

***“Legal Appropriation” versus “Illegal Encroachment” in the Formation
and Transformation of Street Form in Traditional Arab-Muslim Cities***

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Abstract

A review of the literature on Arab-Muslim built environments shows a general mix-up in the understanding of the application of “legal appropriation” and “illegal encroachment” as the means for the transformation of street form in traditional Arab-Muslim cities. The paper seeks to differentiate between the two processes and their application. The paper reviews the Islamic land system, which provides the framework for land allocation and use, and also specifies the parameters of land ownership. The paper then presents a conceptual framework of the process of street formation and transformation, highlighting the difference between encroachment and appropriation as it relates to the Arab-Muslim built environment. The paper concludes by highlighting the fact that the Islamic shariah provides for various legal means of land appropriation from the street and hence points out the need for properly analysis before categorizing development actions into either of the two classes in the study of the form of traditional Arab – Muslim built environments.

INTRODUCTION

The process of development of traditional Arab-Muslim cities and their resultant physical form has been the focus of research interest for a long time. Research has attempted to explain the evolutionary process of the cities, particularly the role of the Islamic land and value system on the development of their physical form. Despite the long period of research on the cities, there still appears to be mix-ups in the understanding of their development. An example of this apparent mix-up is the confusion over, and the synonymous use of the concepts of appropriation versus encroachment in the description of the transformation of street form in the traditional Arab-Muslim cities. Several scholars, including Lughod (1967), Akbar (1988), Lapidus (1967), Al Hathloul (1981) synonymously use the two terms and appear to be unable to clearly distinguish between the two processes in their analysis of the development of the built form of the Arab-Muslim cities. This paper addresses the need to clearly differentiate between the two processes and also distinguish their application. The paper presents the Islamic land system including the system of territorial definition and transformation as the basis for understanding the development and transformation of the street forms. Subsequently the conceptual process of street formation and transformation is discussed along with the likely street patterns in traditional Arab- Muslim cities. The paper thereafter discusses the confusion over the application of the two of the two processes in the analysis of the development of Street forms in the Arab-Muslim cities, presenting a conceptual definition to distinguish between the two types of actions.

LAND TENURE AND THE PHYSICAL FORM OF CITIES

Despite a long period of interest in research on the built environment of the city, there are as yet no universal theories of the process of the development of the form of cities. The complexity of factors that influences the development of the physical form of cities may largely account for the existing situation. The situation may also be partly a result of the current disciplinary approach to urban studies, which tends to cast the analysis and understanding of city development within the framework of disciplinary paradigms. Despite the existing situation, however, it is generally accepted that the prevailing value system, the system of land ownership or tenure and the ability to control and regulate the use of private land all play a significant role in the development of the physical form of cities.

The issue of land ownership and the rights associated with ownership or Land tenure is a pertinent and important issue in almost all societies (McAuslan, 1985; Doebele 1983). The importance of the issue is a factor of the role of land in social, economic and physical development. It is also associated with the unique characteristics of land. Land is a basic need, required by every individual either for habitation or for productive activities. The supply of available land is, however, fixed, and land is location specific. This means that there is always a competition for land in the most suitable locations. The use of land also has long-term implications meaning that once land is used, it is not likely to be available for another use for a very long time. The unique characteristics of land means that there is always a competition for land and a desire to maximize the use of land resources.

The desire to maximize the use of private land resources coupled with the social implications of private land use creates the need to control and regulate the use of land. Land tenure systems are the mechanism used to control and regulate land ownership and use. Land tenure has to do with the laws, customs and practices governing the rights duties and relationship of people to land. Tenure systems are usually rooted in social, cultural and religious circumstances. Every civilization and ethnic group has defined subtle boundaries between social and private interest in land and the way to balance and manage the conflicting interest (Doebele, 1983:350). In almost all societies, these cultural and ethnic attitudes to land are deeply engrained and understanding these deep rooted social, cultural and religious circumstances is necessary for understanding physical development patterns as well as in any effort to manage and guiding the physical development of cities. (Doebele, 1983).

There are two ways of perceiving land ownership within a tenure system; either full or outright ownership of land or rights in land, or limited and restricted rights in land. Associated with the two ways of perceiving ownership are two main forms of urban land tenure, originating from the colonial countries of Britain and France, that are now very popular all over the world. The first system of land tenure originating in part from Roman Law and in part from Code Napoleon gives outright ownership and rights in land. It defines ownership as “the right to absolutely free enjoyment and disposal of objects provided they are not in any way contrary to laws and regulations.” This system limits the ability to control and regulate land use. The second system originating in England does not accept the concept of absolute ownership of land. Rather, the land itself is owned by

the state and individuals derive right over the land from the state. Other than these two principal systems, there are still a plethora of ownership systems associated with specific communities or geographic regions. In traditional African societies ownership systems exist in which individuals acquire rights of use from community leaders who have control over the land resources of the community. The Islamic law offers another unique framework for managing land ownership and use.

Tenure systems have a direct impact on the physical development of cities. The rights associated with ownership can determine the ability to control and regulate the use of land ensuring that public interest is protected. It is generally accepted that when land is not subjected to public control and regulation, there is likelihood that resulting patterns of development may be inefficient and may not take into account the general interest of society. Control of land ownership is also necessary to ensure equity in access to land. Where the public sector is, for instance, unable to intervene and ensure the adequate supply of land for development or equitable access to it, then it is very likely that segment of the society may be excluded from access to land resulting in many instances in blight and inefficient development patterns. Public control and regulation of land Ownership and use usually involve four issues: Pattern and rights of ownership, the use of land, system of transfer and taxation. Three popular measures are generally applied in the regulation and control of land use: legal measures, fiscal control and direct public action. The success or failure of land control regimes is to a large extent tied to the system of enforcement.

THE LAND SYSTEM IN MUSLIM SOCIETIES

Shariah as The Source Of Legislation In Islamic Societies

The Islamic legal system, known as Shariah, provides the framework for the regulation and control of all aspects of life in Islamic societies. As a legal system, the Shariah is derived from four sources; the Muslim holy book, the Quran, which is the primary source of legislation, The sunnah, which is the traditions and actions of the Prophet Mohammad (SAW), Qias (or analogy), referring to intellectual deductions from analogous situations, Ijma (or Consensus), referring to the consensus of learned scholars on issues not addressed by the three previous sources. Muslim jurist usually compile shariah rulings into books and these books serve as the basis for adjudication in any conflict. Currently, the compilations of four major schools of jurist predominate in the application of the Islamic sharia. These are the Hanafi, Maliki, Hanbali, and Shafiei schools. Minor differences exist within and between the schools, particularly in the application of the sources of Islamic legislation in legal rulings. As a system of law, the shariah has five defined objectives; to ensure the protection of the religion (Al Din), the protection of the individual (Al Nafs), the protection of Intellect (Al Aql), the protection of Lineage (Al Nasil), and the Protection of Property (Al Amwal). Actions adjudged to contribute to the achievement of these objectives are regarded as legal and allowable and those that work to the detriment of the achievement of the objectives are regarded as injurious or undesirable (Mafsadah) and their prevention is seen as beneficial to society (Albacly, 1985:154).

In the economic field, Islam teaches that ownership is a social function and that man is the representative of Allah on Earth. He must therefore dispose of his property to the satisfaction of Allah, the original owner (McAuslan, 1985:26). Use and exploitation of resources is allowed in Islam as long as there is no contrary assertion in the Sharia. The use of resources is not however seen as the ultimate goal in the ownership of resources. Rather ownership accrues from the use of resources and from the exploitation of the benefits that comes from the use of the resources.

Organization of the land system

As a legal system, the shariah provides a comprehensive legal system for the management of land, addressing the issues of land ownership and the transfer of ownership, rights in land, and the control and regulation of land use. The shariah provides basic parameters that establishes the framework for the ownership of land and defines obligations and limitations in the acquisition and use of land. Figure 1 shows a diagrammatic representation of the Islamic land system.

<INSERT FIGURE 1>

The preeminent parameter of land ownership in the sharia system is that it not absolute or an end in itself, but rather ownership is tied to beneficial use, which is in conformity with religious requirements. The Islamic creed teaches that utilization of land is the only acceptable reason for individual land ownership. Islamic law “does not give an individual the right of ownership for temporary utilization but for continuous utilization and insist

on its return to communal ownership if utilization ceases... it is the right of an individual to utilize land whether this is authorized by the ruler or not, but the individual has the right of appropriation only so long as he maintains this utilization.” (Hassan Hamza, 1982:9-10) Non-utilized land can be declared as state property and can be allocated or donated to an individual free of cost, but for a specific purpose, to build a house for example. Only when this purpose is fulfilled does the land become privately owned. The Shariah also discourages the extravagant or exhibitionist use of resources. The sharia does not allow the use of private resources to either harm oneself or others.

Islam recognizes private land ownership and places no limits on the extent of private ownership. Private land maybe owned either by an individual or a group. The Shariah also recognizes public ownership (Mulkih amah) in distinction from ownership by the government. Public ownership is recognized for resources that are collectively owned. These are owned collectively either because of their size (like rivers, oceans, dead land) or because of the great number of the users of such resources such as urban roads and fringe of villages. Private resources are sometimes also donated for public uses as in the case of mosque and private endowments in general. Protected lands (Hima) and mining and mined resources are also considered as publicly owned. Public ownership guarantees the individual as well as the group the right to benefit from the resources within the context of sharia provisions. Public Treasury Ownership (Mulkih Bait Al Mall) refers to ownership by the government. Sources of this type of ownership include charity (Zakat), War plunder and mining (Khums), taxation (Kharaj wa jeziah), lost and found objects,

the inheritance of a person with no family, and private donations and endowment. The ruler is usually the trustee of the public treasury

The Shariah recognizes a set of diverse rights in land. The rights convey either full or partial ownership of land. Full ownership refers to ownership of the land and its right of use. Partial ownership refers to the ownership of a bundle of rights in land. Five types of partial ownerships are recognized by the Shariah: Right of Benefit (Haq Al Intifa), referring to the right to benefit from a land without the right to transfer it; ownership of the right of benefit (Mulk al Intifa), referring to ownership of the right to use and benefit from the land but not to transfer it; ownership of usufruct (Mulk Al Manafacah), referring to ownership of the right of use; ownership of land object only (Mulk al ain), referring to ownership of the object only but not to its right of use; and Borrowed Ownership (Mulk Al Dain), referring to ownership derived for a limited period. The Sharia recognizes several ways through which ownership and rights in land can be obtained. One way is through initiation action (Munshi Al Mulk). This refers to initial action to lawfully stake a claim to naturally existing resources, including land. Lawfully here refers to the absence of a claim on the resource by another person and also the permissibility of the action in the sharia. As earlier pointed out, Ownership of resources in Islamic sharia is tied to the exploitation and beneficial use of resources. A person in need is allowed to stake a claim to resources, thus enabling him to automatically acquire a right of benefit (Haq Al Intifa) from the resource. Continuous use of the resource will lead him to acquire the ownership of the right of Benefit (Mulk Al Intifa), with the process ending with his ownership of the land object and its right of usufruct (Abu Zahra, 1963:123). The process

of acquiring rights is governed by the fact that the action should neither harm the person acquiring the rights nor others in the process of the action. Another means of acquiring ownership and rights in land is through conventional transaction (Naqil Al Mulk). This refers to the secondary transfer of land from one person to another through, for example, selling and buying, gift, will, charity, pre-emption, endowment, and allotment by a ruler. Land ownership and rights may also be acquired through succession (Khilafat Al Mulk). This applies when one owner succeeds another owner as a result of his death as in the case of inheritance. Rights of ownership are also conferred on a person, when the owned object is a product of the person's efforts (Tawuld min Mulk). In farming and breeding, for example, a farmer is entitled to own the products if they are a direct result of his efforts. The possession and use of an object for a long period of time may also convey some rights on the object (Hiazah li Mudah Tawilah). While jurist do not generally consider the possession of land or other objects for a long period of time as a means to ownership they, however, consider possession of an object for a long time as a reason for ignoring the claim of others, especially when the person possessing the object claims ownership of it. The period of time considered as valid for claiming possession is estimated at between ten and thirty years. This claim is invalidated if the original owner was absent and so could not claim ownership or he is afraid of threats to his person as a result of the claim (Abu Zahra, 1963:160).

Land ownership in a Muslim society is accompanied by an obligation to consider and give certain rights to neighboring landowners. Among the specific rights guaranteed by the Shariah are the rights to privacy, right of preemption, and easement rights. The right

of preemption is allowed to protect individuals from neighboring owners who want to dispose their land. Easement in Arabic literary means Elbowing. It denotes the reduction of a property owners rights or benefits for the purpose of benefiting another neighboring property or properties (Abu Zhara in Akbar, 1984:43). Example of easements rights include the need for properties on lower elevations to allow properties on higher elevations to drain their rain and waste water through their property or for a house nested in the midst of other houses to be provided access. Easements are specific to immovable property, are mandatory on the eased property and cannot be abandoned. Easement always involves the loss of some rights by the owner of the eased property and some benefits for the owner of the neighboring property. Easement is allowed in public properties because of collective ownership and in private properties because of attachment or topological relationship.

Hanaafi, one of the scholars of jurisprudence has identified 6 types of easement rights provided in the Islamic sharia. These are easement for drinking water resources, for drinking water channels, rainwater drainage, passage on roads, and neighboring right of vertical and horizontal access. Vertical easement rights deals with the relationship between owners of lower and upper floors as in the case of multistory housing. The rights of the upper floor include that the lower owner may not voluntarily demolish the building or cause damage to its structure, and that he may not also use the property in any way that may harm either property. "Horizontal neighbors" refers to neighbors that share boundary. The general injunction is that they are allowed to manipulate their property in whatever way they want as long as it does not harm their neighbors. Some scholars such

as Shafiee and Malik do not consider easement rights as limited to only the six items listed by Hanaafi. They believe that these rights can be extended to cover even new situations. Rulings by Islamic scholars on easement have had a fundamental role in defining the form of the street of Muslim cities.

The enforcement of the Shariah provisions in respect of land occurs at two levels. The first level of control is internal to the landowner. Private land owners are expected to ensure that their actions in respect of owned land is in conformity with the provision of the Shariah and that harm is generally prevented through any of their action. The second level of control is external to the landowner, and is vested in the government. Islam grants government and rulers the exceptional right to regulate and control the use of private resources. The objectives of government control and regulation is to ensure that there is equitable access and distribution of resources, and that use is in conformity with religious requirement and is in the interest of the whole community. Governments or rulers also have the extraordinary right of taking away ownership rights of an individual with compensation for the provision of public facilities or community use as in the case of street widening.

STREET FORMATION AND TRANSFORMATION

Street Spaces and Territory Types

There are principally two types of streets in Muslim cities, the through street (sharia, tariq nafith) and the cul de sac street (tariq ghair nafith). A Street can generally be divided into two categories of spaces, the Fina of abutting properties and the Street right of way. The

two can further be categorized into six defined spatial zones as shown in figure 2; the ground level and upper level fina of the building on the first side of the street, the ground level and upper level fina of the building on the second side of the street, and the street right of way on the ground and its air right above.

<INSERT FIGURE 2>

Understanding the formation and transformation of the street in the Arab-Muslim also requires an understanding of the types of territories existing on the street. Al Said (1992:134) has categorized the types of territorial spaces in the Arab-Muslim street into four, as shown in Figure 3, private, semi private, semi public and public. The territory types are established based on four factors: the original ownership type of the street space, the mechanism through which the street was created, the territory type of adjoining properties and the street users right of use or ownership of the right of benefit. The street territories are dynamic in their nature, changing from one territory type to another with time. The four factors serve as a mechanism that enhances, hinders or freezes the movement of a street space in to a particular category.

<INSERT FIGURE 3>

Street Formation

The process of street and settlement formation in the Arab-Muslim city occurs in three phases, primitive, transitional, and consolidation. The primitive phase is the phase of settlement formation, while the transitional and consolidation stage refers to the period when the settlement undergoes major transformations to arrive at a virtually static form. The primitive phase is the period of territorial allocation, addressing the issue of who is settling in what location, the definition and allocation of housings spaces, neighborhood definition and spaces for public use and for public facilities. Land is acquired through the revival of unused land or through the staking of unclaimed empty land. The physical demarcation of territory is primitive at the initial point of settlement. Four types of territories may generally be identified at this stage: private territory made up mainly of houses with their associated fina; semi private spaces made up mainly of spaces shared commonly by the street residents such as minor streets and essential land for grazing; semi public streets for public facilities such as mosque and markets and for major thoroughfare; and public territory consisting of all empty land that is available for use by the generality of the people.

Houses are the starting point of street formation. Houses are always private properties within the Arab-Muslim city. Land for houses is usually obtained through the established ownership process, including the revival of unused land or conventional transaction. The initial act in establishing the house is the erection of a fence, which separates the interior from the exterior and formally marks the territorial space of the house. The exterior fina of the house is also established at this point. The size of the fina is

determined by the needs of the house owners and, rights associated with it include underground, ground and air rights.

The origin of the street ownership can either be public or private. Public ownership of the street occurs when people revive a land as a circulation space through its continuous use as a passageway, or when the land use is designated as a street through planning. This makes the public street space a semi public territory owned and used by all Muslims collectively. The private ownership of the street occurs when an individual or group of people privately own the land of the street prior to its use as a pathway. This makes the street originally a private territory where its owners own its object and usufruct in ground and upper floor levels. The mechanism for defining the street can either be physical or symbolic as shown in Figure 4. The street is defined physically through the use of objects such as Building, fences, and gates. These could define the street either as a through fare or a cul-de-sac. The street is defined symbolically by the footprints of the users of the street, and the fina spaces of abutting buildings. The process through which the street is defined assist in establishing the ownership of the street, the easement rights of abutting properties and the street users right of use and ownership of benefit. The process of the definition of the street is therefore a strong factor in the later transformation of the street.

<INSERT FIGURE 4>

The types of buildings or facilities located on a street also have a strong influence on the definition of the territorial spaces of a street. Semi public properties such as mosques,

markets, and schools dictate that the street serving them must have the same territory type as these facilities at the ground level. Private facilities such as houses, on the other hand, enhance as much as possible the definition of the street as a private space. Continuity in the use of a space for circulation could lead to the users of a street acquiring a right of benefit and ownership of the street and the ground level. This process can be enhanced or hindered by the original ownership of the street land, the process of the street definition, and the easements of the properties on the street.

The cul-de-sac street is a special case, as it is usually considered a private territory (Akbar, 1984, 1988). Cul-de-Sacs could also either be planned or they could emerge over time. Planned cul-de-sacs occur when a group of people subdivide a piece of land and designate a part of it as a dead end street. The territory in a planned cul-de-sac is private. To keep a cul-de-sac private, the owners of the properties on it must physically define it as private territory, prevent the location of public facilities such as schools, mosques and markets on it and also control the volume of users of the street. If these measures are not enforced, then the cul-de-sac could transform over time to either a semi-private or semi public space.

Cul-de-sacs emerging over time are usually the result of incremental growth by abutting properties of a street. The incremental growth may be on either private, semi private, semi public, or public territories. If the incremental growth of the properties is on a completely private land or on virgin land that is not staked, then the cul-de-sac is in a similar situation with the planned cul-de-sacs. If, however, the growth is on a semi-

private territory, then there has to be a judicial review of the reasons behind the taking. All evidences including claims of ownerships and rights of use and benefit are evaluated on the basis of harm prevention and the action is either allowed or disallowed. In Madinah during the eighteenth century, Al Hathloul (1981) presented two of such cases of cul-de-sac formation, whereby one owner won his claim due to his ownership of the right of use and another lost the case because of the street users right of benefit. In streets spaces that are originally semi public territory, any taking by private individuals is viewed as illegal and is prevented by the Shariah. Such illegal takings do, however, occur, particularly during political crises and wars.

Street transformation

The Arab-Muslim built environment assumes a dynamic character immediately following its formation. Transformation usually occurs as a result of population growth, which translates into an increasing demand for space, changes in the pattern of land ownership or as a result of easement right allowances. Physical changes to the settlement take place at either the ground floor or upper floor levels or both, and these changes shape not only the street, but also the entire settlement. The transformations occur because of the desire to expand the private terrain of the house at the expense of the other street spaces. The usually result is an increase in conflicts regarding rights, which becomes subject to the judicial process.

Street patterns in the Arab – Muslim city are created through the manipulation of the spatial zones of the street. The six spatial zones of a typical street can be manipulated in

more than twenty ways to create the various street patterns common in Arab-Muslim built environments. Figure 5 presents some of the possible ways that the street spaces could be manipulated through conversion to private use.

<INSERT FIGURE 5>

The intertwined issue of easement rights and the territorial categorization of the street spaces are the factors that determine the actual transformations that take place in an Arab-Muslim city's street. Easement rights play a role in enabling the change of street territorial spaces from one category to the other. The rights also serve as a means for organizing the physical fabric of the city, ensuring the efficient and functional attachment of houses and the growth of settlements. The different territory space categories determine whether any attempt to appropriate street space for private use is legal or illegal. As earlier mentioned, the street spaces are dynamic in their territorial definition, changing with the development of the city. Table 1 shows the pattern of changes in the territorial categorization of the house and street spaces of a settlement during its various stages of development.

<INSERT TABLE 1>

At the house level, both the interior and exterior spaces of the house start as a private territory at the ground and upper levels. The interior space and the exterior fin air rights remain private territory throughout the developmental stages of the settlement, and so

could be manipulated by the owner in ways that conform to the Shariah. The only exception is if the house is endowed or given as a gift for public use, or there is an overriding need for easement by other properties. The ground level fina space could however be transformed with time into a semi private and semi public space. The private fina may be shift from private to semi private or semi public territory due to easement requirements and the right of benefit of other users. Neighboring properties need for air and light can also cause the fina to move from private space to semi private space. If the beneficiaries are large in number this may transform the fina space to a semi public space. At the semi private stage, the owner may still be able to convert it for private use, if his interest outweigh all other interests and it is established that his action will not harm any person. But once it is transformed into a semi-public space, then the owner loses the ability to appropriate the space for private use.

At the street level, all cul-de-sac streets also begin as private territories. Air right of the street remains as private territory throughout the process of settlement development. At the ground level, it may change with time from private to semi private, meaning that the owner has to justify his appropriation of the street for personal use, and also show that harm is not occur to others as a result of his action. For the through street, the air right of the street may begin as private territory, transforming over time to a semi private and semi public space, with restrictions on the private use of the space. At the ground level, the through street always starts and remains as a semi-public space. This means that its appropriation for private use is illegal. By the consolidation stage in the development of the Arab-Muslim city, Social and political institutions become established along with

clear demarcation of territorial spaces. This makes changes more difficult and arbitration in case of conflict easier because of the existence of institutions to address conflict.

APPROPRIATION VERSUS ENCROACHMENT IN STREET

TRANSFORMATION

From the examination of the Islamic land system and the conceptual description of the process of street formation and transformation in the Arab-Muslim city, it is apparent that there is a wide leverage for action in converting street spaces to private use depending on their territorial categorization. The wide leverage makes generalizations regarding the legality or illegality of actions prone to error and requires that individual actions be carefully examined before being categorized as legal or illegal. A review of the academic literature on the Arab-Muslim built environment however, appears to indicate a confusing and synonymous use of the terms “encroachment” and “appropriation” in describing the process of street transformation, and also questioning the legality of the process. Abu-Lughod (1971:68), Lipidus (1967:61), Al-Hathloul (1981:86-87) and Akbar (1984:114) all display some confusion in the use of the two terms and in some cases associate them with illegal actions. Abu-Lughod (1971:68) writing on Cairo, for instance, stated that “While Islamic law acknowledged in principle the inviolable sanctity of, if not all the streets, at least public thoroughfares, in actual practice several factors intervened to make preservation difficult and to soften the penalties for encroachment... In short, whereas Western law sought to prohibit all encroachment upon the public way except where specifically exempted, the law in Islamic cities tended to permit encroachments, except when these were judged to interfere with rights of others.” The dictionary defines

encroachment as ‘intruding, invasion, usurping...’ all denoting some form of illegal action, while appropriation is defined as ‘adopt, take to one’s self, take as one’s own, apply to one’s own use...’ suggesting some legality in the act. The difference between encroachment and appropriation is therefore the difference between a legal and an illegal act. If we accept this distinction, then in the context of the Arab-Muslim city, encroachment is the illegal action of expanding properties onto street spaces while appropriation is the lawful shariah action of expanding private properties onto street spaces. Not all cases of the taking for street spaces for private use is illegal as we have shown previously. The shariah does not also support or permit any kind of encroachment onto the street spaces. In this context, Abu-Lughod appears to have erred in her analysis by confusing appropriation with encroachment and suggesting that the shariah permits illegal encroachments onto the street.

Akbar (1984) writing on the ruling of Muslim jurist on encroachment also states that “All jurists agree that no individual is allowed to appropriate any property from the street on the ground level...Another form of encroachment is from upper floors, such as cantilevers (rushan, janah, zullah, kharijah) or overpasses (sabat, sabbah) that connect two houses, or room(s) that belong to one or two houses. The principles applied are similar to those pertaining to encroachment on the ground floors, but with the abutting property having more freedom. Many jurists allow intrusion by upper floors regardless of objections raised by others, so long as the extension does not damage the public. Their reason is that the acting individual has preceded others in benefiting from upper spaces.” Akbar mixes up the definitions of the terms, suggesting that jurist disallow appropriation of property

from the ground level rather than encroachment while also referring to appropriation from the upper floor *fina* as encroachment.

A fundamental observation from the review of the formation and transformation process of the traditional Arab-Muslim city is that the Islamic Shariah provides a wide leverage of action for the taking of space from the street. Whether this taking is legal or illegal depends on territorial categorization of the space, the rights of use and benefit associated with the space and easements provisions obligated on the owner of the space. The review shows that attempts at generalizing takings from the street as either encroachment or appropriation or synonymously using the two terms shows a lack of proper understanding of the processes at work in the transformation of the settlement. It is not the objective of this paper, however, to suggest that encroachments do not occur in the Arab-Muslim traditional built environment. It is an established fact, that the lack of internal control coupled with the lack of concern by external controllers and the abuse of easement rights do lead to street space territory encroachments. This is usually prevalent during period of disputes between street residents or during period of political crises. Arab history books also record many cases where rulers use their authority to abuse the street ownership process. For instance, in Madinah during Hisham Bin Abdulmalik's rule (105/724-125/743), the residents of Madinah demolished a market, built by the governor of Hisham, because of its encroachment upon the semi public open market ground, (Akbar 1984, p77). During the Mamluk period in Egypt, the sultans considered the urban lands as owned by them and, therefore, the owners of the private properties must pay 'rent' to the Sultans. Monumental Mamluk buildings were built on semi public, semi private, or

private lands seized from their owners by force, (Akbar 1988). At that time the people moved their private territory into semi public endowments (wakf amm) as a mechanism to prevent the rulers' from confiscating it. Az-Zahir Baybars (658/1260) was reported to have decided to take over all lands belonging to people who could not prove 'legal ownership'. Muslim jurists protested that such an action was illegal according to Islamic Shariah. " An-Nawawi [the judge] kept insisting and advising the Sultan until in the end he stopped the Sultan", (Akbar 1984, p83). In the late Ottoman Empire public lands were shifted entirely to the government causing them to be 'private territory'. These lands were rented to private individuals for cultivation and building. These cases and many others show the act of 'encroachment' of the traditional built environment territory. These cases do not however warrant a generalization that Arab-Muslim built environments develop through the illegal process of street encroachment.

Summary and Conclusion

The paper addresses the mix-up in the understanding of the application of legal appropriation and illegal encroachment in the transformation of street form in traditional Arab-Muslim cities. The paper starts by reviewing the concept of land ownership and land ownership rights and the impact of this on the development of cities. Ownership patterns which limit the absoluteness of ownership and which subject private land to public control and regulation provide the best means of ensuring the development of cities according to the wishes of communities. In the Arab-Muslim Cities, the Islamic Shariah was identified as the providing the framework for the management of the societies including the management of land. Right of ownership of resources was

highlighted as being tied to utilization. The Shariah recognizes different types of ownership, rights in land and easement provisions. Easement provisions protect the public and neighboring property owners. Rulings by scholars established the limits of the easement provisions.

The process of street formation starts with initial action by people to acquire land, which leads to the definition of different territories associated with the house and the street. A dynamic process of transformation follows this initial action, which leads to development of different patterns of the street depending on the use of the finca and air and street right of way. Development action involving the taking of space from the street can be legal or illegal depending on the zone of the street from which the space is taken from, the territorial categorization of the space and the easement rights obligated on the property that is being expanded. The dynamic nature of the different territory types, changing with the development of the settlement, means that analysis aimed at understanding the legality or illegality of development action in the transformation of street form in the traditional Arab-Muslim cities need to examine individual actions in the context of its period and the state of settlement development before categorizing such actions.

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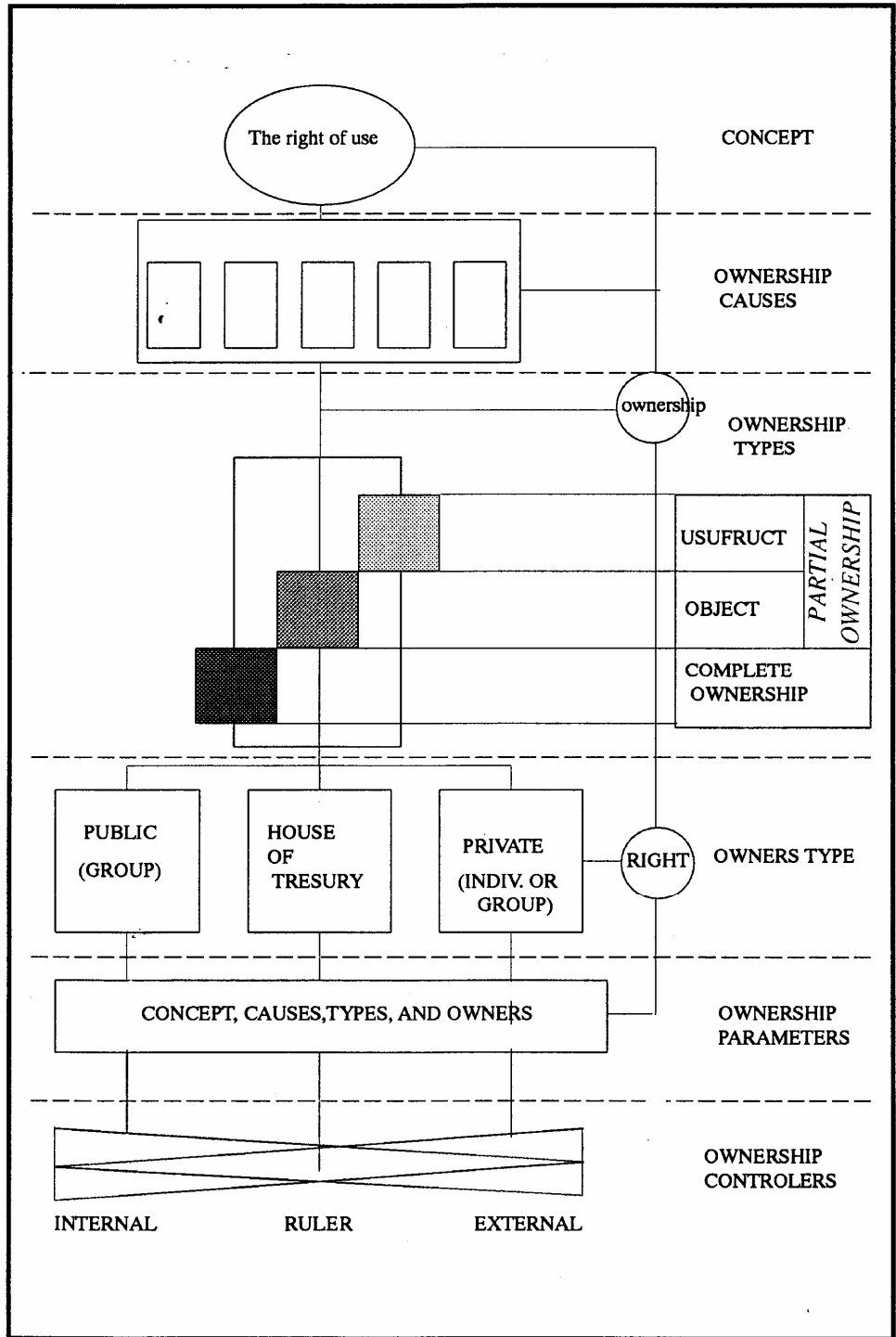


Figure 1: The Land System in Islamic Societies

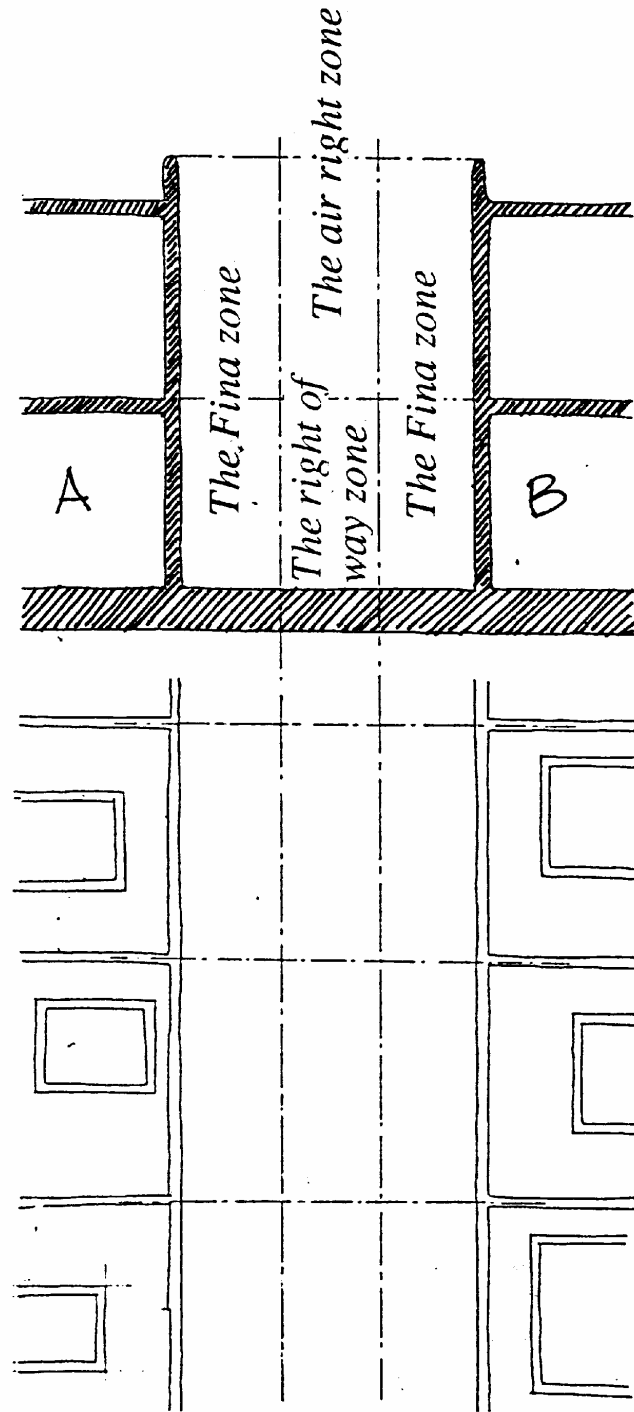


Figure 2: Spatial Zones in A Traditional Street

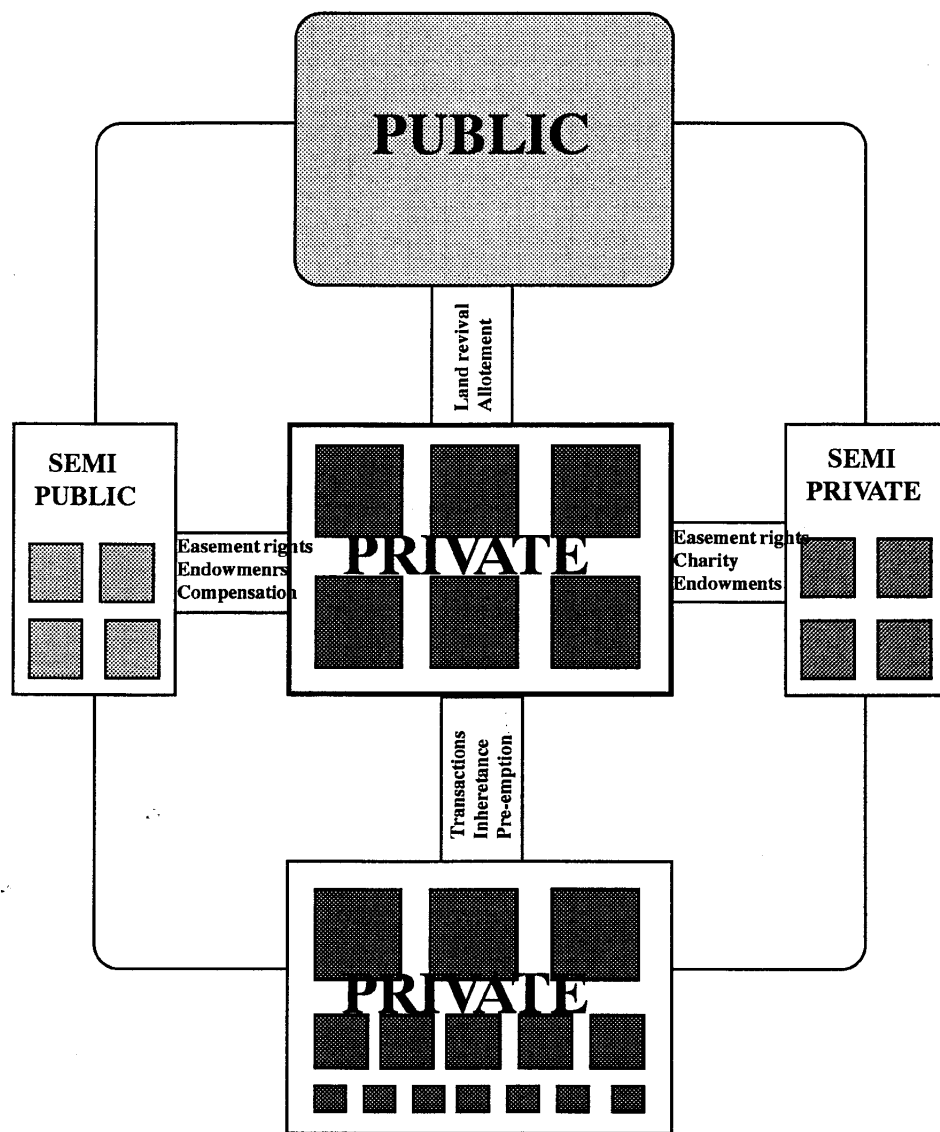


Figure 3: Territorial Spaces in the Arab-Muslim Built Environment

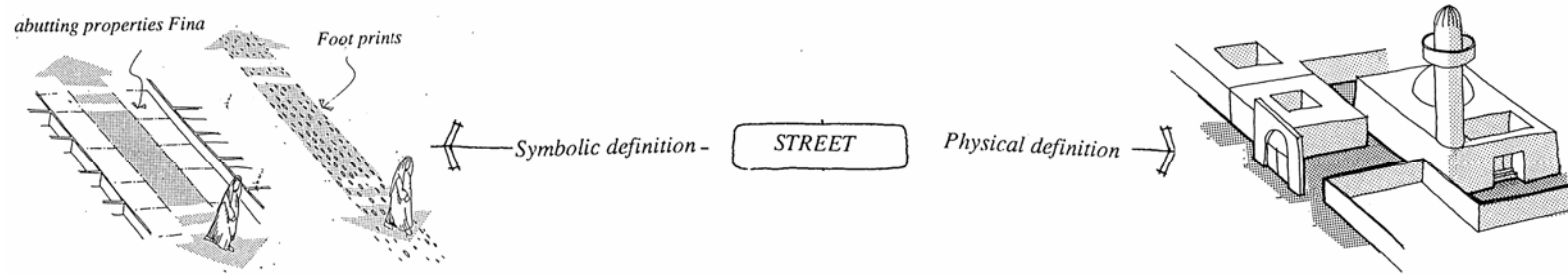


Figure 4: Mechanism of Street Definition

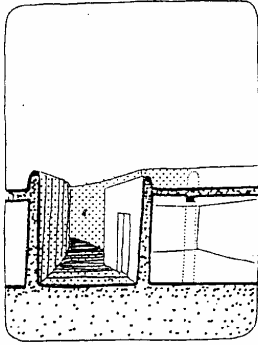
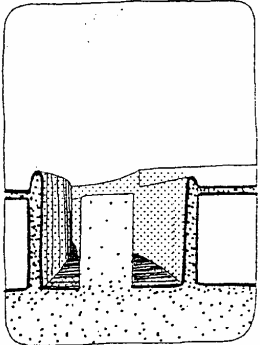
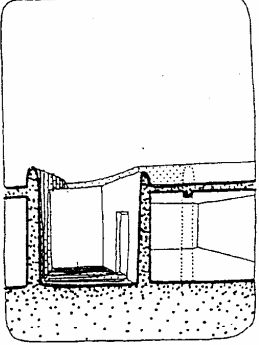
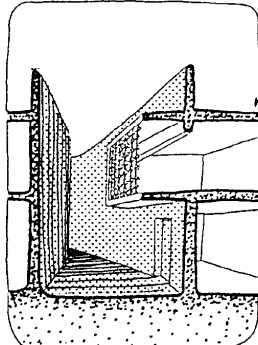
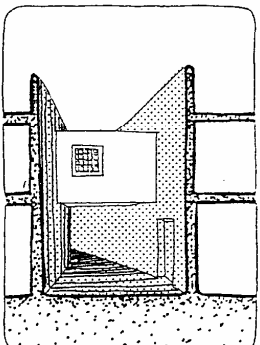
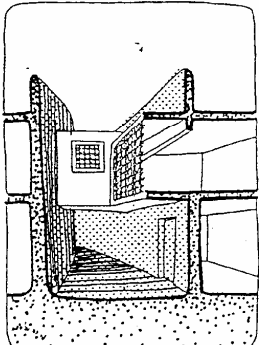
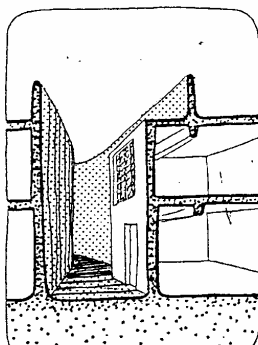
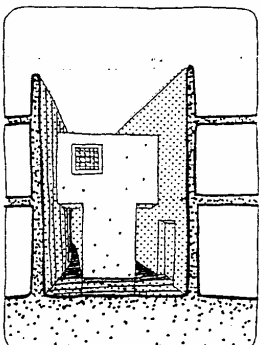
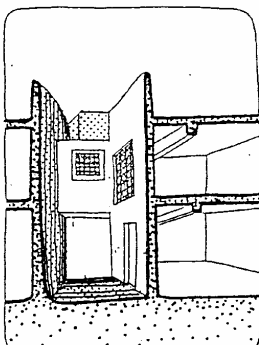













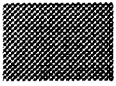
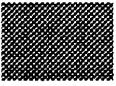

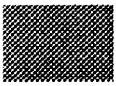
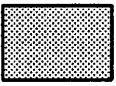
	<i>Appropriation from the street side</i>	<i>Appropriation from the middle of the street</i>	<i>appropriation from the side and middle of the street</i>
<i>In ground floor</i>			
<i>In upper floor</i>			
<i>In ground and upper floor</i>			

Figure 5: Possibilities of Street Patterns in A Typical Street

Table 1: Changes in the Territorial Categorization of House and Street Spaces with Time

ELEMENT			STAGE		
			1	2	3
H O U S E	Exterior (Final)	Upper Floor			
		Ground Level			
	Interior				
S T R E E T	Cul-de-sac	Upper Floor			
		Ground Level			
	Through	Upper Floor			
		Ground Level	