An innate tendency among humans is to take care of one's own things more than those of others. Comparing traditional and contemporary environments reveals this tendency. If the elements of any environment are in the unified form of submission, we should expect the residing parties to be more responsible towards their properties than outsiders are. It is equally true that outsiders will avoid taking care of the property of those parties. This argument is manifested in both traditional and contemporary environments. In traditional, autonomous synthesis, parties took care of their properties and principles were developed to deal with such

responsibilities. At the same time, the outsider party, the authority, avoided taking care of the spaces that it did not own and control, but rather distributed these tasks to the residents. On the other hand, in existing heteronomous synthesis, parties do not take care of the properties that they use, while, the authority does take care of the spaces that it owns and controls. We will explore these issues by investigating some elements of the traditional environment and will comment on the contemporary environment in general.

In traditional environments, regarding maintaining major elements such as city walls, the authority often relied on the inhabitants since such elements benefited the residents. In 792/1390, most of the inhabitants of Aleppo participated -- or were compelled to participate -- with their labor in the reconstruction of the city wall.[69] However, when al-ᶜAbdusi was asked who should pay for the renovation of the city wall of Fez, he answered that it should have priority over other renovations from the waqfs of the city.[70] But if no revenues are available, then according to 'Ibn Marzūq from Miknāsah, the people should not be forced to contribute.[71] Al-Barzali from Tunis relates that these people should participate by paying for the renovations in proportion to their property values. He adds that the owners of dwellings that abut the city wall in such way that the city wall is part of the property wall, should be compelled to renovate the abutting parts; if they could not, they should sell parts of their property and do the needed repairs.[72] As to the mosque, 'Ibn Abi Zayd had the opinion that the people should renovate it, but if they did not, or could not, they should not be compelled to.[73]

In general, as to an element used by a specific group of people, it seems that it should be maintained by them, and the state often avoided

intervention. This seems to have been the consensus among jurists and users. Differences between users were not about who should do the repairs, but how they should be done. For example, as-Ṣā'igh was asked about a small dam that had been demolished; how should those who benefit from the dam share the cost of repairs. Should it be according to the property's area, or value or the amount of benefit the properties gained from the dam?[74]

In terms of responsibility, fire fighting is a good example of the state's avoidance of intervention by distributing responsibility to individuals. Al Maqrizi relates that in 383/993 each shopkeeper of Cairo was ordered to have ready a water bucket as a precaution against fire.[75] Manuals of hisba often ask shop owners to be ready for fires.[76] To illuminate Cairo, al ᶜAzīz Billāh ordered that lanterns should be hung out at night by the owners on shops and gates of quarters, dead end streets and houses.[77] These orders indicate the state's distribution of responsibility to the owners or residents. It seems that it was common practice for owners to sweep and wet down the spaces in front of shops. There are many disputes about overdoing it. For example, 'Ibn al-Qāsim (d.191/807) was asked about the cattle that slipped because the street was wet down by a shopkeeper. The jurist answered that if the wetting is more than usual, the shopkeeper will be liable.[78] Al-Lakhmi (d. 478/1085) was asked about the mud near waste water; he answered that the people should be compelled to remove the mud, each group of people should remove what is in front of their space.[79] Regarding the tasks of the public interest, Lapidus concludes that during the Mamluks' reign, "[i]nstead of distributing the tax on the city as a whole, the people most directly concerned were held responsible." He relates, "[t]he shopkeepers of the city, for example, were obliged to sweep and wet down the streets and even to clean and repair the part of the public way which passed their property."[80]

Until 1246/1830 the shopkeepers and residents of Cairo were compelled to sweep and wet down the spaces in front of their properties, the city officials enforced this custom.[81] This was also one of the muhtasib's responsibilities.[82] As to paving or levelling [tamhid] streets, residents sometimes were compelled to do it. For example, 'Ibn 'Iyās relates that the Sultan al-Ghūri in 909/1503 compelled the residents of Cairo to level their streets, and until the nineteenth century the authority of Cairo used to compel the residents to do the same. In 1233/1817 the muhtasib Mustafa 'Agha was given the job of enforcing state orders to level streets.[83]

Legal principles were developed to resolve disputes among the responsible parties regarding cleaning or maintaining their properties. For example, each person is responsible for the mess he makes. The jurist Yihya was asked about the mud resulting from rain water: are the shopkeepers responsible for sweeping it up? He answered that since they did not cause it, they should not be compelled to clean it. However, if they swept it to the center of the market, (i.e. each shopkeeper sweeeping the mud away from his shop), they should be compelled to sweep up the collected mud.[84]

Although legally the authority cannot compel the residents to level the street since they did not make it uneven, many authorities did compel the residents to level streets as explained above. Such an attitude is understandable since the authority as a party does not control or own the street. However, legally the authority should not compel residents to take care of what they did not cause. On this question, the judge 'Ibn Talīd states that it is not the residents' responsibility to level streets if they refuse, but rather the responsibility of the public treasury. 'Ibn ar-Rāmi relates that there was a road outside Tunis which became impassable if it rained. He asked the judge 'Ibn ᶜAbd ar-Rafīᶜ (d. 733/1333) to compel the

residents living beyond it to level five hand-spans of its width. The judge refused and asked him to bring him the owner of the majority of the lands involved. The judge then convinced the owner to do the levelling.[85]

A different situation arises if responsible parties cause the mess, in that case they should eliminate it. When 'Ibn ar-Rāmi visited Qairouan he saw washing water flow from some houses to the street through small holes under the doors. When informed about it, the judge of Qairouan proclaimed that whoever did not stop the flow of water would be punished. One of the house owners was flogged thirty lashes because his servant did not follow the order.[86] In another case, Suḥnūn was asked about a ruined property which neighbors used as a dumping place. The abutting property owner complained to the ruined property owner that his wall was damaged because of the dumping. The owner of the ruined property answered that he did not cause the damage, and that he was also damaged personally by the neighbor's dumping. Suḥnūn answered that it is the responsibility of the owner of the ruined property to remove the dump near his neighbor's wall. However, he has the right to compel the neighbors to clean his property. The judge al-Madyūni had the opinion that the neighbors' responsibility to clean up should be based on the number of inhabitants per dwelling.[87]

A dead end street is a good example of shared responsibility among the nigh residing parties. 'Ibn ar-Rāmi relates that the residents of a dead end street wanted to repair ['arādū 'islāḥ] things in their space, and asked him to decide for them their shares of responsibility and to put pressure on the few who refused to participate. 'Ibn ar-Rāmi asked the judge 'Ibn ᶜAbd ar-Rafīᶜ about pressuring those who refused to participate. The judge answered that since they are partners in the space, those who refused should not be compelled. 'Ibn ar-Rāmi comments that this was common among the

residents of a dead end street. However, 'Ibn ᶜItāb used to compel those who refused to participate if the majority agreed.[88] But whether they agreed or some of them were compelled, how should they share the responsibility if, for example, they want to build a gate? The judge 'Ibn al-Ghammāz relates that the cost will be shared according to the resident's wealth, since the poor do not have valuables to guard from thieves. 'Ibn ar-Rāmi, however, had the opinion that the cost should be also considered according to property; since an improvement in the space will increase the value of poor peoples' property.[89]

An interesting element in a dead-end street that will force the residents to cooperate is the canal of waste water. 'Ibn Ḥabīb (d. 328/940) was asked about a canal used by four houses, parts of which needed repairs; how should the residents share the repairs? 'Ibn Ḥabīb answered that the resident of the first house should repair what in his house and participate with the resident of the second house in repairing the part in the second house and both of them share the responsibility of repairing with the owner the section in the third house, and so on. 'Ibn al-Qāsim relates that he who refuses should be compelled to cooperate. Should the owner of a new house be allowed to use the canal? The new house owner may use the canal if he pays the owners of the canal his share of the cost. But if the canal penetrates through any house, then he must get the consent of that house owner.[90] As to sharing the responsibility of sweeping the canal among the residents, 'Ibn ar-Rāmi gives a detiled answer to all the possible cases depending on slop of the street, the direction of the flow of waste water and the number of inhabitants of each dwelling. Resolving such issues indicates the awareness of inhabitants as to the shared responsibility for their space.

Indeed, the parties in autonomous synthesis initiated responsibility, since this would promote their properties whether dwellings, dead end streets or through streets. One may argue that the traditional canals in streets are very unhealthy; I would answer that is not a question of responsibility, but rather a technical one. These canals are the best that can be done bearing in mind the residents' poverty and low technical ability. Let us not mix responsibility with technology or poverty. Users will find ways to resolve their immediate problems if they are given the chance. To give one example, the residents of some communities in Riyadh have to wait for months for the authority to connect them to the water network. The authority distrusts the residents' ability to make their own connection. I would ask, who will try to get a better connection to avoid future problems, the resident or the authority's employee? The resident may hire others to do the connection, but he will make sure that it is done well. Some residents went ahead and made the connections themselves. The authority proclaimed that whoever does so will have his water disconnected for two months, be fined ten Saudi Riyals for each cubic meter of water consumed.[91]

Initiatives of responsibility in hetoronomous synthesis are well known within our organized contemporary environments, and it may seem to be doing well. Although there are no statistics to measure its success and compare it with autonomous synthesis, it is costing our societies too much since responsibility is dispersed. To give one example, officials had signed a contract to clean the city of Jeddah for five years for 1.2 billion Saudi Riyal.[92] The city certainly needs its waste materials collected. But the role of the contracting company goes beyond that. They have to pick up what irresponsible people throw away. What created this irresponsibility is the excess of public spaces that are not within the unified form of submission.

Furthermore, those who clean are always careless. Their main objective is to satisfy the contract, not to have a clean space as the responsible party does. An outsider party does not care about the fate of the residing party. It will find and implement the easiest way to deal with the problems. For example, a resident in Riyadh complained that in some cases the municipality's paving of streets resulted in a street level much higher than their houses.[93] When the Jeddah municipality paved the traditional part of the city, it did so without first providing any infrastructure (photo. no. 28), and made the street level so much higher than the dwellings that in some cases (as in photo no. 29), the residents have to climb steps to reach street level. The residents will blame the municipality, the municipality will admonish the construction company, the company will reprove the engineers who may rebuke the laborers. Indeed responsibility is dispersed. In the unified form of submission, a party has no one to blame except itself.

Potential of the Physical Environment

Another unintended result of intervention in the built environment has to do with its potential to accommodate the users' diverse needs. Exploring this potential S. Anderson states, "the physical environment is an arena for potential actions and interpretations. This 'potential environment' is reinterpreted by each user, thus yielding his or her subjective environment--the environment that is effective (or influential) for that person."[94] I would argue that the traditional environment or any other autonomous synthesis will accommodate the society's changing needs more than any other physical environment. The reason is that properties are in the unified form of submission. This means users will have the freedom to change their physical environments. In doing so, they will realize the potential

and will exploit it, thus resulting in endless subject environments. All the principles used in traditional environments gave the user the chance to exploit his physical environment. The leasing principles in the first chapter, the principle of damage that allows parties to act and be judged if the damage is felt by neighbors,; the principle of damaging precedence and others that were explored in the second part, all contributed to the exploitation of the physical environment. In other words, the degree of potentiality, or what the physical environment can support, accommodate and tolerate depends on the degree of responsibility enjoyed by the nigh residing parties. For example, non interference by authorities in traditional environments brought the parties of adjacent properties to agreements which resulted in single party walls. The acceptance of single party walls as a convention in the society, among other factors, stimulated them to build and abut their neighbors since it is always easier and cheaper to build that way, especially if a parcel of land is surrounded by neighbors on three sides. As explored in chapter seven, those abutted buildings with single party walls between territories did indeed have the physical potential to accommodate the movement of territories which is based on the users' changing needs. These tremendous territorial shifts over time did not necessitate mass demolition or rebuilding, but often building or demolishing a single wall, or even opening or sealing a door. The potential of the environment coupled with the freedom of parties allowed the parties to inflect their environments and discover new usages.

To demonstrate the degree of potential in traditional environments, we will rely on historical data. From the Geniza documents, Goitein concludes that almost any function can be found in any quarter. For example, a street of cobblers could inhabit shops of perfumers. A physician has a sugar

factory in his domicile. One letter says: "People who had been living on their properties gave them up. You will sell the house and they will convert it into a workshop, ma^c^mal."[95] An interesting documentary is that of al-Maqrīzi's (d. 845/1441) describing the changes which took place in Cairo. His main interest was change, and as a historian he tried to tell others how Cairo was in the past. Thus he described physical as well as functional changes. For example, in describing the quarters that are called khiṭaṭ, he states that the quarter [khaṭṭ] of khān al-Warrāqā^c^ah (the caravanserai of the stationers) now accommodates a mill and some houses; the site of the quarter was originally stables. He describes many houses that have been transformed into schools and khānqāh (monastery).[96] He gives the location of large houses that divided into smaller ones or vice versa. For example, he states that the area known as as-Sudūs "used to be many dwellings and now they have all became one house." Describing one market that has dwellings in the upper floors he states that "for a while such a place used to be a market for selling books and then it became tanneries."[97]

Other than such description, one can see the changes in traditional environments through conflicts between parties as a result of change. Abu al-Muṭraf ash-Sha^c^bi was asked about a case in which an 'Imam (leader in prayer) changed a small sector of a mosque into a room for educating children. He opened it to the street and at the same time created a door to the mosque. Some individuals objected that the 'Imam was using a part of the mosque while charging people for educating their children; he should lease a shop or transform a room in his house for this. The 'Imam's position is that he is in fact opening the door that leads to the mosque during Friday prayers, thus accommodating the large number of worshippers and no damage is caused to the mosque. Abu al-Muṭraf answered that the Imam should

retransform that sector to join the mosque again.[98] 'Ibn Lubābah was asked about a place of ablution abutting a mosque with an entrance from the street. Later, the entrance was sealed and another was opened directly leading to the mosque, in such a way that the place of ablution will be used exclusively by worshippers. Later, some worshippers complained that children were using the ablution place and in the process were entering and damaging the mosque. Other worshippers want the door to be opened directly to the mosque. 'Ibn Lubābah answered that it is better to reopen the door in its original position towards the street.[99] Al-ᶜAbdūsi was asked about an ablution place that is a waqf and is not used at all because it lacks water. The nāẓir (trustee) wanted to transform it to a hotel; was this allowed? He answered that if it is hopeless to use the place for ablutions, then it is legal to change the function of the waqf.[100]

If we examine a portion of the traditional fabric, we can easily observe that it is a series of connected built sectors and open spaces; those built sectors are very similar in terms of dimensions and joined to form a small dwelling or a large one. That is to say, the general structure managed to accommodate a variety of functions and different sizes of properties by using the same principle--as we saw in the qāᶜa a type dwelling of Medina--and by using similar sectors. The question is, did the people realize that having sectors of similar sizes will allow them to generate a variety of organization with minimum effort to answer their needs? Or were there other constraints on similar size sectors such as technical ones--the length of wooden beams for example, or the high cost of having long spans? Either way, the subtle interaction between the people and their available resources resulted in a structure that did accommodate their needed change. That is to say, technical ability as a constraint affected the rooms'

dimensions which influenced peoples' use of spaces and their behavior. One may also argue the opposite: the customs of the people demanded certain sizes and layouts of rooms. The rooms had to adjust and technology had to serve this need. Which way is it, it is a difficult question to answer especially if we keep in mind the numerous and complex constraints in the built environment. One may even argue that the evaluation of traditional physical environment is based on circular effects, with each constraint influencing the other. In any case homeostasis was achieved since there was no intervention in the affairs of nigh residing parties. Over generations and by experience, the society established the size and organization of elements in order to have an adaptable built environment.

Properties that are not within the unified form of submission may not accommodate change; not because the physical environment does not tolerate the change, but rather because the residing party is not allowed to do so. This is also true in the traditional environment. For example, Abu 'Ibrahim al Andalusi was asked about a house that is a waqf--which is not in the unified form of submission--in which the neighbor of the waqf-house bequeathed part of his house to that waqf before he died. Is the trustee of the waqf allowed to join the bequeathed part to the waqf-house to enlarge it? He answered that the trustee should avoid any physical change as much as possible even if it was a handful of sand.[101] In this case the controlling party's freedom is limited and this will affect the exploitation of the property. Our contemporary heteronomous synthesis is full of regulations designating areas as residential zones, commercial zones and industrial zone. Even traditional environments were regulated. In Tunis the user of house no. 32 (photo no. 30) barely allowed me to photograph his upper floor. He is a

wholesale merchant: he stores and exhibits shoes in that space which is illegal according to the municipal regulations.

People tend to try to change their physical environment to fit their needs. This is one of the most practiced innate tendencies in users. I will give examples from contemporary environments. Photographs no. 31 & 32 show a resident in Taif who had a wooden screen in his entrance for privacy reasons, but removed it since it interfered with his freedom of movement. Photographs no. 33 & 34 show the changes in a balcony that used to belong to the reception room and now joins the front yard. Photographs no. 35 & 36 show an apartment building in Riyadh in which the ground floor apartments were transformed into stores. Another owner of an apartment building decided to change his ground floor to commercial; he had to demolish the walls of the front yard according to the municipal regulations. He did so. However, it is a bit difficult to demolish concrete column, so he transformed them into lamp columns (photo. no. 37). Photographs no. 38, 39 & 40 show the addition of a narrow part of a building that blocks the rooms of the previous facade, which certainly necessitates adjustments in the internal organization. On a smaller scale, concrete seats in Mecca were transformed into flower boxes and were used to form small seating places on the ground (photos no. 41 & 42). Another person in Riyadh, rather than throwing away washing basins, used them as steps (photo. no. 43). These are examples of personal adaptations which can be seen all over the world.

Traditional physical forms was simple while responsibility were in the hands of the users; in contrast, contemporary physical forms are complicated and responsibility is in the hands of the remote party. This raises the issue of the relationship between building technology and space organization. Does technological progress imply and justify the so called "Architectural

Revolution," or is technology there to serve human needs? I would argue that traditional Muslim buildings are more industrialized than contemporary buildings. The extraordinary similarity among traditional Muslim buildings within the same region results from two factors. The first is that the same sources of building materials were used. Those building materials were very small in size and were mass produced so as to be assembled in endless combinations; they were also easily handled by the users. One good example is mud bricks and wooden beams. The second factor is the way houses were assembled on the site. As we explained earlier, it is the role of the muḥtasib to control industry; to protect users from deceptive manufacturers and builders. The manuals of ḥisba are full of regulations and codes regarding the control of the building industry and materials. However, the way those building materials are assembled in the site to form buildings is left totally open for the residing party's desires and discretion, which were made according to specific norms, values and shared images of what is good or bad. These shared norms and values--as I explained earlier--were strong and coherent among the nigh residing parties as a result of non-intervention or absence of regulations by outsider parties. That is to say, the attitude of authorities in the traditional environment is a simple one, to strongly control the builders and industry of building materials, but never to control the way the materials are assembled to form buildings on the site. The attitude of contemporary authorities is completely different. Such differences can be understood through the following, possibly humorous, case. In Saudi Arabia, the Real Estate Development Fund subsidizes individuals with long-term interest-free loans, and such loans can be obtained if individuals fulfill certain requirements and specifications. One of those requirements is that at least 15% of the floor area has to be covered by using marble

tiles. One individual had the entrance area and staircases of his house tiled, but still could not meet the specified percentage; so one third of a room was tiled in marble as well to meet the exact percentage.[102]

Another change that resulted from outsiders' intervention has to do with choice of materials and application of auxiliary elements. In traditional Muslim ordered environments, the best materials and facilities are found in the private properties under the unified form; such as planted and paved courtyards, well built and maintained dwellings and facades decorated with wooden screens. Almost all elements are under the control of the subjected parties. Comparing these properties with the unpaved, unplanted and unlit streets outside, reveals that the wealth of a society is invested in the private places. On the other hand, contemporary organized environments reflect the strong dominance of the authority with respect to such physical elements. Most are under the control of the central party. Streets are paved with sidewalks and well lit; they are planted and have seats, squares, fountains and so on. We have seen paved, planted and lit streets along squatter settlements in which the cost of one column would build a decent dwelling. The wealth of the society shifted when responsibility shifted.

A Case Study

In Taif City, Saudi Arabia, a piece of land was bought and subdivided by a person into three large blocks (180 x 40 m., see fig. 15). Each block was divided into plots of 20 x 20 m. and was sold to individuals who bought one, or more plots.[103] This entire area was built in the last twenty years, with the first houses being built in the early sixties. The interesting fact about this area is that the municipality of Taif did not have much to do with

it beyond approving the original layout of the blocks and the plots. Then the owners had full freedom since the municipality did not have the manpower to implement the building regulations. Furthermore, the owners subdivided their land and sold it to others. In short, what determined the morphology of this area was the residing nigh parties within the constraints of the original layout. Later, in the mid seventies, the authority started to impose regulations, one being that the residents should not use their properties as storage, since the area is recognized as residential. Still, few properties are used for storage. Therefore, if authority could not intervene, we should expect an environment that would, to some extent, resemble the traditional environment in terms of responsibility. But not all the traditional principles were used. For example, questions regarding opening windows could not be enforced -- damaging act. The same is true regarding damaging precedent or right of precedence, since the authority does not recognize such principles and will not help the abused parties. Thus to the extent that the relationships between parties of different properties are not ordered by the physical environment as constraints, we may expect that the morphology of the area will resemble the traditional environment since it involved agreement among parties.

The logical subdivision for the initial plots of 20 x 20 m. was four parcels of 10 x 10 m. However, this subdivision would result in inner parcels without access. This led to the development of dead-end streets owned by the residents (fig. 16 shows the locations of some dead-end streets, A, B, C, D, E, & F). Dead-end street A (as in figure 17) is shared by two houses (1 & 2). House no. 1 owns, uses and controls the space while house no. 2 has the right of servitude in it but rarely uses it. The space is very clean and has a gate (photo. no. 44). The two parcels were owned by one

owner who sold the inner parcel and the dead-end space on the condition that he would have access as he built his dwelling first and opened a door to the space. Dead-end streets B & C are exclusively private and were developed by the owners for future sale or lease of the inner parcels. House no. 3 is occupied by a person who did not build a second party wall along the dead end space, but rather plastered the wall of house no. 4 (photo no. 45 shows the party wall of house no. 4 and the gate of the dead-end street of house no. 3). The owner of house no. 4 died in the summer of 1983. His wife altered her dwelling by opening a new door in the front yard, and made some changes in the ground floor by enlarging one room (a) and joining it with the other (b). Then she leased the upper floor which now has its own entrance (photo no. 46 shows, from the left, the gate of the dead-end space of house no. 3, the new door of house no. 4 and the old door which is exclusively used by the tenants in the upper floor. Photos no. 47 & 48 show the front facade and front yard of house no. 4 before the change, while photos no. 49, 50 & 51 shows the same spaces after the change. Dead-end street D (photos no. 52 & 53) has no gate and it was created through agreements by the owners of the two abutting parcels that were originally one (20 x 20 m.). Their residents do not use such space since it was developed to be used if they sold or leased the inner half of their parcels to others. This space was not used by anyone and gradually became a dumping place since the abutting properties were leased. To the contrary, dead-end street E is tiled and well maintained since the owners are the residents (photo no. 54). In fact, there are many other dead-end streets and their condition depends mainly on the residing party, and on whether it owns the space or only uses it (see, for example, photos 55 & 56).

Most residents are related to each other through blood ties and thus visit each other frequently. However the size of the blocks (180 x 40 m.) does not support this practice because the residents have to walk long distances. Somehow the owners of eight parcels (10 x 10 m.) or the origianl owners of the large plots (20 x 20 m.) agreed to develop a street two meters wide each giving up one meter as a setback of his property (see street G. photo no. 57). The community decided to have another street through the adjacent block (street H. fig 15.) since it would shorten the distance to a large mosque nearby (see fig. 15 for the location of the mosque). The owners of properties no. 11, 12, 13 & 14 have left one meter of land so the residents on the western side of the block could do the same to create a through street. The owner of parcel nos. 9 and 10 left one and one half meters in order to have a wider street and then built his house (no. 9) which has direct access to the street. However, the owner of parcels no. 5, 6, 7, & 8 created his own dead-end street (dead-end street F, photograph no. 58). It should be noted that this space is owned and controlled by the owner who lives in his three story building (house no. 5) and does not use the space. It is used by the tenants of the apartments in properties no. 6, 7, and house no. 8. This space is in the permissive form of submission. This street looks like a traditional dead-end street, but in fact it is not controlled by the residents. Although it was tiled by the owner it is not maintained by the residents; for them it is just like any other street.

The owner of the four parcels (5, 6, 7, & 8) did not leave the agreed-upon setback to create the through street. He informed me that the reason for not doing so is that he already has lost part of his property by creating the dead-end street (F). Thus, the street that is supposed to be more than two meters wide, is now one and one half meter. This caused tension between the

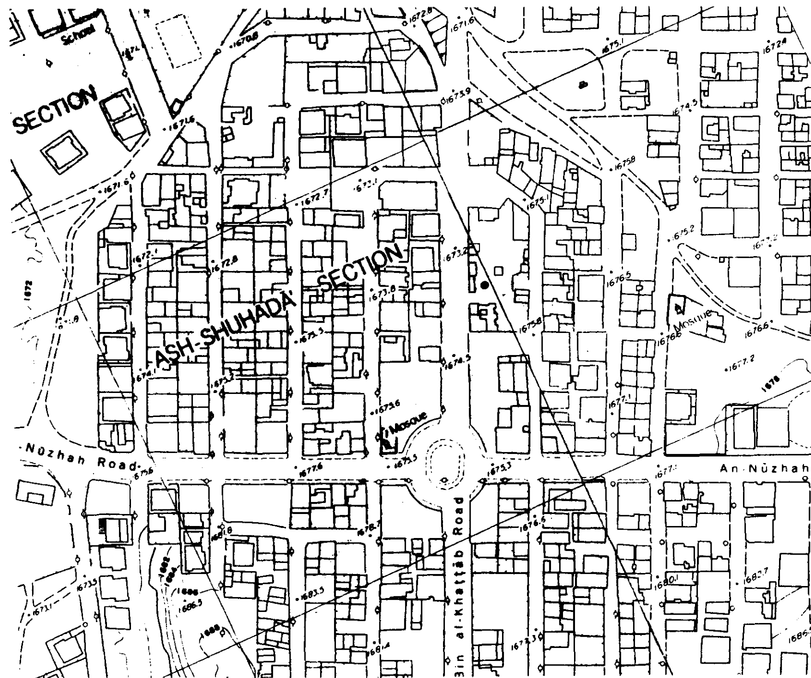
two owners (the owner of properties 9 & 10 and the owner of properties 5, 6, 7 & 8). When the owner who did not give up a setback built an apartment building on parcel no. 6 and later opened a door to the narrow street, his neighbor (owner of properties 9 & 10) did not like this since he was using a street that he did not contribute to. A dispute developed and the community intervened to solve the conflict. They failed and the owner of properties 9 & 10 built a wall on his own property thus blocking the street (photo. no. 59 shows the door that intensified the tension and the wall that blocked the street; photo. no. 60 shows the same wall from the other side). I could not meet the owner who built the wall, but I was informed that the neighbors tried to convince him to demolish the wall. Meanwhile, they cannot sue him, since the street is not recognized by the municipality and the principle of damage is practiced. Finally, because the street is not used and occupied from both sides, it was not well maintained.

Street J which was created by the residents through agreements is possibly the most interesting element in the neighborhood (fig. 18). Parcel 16 (10 x 20 m.) and house no. 15 (30 x 20 m.) were originally two plots and are owned by one person.[104] His brother bought the adjacent parcel (20 x 20 m.), which is occupied by properties 17, 18 & 19, and walled it. The community decided to build a mosque; from this the idea of developing a through street developed. The owners of properties 20, 21 and their opposite neighbors left one and one half meter and the dead-end street was created. The community raised money and bought half the walled parcel (10 x 20 m. which is properties 18 & 19). The neighbor (house no. 15) who is the owner's brother bought the other half abutting him and transformed it to a storage area giving one meter of setback to create the through street. Meanwhile the

mosque's parcel provided only 50 cm. They knocked down the wall of the walled parcel and the street was created (photo no. 61 looking west shows the hole made in the wall to connect the two dead-end streets). When the community decided to build the mosque, the owner of the storage (17) allowed the community to use his wall to rest the beams that carry the minaret (photo 62 & 63 shows the minaret resting on the storage party wall). Rather than using the whole bought parcel (20 x 9.5 m.) to build a mosque, the community decided to build a house (no. 19) for the 'Imām (leader of prayer). Later they decided to add a second floor and lease it for the benefit of the mosque (no. 22). When the second floor was built, they extended it over the street creating an overpass which rests on the storage's party wall (photo. no. 64 shows the overpass, while photo no. 65 shows the overpass resting on the storage's wall). Agreements have resulted in many single party walls between neighbors in this community. For example, almost all the walls in photograph no. 66 for example are single party walls. The owner of house no. 20 has also donated an ablution place (k) to be used by the community. In the summer of 1983, house no. 21 was demolished and an apartment building was being built (photo. no. 67 shows the previous house, while photo. no. 68 shows the unfinished new house). The owner of the rebuilt property did not remove all the remains of demolition but rather levelled parts of it into the narrow street (J). Since the other half of the street abutting the mosque is tiled, the Imām immediately built a small wall to prevent the spread of the demolition refuse, thus creating one step (photo. no. 69 shows the step).

In this case study, the lack of intervention by the authority resulted in an environment that is based on agreements and resembles to some extent the traditional environment. For example, the nigh residing parties created through streets, dead-end streets, an overpass and single party walls when

this was possible. Most dwellings such as houses no. 1, 19, 20 & 21 are of the courtyard type. Others have small front or backyards such as houses no. 3 and 4. There is also a vertical overlapping of territories. The room (n) above the storage (s) of the mosque do not belong to the mosque. The storage room (m) on the overpass belongs to the mosque and can be reached by a ladder. In short, although this area has been developed in the last twenty years by using the existing building technology and within contemporary needs, agreements resulted in an environment that is ordered; the tiled dead-end streets, the party walls created relationships between neighbors and the response of the residing party ('Imām) to the neighbor's change. This raises the question of whether cultural change, complexity and sophistication of life requirements make it necessary that responsibility should shift from the residing party to the central party. The attitude of professionals is that technology and life these days are sophisticated, and that therefore decisions must be centralized, especially larger scale ones. However, there are many cases in which, for example, infrastructures were provided after buildings were erected. In fact, this chapter raised issues relating to the following question: contemporary environments are organized, while traditional ones were ordered; is it possible to have an ordered environment that is organized?



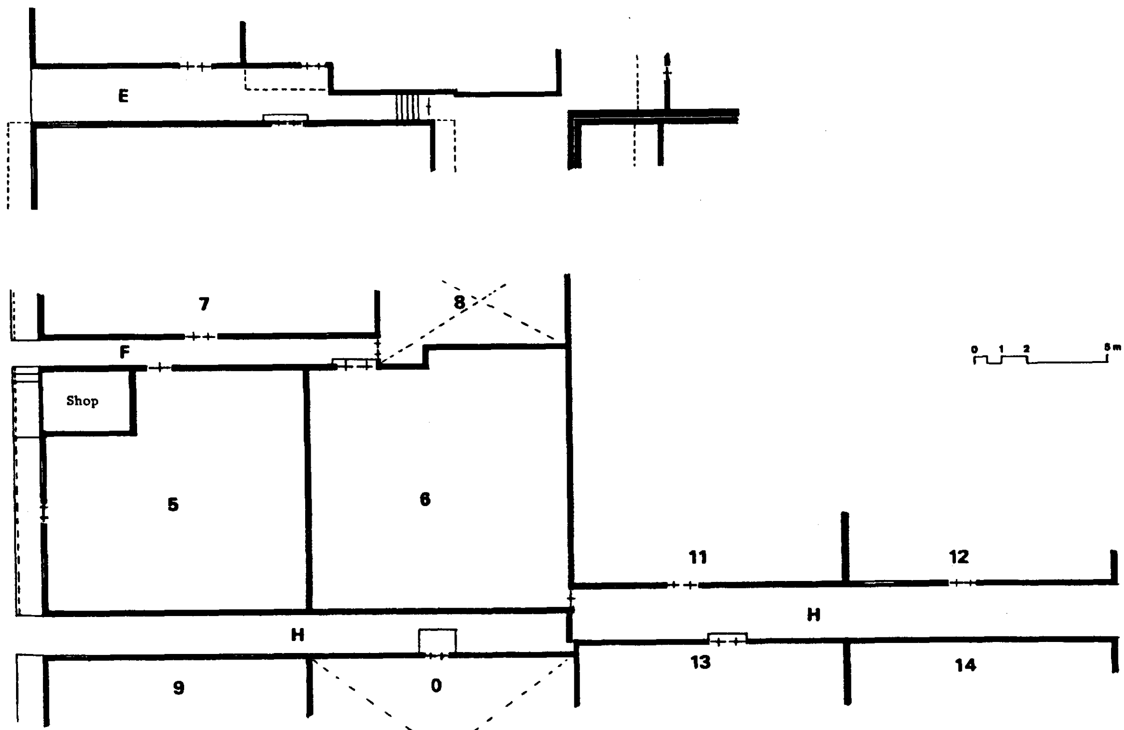


Figure 15. Taif
(upper) Plan showing the layout of the blocks in sh-Shuhadā' al-Janubuyyah section.
Source: Ministry of Municipal and Rural Affairs, Survey and Cadastral Department, Riyadh, Saudi Arabia
(lower) Plan of dead-end street E and through street H that are developed by the residents.
Source: Survey by the author in summer 1982.

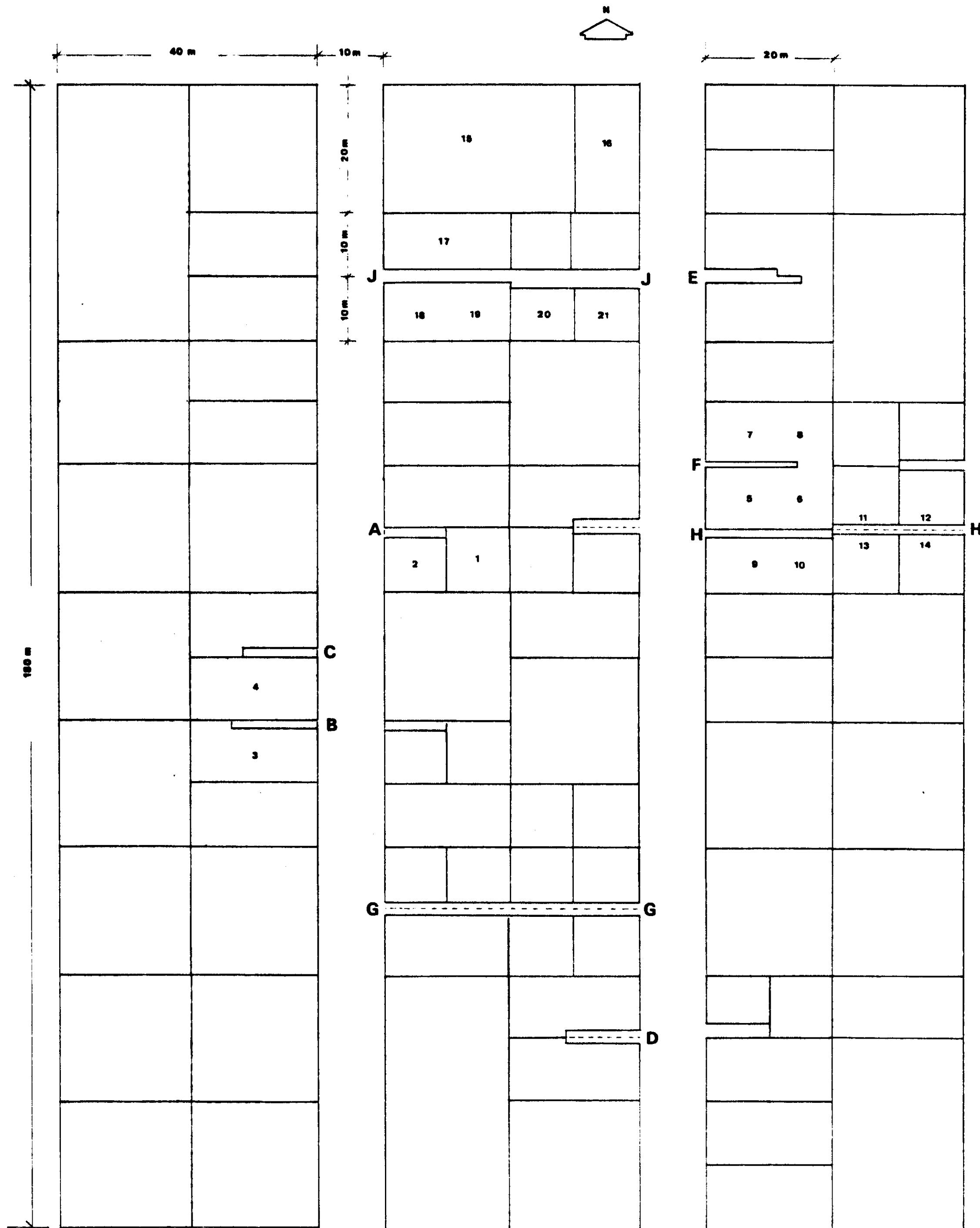


Figure 16. Taif
Layout of three blocks showing only the locations of the studied streets and dead-end streets.
Source: Survey by the author in Summer 1982.

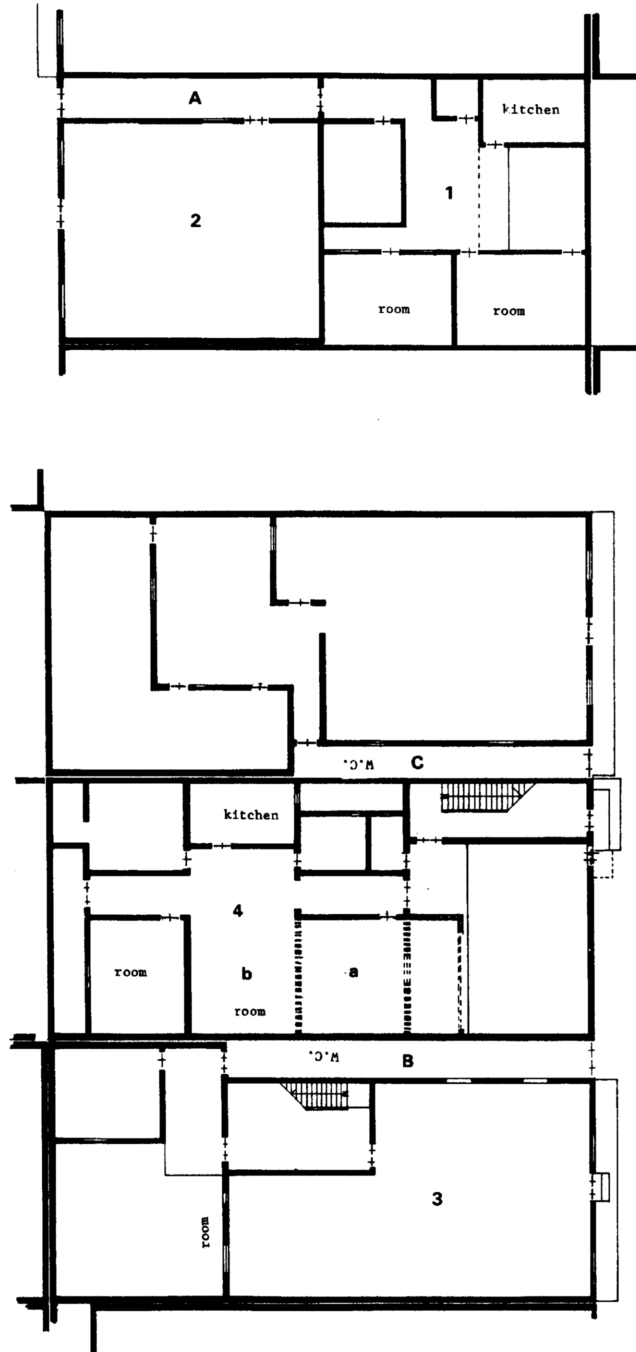


Figure 17. Taif
Plans of dead-end streets A, B and C (only floor plans of houses 1 and 4 are shown).
Source: Survey by the author in Summer 1982.

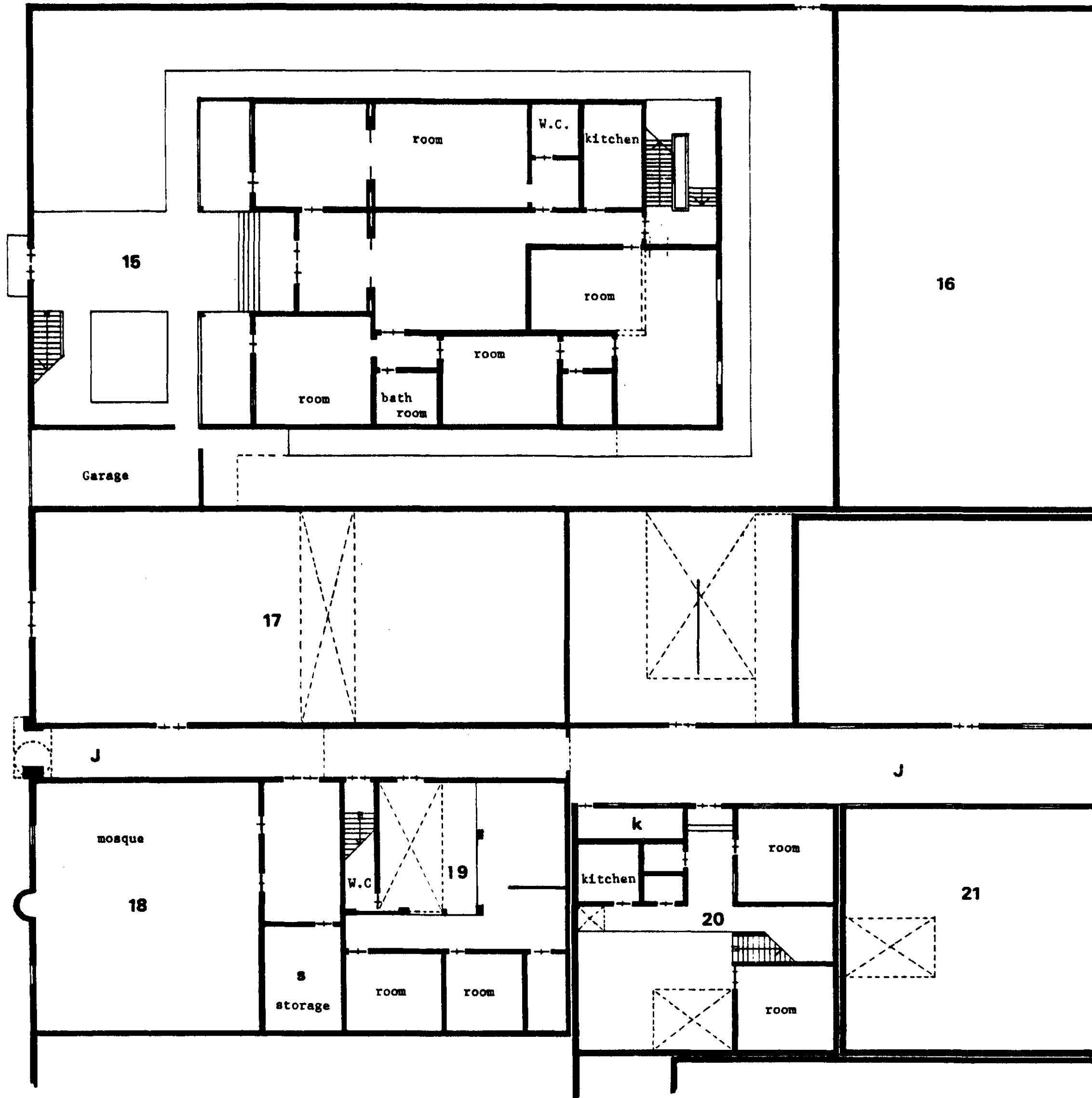


Figure 18. Taif
Ground floor plan of through street J and abutting properties.
Source: survey by the author in Summer 1982.

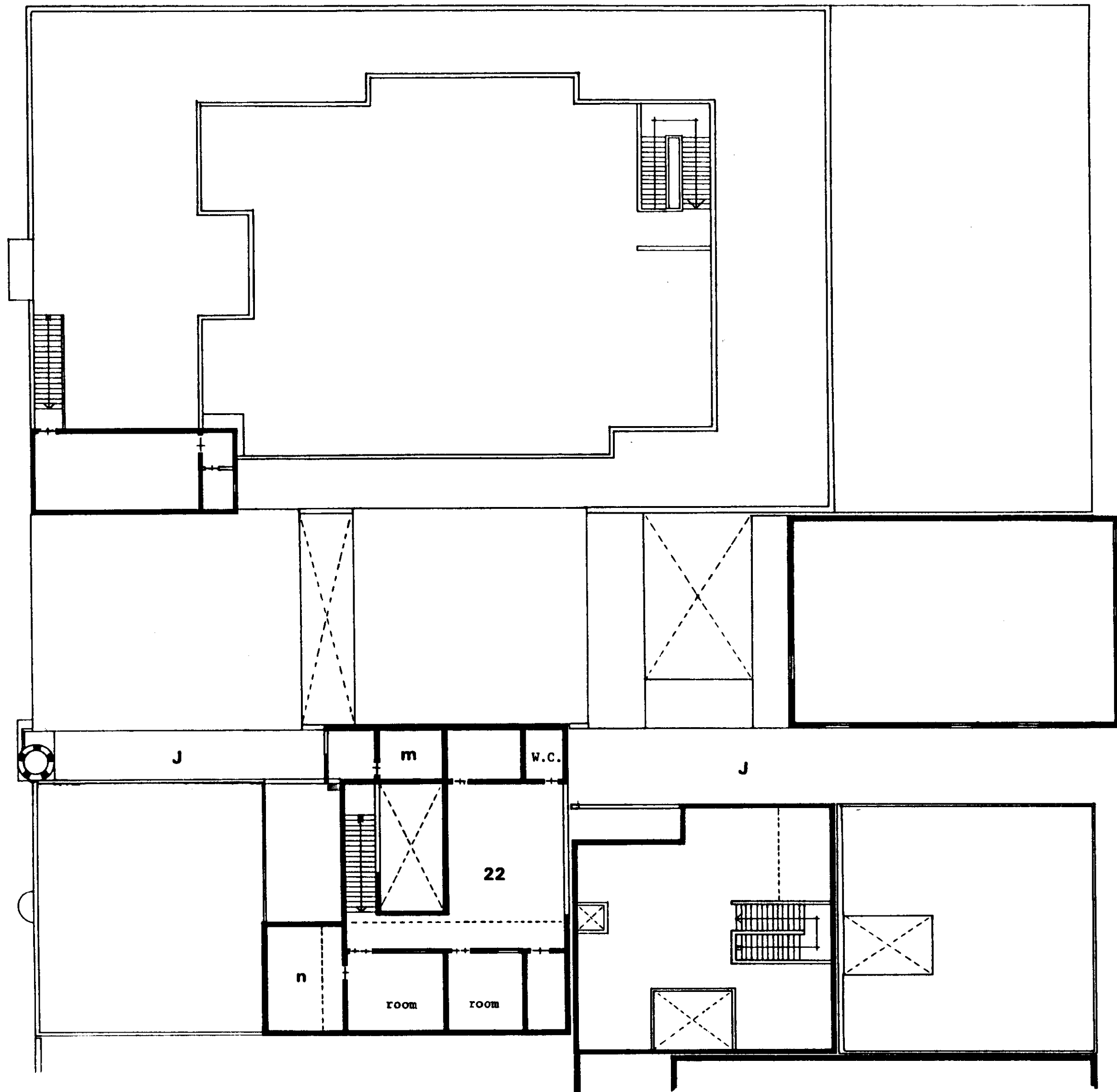


Figure 19: Taif
Upper floor plan of through street J and abutting properties.
Source: Survey by the author in Summer 1982.

N O T E S

INTRODUCTION

1. Karl R. Popper, Conjectures and Refutations: the Growth of Scientific Knowledge (Harper Torchbooks, New York, 1968), p. 129.

2. Ibid., pp. 127-8.

3. Ibid., p. 131.

4. Michon, Jean-Louis, "Religious Institutions" in The Islamic City, edited by R.B. Serjeant, (UNESCO, 1980), pp. 18, 21, 22.

5. For a complete translation of the fatwa see Heyworth-Dunne, Land Tenure in Islam, (The Renaissance Bookshop Press, Cairo, 1951), pp. 30-49.

6. Related by both al-Bukhāri and Muslim. Tran. by E. Ibrahim and D.Johnson-Davies, an-Nawawi's Forty Hadith, (the Holy Koran Publishing House, Damascus, 1977), p. 40.

7. Ibid., pp. 94, 96.

8. Michon, J., op. cit., p. 43.

9. Ira Marvin Lapidus, Muslim Cities in the Later Middle Ages (Harvard Univ. Press, Cambridge, Massachusetts, 1967), pp. 107-109.

10. Ira M. Lapidus, "Muslim Cities and Islamic Societies" in Middle Eastern Cities, edited by I.M. Lapidus, (Univ. of California Press, Berkeley and Los Angeles, 1969), p. 50.

11. Lapidus, Muslim Cities, op. cit., p. 111.

12. Michon, J., op. cit., p. 34. The Qur'anic verse is: "Those who hearken to their Lord, and establish regular prayer; who (conduct) their affairs by mutual consultation; who spend out of what we bestow on them for sustenance;..." ash-shūra (XLII, 38).

13. Michon, op. cit., p. 34.

14. Ziyadah N., al-Hisbah wa al-Muhtasib fi al-Islam, (al-Maṭba^{c}ah al-Kathulikiyyah Press, Beirut, 1962), p. 47.

CHAPTER ONE

1. Narrated by cAbullah bin cAmro bin Al-cAs, Sahīh al-Bukhārī, 9 vol. translated by M. Muhsin Khān, (Islamic University, al-Madina al-Munawwarah, 2nd Edition 1976), V. 3, p. 397 See also Ibn cAsākir (d. 571/1175), Tahdhīb Tarikh Dimishq al-Kabīr, edited by A. Badrān, 7 vol, (Beirut, Dar al-Masirah Press,1979), V. 7, p. 72.

2. It was related by at-Tirmidhī. It also appears in another tradition that was related by Muslim. Riyad as-Sālihīn, by M. an-Nawawi (d. 676 H.), (daru al-Hadīth press, Beirut, 1955), p. 124

3. An-Nisā': 29.

4. Related by Mālik in al-Muwatta (d. 179 A.H.), Beirut, 1981, p. 529. Translated by A. at-Tarjumana and Y. Johnson, (Diwan Press, England, 1982).

5. al-Furūq by Shihābud-Dīn Abi al-cAbbāsi as-Sanhāji, known as al-Qaraf; (a jurist fron the Māliki School of Law, d. 684 H.) 4 vol., (Dar al-Macrifah, Beirut) V. 4, p. 199.

6. The following are selected definitions of ownership from different rites.

   Hanafi rite: Ibn Mascūd's definition (D. 745 H.) "A legitimate connection between the person and an object in which it is absolutely manipulatable by that person and preventing other's manipulation."

   Ibn al-Hammām's definition (D. 861 H.) "The ownership is an ability approved by the Sharīcah regarding manipulation."

   Shāfici rite: al-Zarkashi's definition (D. 794 H.) "The ability of manipulations in which such manipulation would not cause fault or sin." See al-cAbadi, al-Mulkiyyah Fi al-Sharīcah al-'Islāmiyyah. Published Ph.D. dissertation, 3 vol. (Maktabat al-Aqsa, Jordan, 1974) V. 1, pp. 129-133.

   Māliki rite: al-Qarāfi's definition (D. 684 H.) "A legitimate allowing in which the owner of an object or usufruct will be able to benefit from that object or usufruct or take indemnity." al-Qarāfi, op. cit. V. 3, p. 216.

7. Al-cAbādi, op. cit. V. 1, p. 133

8. Al-cAbādi, op. cit., V. 1, p. 169.

9. "Wa ash-sharacu lahu qācidah wahuwa 'annahu 'inna-mā yumlaku li-'ajli al-hājah wa mā lā hājata fīh la yushracu fīhi al-mulk" al-Qarafi, op. cit. V. 4, p. 17.

10. Al-Qarāfi, op. cit., V. 4, p. 16-17.

11. Ibn ash-Shat, Hashiyat Ibn ash-shat cala al-Furūq, 4 vol. (Dar al-Macrifah Press, Beirut), V. 4, p. 17.

CHAPTER ONE

This opinion is supported by Muhammad cAli in his commentary Tahthib al Furuq wa al-Qawacid as-Sunniyyah, (Dar al-Macrifah Press, Beirut), V. 4, pp. 40-41.

12. The right of raising one's own building is an issue on which all the rites agree. For example: The Maliki scholars related that the person who owns a territory has the right to build and raise his building as he wishes as long as he does not harm others, and he may dig the ground of his territory as much as he likes, as long as he does not harm others. The rights of air always belong to the rights of territory, the air of Waqf is Waqf, the air of free (property, Talq) is free, the air of dead land (not owned) is dead, the air of owned is owned, and the air of mosque is a mosque. al-Furuq, V. 4, p. 14.

    The Hanbali rite: Ibn Qudamah (d. 620 H.) states that the air of a territory is owned by that territory's owner. The same is true for what is under the territory. Al-Mughni, (Maktabat Ibn Taymiyah Press, Cairo) edited by M. Harras, V. 4, p. 539.

    The Shafici rite: al-Mawardi relates that "who owns a house, owns the right of raising his house." Al-Hawi, manuscript, V. 7, p. 80, see al-cAbadi, op. cit., V. 1, p. 215.

13. From the Hanbali rite, Ibn Qudamah in al-Mughni relates that the air belongs to the territory. op. cit., V.4, p.539. Ibn Tyamiyah states that, "The buying of the upper floor spaces (not built) are permissible if the lower floor is not built as long as the specifications of the lower floor building is described." Al-cAbadi, op. cit., V. 1, p. 216.

    From the Maliki rite, sahnun questioned Ibn al-Qasim "Can a person sell the space on top of his roof, up to ten cubits high?" Ibn al-Qasim answered, yes. Sahnun continued: "How about the space on top of that ten cubits, up to ten cubits high?" Ibn al-Qasim answered, "It is not allowed, unless the (first) owner builds the ten cubits on top of him." Al-Mudawwanah al-Kubra, (Beirut, Dar al-Fikr Press, 1978), V. 3, p. 262.

14. From the Hanafi rite "The right of height is not a property, since property is an object that is possessable and catchable, and it is not related to property rather it is a right related to the air, and the air cannot be sold." Rad al-Muhtar cala ad-Dur al-Mukhtar, 8 Vol., (Dar al-Fiker Press), 1966, known as Hashiyat Ibn cAbdin, V. 5, p. 52,

    From al-Zahiri rite, Ibn Hazm (D. 456 H.) relates that "the air cannot be owned, since it is not stable . . . and selling the air is illegal . . . but if someone argues that the owner is selling the position (space) and not the air, the answer is, there is no space without air. Thus he is selling emptiness which is unlawful." al-Muhalla, (Maktabat al-Jamhuriyyah, Cairo, 1972), V. 9, p. 634.

CHAPTER ONE

From the Zaydi rite as-San^cani relates that if the owner of upper floors of a dwelling wants to sell that part, he may not, since he is selling the right of height and not ownership, the air cannot be sold, and the selling of rights are unlawful. al-Taj al-Mudhahab, (Halabi press 1947), V. 3, p. 184.

15. Al-^cAbadi concluded: "All jurists agree that if a building consists of upper and lower floors, it is permissible that upper floors be owned by one party and lowers by another. . . The jurists recognize layer ownership (Mulkiy'yat al-Tabaqat)". Hashiyat Ibn ^cAbdin, op. cit. V. 5, p. 443-445, Fath al-Qadir, V. 5, p. 204, al-Bahr al-Zakhar, V. 4, p. 96-102. Al-^cAbadi, op. cit. V. 1, p. 221.

16. They even give the owner of the upper floor the right to build that part; so he -- the owner of the upper floor -- can erect his building. "The owner of the upper floor, if the lower floor collapsed, has the right to build the lower floor [on his own expense] if its owner refused to do so; so he [the owner of the upper floor] may erect his part and has the right to prevent the owner of the lower floor from using the lower floor, unless the owner of the lower floor reimburse him all the expenses." Hashiyat Ibn ^cAbdin, op. cit. V. 5, p. 231.

17. From the Shafi^ci rite in Qawa^cid az-Zarkashi (d. 794 H.): "The air will be sold with its origin [the ground]; if the owner of the ^carsa [open space inside the property such as courtyard] sold the air to other person for the purpose of erecting a Janah [cantilever]; such lease is illegal . . . since the air is a right and not ownership." al-^cAbadi, op. cit., V. 1, p. 214.

18. From the Maliki rite in al-Dhakhirah "The right of air may be sold for the purpose of cantilevering Janah, without selling its origin (the ground)." op. cit., V. 5, p. 249.

"All the Hanabali jurists allow taking compensation of projecting cantilevers (Rawashin) between neighbors, because the air is owned by the land owner; thus it is possible to take compensation since it is possible in the case of lands . . . except Abu Ya^cla al-Hanbali who disapproved such transaction." Al-^cAbadi, op. cit., V. 1, p. 216.

19. A. Fyzee, Outline of Muhammadan Law, (Oxford U. Press), 1974, p. 276.

20. Pl. 'awqaf, another word used is 'habs, Pl. ahbas. Ibn ^cAbdin, op. cit. V. 4, p. 337.

21. Qureshi, Land Systems in the Middle East, working draft, 1954, Ch. IV, p. 1.

22. Ibn Qudamah, op. cit., V. 5, p. 597.

23. According to Hidaya, Waqfs in its legal sense means "the setting apart of a given piece of property, in such a way that the rights of

CHAPTER ONE

the person who has been made owner continue, while the use and enjoyment are for the advantage of some charitable purpose." Qureshi, op. cit., Ch. III, p. 15.

According to Abū Hanīfa, Waqf is the tying-up of the substance of a property in the ownership of the wāqif (the founder of waqf) and the devotion of its usufruct, amounting to commodate loan (ᶜāriya) for some charitable purpose. Fyzee, op. cit., p. 279.

24. Fyzee, op. cit., p. 279.

25. Among those scholars there is, for example, Fyzee who states "The institution of Waqf was in some respects a handicap to the natural growth and development of a healthy national economy . . ." op. cit. p. 277.

    See also F. Ziadeh, Property Law in the Arab World, (London, Graham & Trotman Limited, 1979), p. 64.

    G. Heyworth, Dunne, Land Tenure in Islam, The Muslim World Series, No. 3, Cairo 1953, p. 20.

26. A. Qureshi, op. cit., Ch. 3, p. 23.

27. See, for example, Qureshi's definition of waqf "as a transaction in virtue of which the right of ownership, whether of a movable or immovable, is transferred irrevocably to a religious or charitable institution, in such a way that the thing transferred can never again be made the subject of a pledge or alienation," op. cit., Ch. 3, p. 15.

28. F. Ziyadeh relates "The nāzir himself is not entitled to take the waqf property on lease even at the current rate for similar properties." op. cit., p. 21.

    A. Qureshi indicates that "strictly speaking, the administrator of the waqf is not expected to pocket any of the income from the waqf" op. cit., Ch.3, p.16.

29. Fyzee, op. cit., pp. 277-278.

30. Ira Marvin Lapidus, Muslim Cities in The Later Middle Ages, (Harvard U. Press, Cambridge, Massachusetts 1967), p. 75.

31. Al-Miᶜyāru al-Muᶜrab is a documented fatwas (legal opinions) regarding disputes that took place in Northern Africa and Spain. Published by the Ministry of Endowments and Islamic Affairs in Morocco, 1981, 12 Volumes. V. 7, p. 89.

32. This Rubāt is in al-Misfalah quarter and was built by Muhyi ad-Dīn Qāri Bukhari. The trustee is his son ᶜIsam ad-Dīn -- my grandfather who died in July 1983.

33. One U.S. Dollar = 3.48 S.R. (summer 1983).

CHAPTER ONE

34. The document is in Appendix 1.

35. See Appendix 2.

36. Al-Wansharīsi, op. cit., V, 7, Ibn Taymiyyah, Majmū[c] Fatāwi ash-Shaykh Ibn Taymiyyah, (Maktabat al-Ma[c]ārif Press, Morocco), 36 Volumes. V. 31, p. 5-268.

37. Al-Wansharīsi, op. cit. V. 7, p. 220, 231.

38. G. Heyworth-Dunne, op. cit., p. 18

39. Ibid., p. 18.

40. It was related by at-Tirmidhi who said that "it is a good and sound tradition." See Ibn Qudāmah, op. cit. V.5, p. 598.

41. Sahīh al-Bukhāri, op. cit., V. 4, p. 3.

42. To mention one tradition only, where Ka[c]b bin Malik said: "I said, 'Oh Gods Apostle! for the acceptance of my repentance I wish to give all my property in charity for God's sake through his apostle.' He said, [the prophet] 'It is better for you to keep some of the property for yourself' I said, 'Then I will keep my share in Khaibar.'" Sahih al-Bukhāri, op. cit., V. 4, p. 16.

43. Ibn [c]Ābdīn, op. cit. V. 1, p. 560.

44. Sahīh al-Bukhāri, op. cit., V.4, pp. 27. See also, Ibn Qudāmah, op. cit., V.5, p. 597-598.

45. All the rights refer to this tradtion and develop the rules of Waqfs from it. See, for example, Ibn Qudāmah of the hanbali rite in al-Mughni, op. cit. V. 5, pp. 597-648.

46. Sahih al-Bukhari, op. cit., V.4, p. 13.

47. "Narrated by 'Anas: When the holy verse, 'You will not attain piety until you spend of what you love' (3:92) was revealed, Abu Talha went to Allah's Apostle and said, 'Oh Allah's Apostle Allah, the Blessed, the Superior states in His Book: 'You will not attain piety until you spend of what you love' (3:92) and the most beloved property to me is Bairuhā (which was a garden where Allah's Apostle used to go to sit in its shade and drink from its water). I give it to Allah and His Apostle hoping for Allah's Reward in the Here-after. So, oh Allah's Apostle! Use it as Allah orders you to use it.' Allah's Apostle said: 'Bravo! Oh Abu Talha, it is frutiful property. We have accepted it from you and now we return it to you. Distribute it amongst your relatives.' So, Abu Talah distributed it amongst his relatives, amongst whom were Ubai and Hassan . . . " Sahih al-Bukhari, op. cit., V.4, pp. 16-17.

CHAPTER ONE

48. There are well developed rules regarding this matter, for example: 1) If a person donated an object to another, he does not have the right to use it without the donee's consent, but if he donated an object for all Muslims, such as Mosque, then he may use it. 2) If the donor stipulated that the guardian should distribute the usufractory income as he wishes, he may do so. For detail, see Ibn Qudāmah, op. cit., V. 5, pp. 601-630. Ibn [c]Ābdīn, op. cit. V. 4, pp. 337-412.

49. Heyworth-Dunne, op. cit. p. 19.

50. Al-Wansharīsi, op. cit. V. 7, p. 209.

51. Objects that are prohibited by Islam, such as alcohol, cannot be donated. Objects that are consumed through use, such as food, may not be donated. For detail, see Ibn Qudamah, op. cit., V. 5, pp. 640-642.

52. For example, a horse that is donated for war, if it becomes old, may be sold and by using the money other equipment can be bought. For more detail see Al-Mughni op. cit. V. 5, pp. 631-638.

    The jurist A. al-Haffar of Granada was asked about the selling of one faddan of a useless waqf land. His answer was that if the land is totally useless then it can be sold. Al-Wansharīsi, op. cit. V. 7, pp. 199-200.

    Al-Haffar was also asked about a waqf that is dedicated for a mosque. The waqf was abutting the mosque. The residents wanted to add the waqf to enlarge the mosque. He answered that joining the waqf and the mosque to enlarge it is permissible. Ibid. p. 204.

53. Al-Wansharīsi, op. cit. V. 7, pp. 15-16

54. Also the term, "Nasha'a fi hijrih" means "He grows up within his guardianship or within his care." For both meanings, see for example, Tartib al-Qamus al-Muhīt, edited by at-Tahir A. az-Zāwi, (Beirut, Dar al-Ma[c]rifah Press, 1979), V. 1, pp. 592-593.

55. See Ibn Qudāmah, op. cit. V. 4, p. 505. Al-Dhakhīrah, op. cit. V. 8, p. 294. Ibn [c]Ābdin, op. cit. V. 6, p. 142.

56. Surat al-Nisa (5-6).

57. See, for example, Ibn Qudāmah, op. cit. V.4, pp. 505-527. Al-[c]Abadi's summary of all the different interpretation of the different rites in his Ph.D. dissertation, op. cit. V.2, pp. 81-96. Al-Wansharisi, op. cit. V. 9, p. 243, Ibn Taymiyyah, op. cit, V. 30, pp. 18-53

58. Al-[c]Abadi, op. cit. V.2, p. 81.

CHAPTER ONE

59. Such as al-Jarjani, Ibn al-[c]Arabi, Ibn Taymiyāh. See al-[c]Abādi, op. cit. V.2, pp. 82, 83.

60. This opinion is shared by almost all jurists as isrāf, see for example the opinion of the Hanafi rite in al-[c]Abadi, op. cit. V.2, p. 85.

61. The jurists who support this opinion rely on much evidence such as the case when [c]Abd'ullah bin Ja[c]far bought a house for sixty thousand Dirham; and [c]Ali bin Abi Talib demanded from the Caliph [c]Uthman (the third Caliph) to use the right of trusteeship against [c]Abd'ullah. Al-Mughni, op. cit. V.4, p. 519.

62. See, for example, Ibn Qudamah, op. cit. V.4, p. 505. For Abu Hanifa's opinion see Ibn [c]Abdin, op. cit. V. 6, p. 147.

63. A third type of trusteeship recognized by jurists and very similar to waqf, is that in which a person bequeaths the usufruct of some of his property to a friend for specific period of time. During that period the inheritors have the ownership while the friends have the usufructary right. Al-[c]Abadi, op. cit. V.1, p. 235.

    If the person who has the usufructary right uses the property, then the property is within the trusteeship form of submission. The inheritors must wait. But if he himself does not use it, then, we have the dispersed form of submission. One party owns (inherits), the other controls (friend), a third uses.

64. Well-known tribe in Mecca.

65. See Ibn Qudamah, op. cit. V.4, p. 507.

66. Ibid., V.4, p. 507.

67. For detail see N.J. Habraken Transformations of the Site, (Awater Press), 1982, pp. 18-52.

68. Al-Madkhal 'ilā Nazariyyat al-'Iltizam al-[c]Ammah fi al-fiqh al-'Islami, A. al-Zarqa, (Damascus University Press, 1961), p. 43.

    It is defined by Abu Zahrah as "the right of the defined benefit of one property over the other, regardless of the owner" al-Mulkiyyah wa Nazariyyat al [c]Aqd, M. Abu Zahrah, 1939, p. 75.

69. 'intifā[c]an wa 'irtifāqan.

70. Al-Hawi al-Qudsi, p. 15, see al-[c]Abādi, op. cit. V.1, p. 188.

71. This case was used extensively by Muslim jurists to develop rules regarding servitude rights, such as Ibn Qudamah, Imam Malik.

72. Ibn Qudāmah, op. cit. V.4, p. 548, also al-Muwatta op. cit., p.529.

CHAPTER ONE

73. Kitāb al Majmū^c, by an-Nawawi, edited by Muhammad N. al-Muti^ci, (Maktabat al-'Irshad Press, Jeddah), V. 12, p. 406.

74. Ibid, al-Wansharīsi reports a case in which a stream of water for a group of people was damaged and they were forced to run it through their neighbors' land. It was ruled that the land owner could not be forced to rpovide a servitude. op. cit., V. 8, p. 398.

75. Al-Mudawwanah, op. cit. V.4, p. 269.

76. Kitāb al-'I^clān bi 'Ahkām al-Bunyān, Ibn ar-Rami (d. 734/1334), Edited by A. ad-Dawdi; Majallat al-Fiqh al-Maliki, (published by the Ministry of Justice, Morocco, 1982), Issues 2,3,4, p. 439.

    In another case, 'Asbagh was asked about a man who owns a land inside other people's lands. The owner of the internal land does not pass from a specific land, but depending on the section which has been sowed, he passes from different areas. The owner of the internal land decided to build. The owners of the external lands prevented him. Asbagh answered that they cannot stop him. Additionally, if the owners of the external land want to wall their lands, they have to agree and develop a passageway to be used by the internal owner. Ibid, pp. 437-438.

77. Al-Wansharīsi, op. cit., V. 9, pp. 33-35.

78. Ibid. V. 5, p. 143. Regarding this case, there was another opinion by Abu ad-Diyā'. His opinion was that the owner of the external part have the cōice of accepting the subdivision and allowing the owner of the internal part to pass through, or to redivide the land by giving the internal owner a larger share.

79. Al-Wansharīsi reports a case in which a man sold part of his house. The only access for the gulley of water was through the roof of the part which had been sold. The buyer stopped the flow of water. The jurist ruled that the buyer either had to allow the flow of water or cancel the sale. Ibid, V. 9, pp. 53-54.

80. For the Hanafi School of Law, see Ibn ^cĀbdīn, op. cit., V. 5, p. 79; for the Maliki rite, al-Mudawwana, op. cit., V. 3, p. 261; for the Shafi^ci rite, an-Nawawi op. cit., V. 12, p. 406

81. Ibn ^cĀbdīn, op. cit., V. 5, pp. 77-79

82. For the Zaydi rite see al-Taj al-Mudh'hab, A. al-San^cani relates "the right of way and right of running water through a gulley, may not be rented, since the benefit is not owned" op. cit., V.2, p. 343.

83. From the Maliki rite, Sahnūn asked Ibn al-Qāsim "Can a person rent from his neighbor a gulley for waste water?" Ibn al-Qāsim replied, "Yes." Sahnun: "Can a person rent from his neighbor a gulley for rain water?" Ibn al-Qāsim replied: "I do not prefer such rent, since

CHAPTER ONE

it is not known whether it will rain or not" Sahnūn asked: "Can a person rent from his neighbor the right of way through his neighbor's house to reach his own house" Ibn al-Qāsim answered, yes. al-Mudawwanah, op. cit. V.3, p. 393.

Sahnun inquired, "Can a person buy from his neighbor the right of way only, without buying any physical elements of his neighbor's house?" Ibn al-Qasim replied, yes. Ibid., V.4, p. 270.

For brief summary of other rites see al-ᶜAbadi, op. cit. V.1, pp. 188-189.

84. A summary from al-Zarqa, op. cit. V.1, p. 266.

85. Ibn Rajab's definition of privatation (Ikhtisas) is "The private right of an individual to benefit from it [the property] it, no one could emulate him, and it is not for leasing and compensation; . . . such as sitting in a mosque. The person who is sitting has the right until he moves." al-ᶜAbadi, op. cit. V.1, p. 110.

M. bin Abi Musa went to the market and saw the people reserving spaces in it, and said: "They (the people who reserved spaces) can not do such thing; the markets of Muslims just like their mosques, who is first in occupying a space has the right to it till he leaves." Al-Balādhuri, Futah al-Buldan, (Beirut, Dar al-Kutub al-ᶜIlmiyyah Press) 1978. p. 297.

86. Tamlīk al-Manfaᶜah is different from Mulk al-Manfaᶜah. Tamlīk is the action of the owner to confer to others the usufruct by his own will, while Mulk al-Manfaᶜah means the ownership of usufruct like the peasants who own the right to use lands. The former is less permanent than the latter.

Tamlīk al-'Intifaᶜ is also different from Tamlīk al-Manfaᶜah. The difference is explained in the permissive form of submission (Appropriating Places).

87. Tahdhīb al-Furūq, op. cit. V.1, p. 193.

88. Ibn Qudāmah, op. cit. V.5, p. 433. Al-Qarafi states that it is an absolute ownership for specified period. The lessee even can lease the property as the owners do. op. cit. V. 1, p. 187.

89. Al-Mughni, op. cit., V.5, p. 450.

90. This is the opinion of Mālik and ash-Shāfiᶜi and Ibn-Qudāmah. Ibid., V. 5, p. 448. See also Ibn ᶜĀbdīn, op. cit., V. 6, p. 76.

91. For example, the agreement over the rent and the period should be clear. Ibn Qudamah relates that "if the agreed upon period is Christian year or Persian year or Coptic year; it is valid as long as the two parties understand the differences between those designations." al-Mughini, op. cit. V. 5, p. 435.

CHAPTER ONE

Suhnūn asked, "If a man leased his house for twenty Dīnār per year, is it possible for the lessee to be allowed to repair the house if needed from the rent?" Ibn al-Qasim answered, "Yes." al-Mudawwanah, op. cit., V. 3, p. 446.

Suhnun asked, "Is it possible to rent a house or path on the condition that I will do the repairs as rent? Ibn al-Qasim answered, "No, unless he deducts the repair cost from the rent (since the repair cost is unknown and therefore cannot be specified to the lessor)" Ibid., V. 3, p. 447.

92. Al-Mughni, op. cit., V. 5, p. 458.
Disagreement arises regarding continuous maintenance such as cleaning the cesspool when it is filled up. Ibn Qudamah and Abu Thawr argues that it is the responsibility of the lessor, since the benefit is not complete without it. "It is the custom among people." Ash-Shafᶜi's opinion is that it is the lessee's responsibility if he caused such things through careless action. Ibid., V. 5, p. 458.

Ibn ᶜĀbdīn's opinion, from the Hanafi rite, is that cleaning the cesspool is the responsibility of the lessor, but he is not compelled to do so. While the lessee has the right to terminate the lease. op. cit. V. 6, pp. 79-80.

Ibn ar-Rami's opinion is that cleaning the cesspool is the responsibility of the lessor at the outset. If the property cannot be inhabited without such cleaning, then the lessor will be compelled to clean it. Ibn al-Majishūn's opinion is that it should be left to the customs of the town. ᶜAbdul-Malik relates, "our custom on Andalus [Spain] is that sweeping the house is the lessee's [responsibility]; sweeping the toilet is the lessor's [responsibility]. op. cit., p. 368.

93. Al-Mughni, op. cit., V. 5, p. 459. 'Ibn ᶜĀbdīn, op. cit., V. 6, pp. 76-77.

Sahnun asked, "If I rented a house, who is responsible for maintaining the walls and the rooms?" Ibn al-Qasim answered "the owner of the house [is responsible]. We asked Malik about the man who leases his house and stipulates that the leasee should repair a broken wooden beam or maintain walls? Malik said, 'Such a thing is not acceptable unless it [the expense] is deducted from the rent', which means the maintenance is totally the owner's responsibility." al-Mudawwanah, op. cit., V. 3, p. 447.

94. Al-Mughni, op. cit. V. 5, p. 457.

95. Al-Wansharisi, op. cit., V. 8, p. 285

96. Ibn ar-Rami, op. cit., pp. 316-317, al-Wansharīsi, op. cit., V. 8, p. 267.

97. Sahnūn asked, "If I rented a house from a man, and it rained, do I have the right to leave [terminate the lease] or will the owner be

compelled to plaster the house?" Ibn al-Qāsim answered, "If the owner plasters the house then you have to continue with the lease, if he refuses then you may terminate it if the damage is a clear one. But the owner should not be forced to plaster the house." Sahnūn inquired about a rented house in which a wall or a room collapsed and such collapse exposed the house -- in terms of privacy -- "Is the owner compelled to rebuild the collapsed parts?" Ibn al-Qāsim replied, "The owner is not compelled to rebuild unless he wishes to do so, and if such exposure would damage the leasee, then the leasee has the right to leave or stay in the leased house." al-Mudawwanah, op. cit. V. 3, p. 455. Also, see Ibn ᶜAbdīn, op. cit. V. 6, p. 74-77.

98. Sahnūn asked about the collapse of the parapets of a house. Ibn al-Qāsim responded, "The parapets do not damage the livability [as a function] of the house." al-Mudawwanah, op. cit, V. 3, p. 455.

99. The levels of doors and windows is lower than walls in the physical form. We may say doors and windows in the same level as furniture because the movement of the windows may not disturb the furniture and vice versa. However, since doors and windows are always fixed to walls and often are not, a personal belonging like furniture they are considered the owner's responsibility. Moreover, if a door or a window is damaged while the lessee is occupying the house, then it is not the lessor's responsibility. In other words, the windows and doors as lower level elements than walls are not within the owners responsibility. This is a conclusion from the cases discussed by Ibn Qudāmah, op. cit., V. 5, pp. 432-562.

100. Ibn ar-Rami, op. cit., pp. 357-358.

101. These opinions are documented by al-Māziry. The opinion of jurists of Madina is that the cistern water belongs to the lessee. al-Wansharīsi, op. cit., V. 8, pp. 429-430, Ibn ar-Rami, op. cit., pp. 380, 381

102. al-Mudawwanah, op. cit., V. 3, p. 452.

103. Ibn-Qudāmah, op. cit., V. 5, pp. 475-476.

104. Al-Mudawwanah, op. cit., V. 3, pp. 452.

105. Ibid., V. 3, p. 456.

106. Ibn ar-Rami, op. cit., pp. 302.

107. Later, we will deal with the relationship between the physical environment and the social environment.

108. The party wall between two neighbors which is owned by one and used by the other, is a case where the spots may be leased, and the user brings lower level elements -- wooden beams -- to utilize the spot. It is also considered as an easement right. In any case it belongs

CHAPTER ONE

to the permissive form of submission. We will explore it in the "Interface Between parties."

109. Muzara[c]ah is literally amodiation or share-cropping, it is "a contract by virtue of which an owner entrusts land to a person to plant it with seasonal crops or vegetables as against receiving a share of the crops of vegetables." Ziyadeh, Property Law in the Arab World. (London, 1979), p. 70.

Mugharasah, "is a contract by virtue of which an owner entrusts land to a person who undertakes to plant it with fruit trees as against receiving a portion of the land." Ibid., p. 70.

Mukhābarah, originated from Khabīr or cultivator, is a type of contract in which the user has minimum control, because the owner furnishes draught cattle, implements and seed corn, and the conditions of the tenant are proportionately less remunerative. Qureshi, op. cit., part 1, Chapter 3, p. 18.

Musāqāt, from Saqā or irrigated, is the type of contract in which the user has almost no control. It is "a contract by virtue of which an owner of trees or crops entrusts his trees or crops to a person to look after and water them until they bear fruit or ripen as against a specific portion of such fruits or crops." Ziyadeh, op. cit., pp. 70-71.

110. Musāqat is considered totally legal by Muslim jurists since no speculative profit is involved. See Ibn Qudāmah, op. cit. V. 5, pp. 416-432. Al-Wansharisi, op. cit., V. 8, pp. 137-220.

111. Known as Riba, (usury) is the fixed income of investment without sharing a risk.

112. Related by Muslim. See Abu al-'A[c]la Al-Mawdūdi, Mulkiyyat al-Ard fī Al-Islam. (Dar al-Qalam press, Kuwait, 1969), p. 50.

113. The tradition is related by Mujahid who says that Rafi[c] had said that the Prophet had debarred them from such a business which was profitable for them. By business he meant that if anyone owned land he leased either for cash or in kind. The Prophet said, "If anyone of you has land, you should give it free to your brethren or cultivate it yourself." Related by at-Tirmidhi. Ibid., p. 51.

Other traditions which support this opinion are narrated by Jābir bin [c]Abdullah. He reported that the Prophet said, "If anyone has land, he should cultivate it himself. And if he could not do that he should give the land to his brother." Related by Muslim Ibid., p. 53.

114. A. al-Mawdūdi wrote a book specifically on this subject, in which he contests all the traditions concerning this topic. (Ibid., Chapter 3, p. 49.) He also gives examples of all the opinions of rites and a survey of all the companions leases.

CHAPTER ONE

115. Al-Mughni, op. cit., V. 5, pp. 416-432.

Ibn Qudamah refutes those traditions by referring to zayd bin Thābit who said "I know more than him, (refering to Rafi[c] on the leasing issue) he had heard the prophet while two men were fighting (over the contract of land)" Ibid., V. 5, p. 419.

Other traditions related by Ibn [c]Abbas that "the Prophet went towards some land which was flourishing with vegetation and asked to whom it belonged. He was told that such a person took it on rent. The Prophet said: It would have been better (for the owner) if he had given it to him gratis rather than charging him for a fixed rent." Sahih al Bukhari, op. cit., V. 3, p. 484.

116. Heyworth Dunne, op. cit., p. 13.

117. We will explore this issue in "revivifying deadlands."

118. Related by Abu Dāwūd, al-Mawdudi, op. cit., p. 27.

119. Regarding this Abu Yusuf states that "their (those who became Muslim) blood is taboo, whatever property they had before accepting Islam is theirs, including their lands. It is [c]ushri land, just like in Madina where the people accepted Islam as a religion with the Prophet. As in Taif and Bahrean . . . they may sell and inherit their lands." Kitab al-Kharaj, (Dar al-Ma[c]rifah Press, Beirut), p. 63.

120. [c]Umar, the second caliph, ordered his governors in Iraq and Syria to recognize the ownership of those who accepted the treaty. (Kitab al-Amwal, 'Abi [c]Ubayd al-Qasim bin Salam, (d. 224 H.) Dar al-Fikr Press, p. 133). A famous example of this treaty is the Najran treaty. See al-Balādhuri (d. 279/892) op. cit., pp. 75-79.

121. Ibid., p. 49-66.

122. Ibid., p. 36-42.

123. This opinion was supported by Mu[c]ādh and [c]Ali, see al-'Amwāl, op. cit., p. 75.

124. al-Balādhuri, op. cit., p. 265. For detail about as-Sawād land in Iraq see, The Islamic Law of Nations, by Majid Khadduri, (The Johns Hopkins press, 1966), p. 269, al-Kharaj (Abu Yūsuf) op. cit., p. 18-35.

125. al-Blādhuri, op. cit., p. 268. This opinion was supported by most Muslim jurists as Malik Bin Anas, Ibid., p. 433.

Also see, Kitab al-Kharaj by Yihya Ibn 'Ādam al-Qurashi (d. 203 H.

CHAPTER ONE

during al-Ma'mūn's reign), (Dar al-Ma[c]rifa Press, Beirut), pp. 22 and 54. We will refer to it as Ibn 'Ādam.

126. Al-Baladhuri, op. cit., p. 433.

127. Ibn [c]Ābdīn, Op. cit., V. 4, p. 191.

128. Ibn 'Ādam, op. cit., p. 24.

129. This opinion was shared by many jurists, such as Mālik, Abi Lylā, Muhammad bin al-Hasan, al-Balādhuri, op. cit., p. 434.

Ibn [c]Abdin states that the ruler may help the possessor by lending him from the Treasury to be invested in the land and then take the Kharaj. op. cit., V. 4, p. 191.

130. Al-Balādhuri, op. cit., p. 434. This opinion is shared by Ibn Abi Dhi'b.

131. There are many other regulations depending on the nature of the land, whether it is irrigated by rain water, or through efforts made by the inhabitants through wells, etc. See, for example, Ibn [c]Abdīn, op. cit., V. 4, pp. 191-192.

132. All the rites uses the word Ikhtisās (privatation) except the Hanafi and Zaydi rites they uses the word Haq (right). See al-[c]Abadi, op. cit., V. 1, p. 164.

133. al-Qawā[c]id, by Ibn Rajab (from the Hanbali rite, d. 795/1393) Maktabat al-Khanji, Cairo, 1933, pp. 188-195.

134. Mulk al-intifa[c] is the ownership of benefit, while mulk al-Manfa[c]ah is the ownership of usufruct. al-Qarāfi, op. cit., V. 1, p. 187.

135. Tahdhīb al-Furuq, op. cit., V. 1, p. 193.
Al-[c]Iz bin [c]Abd al-Salam gives some examples of such rights as the privatation of demarking dead lands to be revivified, the privatation of market seats and mosque places, the privatation of places in schools and waqfs, the privatation of endowed shops in the roads (al-Khanat al-Musabbalah fi al-Turuqat). al-[c]Abadi, op. cit., V. 1, p. 162.

136. Utilized by building on it ('ihya'). This issue will be explored in the section dealing with revivifying dead lands.

137. Minā is one of the sacred places where people have to stop during pilgrimage in Mecca.

138. al-Mughni, op. cit., V. 5, pp. 576-577.

139. Ibn al-Ukhuwwa, Ma[c]ālim al-Qurba fi Ahkam al-Hisba, (Cambridge, England, 1937), p. 78.

CHAPTER ONE

140. Wafā' al-Wafā, by as-Samhūdi, 4 vol. (Dar 'ihyā' al-turāth al-^{c}arabi press, Beirut), V.2, p. 748.

141. Al-Balādhuri, op. cit., p. 297.

142. A. Ya^{c}la al-Hanbali, (d. 458 H.), al-Ahkam al-Sultaniyyah, (Cairo, al-Halabi press, 1966), p. 226.

143. Al-Māwardi, al-Ahkam al-Sultaniyyah, d. (450/1058) (Cairo, al-Halabi press 1960), p. 188.

144. Ibn Rajab, op. cit., p. 199.

145. Al-Māwardi, op. cit., p. 188.
Abu Yūsif relates, "No individual has the right to do anything which will harm the Muslims in their passage. The Imam (ruler) does not have the right to allot (places) from the Muslims roads which harms them." Kitab al-Kharaj, op. cit., p. 93.

146. Al-Suyuti, al-Hawi Lil Fatawi, V. 2, p. 201, cited by al-^{c}Abadi, op. cit., V. 1, p. 256.

147. al-Hathloul, Tradition, Continuity and Change in the Physical Environment, (unpublished Ph.D. Dissertation, M.I.T., 1981), p. 65-69.

148. The same conclusion may be derived from Ahmad's statement, "The first person coming to a shop at dawn has the right to occupy it until night. This was the practice in al-Madina market in the past." The statement was narrated by Ibn Qudāmah, op. cit., V. 5, p. 576.

149. Al-Balādhuri, op. cit., p. 293.

150. Al-Ya^{c}qūbi, Tarīkh al-Ya^{c}qūbi, (Dar Sader Press, Beirut, 1960), 2 Volumes, V. 2, p. 399.

151. Al-^{c}Ali, al-Basrah fi al-Qarn al-'Awwal., published Ph.D. dissertation, (Oxford U.), (al-Ma^{c}arif Press, Baghdad, 1953), pp. 238-240.

152. Lapidus, op. cit., pp. 59-60.

153. Al-Māwardi relates that the fināʾ -- spaces adjacent, around or along a building -- of "Mosques and Jami^{c}s can be appropriated, but if such appropration ('irtifaq) harm the prayers or residents of the mosque (such as students and scholars) then they will be prevented, and the ruler is not allowed to permit such appropriation. The prayers has the right. But if (the appropriation) does not cause harm; then, they may appropriate the places." al-Ahkam al-Sultaniyyah, op. cit., p. 188, also see A. al-Hanbali, op. cit., pp. 225-226.

CHAPTER ONE

154. This classification is recognized by many Muslim jurists. See, al-[c]Abādi, op. cit., V.2, p. 29. Al-Majallah, Article 1248.

155. Ibn [c]Ābdīn, op. cit., V. 6, p. 431.

156. Al-Māwardi, op. cit., p. 177.

157. The Hanafi rite defines it as what is not owned by any one and not regulated to towns as roads, or is outside the town whether it is close or far. Abu Yūsif defines it as "the land that is not utilized because of the absence of water. . . or remote from the urbanized areas." Al-[c]Abādi, op. cit., V.1, p. 307.

    The Hanbail rite defines it as "what is not owned by any one or has no trace of urbanization in it." Ibn-Qudāmah, op. cit., V.5, p. 563.

    The Māliki rite defines it as "the land that is not owned by any person and is not useful (because it is not utilized)". Al-[c]Abādi, op. cit., V.1, p. 307.

158. Al-Māwardi, op. cit., p. 177, A.Y. al-Hanbali, op. cit., p. 209, this is also the opinion of Abu Hanīfah, al-Mughni, op. cit., V.5, p. 567.

159. This is the definition in al-Kharaj, op. cit., p. 63.

160. Sahīh al-Bukhāri, op. cit., V.3, p. 306.

161. Sunan al-Bayhaqī, related by [c]A'isha, the Prophet's wife. Also Ibn 'Ādam, op. cit., p. 91.

    Other tradition narrated by Samrah B. Jundub who mentioned that the prophet said "He who walled (erected) a wall around a piece of land owns it." Al-Kharaj, op. cit., p. 65.

162. Al-Muwatta, op. cit., p. 528, translated, op. cit., p. 346.

163. Narrated also by al-Nisā'i and Ibn Habān.

    In fact, the traditions regarding revivification are ample. Every book of law is full of such traditions. To name two, Abi [c]Ubayd (d. 224 H.) documented six traditions in his book al-Amwal, op. cit., pp. 362-366. Ibn 'Ādam documented seventeen traditions in his book, al-Kharaj, op. cit., pp. 84-90.

164. Ibn 'Ādam, op. cit., p. 63.

165. Al-'Amwal, op. cit., p. 369

166. Al-Mughnī, op. cit., V. 5, p. 563.

167. This is a brief summary from al-Māwardi, op. cit., p. 190-191, A.Y. al-Hanbali, op. cit., pp. 228-229, al-Mughni, op. cit., V. 5, p. 563-564. Ibn [c]Abdīn, op. cit., V. 6, p. 431-437, al-Amwal, op. cit., pp. 362-371.

CHAPTER ONE

168. Al-Māwardi, op. cit., p. 177, A.Y. Hanbali, op. cit., p. 209.

169. This is the opinion of A.Y. al-Hanbali, op. cit., p. 209.

170. Al-Māwardi, op. cit., p. 177.

171. Ibid., p. 177. For example, the Umayyad caliph [c]Umar B. [c]Abdul-[c]Aziz said, "He who drain water from a thing [savanna land], it is his (land)." al-Amwal, op. cit., p. 361-362.

172. This is a summary of the classification made by A.Y. al-Hanbali, op. cit., p. 227-240. al-Mawardi, op. cit., p. 190-198, Ibn-Quadāmah, op. cit., V. 5, p. 567-580.

173. A summary from al-Kharaj, op. cit., pp. 57-62, Ibn 'Ādam, op. cit., pp. 63-81, Ibn [c]Abdīn, op. cit., V. 4, pp. 193-194, al-Mughni, op. cit., V. 5, pp. 567-580, al-Mawardi, op. cit., pp. 190-198.

174. Al-Balādhuri, op. cit., p. 295.

175. Ibid., p. 134.

176. From the Hanafi rite "whoever owns property whether he is Muslim or Dhimmi [Jews and Christians] whatever the means; his ownership does not lapse because of negligence. Even if he owns a dwelling that is ruined for years or centuries, [the dwelling] still belongs to the owners and will not be considered dead-land." Zawābit al-Fiqh, p. 37A, cited by al-[c]Abadi, op. cit., V. 1, p. 377.

From the Hanbali rite Ibn Qudamah states that property "which is bought or received as a gift can not be owned [by others] through revival." Al-Mughni, op. cit., V. 5, p. 563.

177. This opinion is mainly based on J.B. [c]Abdullah's statement: "The prophet permitted us [to pick up] sticks, whips, ropes and the like; a man picks it up and benefits from it." Sunan al-Bayhaqi, V. 6, p. 195. See al-[c]Abadi, op. cit., V. 1, p. 381. For detail see al-Qarafi, op. cit., V. 4, p. 33, Tahdhib al-Furūq, op. cit., V. 4 p. 65. They both discuss the opinions of different rites regarding picking up things, in detail.

178. Al-Balādhuri, op. cit., p. 344.

179. As-Samhudi, op. cit., V. 2, p. 753.

180. In al-Hidāya, "If a person revived dead-land and left it, during which time others cultivated it, then the second [reviver owns it] rightfully, since the first owned its utilization, not its neck [bare ownership]." V. 8, p. 138. Some Hanafi scholars, such as Abu al-Qāsim A. al-Balkhi, argue that revivification does not lead to ownership, rather it means ownership of utilizing the land utilization. al-[c]Abadi, op. cit., V. 1, p. 382.

CHAPTER ONE

181. Al-Mughni, op. cit, V. 5, p. 564.
Most jurists disagree with Malik's opinion. For example, Ibn-Qudamah contests such opinion. He argues that if a person revives dead-land and sells it, then the second owner will be permanently the owner of the land, even if he neglects it. Thus Malik's opinion is not valid. al-Mughni, op. cit., V. 5, p.564.

182. This is based on the Prophet's tradition, "the common [unowned] land belongs to God and his Prophet, then it is yours. He who revived dead land owns it; and the demarcator has no right after three years." al-Kharaj, op. cit., p. 65.

183. Abu Yūsif, op. cit., p. 65. He adds, "If he (the demarcator or the allotee) did not revive it within three years, he is then on an equal footing with everyone else." Ibid., pp. 101-102.

184. al-Bada'i^c, V. 6, p. 195. In al-Durar from the Hanafi rite, "if a person surrounded a piece of land in order to revive it, but did not do so within three years, then his right rescinds. The ruler may take it back from him and give it to others." V. 1, p. 306, cited by al-^cAbadi, op. cit., V. 1, p. 384.

185. Nihāyat al-Muhtag, V. 5, p. 340, al-Shafi^ci says "if one demarcates a piece of land and does not revive it within three years, then the ruler should repossess it and assign it to others, since assigning it to the first [reviver] was merely to revive it and thereby to benefit Muslims through its Kharāj or ^cUshr [tax]." Al-Hidāya, V. 8, p. 137, cited by al-^cAbadi, V. 1, p. 386.

186. Al-^cAbādi, op. cit., V. 1, p. 164. For the same opinion from the Hanbali rite, see A.Y. al-Hanbai, op. cit., p. 211. From the Shafi^ci rite see al-Mawardi, op. cit., p. 178.

187. Al-Mughni, op. cit., V. 5, p. 569.

188. Al-Balādhuri, op. cit., p. 356.

189. Ibn 'Ādam, op. cit., p. 93, many other incidents similar to this one took place. See al-Amwal, op. cit., p. 366-369, al-Kharaj, op. cit., pp. 61-62.

190. For example, from the Hanbali rite, Abu Ya^clā reports, "If the demarcator wishes to sell the demarcated land prior to revivification, he can not do so as it is unlawful. This is the opinion of A.b. Hanbal." A.Y. al-Hanbali, op. cit., p. 211. This is the opinion of the Shafi^ci rite too, see al-Mawardi, op. cit., p. 178.

191. A.Y. al-Hanbali, op. cit., p. 210. He also reports the Prophets tradition "He who walled ['ahāta hā'itan] a land has the right of it" which means that walling leads to ownership in agricultural lands and

CHAPTER ONE

does not lead to demarcation. Regarding this tradition 'Abu Yusuf explains that it means planting and irrigating the land, op. cit., p. 65.

192. Related by Rāfi[c] b. Khadīj, al-'Amwāl, op. cit., p. 364.

193. Al-Amwāl, op. cit., p. 367, Abu [c]Ubayd relates that the Umayyad caliph, [c]Umar b. [c]Abd al-[c]Aziz judged in such matters as [c]Umar, the second Caliph. Except that he "gave the owner of the unutilized land the right to take back his land by compensating the reviver for his expenditure, and if he could not [compensate him], the reviver could pay him the price of the land." That is the original owner of the land had to accept the price set by the reviver, if he could not compensate the reviver. Ibid. p. 367.

194. Ibn ar-Rami, op. cit., p. 440, Ibn Habīb adds, explaining the ratio of ownership, that the land will be evaluated as if it is vacant, the estimated price will be the value of the owner's share. The difference between such estimation and the value of the property after building will be the value of the builder's share. Ibid., p. 441.

195. Al-Amwal, op. cit., p. 369, Ibn 'Ādam relates that if a person built on other's land without their permission, then he has to demolish such building. But if he built with their permission, then he will have his expenditure op. cit., p. 99, also, Ibn ar-Rami, op. cit., p. 442.

196. This statement seems to be well known among jurists. See for example, A.Y. al-Hanbali, op. cit., p. 211. Al-Māwardi, op. cit., p. 178. Ibn-Qudāmah, op. cit., V. 5, p. 569.

197. Hāshiyat al-Bājūrī, V. 2, p. 39, from the Shafi[c]i rite, cited by al-[c]Abādi, op. cit., V. 1, p. 385. For the same opinion from the Hanafi rite see Ibn [c]Abdin, op. cit., V. 6, p. 433.

198. An example of this is the book of al-Kharaj which was written by the jurist Abu Yusuf to be used during and after the calipf Harun ar-Rashid's reign (170/786-193/809). For such disputes see also Ibn 'Adam, op. cit., p. 90-99, al-Amwal op. cit., pp. 362-371. Ibn ar-Rami's description regarding the resolution of such disputes indicates that these principles were still applied in Tunis. op. cit., pp. 439-443.

199. Al-Mawardi, op. cit., p. 177, al-Mawdudi, op. cit., p. 38. al-kharaj, op. cit., p. 64.

200. Tahdhib al-Furūq, op. cit., V. 3, p. 19.

201. Al-Kharaj op. cit., p. 64.

CHAPTER ONE

202. They all agree, "He who revives dead-land owns it whether with the permission of the Imam or not." For Ahmad b. Hanbal and A.Y. al-Hanbali's opinion see A.Y. al-Hanbali, op. cit., p. 209. For al-Shafi[c]i and al-Mawardi's opinion see al-Mawardi, op. cit., p. 177. For Ibn Qudamah's opinion, see al-Mughni, op. cit., V. 5, p. 563. For Malik's opinion see al-Qarafi, op. cit., V. 3, p. 8. For Abu Yusif's opinion see al-Kharaj, op. cit., p. 64.

203. Concluded by al-Mawdudi, op. cit., p. 38.

204. Al-Mawardi, op. cit., p. 177, also al-Mawdudi, op. cit., p. 38.

205. Related by Al-Bukhāri and Muslim, translated by A. N. Bussol, Forty Ahadīth, (Kazi Publications, Chicago, 1982), p. 54. See also al-Kharaj, op. cit., p. 62.

206. Ṣaḥīḥ al-Bukhari, op. cit., V.3, p. 397.
In fact many traditions were reported about the issue of expansion, thereby alluding to its existence. For example, "A person came to the Prophet and said, 'Massenger of God! What do you think of a man comes to me in order to rob my possessions?' The Prophet said, 'Don't surrender your possessions to him.' The man asked 'If he fought me?' The Prophet 'Then fight him.' The man, 'What do you think if he kills me?' The Prophet 'You will be a martyr.' The man, 'What do you think if I kill him?' The Prophet, 'He will be in fire.'" Related by Muslim, translated by Bussol, op. cit., p. 34.

207. Ibn [c]Ābdīn, op. cit., V.4, p. 181.

208. Related by Abu Dāwūd, al-Kharaj, op. cit., p. 96, al-Mawardi, op. cit., p. 187. al-Amwal, op. cit., p. 373.

209. Al-Mughni, op. cit., V.5, p. 571. Al-Amwal, op. cit., p. 350.

210. Sahīh al-Bukhāri, op. cit., V.3, p. 326, As-Sa[c]b B. Jaththāma said, "We have been told that God's Apostle made a place called An-Naqī[c] as Hima, and [c]Umar made Ash-Sharaf and Ar-Rabadha Hima [for grazing the animals of Zakāt]." Ibid.

211. See A.Y. al-Hanbali, op. cit., p. 222, al-Mawardi, op. cit., p. 185, Ibn Qudāmah, op. cit., 571, al-[c]Aabadi, op. cit., V.1, p. 246.

212. This is the opinion of all Muslim jurists with no exception, for example see Ibn Qudāmah, op. cit., V.5, p. 571.

213. This is a summary of the opinion of many jurists as al-Shāfi[c]i al-[c]Abadi, op. cit., V.1, p. 247.

214. A.Y. al-Hanbali, op. cit., p. 222.

215. Ibid., al-Māwardi, op. cit., p. 185.

CHAPTER ONE

216. Al-Kharaj, op. cit., 102.

217. Ibid., p. 103.

218. Al-Wansharisi, op. cit., V. 8, p. 131-132.

219. The jurists classify sources of water into many types. Depending on the effort made by the people to get it and the nature of the source and its amount, they judged which type may be owned by individuals and which is owned by all Muslims collectively.

220. This is the conclusion of Dr. al-[c]Abadi's study of all rites. op. cit., V.1, p. 247.

221. Al-Hāwī lil-Fatāwī, Jalāl ad-Dīn al-Suyūti, (al-Maktabah al-Tijariyyah, Cairo, 1959), V.1, p. 209.

222. Ibid., V.1, p. 220.

223. Ibid., V.1, p. 213.

224. A good example of such a distinction is made by [c]Umar as-Sināmi who lived in India in the fourteenth century and wrote a book about Hisba -- Nisāb al-'Ihtisab, (Dār al-[c]Ulum press, Riyadh, 1982), pp. 206-220 -- where all his judgment is based on whether the street is dead-end or not.

225. Al-Hāwī, V.7, p. 68B, cited by al-[c]Abādi, op. cit., V.1, p. 256.

Az-Zarkashi relates "The owners of the shared Darb [dead-end street] have the right to prevent those who want to build in its [the dead-end street's] air" al-Qawā[c]id, p. 167A, cited by al-[c]Abādi, op. cit., V.1, p. 214.

226. [lā yu[c]tabar ad-darar wa yu[c]tabar 'idhn ash-shurakā'] as-Sināmi, op. cit., p. 208.

227. Ibn Qudamah, op. cit., V.4, p. 553. Regarding digging wells in the road he adds, "it is not permitted in dead-end streets without the permission of all residents, since the street is owned by the residents." Ibid.

CHAPTER TWO

1. Al-Majallah, Majallat al-Ahkām al-ᶜAdliyyah, (al-Adabiyyah press, Beirut, 1302 H).

2. Harīm is defined in Article 1281 of Majallah.

3. Ottoman Empire and Islamic Tradition, Norman Itzkowitz, (the University of Chicago Press, 1972), p. 117.

4. Later the term "beglerbeglik" was replaced by "eyalet", ibid., pp. 42.

5. In 926/1520 the beglerbeglik of Rumeli was composed of thirty sanjaks, while Anatolia had twenty. Ibid., p. 42.

6. Ibid.

7. Ibid., p. 42-48.

8. Ibid., p. 46

9. For detail see Qureshi, op. cit., Ch. VIII, p. 1-3.

10. Timar incomes that are between 20,000 and 100,000 akchas were known as zeamets. One gold ducat was worth between 50 and 60 akchas in the fifteenth and sixteenth centuries. Itzkowitz, op. cit., p. 44.

11. Ziadeh, op. cit., p. 8.

12. Ibid., p. 10.

13. Conclusion made by Qureshi, op. cit., Ch. VIII, p. 12, and Ziadeh, op. cit., p. 10.

14. Mūjaz fi Ahkām al-Arādi, by Shākir al-Hanbali, (al-Tawfīq press, Damascus, 1928), p. 9-10.

15. Ibid., p. 19-20.

16. Qureshi, op. cit., Ch. VIII, p. 5.

17. Shākir, op. cit., p. 20.

18. Az-Zarqā, op. cit., p. 179.

19. Al-ᶜAbādi, op. cit., V. 1, p. 340.

20. Ibid., V. 1, p. 341.

21. Shākir, op. cit., p. 36.

22. Ibid., p. 295-297. Articles 93, 94 and 95.

CHAPTER TWO

23. The concept of a collective ownership and its implication will be discussed in the second part.

24. Also, see Art. 125 and 1192 of al-Majallah.

25. Az-Zarqā, op. cit., p. 177.

26. Art. 1270 of al-Majallah.

27. Art. 1272 of al-Majallah reads, "He who revives a piece of dead-land, through the sovereign permission, owns it; but if the sovereign or his representative permits a person to benefit from it only and not own it, such person has the right to take possession in the way he was permitted, but does not become the owner of the land."

28. Art. 1275 of al-Majallah reads, "As sowing and planting is considered revivification, so also is tilling and irrigation or the opening of a channel considered revivification."

29. Art. 1277 of al-Majallah reads, "enclosing a land by heaping up stones, or thorns, or branches of dried trees and cleaning it from weeds or the burning of thorns in it, or the digging of a well in it, does not constitute revivification, but merely demarcation."

30. Shākir, op. cit., p. 37-38.

31. Qureshi, op. cit., Ch. VIII, p. 19.

32. Art. 906 of al-Majallah.

33. Article 1229 of the al-Majallah, for example, reads that "[if] a gulley of rain water has passed over a neighbor's [house] for a long time has passed, the neighbor may not interfere with such a flow of water."

34. See Articles 522 through 533, 582 through 595 and 600 through 611 of al-Majallah.

35. Qureshi, op. cit., part 1, pp. 10-11.

36. Heyworth-Dunne, op. cit., p. 23.

37. Qureshi, op. cit., part 1, p. 11.

38. Ibid., Heyworth-Dunne, op. cit., p. 23.

39. Qureshi, op. cit., part 1, p. 12.

40. Ziadeh, op. cit., p. 5, Qureshi, op. cit., part 1, p. 13.

41. Ziadeh, op. cit., p. 6, Qureshi, op. cit., part 1, p. 17.

CHAPTER TWO

42. 1 Faddan = 4201 m^2 = 1.038 acres.

43. Selected Articles from Law No. 178 of 1952, Tashrīᶜāt az-Zirāᶜah wa al-'Islāh az-Zirāᶜi, United Arab Republic, Cairo, 1966, p. 3.

44. Decree No. 186. The decrees are published in Qawānīn ash-Shahr al-ᶜAqāri fi ad-Duwal al-ᶜArabiyyah, Cairo, 1972, p. 239.

45. For detail see az-Zarqā, op. cit., p. 182.

46. Ziadeh, op. cit., p. 14.

47. A conclusion by Dr. al-ᶜAbādi, op. cit., V. 1, p. 152.

48. Article 802 of the Egyptian Civil Code, for details see al-Huqūq al-ᶜAyniyyah al-Asliyyah, by Dr. A. al-Badrawi, 3rd. publication, Cairo, 1968, pp. 13-15, Article 867 of the Syrian Civil Code, and Article 861 of the Lybian Civil Code.

49. This principle is fully discussed in the second part of this thesis.

50. The same classification was made in Iraq. See M. Khalifa, al-Muzaraᶜah wa al-Musaqat fi al-Shariᶜah al-Islamiyyah. Dar al-Risalah Press, Baghdad, 1975, p. 58.

51. Al-ᶜAbādi, op. cit., V. 1, p. 344.

52. Ziadeh, op. cit., p. 16.

53. az-Zarqā, op. cit., p. 183-184. Also see al-Mulkiyyah fi Qawānīn al-Bilad al-ᶜArabiyyah, by Dr. A.F. al-Saddah, 1961, V. 1, pp. 13-14.

54. Article 832 of the Syrian Civil Code reads "Uncultivated lands with no owners are the property of the state, the ownership and possession of such lands cannot be had except by permission from the state in accordance to the law."

55. 1938 decree 29, article 5, Khalifa, op. cit., p. 59.

56. Al-Huqūq al-ᶜAyniyyah, by M. al-Kuzbari, Damascus, 1959, p. 39.

57. Article 833 of the Syrian Civil Code.

58. Ibid.. Article 834.

59. For more detail see al-Mulkiyyah al-Khāssah fi al-Qānūn al-Masrī, by Dr. Ahmad Salāmah, al-Nahdah al-ᶜArabiyyah press, 1968, p. 90. Also see al-Badrawi, op. cit., pp. 444-455.

60. Sharh Qānūn al-Islāh az-Zirāᶜi, by Anwar al-ᶜAmrūsi, Cairo, 1963, p. 19.

CHAPTER TWO

61. al-Badrāwi, op. cit., p. 452, 453.

62. Article 1080 of the Jordanian Civil Code, for example, reads "The ownership and possession of [dead-lands] may not be obtained except through the permission of the state in accordance with the law."

63. The Egyptian Civil Code, for example, does not define Tasarruf, al-ᶜAbadi, op. cit., V.1, p. 344. The Syrian and Lebanese (Art. 11, Decree No. 337) defines it as the right of using a land, to enjoy it, and manipulate it within specified conditions, according to the laws, decrees and regulations.

64. The Amīriyyah -- miri, owned by the state -- land is the second category of land recognized under Article 86 of the Syrian Civil Codes. Al-Ṣaddah, op. cit., V. 1, pp. 11-17.

65. Article 1199 of the Jordanian Civil Code reads, "the tasarruf holder of miri land has the right to plant it with seeds, to enjoy it, to benefit from the crops which result from his work or grow naturally on the land, to plant trees and grape-vines, to use it as a park, a forest or a grazing ground, to cut or uproot the trees and grape-vines planted therein, to build on it houses, shops, factories or any building which he might need in his agricultural acitivities, on condition that he does not so extend the buildings as to become a village or a settlement, to tear down the buildings on it, to alienate it absolutely, to lease it, to lend it, and [or] to mortgage his right in tasarruf as a security for debt or to give it as a possessory pledge," translated by Ziadeh, op. cit., pp. 60-61. This article is very similar to Article 1169 of the Iraqi Civil Code.

66. Article 775 of the Syrian Civil Code. This period is three years in Iraq, Article 1186 of the Iraqi Civil Code.

67. Al-Badrāwi, op. cit., pp. 452-453.

68. A good example of this is Decree No. 54 of 1966 regarding the committee of settling Agricultural disputes, see Tashrīᶜat az-Ziraᶜah, op. cit., p. 86.

69. Category 3 of Article 86 of the Syrian Civil Code which classified lands into five categories. az-Zarqā, op. cit., pp. 183-184.

70. The same process took place in Iraq in which the state's claim of ownership was emphasized in 1971, Decree 43, Article 8, Khalifa, op. cit., p. 62.

71. Ziadeh, op. cit., p. 16.

72. Category 4 of Article 86 of the Syrian Civil Code. az-Zarqā, op. cit., p. 183-184.

CHAPTER TWO

73. Articles 93, 94 and 95 of the Jordanian Civil Code. Summarized by al-ᶜAbādi, op. cit., V.1, p. 342.

74. This is a conlcusion of an observation that will be discussed thoroughly in the second part.

75. ᶜAqd al-'Ījār, by Dr. S. Tanāgho, Alixandria, 1969 pp. 22-23.

76. Articles 558-609 deals with leasing in general, while Articles 610-634 deals with leasing agricultural lands, waqfs, etc.

77. Tanāgho, op. cit., p. 23.

78. Majmūᶜat al-Qawānīn, al-Jadīdah, Dar al-Fikr al-Hadīth press, Cairo 1952, pp. 37-38.

79. Qānūn al-'Ijārāt al-Jadīd, by M.A. ᶜAnbar, Dar al-Fikr press, 1969. pp. 3-4.

80. For example, Decrees 121 of 1947, 71 and 87 of 1949, 199 of 1952, 657 of 1953, 56 of 1954, 564 of 1955, 353 of 1956, 55 of 1958, 168 and 169 of 1961, 46 of 1962, 133 of 1963, 7 and 24 of 1965, 36 and 37 of 1966, 52 of 1969

81. ᶜAnbar, op. cit., p. 4.

82. Ibid., pp. 4-5.

83. Qanūn Takhfīd al-'Ijarāt, United Arab Republic, 1965, p. 3.

84. Ibid., p. 33.

85. Article 6 of Decree 52, 1969, see 'Ījār al-Amākin, United Arab Republic, First Publication, 1969, p. 3-4.

86. Ibid., p. 4, Article 7.

87. Ibid., p. 4, Article 8. Rent level is decided by a committee composed of members of different government sectors. In its functioning these committees have a specific list of requirements to be fulfilled in order to carry out their work. The rent is evaluated as five percent of the land value and three percent of the total cost of the building. Article 10.

88. Ibid., Articles 11, 12.

89. Section 3 of 1969 Decree 52.

90. Qanūn Takhfīd al-'Ijārāt, op. cit., p. 33.

91. For example, see Articles 13, 14 and 15 of 1969 Decree 52, ᶜAnbar, op. cit., pp. 44-48.

CHAPTER TWO

92. Article 5 of Decree 52, 1969.

93. Article 9 of Decree 52, 1969.

94. Article 26, see ^{c}Anbar, *op*. *cit*., p. 84-85.

95. *Ibid*., p. 60.

96. Article 5 of Decree 52, 1969.

97. This example is given as an explanation of such reasons. See ^{c}Anbar, *op*. *cit*., p. 27.

98. *Ibid*., p. 85.

99. *Ibid*., p. 86.

100. *'Ijār al-'Amākin*, United Arab Republic, Cairo, 1971, pp. 127-146.

101. Articles 487 and 649 of 1970.

102. Tanāghu, *op*. *cit*., p. 263.

103. See for example Article 23, ^{c}Anbar, *op*. *cit*., p. 64.

104. Article 19 of Decree 52, 'Ijar al-Amākin, *op*. *cit*., p. 10.

105. ^{c}Anbar, *op*. *cit*., p. 92. See Decree 178 of 1961, Article 1.

106. Articles 30, 31 and 32 of Decree 52, 1969.

107. Article 33 of Decree 52, 1969.

108. Explanation made by Tanāghu of Article 579 of the Egyptian Civil Code. *op*. *cit*., p. 229.

CHAPTER FOUR

1. G.E. Von Grunebaum, Islam: Essays in the Nature and Growth of a Cultural Tradition. (London, Routledge & Kegan Paul Ltd., 1961), pp. 144-145.

2. A.R. Guest, "The Foundation of Fustat and the Khittahs of that Town," The Journal of the Royal Asiatic Society of Great Britain & Ireland, January 1907, p. 82.

3. Al-Hathloul, op. cit., pp. 24-29.

4. K.A.C. Creswell, Early Muslim Architecture, Second Edition. (New York, Hacker Art Books, 1979), V. 1, part 1, p. 22. For the use of this verb see also pp. 28, 39.

5. Ibid., p. 39.

6. Von Grunebaum, op. cit., p. 141.

7. Creswell, op. cit., V. 1, part 1, p. 38.

8. Jacob Lassner, The Topography of Baghdād in the Early Middle Ages, (Detroit, 1970), p. 138.

9. [al-khittu wa al-khittatu: al-'ardu tunzalu min ghayri 'an yanzilahā nazilun qabla dhalik] Ibn Manzur, in Lisan al-'Arab al-Muhīt, edited by Y. Khayyat and N. Mar^cashli, (Beirut, Dar lisān al ^cArab) 3 volumes, V. 1., p. 858.

10. [wa kullu ma hazartahu fa-qad khatatta ^calyhi] Hazartahu means you prevented others from the right of using and possessing the object. Ibid. pp. 665-666.

11. Ibid., p. 858.

12. Ibid., pp. 665-666.

13. al-Mi^cyār al-Mu^crab, op. cit., V. 2, p. 227.

14. For as-Samhūdi, op. cit., see p. 489 in which al-^cAbbas says: this khittah is marked-out [khattaha] to me by the Prophet and I build it and the Prophet builds it with me." Also see p. 483.

    For al-Baladhuri, op. cit., see p. 342, in which he describes al-Basra, he reports: "the people marked out ['akhtattu] and built the houses." On p. 215 he reports that "az-Zubayr marked out ['akhtatta] and built his known house in Egypt." Also see pp. 216, 230, 232, 235, 241.

    For al-Maqrīzi, al-Mawa^ciz wal-'I^ctibār, al-Halabi press, Cairo. See for example V. 1, p. 286. For Abu Yusif, op. cit. see p. 30 in which he refers to al-Kufa saying: "the people marked out

CHAPTER FOUR

['akhtatta] and settled in Kufah."

For al-Ya[c]qubi, op. cit., see V. 2, pp. 358, 472-473 in his description of Samarra.

15. al-Baladhuri, op. cit., p. 345.

16. Guest, op. cit., p. 57.

17. al-Baladhuri, op. cit., p. 341. There is another usage by al-[c]Abbas who said, when [c]Umar wanted to demolish his house, "the Prophet has marked it out [khattaha] for me, and installed its water-spout by his hand." as-Samhudi, op. cit. V. 2, p. 489.

18. The precise meaning of riba[c], plural of rab[c], is dwellings. Ibn-Manzur, op. cit., V. 1, p. 1110.

19. as-Samhudi, op. cit. V. 2, p. 717-718.

20. Ibid., p. 732.

21. Other cases that I came across will be reported in the text of the section on al-Basrah.

22. See, for example, al-Baladhuri, op. cit., p. 342, 366, al-Maqrizi, op. cit. V. 1, p. 286, al-Ya[c]qubi, op. cit. V. 2, p. 150-151.

23. For Baghdad see, for example, al-Baladhuri, op. cit., p. 293; al-Ya[c]qubi, op. cit., V. 2, p. 374.

24. al-Ya[c]qubi, op. cit., V. 2, pp. 472-473.

25. Lisan al-[c]Arab, op. cit., V. 1, p. 858.

26. al-Ya[c]qubi, op. cit. V. 2, p. 358. For another example, 'Usama al-Hanafi reports that the Prophet marked out a mosque for his community. The usage suggests that the Prophet established the boundaries of the mosque and nailed a piece of wood to indicate the Qiblah (Mecca) direction. A. al-Kittani, at-Taratib al-'Idariyyah, (Beirut: Dar al-Kitab al-[c]Arabi press), 2 volumes, V. 2, p. 76.

27. Guest, op. cit., pp. 57-58.

28. This is reported by 'Ubay b. Ka[c]b quoting the Prophet Muhammad. as-Samhudi, op. cit. V. 2, p. 483. Also see p. 489 in which it is reported differently but with the same notion which suggests that the khittah is not marked out on the ground, and that part of the khittah will be on the house of others.

29. al-Baladhuri, op. cit., p. 274.

CHAPTER FOUR

30. M. at-Tabari (d. 311/923), Tarikh ar-Rusul wa al-Muluk. (Dar al-Ma[c]arif press, 1963), 10 volumes, V. 4, p. 21-42.

31. al-Baladhuri, op. cit., p. 275.

32. at-Tabari, op. cit., V. 4, p. 44.

33. al-Baladhuri, op. cit., p. 275.

34. at-Tabari, op. cit. V. 4, pp. 44-45.

35. al-Baladhuri, op. cit., p. 342.

36. For the definition of Mirbad see Ibn Manzur, op. cit., V. 1, p. 1105.

37. al-Mawardi, op. cit., p. 179-180.

38. Abu Ya[c]la al-Hanbali, op. cit., pp. 212-213.

39. al-Hathloul's translation, for example, of J. Zaydan's citation of al-Mawardi's statement states that " . . . the settlers divided the city into khitat according to tribes, assigning a khittah for each tribe, . . ." suggesting that each tribe was assigned a khittah and did not select or decide by itself upon the boundaries. al-Hathloul, op. cit., p. 35.

40 al-Baladhuri, op. cit., p. 366.

41. Different dates were given regarding the foundation of al-Fustat. See at-Tabari, op. cit., V. 4, p. 109 and al-Maqrizi, op. cit. V. 1, p. 297.

42. al-Hathloul, op. cit., pp. 39-40.

43. Guest, op. cit., p. 56.

44. Ibid., p. 78.

45. al-Maqrizi, op. cit., V. 2, p. 246.

46. The names of the three individuals who participated in settling the disputes between the tribes are Sharik al-Ghitayfi, [c]Amr al-khawlani, and Haywil al-Mughafiri. al-Maqrizi, op. cit., V. 1, p. 297.

47. Guest suggests that a general commotion arose as a result of converting al-Fustat from a temporary camp into a permanent settlement. This conversion may have involved some internal changes of the tribes' territories without necessarily disturbing the main features of the general arrangement. This resulted in assigning these four individuals to settle disputes. But there is

CHAPTER FOUR

not much evidence to support this suggestion. op. cit., p. 57.

48. Guest, op. cit., p. 83.

49. The section is the khitat of al-Fustat. al-Maqrīzi, op. cit., V. 1, pp. 296-299.

50. The Arabic sentence is [fa 'akhtattu bihā wa akhdhu safh al-jabal]. al-Maqrizi, op. cit., V. 1, p. 298.

51. The Arabic sentence is [fa-nazalū fī muqaddimati an-nās wa-hāzū hādhihi al-mawādi^c]. Ibid.

52. Ibid., p. 297.

53. For the definition of diwān, see 'Ibn Manzūr, op. cit., V. 1, p. 1039. Guest's conclusion is based on khittat 'ahl ar-Raya of which he states: "the parties associated in Khittat Ahl er-Rayah were obliged to combine, because they were too small singly for a separate muster in the dīwān." op. cit., p. 58.

54. al-Maqrīzi, op. cit., V. 1, p. 297.

55. Ibid.

56. Ibid. The fortress was the only building in al-Fustāt. Ibid., p. 286.

57. Ibid., pp. 298-299.

58. Al-Maqrīzi in his description of the khitat in al-Jizah always uses the term 'iktatta or 'akhtattat referring to the tribe leader or the tribe in general as territorializers. Ibid., p. 206; see also al-Ya^cqūbi op. cit. V. 2, p. 156.

59. Al-Hathloul interpreted roads or in between the roads as kittah! op. cit., p. 37; at-Tabari, op. cit., V. 4, p. 45.

60. Al-Balādhuri, op. cit., pp. 275, 276.

61. Al-Janābi lists the names of those individuals and the site of some of those allotments. Op. cit., p. 85.

62. At-Tabari, op. cit., V. 4, p. 45.

63. Al-Janābi, op. cit., pp. 41-42; at-Tabari, op. cit., V. 4, p. 45.

64. Al-Janābi, op. cit., pp. 87-88, 93-94.

65. Ibid., p. 74.

66. At-Tabari, op. cit., V. 4, p. 44.

CHAPTER FOUR

67. Guest, op. cit., p. 78.

68. At-Tabari, op. cit., V. 4, p. 45; for the meaning of ar-rawadif and radifah see Ibn Manzur, op. cit., V. 1, p. 1152.

69. at-Tabari, op. cit., V. 7, p. 618; for details regarding the process of selecting the site, see V. 7, pp. 614-618. Also see al-Khatib al-Baghdadi, Tarikh Baghdad, (Dar al-Kitab al-cArabi, Beirut) 14 Volumes, V. 1, p. 66-69.

70. Al-Khatib, op. cit. V. 1, p. 67. One of the scholars who documented and summarized most Arabic data regarding Baghdad is Creswell, op. cit. V. II, p. 6. See also Lassner, op. cit. al-Yacqubi relates that the workers reached 100,000 individuals. Kitab al-Buldan, edited by M.J. De Goeje, (Brill, Leiden, 1892), p. 238.

71. At-Tabari, op. cit., V. 7, p. 618.

72. Al-Baghdadi, op. cit., V. 1, p. 67.

73. Lassner, op. cit., pp. 143-144.

74. Creswell, op. cit., V. II, pp. 8-13.

75. See the description of al-Yacqubi, in al-Buldan, op. cit., p. 241. Parts of it are translated by Creswell, op. cit., V. II, p. 10. See also al-Baghdadi, op. cit., V. 1, pp. 73-76, translated by Lassner, op. cit., p. 25-118.

76. Al-Yacqubi, al-Buldan, op. cit., pp. 240-241.

77. Al-Baghdadi, op. cit., V. 1, pp. 71, 73.

78. Al-Baladhuri, op. cit. pp. 293-296; al-Yacqubi, al-Buldan, pp. 240-244.

79 Al-Yacqubi, al-Buldan, op. cit., pp. 241-242.

80. At-Tabari, op. cit., V. 7, p. 619, al-Baghdadi, op. cit., V. 1, p. 71.

81. Creswell's interpretation is based on comparing the dimensions reported by different historians and travellers. Although it may not be precise, it gives an idea of the allotment size. Op. cit., V. II, pp. 7-8. Most reliable dimensions are reported by al-Baghdadi, op. cit., V. 1, p. 70-74.

82. Al-Yacqubi, al-Buldan, op. cit., pp. 242-250.

83. Al-Baghdadi, op. cit., V. 1, p. 80.

84. Creswell, op. cit., V. II, p. 17.

CHAPTER FOUR

85. *Ibid*., pp. 17-18; Lassner, *op*. *cit*., pp. 146-177.

86. Malik's opinion is that the neighbors abutting the dead-lands have a higher claim to the land (more rightful) than others in reviving them. al-Mawardi, *op*. *cit*., pp. 177-179. The Hanbali's opinion is that the neighbors and more distant people have equal rights to revive a dead-land that is abutting urbanized areas, A.Y. al-Hanbali, *op*. *cit*., p. 209.

87. Al-Wansharisi gives detailed information about those opinions of the jurists from the different schools of law. *op*. *cit*., V. 5, p. 117.

88. Ibn Qudamah, *op*. *cit*., V. 5, p. 567, A.Y. al-Hanbali, *op*. *cit*., p.209.

89. The site was originally part of the Nile river when the Muslims settled in al-Fustat; later it dried out and was occupied. al-Maqrizi, *op*. *cit*. V. 1, p. 286.

90. Al-Wansharisi, *op*. *cit*., V. 5, p. 117.

91. He also relates that the harim of a mosque is its fina'; and the harim of a well is forty cubits all around it. Ibn Manzur, *op*. *cit*. V. 1, p. 617.

92. A.Y. al-Hanbali, *op*. *cit*., p. 212.

93. See, for example, Ibn Qudamah, *op*. *cit*., V. 5, p. 566.

94. Al-Mawardi, *op*. *cit*., p. 179.

95. Ibn ar-Rami, *op*. *cit*., p. 434.

96. Ibn ar-Rami added that this was the custom in Tunis, denoting the commonness of such disputes. *Ibid*., pp. 433-434.

97. *Ibid*., pp. 430-431.

98. Narrated by al-Bukhari, *op*. *cit*., V. 3, p. 349. See also A.Y. al-Hanbali, *op*. *cit*. p. 213; al-Mawardi, *op*. *cit*., p. 180. For other similar traditions, see Ibn 'Adam, *op*. *cit*. p. 97; Ibn ar-Rami, *op*. *cit*., pp. 430-431.

99. A.Y. al-Hanbali, *op*. *cit*., p. 213.

100. *Ibid*.

101. Al-Qarafi, *op*. *cit*., V. 4, p. 16.

CHAPTER FIVE

1. This tradition is related by Ibn Mājah, Mālik and many others; al-Muwatta, op. cit. p. 529, tradition no. 1426; first transation by Dr. E. Ibrahim and D. Johnson-Davis, An-Nawawi's Forty Hadith, p. 106; Second translation of al-Muwatta, op. cit. p. 346.

2. See the notes of A. M. Shākir on 'Ibn 'Ādam, op. cit., p. 97.

3. Al-Wansharīsi, op. cit. V. 9, p. 46.

4. Ibn ar-Rāmi, op. cit., p. 299.

5. Ibn ᶜĀbdīn, op. cit., V. 6, p. 593.

6. Ibn ar-Rāmi, op. cit., p. 299.

7. This is the opinion of 'Ashhab, Ibn ar-Rāmi, op. cit., p. 299; and A. B. ᶜAbd ar-Rahmān, al-Wansharīsi, op. cit., V. 9, p. 60. Ibn ar-Rāmi relates that this is the opinion of the majority of jurists, op. cit. p. 408.

8. Ibn ar-Rāmi, op. cit., p. 299.

9. Ibn ar-Rāmi relates that this is very common in Tunis, and he did not come across a judge who ruled differently. Ibid., p. 314, 315.

10. Al-Wansharīsi, op. cit., V. 9, p. 60. The same principle is used in digging wells that will damage the neighbor's well. For detail, see Ibn
ar-Rāmi, op. cit., p. 408.

11. For example, Sahnūn asked Ibn al-Qāsim about the pre-existing doors and windows between two dwellings (neighbors) and if these openings would harm one of the neighbors and without benefiting the other, "Does such an opening have to be sealed or relocated?" Ibn al-Qāsim answered, "The owner should not be compelled to seal or relocate them, since he did not cause such an opening and it is a pre-existing one." al Mudawwnah, op. cit., V. 3, p. 382. The opposing opinion I found was made by Ibn Yunis,
see Ibn ar-Rāmi, op. cit., p. 309.

12. Ibid.

13. Ibn al-Qāsim was asked by Sahnūn about the case of a person who built a palace or large house which intruded upon his neighbor's privacy. He answered that such a person should be prevented from harming his neighbors. al-Mudawwanah, op. cit., V. 4, p. 378.

    Ibn al-Qāsim was also questioned by Sahnūn about a hypothetical case of a house owner who opened a window or a door in his own wall which intruded upon his neighbor's privacy and harmed his neighbor. Ibn al-Qāsim answered on the authority of Mālik, that "such a person

should be prevented from harming his neighbor, and he should seal such an opening, even if it was within his territory." Ibid., V. 3, p. 382.

14. Ibn ar-Rāmi relates that according to Ibn Abi Zimnan, a bed [sarīr] may mean the furniture in the room; while Ibn Shās relates that a bed, in this case, means a ladder. Ibn ar-Rāmi, op. cit., p. 308.

15. Al-Wansharīsi, op. cit., V. 9, p. 14.

15.1 Ibid. V. 9, p. 20.

16. The Judge of Tunis, Abu 'Ishāq, had the same opinion to this case which is documented by al-Wansharīsi, op. cit., V. 8, pp. 449-450.

17. Ibn ar-Rāmi, op. cit., p. 313; al-Wansharīsi, op. cit., V. 8, p. 452.

18. A. Y. al-Hanbali, op. cit., pp. 303-304. In regard to this issue, al-Māwardi stated that such a person should not be compelled to wall his roof, but he should be prevented from using it. Op. cit., p. 256.

19. Al-Wansharīsi, op. cit., V. 8, p. 452; Ibn ar-Rāmi relates that most judges ruled such disputes in this manner.

20. Ibn ar-Rāmi, op. cit., p. 313.

21. Ibid., p. 309.

22. This is also the opinion of Ibn Rushd and Ibn Hishām, ibid., p. 308.

23. Ibid., p. 312-313.

24. Al-Wansharīsi, op. cit., V. 8, pp. 451-452. There is another opinion by A. B. ᶜAbd as-Sayyid which states that any new opening overlooking a neighboring orchard should be sealed, whether the orchard is inhabited or not; the reason is that the owner of the overlooked orchard may walk around with his family or even sleep under a tree, and thus may be exposed without knowing. Ibid., V. 8, p. 451.

25. Ibid.

26. Ibn ar-Rāmi, op. cit., p. 303.

27. Al-Wansharīsi, op. cit., V. 9, p. 59. For a similar statement made by Mālik see p. 27. Ibn Zayd gave the same opinion, see Ibn ar-Rāmi, op. cit., p. 304.

28. This is also the opinion of 'Ibn ᶜAbd al-Ghafūr. Ibid., pp. 59-60.

CHAPTER FIVE

29. Kammād may mean the hammerer on the fabric; according to Ibn Manzur and by comparing Kammād and qassar it means tailor who hammers or hits the clothes [wa kamada al-qassāru ath-thawba 'idhā daqqahu], op. cit., V. 3,
pp. 101, 295; for naddāf see V. 3, p. 608.

30. Al-Wansharīsi, op. cit., V. 9, p. 60. Ibn ar-Rāmi relates that even the sound which keeps someone awake is not considered damage. op. cit., p.
307.

31. Ibn ar-Rāmi, op. cit., p. 303. The reason for preventing them is that if they gathered the sound will be very loud. Al-Wansharīsi, op. cit.,
V. 9, p. 60.

32. Al-Wansharīsi, op. cit., V. 9, p. 60; He relates, this is why the Prophet said "he who has eaten from this bad tree should not approach our mosque and annoy us with the smell of garlic." Ibid.

33. Ibn-Qudāmah, op. cit., V. 4, pp. 572-573. The opinion of 'Ibn ᶜAbdūs, Ibn al-Qāsim and Suhnūn is also that the damage of ovens is very slight,
and thus to be permitted. Ibn ar-Rāmi, op. cit., p. 301.

34. The reason for considering smoke as damage is the Quy'anic verse: "Then watch thou for the day that the sky will bring forth a kind of smoke (or mist) plainly visible.* Enveloping the people: this will be a penalty grievous." XLIV (ad-Dughān) 10,11; From al-Mudawwanah, Sahnun asked Ibn al-Qāsim, "if I have a ᶜarsa (an open space, possibly court yard) that is abutting another person's house and I desire to establish a bath or furnace in that space but the neighbors refuse, can they do so according to Mālik's opinion?" He answered that if the established function caused damage to the neighbors, the neighbors had the right to prevent
him. Ibn ar-Rāmi, op. cit., p. 300.

35. These jurists are Mutraf (d. 220/835), 'Ibn al-Mājishun (d. 213/828), and 'Asbāgh (d. 225/840). Ibid. p. 301.

36. Ibid. pp. 301, 302.

37. This is a summary of the opinions if Ibn Habīb, Mutraf, Ibn al-Majishūn
and 'Asbāgh. Ibid., pp. 302, 303.

38. Al-Mutīᶜi adds that this should not suggest the possibility of eliminating the party wall, since the whole house will be exposed and will not be livable, which is wasting wealth; al-Majmūᶜ, op. cit., V. 12, pp. 412-413. For the opinion of ash-Shafiᶜi, see also Ibn Qudāmah,
op. cit., V. 4, p. 573.

CHAPTER FIVE

39. Al-Majmu[c], op. cit., V. 12, p. 412-413. Ibn Qudamah, although from the Hanbali rite, has a different opinion. He asserts that the owner of the higher roof terrace should be prevented from using his roof unless he
walls it. Op. cit., V. 4, p. 573.

40. Al-Wansharisi, op. cit., V. 8, p. 444.

41. As-Saqati, Kitab fi 'Adab al-Hisbah, edited by Levi-provecal, Paris, 1931, pp. 7-8.

42. Al-Wansharisi, op. cit., V. 9, p. 23.

42.1 Ibid., V. 9, p. 20.

43. For example, Ibn [c]Itab states, "all damages have to be eliminated except the damage of raising (an edifice) without intending to damage others, (even if it) prevents light and air (from neighbors)." al-Wansharisi, op. cit., V. 9, p. 60.

44. Ibn ar-Rami, op. cit., pp. 314-315.

45. Ibn [c]Abdin, op. cit., V. 5, p. 448.

46. Al-Mudawwanah, op. cit., V.3, p. 399.

47. This opinion is based on 'Ahmad b. Hanbal's opinion, A.Y. al-Hanbali, op. cit., pp. 301-302. Ibn Qudamah states that 'Ahmad's opinion is not to prevent the person from acting in his property. Op. cit., V. 4, p.
572.

48. The reason is, he said, "the people have the right to inflict (or conduct) their properties as they wish." al-Mawardi, op. cit., p. 255.

49. Ibn Qadamah, op. cit., V. 4, p. 572.

50. 'Abu Yusif, op. cit. For the irrigation see p. 99; for fire see p. 104.

51. 'Al-'Amwal, op. cit., p. 371.

52. Al-Wansharisi, op. cit., V. 8, p. 445.

53. Ibn ar-Rami, op. cit., pp. 481-482.

54. Ibid., p. 302. This is also the opinion of Ibn Hisham, ibid., p. 300.

55. See, for example, the opinion of ar-Razi of the Hanafi rite. He refers to the possibility of preventing damage by building a wall between neighbors in cases of baths, which is not the case regarding a mill, and thus new mills will be prevented; Ibn [c]Abdin, op. cit., V. 5, p. 448. From the Maliki rite Sahnun asked Ibn al-Qasim about a

CHAPTER FIVE

blacksmith who wants to establish in his ^{c}arsa (enclosed open space, such as a courtyard), a furnace or blacksmith's bellows which would damage his neighbor's party wall. Ibn al-Qāsim replied that such a person should be prevented from causing damage. al-Mudawwanah, op. cit., V. 4, p. 273.

56. Al-Wansharīsi, op. cit., V. 8, p. 431. Ibn ar-Rāmi reports a similar case, op. cit., p. 409.

57. Al-Wansharīsi, op. cit., V. 8, p. 431.

58. Ibid., V. 8, p. 412.

59. Ibn ar-Rāmi, op. cit., pp. 461-462.

60. The expert Ibn ar-Rāmi asked the jurist Ibn al-Ghammāz about the limit, and he answered that there is no exact limit; the limit is what is sufficient to eliminate damage. Ibn ar-Rāmi , op. cit., p. 305.

61. Ibid., pp. 305-306. For the same case see also al-Wansharīsi, op. cit., V. 9, pp. 7-8.

62. 'Arwa, in Northern Africa, means stable for beasts. In the common language it is pronounced as ar-riwa. Al-Wansharīsi, op. cit., V. 9, p. 8.

63. Ibn ar-Rāmi, op. cit., pp. 306-307. See also al-Wansharīsi, op. cit., V. 9, p. 8.

64. Ibn ar-Rāmi, op. cit., V. 9, p. 8. The same case is reported by al-Wansharīsi, op. cit., V. 9, p. 8.

65. It should be noted that the latter owner did not own the land when the first owner installed his water spout. Ibn Taymiyyah, op. cit., V. 30, p. 7.

66. Ibn ar-Rāmi, op. cit., p. 301.

67. Al-Wansharīsi, op. cit., V. 9, p. 10. See also Ibn ar-Rāmi, op. cit., p. 304.

68. The text does not clarify who forced the tanners to move out. It states that they were moved out by the ^{c}ummāl, which may mean the governors or the laborers. Al-Wansharīsi, op. cit., V. 8, p. 412.

69. Ibid., see also V. 8, p. 446.

70. Ibid.

CHAPTER FIVE

71. Ibid, V. 8, p. 457.

72. Ibid., V. 9, p. 9; Ibn ar-Rāmi, op. cit., p. 302.

73. This is the opinion of the judges Ibn [c]Abd ar-Rafī[c] and Ibn al-Ghammāz;
Ibn ar-Rāmi adds that no jurist ruled differently. Ibid., pp. 315-316.

74. Ibid., p. 375.

75. Al-Wansharīsi, op. cit., V. 9, p. 32.

76. Ibid., pp. 61-62.

77. For actual cases and details see Ibn ar-Rāmi, op. cit., pp. 322-323.

78. Ibn [c]Ābdīn, op. cit. V. 5, p. 237

79. Al-Wansharīsi, op. cit. V. 9, p. 41.

80. Narrated by Ibn al-Musayyab, Ibn ar-Rāmi, op. cit., p. 339.

81. Ibn ar-Rāmi, op. cit., p. 339. There are other opinions which state twenty years as a required period to gain right of precedence, such as the opinion of 'Asbāgh, Ibid., while the son of Suhnūn states that four to five years is a sufficient period between neighbors. al-Wansharīsi,
op. cit. V. 9, p. 42.

82. Al-Wansharīsi, op. cit., V. 9, p. 42.

83. Ibn ar-Rāmi, op. cit., p. 340. For more detail see also al-Wansharīsi,
op. cit. V. 9, p. 46-47.

84. Ibn ar-Rāmi, op. cit., p. 340. al-Wansharīsi, op. cit., V. 9, p. 46-47.

85. The opinion of Abi al-Fwāris regarding this case is that the protesting party could have appointed an agent to protest, but he did not, thus the
action will continue. al-Wansharīsi, op. cit., V. 9, pp. 56-57.

86. Ibn ar-Rāmi, op. cit., pp. 342-343.

87. Al-Wansharīsi, op. cit., V. 9, pp. 21-22.

88. Ibid. pp. 37-38.

89. Ibn ar-Rāmi, op. cit., p. 316.

90. He adds that this is the opinion of all jurists in Cordoba.
Al-Wansharīsi, op. cit., V. 9, p. 56.

CHAPTER FIVE

91. 'Ibn ar-Rāmi, op. cit., p. 316.

92. The same is true with respect to windows. See, for example, al-Wansharīsi, op. cit. V. 9, p. 14 and 'Ibn al-Hindī's opinion, Ibn ar-Rami, op. cit., p. 310.

93. Al-Wansharīsi, op. cit., V. 9, p. 8.

94. Ibid., V. 6, p. 439.

95. Ibid., V. 6, p. 435.

96. Ibid., V. 9, p. 20.

97. The text suggests that one person bought the houses, while the answer by Ibn ᶜItāb suggests that more than one person bought the houses. Al-Wansharīsi, op. cit., V. 9, p. 31.

98. This is the opinion of Muṭraf and 'Ibn al-Majishūn, too. Ibid., p. 32.

99. This is the opinion of 'Ibn al-Majishūn and Muṭraf in al-Wāḍiḥah; Ibn ar-Rāmi, op. cit., p. 342.

100. Ibid., p. 352.

101. Ibid., p. 379.

102. For this and other similar traditions and the definition of al-manār see 'Ibn 'Ādam, op. cit., p. 96.

103. Ibn ar-Rāmi, op. cit. pp. 393-394.

104. This is also the opinion of Suhnun Al-Wansharīsi, op. cit., V. 9, p. 39. For an interesting case rêgarding a shelf in the party wall where the owner of the party wall wanted to build on the shelf's supports that he owned in the neighbor's house see V.9, pp. 29-30 of al-Wansharīsi.

105. Ibn ᶜAsākir (d.571/1175), Tahdhīb Tārīkh Dimishq al-Kabīr, edited by A. Badrān, 7 volumes (Beirut, Dar al-Masīrah press, 1979), V. 1, p. 245.

106. Ibn ar-Rāmi, op. cit., p. 359.

107. This is a case that took place in Tunis and was judged by 'Ibn al-Ghammāz. Ibid., pp. 362-363. In a similar case a person transformed his upper floor into a mosque that overlooked the neighbor's house. The owner of the mosque was compelled to build a parapet in order to allow the people to pray in his mosque. Ibid., p. 320.

CHAPTER FIVE

108. Al-Wansharīsi, op. cit., V. 8, p. 440.

109. For examples see al-Hathloul, op. cit., pp. 122-125.

110. I have translated "tīb nafs" as "conciliative consent." Ibn ar-Rāmi, op. cit., p. 410.

111. 'Ubay favored al-ᶜAbbās's position because he invoked the Prophet's story regarding a house built by the Prophet David in Jerusalem. While David was building, the house was collapsing, and then David said, "Oh God, you ordered me to build a house for you but the building is collapsing." God then insinuated to him, "I accept only goodness and you built for me on a coerced land." David then discovered that he did not buy a part of that land. He consequently bought the remaining part from its owner and managed to complete the house. This was reported by al-Yaᶜqubi, Tarikh., op. cit. V. 2, p. 149.

112. This incident is well known and used by many jurists and historians. See for example as-Samhūdi, op. cit., V. 2, pp. 482-489; al-Wansharīsi, op. cit., V. 1, p. 244.

113. Al-Balādhuri, op. cit., p. 343.

114. Lapidus, Muslim Cities, op. cit., p. 62.

115. Ibid.

116. This conclusion is made by Lapidus, ibid.

117. Ibn ar-Rāmi, op. cit., p. 431.

118. Al-Wansharīsi, op. cit. V. 1, p. 245.

119. Ibn ar-Rāmi, op. cit., pp. 431-432.

120. He adds "this is what is done in our (community) in the houses that were around the grand mosque. They extended it and the owners were compelled to sell." al-Wansharīsi, op. cit., V. 1, p. 245.

121. Ibid., V. 6, p. 69.

122. Ibid., V. 9, p. 22.

CHAPTER SIX

1. Al-Wansharīsi, op. cit., V. 5, p. 183.

2. 'Ibn Taymiyyah, op. cit. V. 30, p. 410

3. Ibn ar-Rāmi, op. cit., p. 335.

4. Abū Sa^cīd al-Khudri related that when the Prophet saw them sitting on the road, he said: "Beware! Avoid sitting on the road(ways)." The people said, "There is no way out of it as these are our sitting places where we have talks." The Prophet said, "if you must sit there, then observe the rights of the way." They asked, "what are the rights of the way?" He said, "They are the lowering of your gazes (on seeing what is illegal to look at), refraining from harming people, returning greetings, advocating good and forbidding evil." al-Bukhāri, op. cit., V. 3, p. 385.

5. This is also the interpretation of at-Tahāwi, Ibn Taymiyyah, op. cit. V. 30, pp. 407-408; For the complete statement of Malik see also Ibn ar-Rami, op. cit., p. 335.

6. 'Ibn ar-Rāmi, op. cit., p. 334.

7. Ibn Taymiyyah, op. cit., V. 30, p. 408.

8. Ibid.

9. Ash-Shāfi^ci, for example, states that the house owner should not sell his finā', ibid.

10. Al-Wansharīsi, op. cit., V. 6, p. 250.

11. Ibn ar-Rāmi, op. cit., pp. 335-336.

12. This is also the opinion of al-Layth; 'Ibn Qudāmah, op. cit., V. 5, p. 567.

13. This is also the opinion of al-Māwardi and Abū Hāmid of the Shafi^ci rite. 'Ibn Taymiyyah, op. cit., V. 30, p. 410.

14. Ibid.

15. Ibid, pp. 408-409.

16. This is the opinion of Malik himself, Ibn ar-Rāmi, op. cit. pp. 332-333.

17. The jurists who opposed 'Asbagh's opinion are Mutraf, Ibn al-Majishūn and Suhnūn. Ibid, pp. 333-334.

18. Ibid.

19. See, for example, al-Wansharīsi, op. cit., V. 8, p. 439.

CHAPTER SIX

20. Lapidus, Muslim Cities, op. cit., p. 72.

21. Ibid, p. 61.

22. 'Ibn 'Iyās, Tārīkh Misr, V. 2, pp. 171-177, cited by Hasan ᶜAbd al-Wahab, Takhtit al-Qahirah wa Tanzimaha, Cairo, 1957, p. 13. It seems that every now and then the authority used to remove those parts that encroached on the street. For example, Lapidus relates that "in Damascus during the long tenure of Tankiz (1312-1340), a great effort was made to provide adequate streets in new parts of the city. Shops were knocked down and benches removed to widen the way." Muslim Cities, op. cit., p. 72.

23. Al-Hathloul, op. cit., p. 87.

24. Al-Wansharīsi, op. cit., V. 9, pp. 15-16.

25. For full details of this case see Appendix I of al-Hathloul's Thesis, op. cit., p. 318.

26. Reported by Ibn al-Qāsīm. See Ibn Taymiyyah, op. cit., V. 30, pp. 399-400; and A.Y. al-Ḥanbali, op. cit., p. 213.

27. Ibn Taymiyyah, op. cit., V. 30, p 6-7.

28. Ibn ᶜĀbdīn, op. cit., V. 6, p. 592.

29. 'As-Sināmi, Nisāb al-'Ihtisāb, edited by Dr. M.Y. ᶜIzad-Dīn, Riyadh, 1403/1983, pp. 207-208.

30. Ibn ᶜĀbdīn, op. cit., V. 6, p. 593.

31. Ibn ar-Rāmi, op. cit., pp. 332. The encroached part was demolished, although the street's width was eight cubits, which is wider than the minimum width of the street, i.e., seven cubits.

32. A.Y. al-Ḥanbali, op. cit., p. 284; al-Māwardi, op. cit., p. 240.

33. Surat 'Āl ᶜImrān (III, 104).

34. See, for example, al-Māwardi, op. cit., p. 240; A.Y. al-Ḥanbali, op. cit., p. 284.

35. Ibid.

36. Al-Māwardi, op. cit., p. 255; A.Y. al-Ḥanbali, op. cit., p. 300.

37. The name of the Mu'adhin is 'Abi ar-Rafīᶜ and the majority of the jurists approved his prayer. Al-Wansharīsi, op. cit., V. 9, pp. 23-28.

38. For the opinion of 'Ibn ᶜItāb see Ibid., p. 27.

CHAPTER SIX

39. Qur'ān, LXXXIII, 1-5; for other verses, see also as-Saqaṭi, op. cit., p. 3.

40. Lapidus, Muslim Cities, op. cit., p. 98.

41. See, for example, as-Saqati, op. cit., pp. 64-66; 'Ibn ᶜAbdūn, Thalāthu Rasā'il 'Andalusiyyah fi 'Adab al-Hisbah wa al-Muhtasib, edited by E. Levi-Provencal, (Cairo, Matbaᶜāt al-Maᶜhad al-ᶜIlmi al-Faransi lil-'Āthār al-Sharqiyyah press,1955), pp. 34-35; N. Ziyādah, al-Hisbah wa al-Muhtasib fi al-'Islam, (Beirut, al-Maṭbaᶜah al-Kathulikiyyah Press, 1962), pp. 125-6, 133-4.

42. As-Saqaṭi, op. cit., p. 3.

43. See, for example, al-Jarsīfi, in Levi-Provencal, op. cit., pp. 122-123; ash-Shayrazi, in Ziyādah, op. cit., pp. 95-96; 'Ibn ᶜAbd ar-Ra'ūf, in Levi-Provencal, op. cit., pp. 110-111; as-Sinami, op. cit., pp. 206-207.

44. Ibid.

45. Ibn Qudāmah, op. cit., V. 4, p. 552.

46. As-Sināmi, op. cit., p. 209. This is also 'Ibn Taymiyyah's opinion, op. cit., V. 30, p. 10.

47. As-Sināmi, op. cit., p. 209.

48. Al-Wansharīsi, op. cit., V. 9. p. 37. See also, Ibn ar-Rāmi, op. cit., p. 342.

49. Ibn ar-Rāmi, op. cit., p. 331.

50. This case took place on the eastern side of the great mosque, probably in Tunis; Ibid., pp. 330-331.

51. Ibid., pp. 323, 329.

52. Ibid., p. 431.

53. Al-Wansharīsi, op. cit., V. 8, p. 445.

54. Ibn Taymiyyah, op. cit., V. 30, p. 401.

55. Ibn Qudāmah, op. cit., V. 4, p. 552.

56. The opinion of taking from the street for the public interest without the authority's permission is related from Ahmad b. Hanbal through al-Jawzāni. Al-Marwazi relates that when 'Aḥmad was asked about such mosques he answered that people should not pray in it. Ibn Taymiyyah, op. cit., V. 30, pp. 402-404.

CHAPTER SIX

57. As-Sinami, op. cit., p. 209.

58. See, for example, 'Ibn Taymiyyah, op. cit., V. 30, p. 10.

59. Ibn Qudamah, op. cit., V. 4, pp. 551-552.

60. Al-Majmu^c, op. cit., V. 12, pp. 400-401.

61. The jurists are al-'Awza^ci, 'Ishaq, Muhammad and Abu Yusif. See Ibn Qudamah, op. cit., V. 4, pp. 551-552, al-Muti^ci, op. cit., V. 12, p. 299, and Ibn Taymiyyah, op. cit., V. 30, p. 10.

62. Ibn ar-Rami, op. cit., pp. 389-390.

63. The height requirement is given by 'Ibn 'Abi Zayd, Ibid., p. 389.

64. This is also the opinion of Abu Yusif, as-Sinami, op. cit., p. 208, Ibn ar-Rami, op. cit., p. 389.

65. Al-Wansharisi, op. cit., V. 8, p. 431.

66. See, for example, the opinion of al-^cUmrani, al-Majmu^c, op. cit., V. 12, p. 400.

67. 'Ibn ar-Rami, op. cit., p. 323.

68. Ibid., p. 324-325.

69. Al-Wansharisi, op. cit., V. 9, p. 19; Ibn ar-Rami, op. cit., pp. 323, 324.

70. Al-Wansharisi, op. cit., V. 9, pp. 12-15; also see Ibn ar-Rami, op. cit., p. 325.

71. Al-Wansharisi. op. cit., V. 9, p. 56. The judge 'Ibn ^cAbd ar-Rafi^c ruled the continuation of the shop in a similar case. al-Wansharisi, op. cit., V. 8, p. 454.

72. Ibn ar-Rami, op. cit., p. 325.

73. The jurists are Ibn ^cAbd ar-Rafi^c and Ibn al-Qasim, Ibid., p. 320.

74. The fourth opinion is for Malik narrated by 'Ashhab. Ibid., pp. 320-321.

75. For his definition of a wide street regarding doors see Ibid., p. 323.

76. Ibid., p. 321.

77. In the same page, Ibn ar-Rami explains the term 'uskuffah. Ibid., p. 322.

CHAPTER SIX

78. Al-Wansharīsi, op. cit., V. 9, pp. 20-21.

79. As-Sinami, op. cit., p. 208. Later we will mention some examples of such differences.

80. 'Ibn Taymiyyah, op. cit., V. 30, pp. 8-9.

81. 'Ibn Qudāmah, op. cit., V. 4, pp. 552-553.

82. For the opinion of ash-Shāfi[c]i, see Ibid; also al-Majmū[c], op. cit., V. 12, p. 403.

83. Al-Majmū[c], op. cit., V. 12, p. 403.

84. Al-Wansharīsi, op. cit., V. 8, p. 43; V. 9, p. 6.

85. For tābūt see 'Ibn Manẓūr, op. cit., V. 1, p. 309.

86. This is also the ruling of Ibn Hārith, al-Wansharīsi, op. cit., V. 9, p. 55. In another similar case al-Barni was asked about a person who projected a cantilever that was three handspans wide into a dead-end street occupied by two neighbors. He answered that such action is illegal unless the other neighbor agrees. al-Wansharīsi, op. cit., V. 8, p. 449.

87. [lā yu[c]tabaru ad-dararu wa yu[c]tabaru 'idhnu ash-shurakā'], as-Sinami, op. cit., p. 208.

88. Ibid.

89. For the Hanafi rite see Ibn [c]Abdīn, op. cit., V. 5, p. 446; for the Shāfi[c]i rite see al-Muṭī[c]i, op. cit., V. 12, p. 414.

90. 'Ibn [c]Ābdīn, op. cit., V. 6, pp. 553-554.

91. Al-Wansharīsi, op. cit., V. 9, p. 63.

92. Ibid., V. 8, p. 447.

93. Al-Wansharīsi, op. cit., V. 9, p. 7. See also Ibn ar-Rāmi, op. cit., p. 336.

94. Ibn ar-Rāmi, op. cit., p. 336.

95. Al-Wansharīsi, op. cit., V. 9, pp. 5-6; V. 8, pp. 42-43.

96. The name of the daughter is Nādrah al-[c]Arafah.

97. Ibn ar-Rāmi drives this case in the section of opening a door into a dead-end street. It was documented by Abū Zayd b. al-Qattān. He states that this case may have taken place in a through or dead-end street. Op. cit., p. 329.

CHAPTER SIX

98. Al-Wansharisi, op. cit., V. 9, p. 10. Ibn ar-Rami, op. cit., p. 328.

99. This is the opinion of the majority of the jurists of the Hanafi rite. However, they approve of opening a door if the person opening it claims that he is creating the opening to admit light and air only, and not for passing. See 'Ibn cAbdin, op. cit., V. 5, pp. 445-446.

100. Ibid., V. 5, pp. 446-447.

101. Al-Mutici, op. cit., V. 12, p. 413.

102. Ibn ar-Rami, op. cit., pp. 326-328. See also al-Wansharisi, op. cit., V. 6, p. 421, from al-Mudawwanah Suhnu asked Ibn al-Qasim about opening a door in a dead-end or a through street by saying, "does a neighbor have the right to pervent such a person from opening his door? 'Ibn al-Qasim's response was, "A person does not have the right to establish a door in front of his neighbor's door, or near it, within a dead-end street because (he said) the owner of the pre-existing door has the right to say, 'This place of the street in which you want to open your door, I do have the right of way in it, and when I open my door, I do not want my privacy to be invaded. I bring my loads near my door without harming others, thus I will not allow you to open your door in front of mine or near it, since you may use yours as a reception place or for other purposes.' But if the street is a through street, the person has the right to open his door as he wishes." al-Mudawwanah, op. cit., V. 4, p. 275.

103. Al-Wansharisi, op. cit., V. 8, p. 447.

104. For the Hanafi rite, see 'Ibn cAbdin, op. cit., V. 5, p. 446. For the Maliki rite see 'Ibn ar-Rami, op. cit., pp. 327-329. For the Shafici rite see al-Majmuc, op. cit., V. 12, pp. 415-416.

105. For the Shafici rite see al-Majmuc, op. cit., V. 12, pp. 413-415. For the Hanafi rite see 'Ibn cAbdin, op. cit., V. 5, p. 446. For the Hanbal rite see Ibn Qudamah, op. cit., V. 4, pp. 570-571,; Ibn Taymiyyah, op. cit., V. 30, p. 5.

106. Al-Majmuc, op. cit., V. 12, p. 413.

107. Ibn Qudamah, op. cit., V. 4, pp. 570-571.

108. Ibid.; al-Majmuc, op. cit., V. 12, pp. 413-414.

109. Al-Wansharisi, op. cit., V. 9, p. 7. A similar case or the same one is reported by Ibn ar-Rami, op. cit., p. 336.

CHAPTER SEVEN

1. Al-Wansharīsi, op. cit., V. 9, p. 171-172.

2. Ibid., pp. 176-177. In fact there are many other cases which suggest that giving away a charity is common practice. See for example, V. 9, pp. 124-242 of al-Wansharīsi.

2.1 Joseph Schacht, An Introduction to Islamic Law, (Oxford University Press, 1964), p. 158.

3. Translated by Fyzee, Asaf A., from Durr al-Mukhtār, Outline of Muhammdan Law, (Delhi: Oxford University Press, 1974), p. 218.

4. Al-Wansharīsi, op. cit., V. 9, p. 146; for the Hanifif rite see Fyzee, op. cit. p. 240.

5. Al-Wansharīsi, op. cit., V. 9, p. 196.

6. Narrated by al-Bukhāri, op. cit., V. 3, p. 478, tradition no. 790.

7. Ali, Syed Ameer. Mahommedan Law, 2 vol., (Law Publishing Co. Lahore, 1976), V.1, p. 78.

8. For detail see Fyzee, op. cit., p. 239; Syed Ameer, op. cit., V. 1, p. 78

9. Brugman, J., "The Islamic Law of Inheritance" in Essays on Oriental Laws of Succession, (Leiden: Brill, 1969), p. 88.

10. G. Heyworth, op. cit., p. 26.

11. The Cairo Geniza documents are discarded Hebrew writings that were put away in a lumber room and dating from the tenth through the thirteenth centuries. These documents, which cover diverse writings such as offiical business and private correspondence, were analyzed by S.D. Goitein.

12. S.D. Goitein, Cairo: An Islamic City in the Light of the Geniza Documents, in Middle Eastern Cities, ed. by Ira M. Lapidus, (U. of California Press, Berkeley and Los Angeles, 1969), pp. 88-89.

13. Ibid., pp. 95-96.

14. This case took place in the city of al-'Ashbūna in western Spain. Al-Wansharīsi, op. cit., V. 6, pp. 476-477. For other similar cases see pp. 262-263.

15. This is a summary; the case is more complicated. For detail see al-Wansharīsi, op. cit., V. 9, pp. 155-157. For a similar case see pp. 178-179.

16. Ibn Qudāmah, op. cit., V. 5, p. 307. For the concept of equities see also, al Mudawwanah, op. cit., V. 4, p. 211.

CHAPTER SEVEN

17. Sahih al Bukhari, op. cit., V. 3, p. 408, 227. See also al-Muwatta, translated, op. cit., pp. 331-333.

18. Al-Muwatta, trans., op. cit., p. 331.

19. Ibn Qudamah, op. cit., V. 5, p. 309.

20. See Article 1008 of al-Majallah, op. cit., also Fyzee, op. cit., pp. 64-65.

21. Article 1009, 1010 of al-Majallah, op. cit.

22. Ibid., Article 1012.

23. For the Hanafi rite see 'Ibn Qudamah, op. cit., V. 5, pp. 309-310. For the Maliki rite see al-Mudawwanah, op. cit., V. 4, pp. 205-238.

24. From the Maliki rite, Sahnun questioned, "If I sold my upper floor while the lower floor is owned by others or vice versa, does my neighbor have the right of pre-emption?" Ibn al-Qasim answered, "No he does not, since every one of you knows his share and the line of subdivision is there." al-Mudawwanah, op. cit., V. 4, p. 237. See also 'Ibn ar-Rami, op. cit., p. 478.

25. Suhnun asked 'Ibn al-Qasim about a dead-end street that was owned by the dwellers of that street. If one of them decided to sell his dwelling, would the neighbors have the right of pre-emption? Ibn al-Qasim answered that they do not have the right of pre-emption according to Malik, al-Mudawwanah, op. cit., V. 4, p. 207.

26. Ibn ar-Rami, op. cit., p. 478.

27. Of al-Mudawwanah, Suhnun asked, "If my neighbor and I both own the party wall and I decide to sell my share of it, does he have the right of pre-emption?" Ibn al-Qasim answered: "yes". Suhnun pursued: "But if that party wall is mine and my neighbor's wooden beam is in it, does he have the right of pre-emption?" Ibn al-Qasim replied, "no." op. cit., V. 4, p. 237.

28. 'Ibn ar-Rami, op. cit., p. 478.

29. For the Hanafi's opinion which gives the pre-emptor an equal proportion regardless of his unequal share, see Fyzee, op. cit., p. 342.

30. Ibn Qudamah, op. cit., V. 5, p. 363. For the Sahfi^c is opinion see ibid. and Fyzee, op. cit., p. 342.

30.1 Al-Muwatta, op. cit., p. 505, trans., op. cit., p. 332. See also the opinion of 'Ibn al-Qasim in al-Mudawwanah, op. cit., V. 4, p. 207. For a case in which a dispute took place between the co-owner

of a house and the successors of the other co-owner, see al-Wansharīsi, op. cit., V. 6, pp. 114-115.

31. Al-Wansharīsi, op. cit., V. 8, p. 106. For another interesting and complicated case in which one of the co-owners gave his right of pre-emtpion as a gift to another person, see V. 5, pp. 46-47 of al-Wansharīsi. For a case that took place in Miknāsah in which a prince was a co-owner in a bath and the question of whether the co-owners of such property have the right of pre-emption, see ibid, V. 8, pp. 111-113. For a third case in which the question of pre-emption involves a waqf, see ibid., V. 6, pp. 258-259.

32. See for example Article 1118 of al-Majallah from the Hanafi school of law, op. cit.

33. Article 1129 of al-Majallah, op. cit.

34. Article 1149 of al-Majallah, ibid.

35. Ibn ar-Rāmi, op. cit., pp. 425-426, 416-417. See also al-Mudawwanah, op. cit., V. 4, p. 270. According to the Hanafi rite, if there is no damage to the other co-owner he should be compelled to accept the share that is not adjacent to his neighbor in order not to damage the partner who owns adjacent property. 'Ibn ᶜAbdīn, op. cit., V. 8, p. 63.

36. Al-Wansharīsi, op. cit., V. 8, p. 118.

37. Ibid., V. 8, p. 131.

38. 'Ibn ᶜAbdīn, op. cit., V. 8, p. 62.

39. Al-Wansharīsi, op. cit., V. 8, p. 134.

40. The jurists are 'Ibn Lubābah, 'Ibn Ghālib and 'Ibn Walīd, ibid., V. 8, p. 127.

41. Ibid., V. 9, p. 179.

42. See Article 1174 of al-Majallah, op. cit.; also ibn ar-Rāmi, op. cit., p. 417.

43. Articles 1176-1182 of al-Majallah, op. cit.

44. Ibn ar-Rāmi, op. cit., p. 328.

45. al-Mudawwanah, op. cit., V. 4, pp. 249-250.

46. Ibid., V. 4, p. 241. Al-Wansharīsi reports a complicated case of a dispute among brothers that took place years after the subdivision

process in which the successors claimed the subdivision was unfair. Op. cit., V. 5, p. 167.

47. Al-Wansharīsi, op. cit., V. 8, p. 132.

48. Al-Mudawwanah, op. cit., V. 4, p. 277.

49. See Articles 1138-1140 of al-Majallah, op. cit.

50. For the opinions of these schools of law see al-Qarāfi, op. cit., V. 4, p. 26.

51. See Articles 1141-1144 of al-Majallah, op. cit..

52. 'Ibn Qudāmah, op. cit., V. 4, pp. 573-576.

53. Al-Qarāfi, op. cit., V. 4, p. 26.

54. Al-Mudawwanah, op. cit., V. 4, pp. 269-270.

55. Qur'ān, an-Nisā', 7 (IV, 7).

56. 'Ibn ar-Rāmi, op. cit., pp. 422-423.

57. Al-Mudawwanah, op. cit., V. 4, p. 273; Ibn ar-Rāmi, op. cit., p. 422.

58. 'Ibn ar-Rāmi, op. cit., p. 422.

59. Al-Wansharīsi, op. cit., V. 8, p. 124.

60. Al-Mudawwanah, op. cit., V. 4, pp. 268-269; the water gulley or canals are also considered as indivisible elements. Ibid., p. 251.

61. Al-Wansharīsi, op. cit., V. 8, p. 121.

62. Ibn ar-Rāmi, op. cit., pp. 417-418; al-Mudawwanah, op. cit., V. 4, pp. 251, 272.

63. 'Ibn ar-Rāmi, op. cit., p. 419, al-Mudawwanah, op. cit., V. 4, p. 272. Ibn al-Qasim adds that if an open space is divided in a way that one partner will be able to have access while other partners will have access and will enjoy other usages, then the open space should not be divided. Ibid.

64. Ibn ar-Rāmi, op. cit., p. 418; al-Mudawwanh, op. cit., V. 4, p. 272.

65. Ibn ar-Rāmi, op. cit., p. 418.

66. Ibid.

67. 'Ibn ᶜAbdīn, op. cit., V. 8, pp. 66-67.

CHAPTER SEVEN

68. For the Hanafi rite, for example, see Article 1145 of al-Majallah, op. cit. For the Maliki rite, see 'Ibn ar-Rami, op. cit., p. 421.

69. Al-Mudawwanah, op. cit., V. 4, p. 241.

70. Ibn ar-Rami, op. cit., pp. 420-421.

71. See article 1169 pf al-Majallah, op. cit..

72. Article 1168, Ibid.

73. Ibn ar-Rami, op. cit., p. 424. I have given other examples in chapter one under the permissive form of submission and in chapter four under the original growth of towns.

74. Ibid., pp. 327, 424. From al-Mudawwanah, Sahnun asked what would happen if the owners of the internal house divided that house into two dwellings, and each owner of these internal dwellings wanted to open a door within his property to the external house, while the owner of the external house rejected it. 'Ibn al-Qasim answered that the owner of the external house has the right to reject. Op. cit., V. 4, p. 275.

75. Al-Wansharisi, op. cit., V. 8, p. 457.

76. Ibid., V. 8, p. 405.

77. Ibid., V. 6, pp. 256-257.

78. Ibn ar-Rami, op. cit., p. 283.

79. Ibid., p. 424. From al-Mudawwanah, Suhnun questioned that if a house that was inherited and divided between two persons and one of the neighbors of that house bought the share of the person adjacent to him and opened a door in that share, turning a part of that share into a passageway. Could the owner of the other share prevent such an action? Ibn al-Qasim answered, "No, he cannot prevent him, since that person bought that part to use it and enlarge his dwelling." op. cit., V. 4, p. 275.

80. Ibn ar-Rami, op. cit., p. 427.

81. Al-Wansharisi, op. cit., V. 6, pp. 431-432.

82. Ibid., V. 5, pp. 296-297. For another case see p. 130.

83. S. Yaiche and S. Dammak, Analyse Typologique et Morphologique des J'Neins a Sfax, Institute Technologique d'Art d'Architecture et d'Urbanisme de Tunis, 1980, pp. 36-50.

84. Ibid., p. 38.

CHAPTER SEVEN

85. For more detail regarding the process of building the free-standing vacation houses [burj] within the jināns and the building typology see *ibid*., pp. 51-130.

CHAPTER EIGHT

1. As-Samhūdi, op. cit., V. 2, p. 513.

2. Al-Maqrīzi, op. cit., V. 2, p. 20.

3. Article 1218 of al-Majallah. For other examples see Articles 1213 and 1217.

4. For more detail, see the article by Amīn al-Hashimi in Khitat ash-Shām by M. Kurd ᶜAli, (Dar al-ᶜIlm Press, Beirut, 1971), 6 volumes, V. 5, pp. 131-139.

5. Ibid.

6. It is also the same as Article 816 of the Libyan Civil Code. Ziadeh, op. cit., p. 27.

7. Al-Badrāwi, op. cit., p. 138.

8. Ibid, pp. 138-9.

9. Ziadeh, op. cit., p. 28.

10. Slamah, op. cit., pp. 194-5.

11. Al-Jazeerah daily newspaper; issue no. 3858 of April 13, 1983 (3/6/1403).

12. Ibid, issue no. 3989 of August 31, 1983 (23/11/1403).

13. Salamah, op. cit., p. 196.

14. Al-Jazeerah, op. cit., issue no. 3798 of February 12, 1983 (29/4/1403).

15. Salamah, op. cit., pp. 192-3.

16. Ibid, pp. 201-2.

17. Ibid, pp. 202-3.

18. Al-Madena newspaper; issue no. 5987, 9/11/1403.

19. 1 Riyal = 3.4 U.S. dollars; al-Jazeerah, op. cit.; issue no. 4199 (1404/1984).

20. C.S. Holling and M.A .Goldberg, "Ecology and Planning," Jounral of the American Institute of Planners, 37 (1971), p. 229.

21. Ibid, pp. 222, 226.

22. Al-Wansharīsi, op. cit., V. 9, pp. 38-39; V. 8, pp. 431-432; 'Ibn ar-Rāmi, op. cit., p. 410.

CHAPTER EIGHT

23. 'Ibn ar-Rāmi, op. cit., pp. 376-377.

24. Nasir Khasra, Safarnāmah, translated from Persian to Arabic by Dr. Y. al-Khashshāb, (Ma^c had al-Lughāt ash-Sharqiyyah Press, Cairo, 1945), p. 50.

25. Related by al-Bukhāri, op. cit., V. 3, p. 384. Also see al-Muwaṭṭa's translation, op. cit., p. 346.

26. Ibn ar-Rāmi, op. cit., p. 294.

27. Al-Mughni, op. cit., V. 5, p. 548.

28. al-Majmū^c, op. cit., V. 12, p. 104.

29. Sahnūn continued: "Did Mālik consider the prophet's tradition, 'no one of you should prohibit his neighbor from nailing a wood into his wall'?" Ibn al-Qāsim replied, "yes, Malik considered the prophet's tradition; but the prophet's objective was for amicable relations among people." Sahnūn inquired, "Can a person buy a certain spot of his neighbor's party wall, to nail his wooden beam?" Ibn al-Qāsim answered yes. Sahnun also inquested: "If two neighbors own the party wall and one of them demanded the division of that wall; do they have to divide that party wall?" Ibn al-Qāsim responded: "If the wall is dividable and such division would not harm any of them; then they have to divide. But if there are wooden beams in that wall, then it is undividable." Al-Mudawwanah, op. cit., V. 3, pp. 261, 404; V. 4, p. 268.

29.1 Al-Wansharīsi, op. cit., V. 9, pp. 30, 58.

30. Ibid, V. 9, pp. 29-30.

31. See, for example, 'Ibn ^cAbdīn, op. cit., V. 8, pp. 53-54; 'Ibn Qudāmah, op. cit., V. 4, pp. 555-576.

32. 'Ibn ar-Rāmi, op. cit., pp. 275-294.

33. Al-Wansharīsi, op. cit., V. 8, pp. 428-9. For other cases see V. 9, p. 67; 'Ibn ar-Rāmi, op. cit., pp. 379-380.

34. This was reported in al-Madinah newspaper and was told to me by Sameer Khashugjee in 1982.

35. Al-Hathloul, op. cit., pp. 219-223.

36. For detail see S. Khashugjee, Principles and Application for Qā^ca House in Madina, (S.M. Arch. S. thesis, MIT, 1983), pp. 16-25.

37. For Riyadh, see Jamel Akbar Support for Courtyard Houses, (M.Arch. A.S. Thesis, MIT, 1980) pp. 13-43. For Baghdad, see J. Warren and I. Fethi, Traditional Houses in Baghdād, (Coach Publishing House,

CHAPTER EIGHT

Horsham, England, 1982) pp. 42-97. For San^{c}ā' see F. Varanda, Art of Building in Yemen, (MIT Press, Cambridge, Massachusetts, 1982) pp. 77-99. Also see R.B. Serjeant and R. Lewcock, San^{c}ā', an Arabian Islamic City, (The World of Islam Festival Trust, London, 1983) pp. 436-500.

38. Lapidus, Middle Eastern Cities, op. cit., p. 49.

39. Ibid., p. 51.

40. Lapidus, Muslim Cities, op. cit., p. 86.

41. Ibid., p. 87.

42. Al-Balādhuri, op. cit., see for example pp. 280, 281, 283, 284-287; 293-296; 353-363.

43. Al-Maqrīzi, op. cit., V. 2, p. 37.

44. Goitein, op. cit., pp. 85-86.

45. Al-Maqrīzi, op. cit., V. 2, p. 47.

46. For full information regarding this decree, see Hasan ^{c}Abd al-Wahāb, Takhtit al-Qāhirah wa Tanzimaha, (Dar an-Nashr lil-Jami^{c}āt Press, Cairo, 1957) pp. 23-35.

47. Ibid., p. 27.

48. Al-Jazirah, op. cit., issue no. 3799 of February 13, 1983 (4/30/1403).

49. Al-Balādhuri, op. cit., p. 199; trans. pp. 307-308.

50. Al-Maqrīzi, op. cit., V. 2, pp. 46-47.

51. N. Khasro, op. cit., p. 102.

52. 'Ibn Taymiyyah, op. cit., V. 30, p. 11; 'Ibn ar-Rāmi, op. cit., p. 336.

53. 'Ibn ^{c}Abdīn, op. cit., V. 5, p. 446.

54. Al-Wansharīsi used darb to indicate the frame of a gate when a dispute took place regarding the gate and the judge ordered the demolition of the door [al-bāb] and uprooting the frame [darb] op. cit., V. 9, p. 7; Al-Maqrīzi, op. cit., V. 2, p. 37.

55. 'Ibn Manzūr, op. cit., V. 1, p. 961.

56. Al-Wansharīsi, op. cit., V. 7, p. 79.

57. H. ^{c}Abd al-Wahāb, op. cit., pp. 35-36.

CHAPTER EIGHT

58. Goitein, op. cit., p. 93.

59. Ḥ. ᶜAbd al-Wahāb, op. cit., p. 35.

60. Lapidus, Muslim Cities, op. cit., p. 94.

61. 'Ibn 'Iyās, V. 3, p. 143; cited by ᶜAbd al-Wahāb, op. cit., p. 36.

62. See for example Levi Provencal, op. cit., p. 33.

63. Ḥ. ᶜAbd al-Wahāb, op. cit., pp. 35, 37.

64. Ibid., p. 36.

65. I made this study in the summer of 1983. The name of the resident is Nadrah al-ᶜArafah.

66. The owners of the two dwellings are Muḥammad and ᶜUmar Ḥrār.

67. 'Ibn ar-Rāmi, op. cit., p. 336.

68. Goitein, op. cit., p. 86.

69. Lapidus, Muslim Cities, op. cit., p. 64.

70. Al-Wansharīsi, op. cit., V. 7, pp. 303-304.

71. Ibid, V. 5, pp. 347-348.

72. Ibid., pp. 350-351.

73. Ibid, p. 348.

74. Ibid, p. 350.

75. Al-Maqrīzi, op. cit., V. 2, p. 108.

76. N. Ziyadah, al-Ḥisbah, op. cit., p. 29.

77. Al-Maqrīzi, op. cit., V. 2, p. 108.

78. Al-Wansharīsi, op. cit., V. 6, p. 420.

79. Ibid., V. 9, p. 69.

80. Lapidus, Muslim Cities, op. cit., p. 66.

81. H. ᶜAbd al-Wahāb, op. cit., pp. 8-9.

82. See for example N. Ziyadah, al-Hisbah, op. cit., pp. 135-136.

83. H.ᶜAbd al-Wahāb, op. cit., p. 13.

CHAPTER EIGHT

84. Al-Wansharīsi, op. cit., V. 6, pp. 420-421.

85. 'Ibn ar-Rāmi, op. cit., p. 432.

86. Ibid., p. 385.

87. Al-Wansharīsi, op. cit., V. 9, pp. 36-37. For another case see, V. 8, pp. 436-437.

88. 'Ibn ar-Rāmi, op. cit., p. 337. For the opinion of 'Ibn ^{c}Itāb see also al-Wansharisi, op. cit., V. 9, p. 11.

89. 'Ibn ar-Rāmi, op. cit., p. 337.

90. Ibid., pp. 373-374.

91. Al-Jazeerah, op. cit., issue no. 3974, August 16, 1983 (8/11/1403).

92. Al-Madīnah, op. cit., issue no. 6000, August 30, 1983 (22/11/1403).

93. Al-Jazeerah, op. cit., issue no. 3892, May 17, 1983 (5/8/1403).

94. Stanford Anderson, "People in the Physical Environment: the Urban Ecology of Streets," in On Streets, edited by S. Anderson (MIT Press, Cambridge, Massachusetts, 1978), p. 6.

95. Goitein, op. cit., pp. 86-87.

96. Al-Maqrīzi, op. cit., V. 2, pp. 23, 27, 28, 415.

97. Ibid, V. 1, p. 375.

98. Al-Wansharīsi, op. cit., V. 9, pp. 49-50.

99. Ibid., V. 8, p. 443.

100. Ibid., V. 7, p. 57.

101. Ibid., pp. 225-226.

102. This was reported to me by Sameer Khashugjee who worked for the Real Estate Development Fund in 1979.

103. See Appendix 3 for the legal document of house no. 4 in fig. 17 and compare it with Appendix 4.

104. See Appendix 4 for the legal document of house no. 15 and parcel no. 16 that were originally two parcels of 20 x 20 and bought by the same person.

A P P E N D I C E S

Appendix 1

رقم الوارد — صادر

المملكة العربية السعودية وزارة الحج والأوقاف وكالة الوزارة لشئون الحج مسودات	رقم القيد تاريخه جهة الورود توقيع المبيض

١. اسم الرباط المستعمل قرب السبع [illegible]

يجب ترميم الرباط كامله حسب البيان

١- جميع الجدار الموجودة في اسفل الرباط إما تلبيس أو لبشاني [illegible]
٢- جميع الدريزانات تغيير الخشب لأنه مسوس
٣- تجديد جميع [illegible] حيث انه غير صالح ومسوس
٤- تصليح جميع الحمامات لأنه غير صالح للاستعمال
٥- يجب دهن جميع الرباط [illegible] البيضاء [illegible] وخارج

المهندس
حرر في ١٠/٩/١٤٠٢ عصمت النابلسي [illegible]

Appendix 2

بسم الله الرحمن الرحيم

لقد تم الاتفاق بين الطرف الأول السيد عبد الله حريري المقيم بالرباط
التابع للناظر عصام [illegible] والطرف الثاني العامل محمد حامد
الحامل لإقامة رقم ٢٠٧١ و[illegible] رقم جوازه ٢٧٧١ [illegible]
[illegible] الطرف الثاني للطرف الأول
في رباط جميع [illegible] السطح [illegible]
[illegible]
المذكور مبلغ وقدره ٥٠٠ ريال [illegible]
يستلمها من الطرف الأول [illegible]
حرر في ١٩/٩/١٤٠٢هـ

الطرف الأول — الطرف الثاني — الشاهد

[illegible]

Appendix 3

المملكة العربية السعودية
رئاسة القضاة

الصكوك الصادرة من كتابات العدل

مبايعة ـ افراغ

Appendix 4

المملكة العربية السعودية

الصكوك الصادرة من كتابات العدل

مبايعة فراغ

APPENDIX 5
TERMINOLOGY

Autonomous Synthesis: is the coexistence of properties mostly in the unified form of submission in which properties are not regulated by outsider parties. Each property is self-governed, owned and controlled by the largest residing party. It is internally controlled.

Control: The ability to manipulate elements without using or owning it, such as the decision to erect a wall or divide a room.

Damaging Act: is the action made by a party which may, or can potentially, damage other properties or parties in the future but not inevitably so, such as the creation of a window that may overlook future properties.

Damaging Precedent: is the action made by a party which will inevitably damage others' properties or parties in the future, such as a tannery.

Dispersed Form of Submission; is the state of a property in which it is shared by three parties, one party owns, the second controls and the third party uses it, such as waqfs.

Dominance Among Parties: such dominance can be observed through change of elements controlled by different parties; if a change by a party (A) will force the configurations of the other party (B) to adjust then party A is dominant. For example, the party that controls the walls will dominate the party that controls the furniture.

Form of Submission; is the physical state of property which results from the actions and relationships between the parties that own, control and uses it. It is the main indication of the parties' responsibility and the property's condition.

Heteronomous Synthesis: is the coexistence of properties in which the users have no control and do not own the property they are using. The majority of properties in such an environment is in the permissive or dispersed forms of submission. It is externally controlled.

The Largest Residing Party; is the party that is composed of the largest number of property users or owners. If the owners are not well defined such as the owners of a through street, then the largest residing party means the affected party by other individuals. If the owners are well defined, such as the residents of a dead-end street, then all the residents collectively are the largest residing party.

Nigh Party: is the party that is composed of individuals in which the members of such party is residing, near or abutting a property that initiate a change and such a change is to be approved by this party whether it is affected by the change or not.

Ordered Environment: is the environment in which responsibility is clear and in the hands of the largest residing party. The relationship between parties different properties (not the same property) are ordered by the physical environment as constraints, yet the physical environment is shaped by the responsible parties. Such environment may not be organized.

Ownership: is owning a property apart from control or use.

A Party: is any group of individuals acting as one regarding a property. A party can have one, two or three claims -- ownership, control and use. Two parties will not share the same claim.

Permissive Form of Submission: is the state of a property in which it is shared by two parties, one owns and controls it while the second uses it, such as leased apartment.

Possessive Form of Submission: is the state of a property in which it is shared by two parties, one owns while the other uses and controls, such as the places in the market that is appropriated by individuals who uses and controls the space that is owned by the state.

Possessive Party or Possessor: is the party that uses and control but does not own the property.

Remote Party: is the party that does not occupy the property such as the state as a party that controls a housing project.

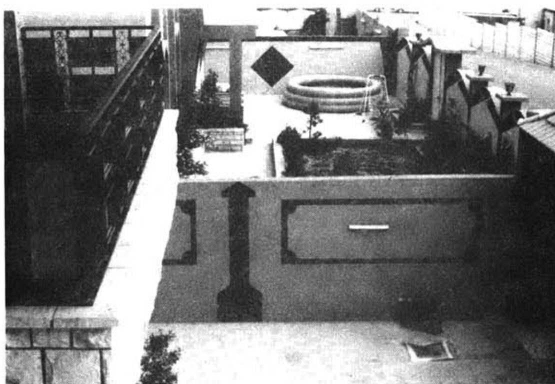
Right of Precedence: is the right enjoyed by a property to damage other properties. If a party precedes other parties in making a change, such as opening a window, then this property will have the right of precedence over other properties. The window will have the right to continue even if it damages adjacent properties.

Size of a Party: is the number of individuals composing that party.

Unified Form of Submission: is the state of a property in which all the claims -- ownership, control and use -- are enjoyed by one party such as a resident who controls and owns his dwelling. This form is the extreme opposite of the dispersed form of submission.

Use: the enjoyment of a property without controlling or owning it such as the tenant who lives in a rented house.

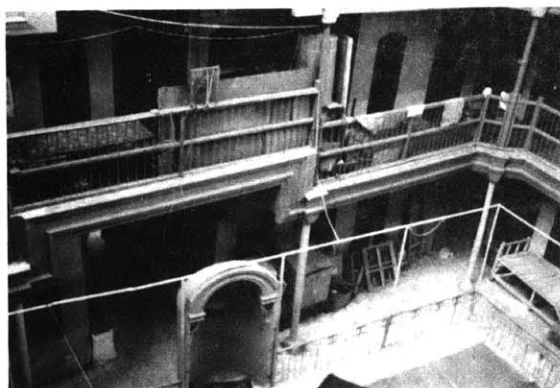
APPENDIX 6 (Photographs)



5

1

6



2

7

3

8

9

10

11

12

13

14

15

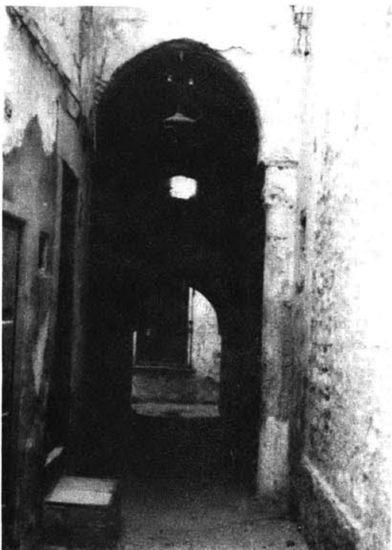
16

19

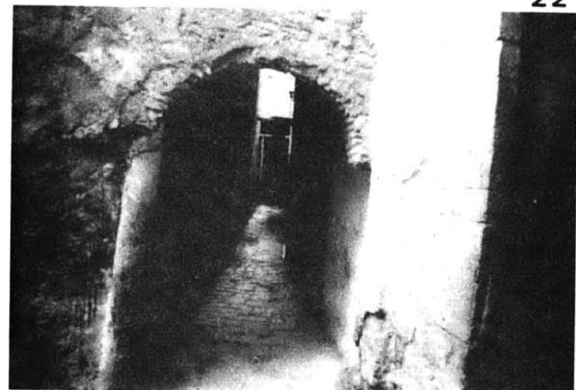
20

17

21



18



22

23

26

24

27

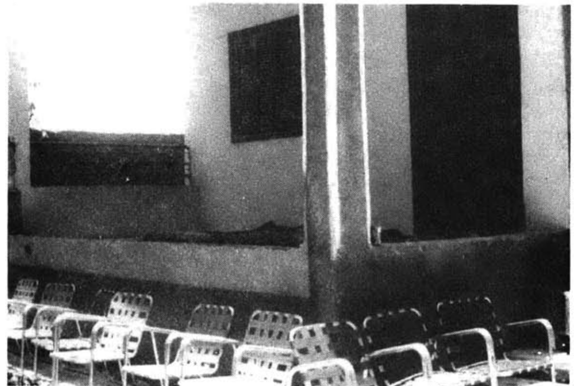
25

28

29

32

33

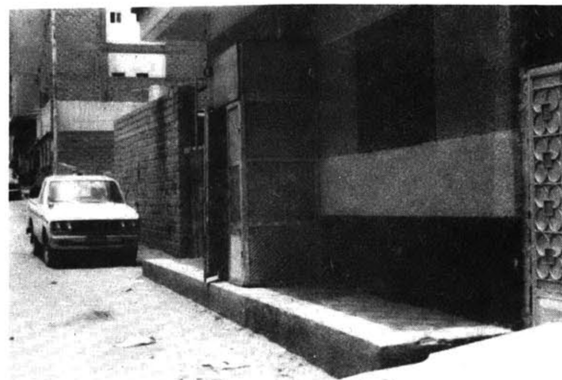


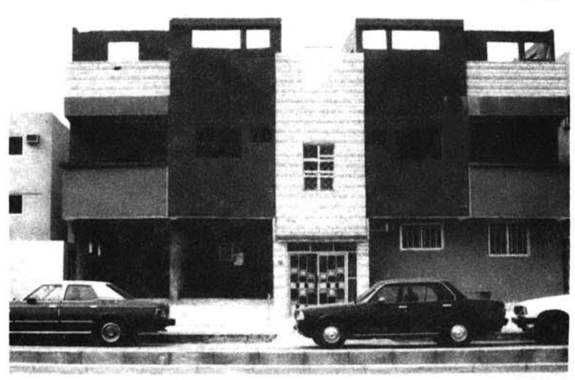
30

31

34

35





36

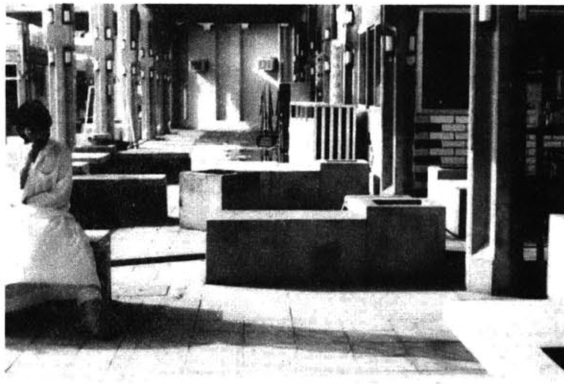
37

38

39

40

41

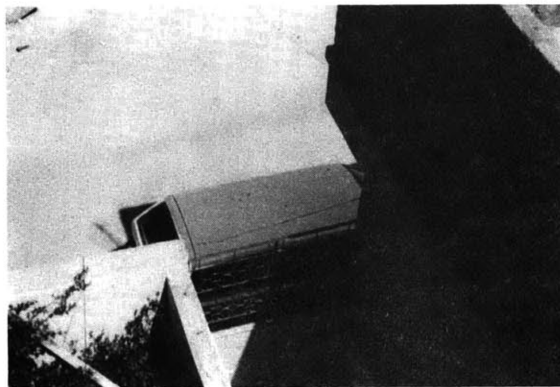


42

43

44

45

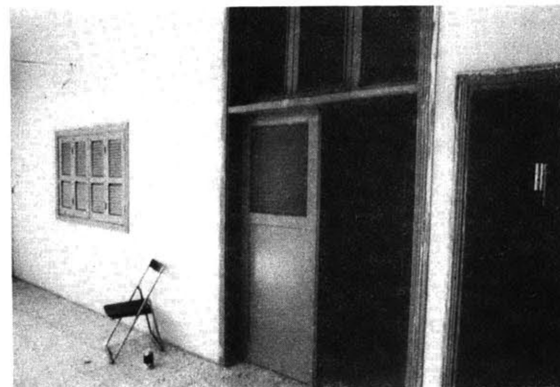


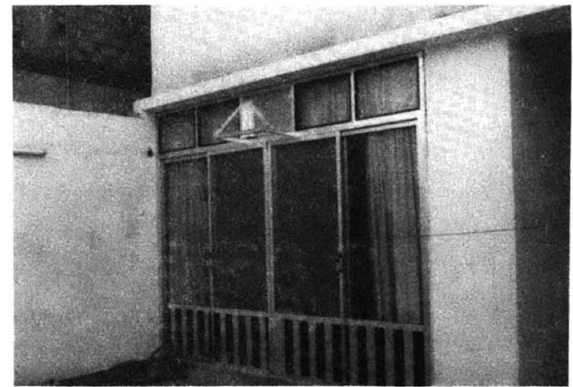
48

49

46

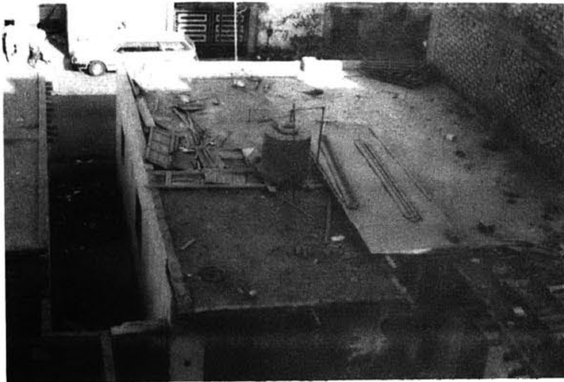
47





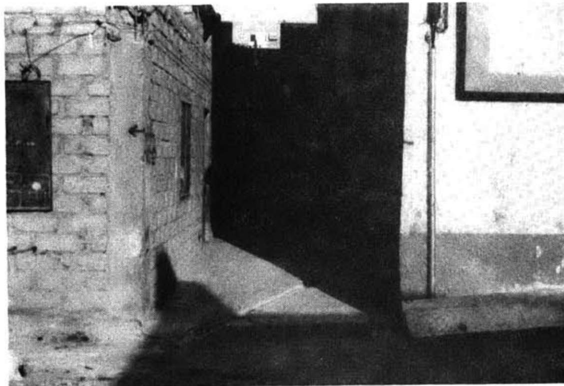
50

51



52

53



54

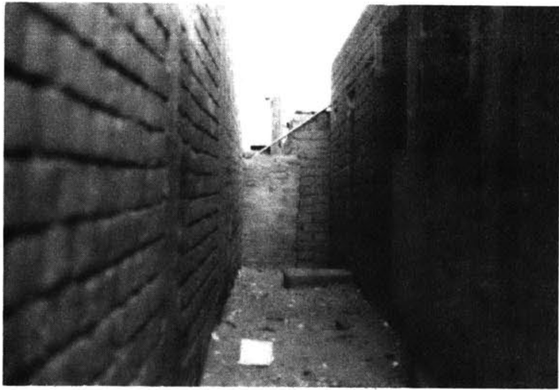
55

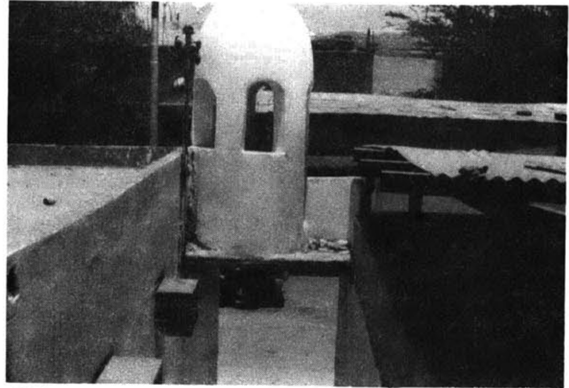
56

57

58

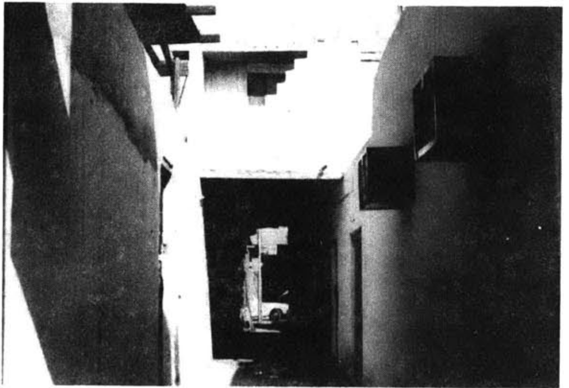
59


60

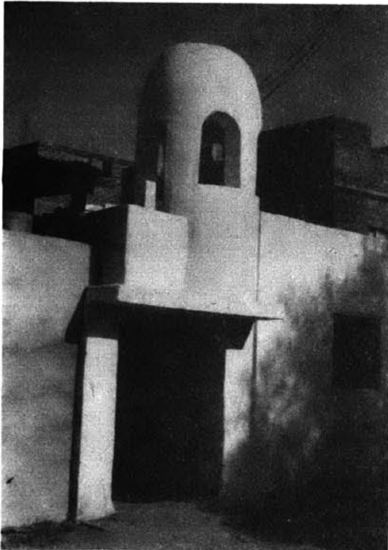

63

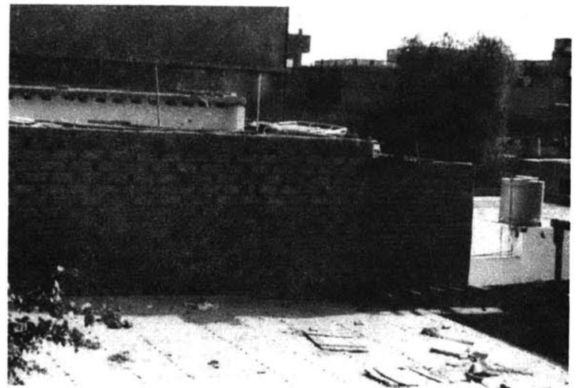
61

64



62

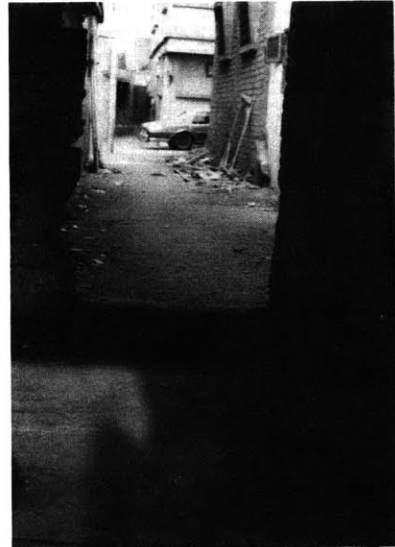



65

66

67

69



68

BIBLIOGRAPHY

The following are the sources that are quoted and/or directly referred to by this study:

Al-^{c}Abbādi, D., al-Mulkiyyah Fi al-Sharī^{c}ah al-'Islāmiyyah. Published Ph.D. dissertation, 3 vol. (Maktabat al-Aqsa, Jordan, 1974).

^{c}Abd al-Wahāb, Hasan. Takhtīt al-Qāhirah wa Tanzimaha, (Cairo, 1957).

'Abi ^{c}Ubayd, al-Qāsim 'Ibn Salām (d. 224H.), Kitāb al-'Amwāl, (Dar al-Fikr Press).

Ali, Syed Ammer. Mohammedan Law, 2 vol., (Law Publishing Co., Lahore, 1976).

Al-^{c}Ali, al-Bashrah fi al-Qarn al-'Awwal., published Ph.D. dissertation (Oxford U.), (al-Ma^{c}arif Press, Baghdad, 1953).

Abu Yūsif, Kitāb al-Kharāj, (Dar al-Ma^{c}rifah Press, Beirut).

^{c}Anbar, A.M. Qānūn al-'Ijārāt al-Jadīd, (Dar al-Fikr Press, 1969).

Anderson, Stanford, "People in the Physical Environment: the Urban Ecology of Streets," in On Streets, edited by S. Anderson (MIT Press, Cambridge, Massachusetts, 1978).

Al-^{c}Amrūhsi, Anwar. Sharh Qānūn al-'Islāh. az-Zirā^{c}i (Cairo, 1963).

Al-Badrāwi, A., al-Huqūq al-^{c}Ayniyyah al-Asliyyah, 3rd publication, (Cairo, 1968).

Al-Balādhuri, Futūh al-Buldān, (Dar al-Kutub al-^{c}Ilmiyyah Press, Beirut, 1978).

Brugman, J., "The Islamic Law of Inheritance" in Essays on Oriental Laws of Succession, (Leiden: Brill, 1979).

Al-Bukhāri, Sahīh al-Bukhāri, 9 vol. trans. M. Muhsin Khānn, (Islamic University, al-Madina al-Munawwarah, 2nd Edition, 1976).

Creswell, K.A.C., Early Muslim Architecture, Second Edition. (New York, Hacker Art Books, 1979).

Fyzee, Asaf A., Outline of Muhammdan Law, (Delhi: Oxford University Press, 1974).

Goitein, S.D., "Cairo: An Islamic City in the Light of the Geniza Documents," in Middle Eastern Cities, ed. by Ira M. Lapidus, (U. of California Press, Berkeley and Los Angeles, 1969).

Von Grunebaum, G.E., Islam: Essays in the Nature and Growth of a Cultural Tradition. (London, Routledge & Kegan Paul Ltd., 1961).

Guest, A.R., "The Foundation of Fustat and the Khittahs of that Town,"

The Journal of the Royal Asiatic Society of Great Britain & Ireland, January 1907.

Habraken, N.J., Transformation of the Site, (Atwater Press, 1982).

Al-Hanbali, A. Ya^c^la, al-'Ahkām al-Sultāniyyah, (al-Halabi Press, Cairo, 1966).

Al-Hanbali, Shākir, Mūjaz fi 'Ahkām al-'Arādi, (al-Tawfīq Press, Damascus, 1928).

Al-Hathloul, Saleh, Tradition, Continuity and Change in the Physical Environment, unpublished Ph.D. Dissertation, M.I.T., 1981.

Heyworth-Dunne, J., Land Tenure in Islam, (The Renaissance Bookshop Press, Cairo, 1951).

Holling, C.S. and M.A. Goldberg, "Ecology and Planning," Journal of the American Institute of Planners, 37 (1971).

'Ibn ^c^Abdīn, Rad al-Muhtār ^c^ala ad-Dur al-Mukhtār, 8 Vol., (Dār al-Fikr Press, 1966) known as Hashiyat 'Ibn ^c^Abdin.

'Ibn ^c^Abdūn, Thalāthu Rasā'il 'Andalusiyyah fī 'Adāb al-Hisbah wa al-Muhtasib, edited by E. Levi-Provencal, (Cairo, Matba^c^at al-Ma^c^had al-^c^Ilmi al-Faransi lil-'Athār al-Sharqiyyah Press, 1955).

'Ibn ^c^Asākir (d. 571/1175), Tahdhīb Tārīkh Dimishq al-Kabīr, edited by A. Badrān, 7 volumes (Beirut, Dar al-Masirah Press, 1979).

'Ibn Hazm, (d. 456 H.), al-Muhalla, (Maktabat al-Jamhūriyyah, Cairo, 1972).

'Ibn Manzūr, Lisān al-'Arab al-Muhīt, edited by Y. Khayyat and N. Mar^c^ashli, (Beirut, Dar lisan al-^c^Arab) 3 volumes.

'Ibn al-Qāsim and Sahnūn, al-Mudwwanah al-Kubrā, 4 Vol., (Dār al-Fikr Press, Beirut, 1978).

'Ibn Qudāmah (d. 620 H.), al-Mughni, (Maktabat 'Ibn Taymiyyah Press, edited by M. Harras).

'Ibn Rajab, al-Qawā^c^id, (Maktabat & al-Khanji, Cairo, 1933).

'Ibn ar-Rāmi, Kitāb al-'I^c^lān bi 'Ahkām al-Bunyān, Ed. A. ad-Dawdi, Majallat al-Fiqh al-Maliki, (published by the Ministry of Justice, Morocco, 1982, Issues 2,3,4).

'Ibn ash-Shāt, Hashiyat 'Ibn ash-shāt ^c^ala al-Furūq, 4 Vol. (Dar al-Ma^c^rifah Press, Beirut).

'Ibn al-Ukhuwwa, Ma^c^ālim al-Qurba fi Ahkām al-Hisba (Cambridge, England, 1937).

'Ibn 'Adam, Y. al-Qurashi, Kitāb al-Kharāj, (Dar al-Ma^crifa Press, Beirut).

Itozkowits, Norman, Ottoman Empire and Islamic Tradition, (The University of Chicago Press, 1972).

Khadduri, Majid, The Islamic Law of Nations, (The Johns Hopkins Press, 1966).

Khalifa, M. al-Muzāra^cah wa al-Musāqāt fi al-Sharī^cah al-Islamiyyah. (Dar al-Risalah Press, Baghdad, 1975).

Khashugjee, S., Principles and Application for Qq̄^ca House in Madina, (S.M. Arch. S. thesis, MIT, 1983).

Khasro, N., Safarnāmah, trans. from Persian to Arabic by Dr. Y. al-Khashshab, (Ma^chad al-Lughāt ash-Sharqiyyah Press, Cairo, 1945).

Al-Khatīb al-Baghdādi, Tārikh Baghdād, (Dār al-Kitāb al-^cArabi, Beirut), 14 Volumes.

Al-Kittanị, A., at-Taratīb al-'Idariyyah, (Beirut: Dar al-Kitab al-^cArabi Press), 2 volumes.

Al-Kuzbari, M., al-Huqūq al-^cAyniyyah, (Damascus, 1959).

Lapidus, Ira Marvin, Muslim Cities in the Later Middle Ages (Harvard Univ. Press, Cambridge, Massachusetts, 1967).

------------------- "Muslim Cities and Islamic Societies" in Middle Eastern Cities, edited by I.M. Lapidus, (Univ. of California Press, Berkeley and Los Angeles, 1969).

Lassner, Jacob, The Topography of Baghdād in the Early Middle Ages, (Detroit, 1979).

Mālik, Mālik b. Anas, al-Muwatta (Beirut, 1981) Trans. by A. at-Tarjumana and Y. Johnson, (Diwan Press, England, 1982).

Al-Maqrīzi, al-Mawā^ciz wa al-'I^ctibār, 2 Vols. (al-Ḥalabi Press, Cairo).

Al-Māwardi, al-Aḥkam al-Sulṭaniyyah, (Al-Ḥalabi Press, Cairo, 1960).

Michon, Jean-Louis, "Religious Institutions" in The Islamic City, ed. by R.B. Serjeant, (UNESCO, 1980).

Al-Majallah, Majallat al-'Aḥkām al-^cAdliyyah (al-Adabiyyah Press, Beirut, 1302 H.).

Majmū^cat al-Qawānīn, al-Jadīdah, (Egypt: Dar al-Fikr al-Ḥadīth Press, Cairo, 1952).

Al-Mawdūdi, Abu al-'A^cla, Mulkiyyat al-Ard fī al-Islam, (Dar al-Qalam Press, Kuwait, 1969).

Muhammad ᶜAli, Tahthīb al Furūq Wa al-Qawāᶜid as-Sunniyyah, 4 Vols. (Dar al-Maᶜrifah Press, Beirut).

An-Nawawi, M., Kitāb al Majmūᶜ, ed. Muhammad N. al-Mutīᶜi, 13 vol. (Maktabat al-'Irshad Press, Jeddah).

An-Nawawi, M. Riyād as-Sālihīn, (daru al-Hadīth Press, Beirut, 1955).

An-Nawawi's Forty Hadith, trans. by E. Ibrahim and D. Johnson-Davies, (the Holy Koran Publishing House, Damascus, 1977).

Popper, Karl R., Conjectures and Refutations: the Growth of Scientific Knowledge, (Harper Torchbooks, New York, 1968).

As-Qarāfi, Shihābud-Dīn A. as-Sanhāji, al-Furūq, 4 Vols. (Dar al-Maᶜrifah, Beirut).

Qawānīn ash-Shahr al-ᶜAqāri fi ad-Duwal al-ᶜArabiyyah (Cairo, 1972).

Quereshi, Land Systems in the Middle East, (working draft at Harvard Law School Library, 1954).

As-Saddah, A.F., al-Mulkiyyah fi Qawānīn al-Bilād al-ᶜArabiyyah, 1961.

Salāmah, Ahmad, al-Mulkiyyah al-Khāssah fi al-Qānūn al-Masrī, (al-Nahdah al-ᶜArabiyyah Press, 1968).

As-Sanᶜāni, al-Tāj al-Mudhhab, (Halabi Press, Damascus, 1947).

As-Samhūdi, Wafā' al-Wafā, 2 Vols., (Dar 'ihyā' al-turāth al-ᶜarabi Press, Beirut).

As-Saqati, Kitāb fī 'Adāb al-Hisbah, ed. by Levi-Provecal, (Paris, 1931).

Schacht, Joseph, An Introduction to Islamic Law, (Oxford University Press, 1964).

Serjeant, R.B. and Lewcock, R. Sanᶜā', and Arabian Islamic City, (The World of Islam Festival Trust, London, 1983).

'As-Sināmi, Nisāb al-'Ihtisāb, ed. by Dr. M.Y. ᶜIzzad-Dīn (Dar al-ᶜUlūm Press, Riyadh, 1983).

'As-Suyūti, Jalāl ad-Dīn, al-Hāwi lil-Fatāwi, (al-Maktabah al-Tijariyyah, Cairo, 1959).

At-Tabari, M., Tārīkh ar-Rusul wa al-Mulūk, 10 Vols., (Dar al-Maᶜārif Press, 1963).

Tanāgho, S., ᶜAqd al-'Ijār, (Alexandria, 1969).

Tartīb al-Qāmūs al-Muhīt, ed. by at-Tahir A. az-Zāwi, 4. Vols. (Dar al-Maᶜrifah Press, Beirut, 1979).

United Arab Republic, Qanun Takhfid al-'Ijarat, 1965.

United Arab Republic, 'Ijar al-Amakin, First Publication, 1969.
United Arab Republic, 'Ijar al-'Amakin, Cairo, 1971.

United Arab Republic, Tashri[c]at az-Zira[c]ah wa al-'Islah az-Zira[c]i, Cairo, 1966.

Vararanda, F., Art of Building in Yemen, (MIT Press, Cambridge, Massachusetts, 1982).

[c]Abd al-Wahab, H. Takhtit al-Qahirah wa Tanzimaha, (Dar an-Nashr lil-Jami[c]at Press, Cairo, 1957).

Al-Wansharisi, al-Mi[c]yaru al-Mu[c]rab, 12 Vols. (the Ministry of Endowments and Islamic Affairs in Morocco, 1981).

Warren, J. and Fethi, I., Traditional Houses in Baghdad, (Coach Publishing House, Horsham, England, 1982).

Yaiche, S. and Dammak, S., Analyse Typologique et Morphologique des J'Neins a Sfax, (Institute Technologique d'Art d'Architecture et d'Urbanisme de Tunis, 1980).

Al-Ya[c]qubi, Tarikh al-Ya[c]qubi, 2 Vols. (Dar Sader Press, Beirut, 1960).

Al-Ya[c]qubi, Kitab al-Buldan, ed. by M.J. De Goeje, (Brill, Leiden, 1892).

Al-Zarqa, A., Al-Madkhal 'ila Nazariyyat al-'Iltizam al-[c]Ammah fi al-fiqh al-'Islami, (Damascus University Press, 1961).

Ziyadah, N., al-Hisbah wa al-Muhtasib fi al-Islam, (al-Matba[c]ah al-Kathulikiyyah Press, Beirut, 1962).

Ziyadeh, F., Property Law in the Arab World, (London, Graham & Trotman Limited, 1979).