

ISLAMIC LAND LAW IN AFGHANISTAN: Innovative Land Tools & Strategies

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1. Introduction

Land, property and housing rights are generally cross-cultural and asserted within every socio-economic and political system but the practice regarding their regulation and protection may take different forms. Effective land tools and strategies for specific countries or contexts are predicated on the choice of appropriate frameworks and methodologies. Though international human rights and development standards underpin the land rights discourse, the intersection of international, state and customary norms has been well researched. However, religious dimensions in articulating and realising land rights have not received equal attention. Over 20 percent of the world's population is Muslim but there has been little research on the complex and distinctive Islamic forms of land tenure and land rights. Too often global reviews of land tenure are undertaken without taking Islamic laws relating to land sufficiently into account. This paper offers a case study of post-Taliban Afghanistan in the broader context of Islamic and universalist approaches to land issues. It evaluates Islamic land strategies in Afghanistan and their implications using a theoretical framework provided by recent UN-HABITAT studies on Islamic land strategies.

This paper makes two arguments. First, that post-conflict Afghanistan demonstrates that the Islamic features cannot be assumed to be dissolved or dismantled by universalist interventions and they continue to resurface in the pursuit of durable solutions to the land management issues. While Islamic law is a dominant source here, a workable and operational land framework should consider the interplay between universalist, human rights, customary, informal and Islamic conceptualisations and application. The lack of engagement with the internal Islamic dialogue risks creating land systems that are, as for the Afghan people, bereft of authenticity and legitimacy. Even where well intentioned donor driven efforts to establish modern land systems succeed, the obduracy of informal norms, practices and processes lead to unattended dualisms that undermine the prospect of integrated and unifying land policies.

The second argument is that, in contrast to the stereotypes about Islamic law, constructive engagement with Islamic dimensions of land potentially offers opportunities for the development of Islamic land tools which can support the campaign for the realization of fuller land rights for various sections of Muslim societies, including women. A recent UN-HABITAT commissioned study on Islamic land tools finds that Islamic land law can be seen as an evolving, responsive and assimilating sphere of competing ideologies and interests, though it is a site of struggle between conservatives and liberals. However, in order to enable that debate and prospects for pro-poor, innovative and inclusive land tools, the various stakeholders must constructively review

the normative and methodological Islamic frameworks and their relationship with other systems of formal and informal land tenure.

2. The Islamic Dimensions of Afghanistan Land Systems

Securing equitable land rights in the post-conflict society of Afghanistan requires recognition of its tangled web of historical, political, socio-economic, religious and legal systems (Sait 2003). Foley (2005: 9-10) refers to the distinct legal culture and system in Afghanistan

... because the law of Afghanistan is, thus, for the most part, either the traditional Islamic law or an indigenous product, it is a system somewhat unique in the world. Unlike most of the other Islamic and non-Western countries, Afghanistan never came under the political and juridical dominance of any European power. Accordingly, its sources have remained purely Islamic and where foreign models have been used they have, with the major exception of the Commercial Code, normally been molded to the Afghan context.

Elaborating on the same, d'Hellencourt et al (2003:15) note

It has been seen that the principles of Islam constitute the fundamental reference and are the source of legitimisation for the Constitution, Civil Law and other Laws; however other sources can be and are used in law making, for example, dominant traditions and customs, known as *urf*. Socially accepted secular traditions, or *urf*, can be integrated into the judicial corpus, the only prerequisite being that they are compatible with the principles of Islam. The *Loya Jerga*, which is a traditional institution of ancient tribal origin, illustrates this; its nature and function proved compatible with the principle of consultation, or *shura* in Islam, and so it is recognised by the Constitution as a source of politico-judicial legitimisation in the State of Afghanistan.

However, much of what passes in the name of Islamic land tenure law can in fact be customary practice. Customary systems derive their validity from the values of dominant social groups, and often they undermine not just statutory law, but also the true spirit of Islamic law which prohibits exclusion or discrimination of vulnerable groups such as women and minorities (d'Hellencourt et al 2003). While international human rights and development standards are a relevant benchmark, Islamic reasoning emerges as a principal validating framework in Afghanistan, informally if not formally. The question for international actors often is – will the proposed approach satisfy international professional, ethical or development standards? The concern of many Afghans may well be- will the proposals satisfy or conflict with tradition or religious values that have long been the basis of their land relations.

Thus, any political and administrative decision related to land ownership and its distribution must take into consideration Islamic principles and traditional practices which are the basis of civil Law are engraved in the collective mind of Afghan civil society and differing provincial and regional practices (d'Hellencourt et al 2003: 1). At the community level the mechanisms for property dispute resolution are three-fold; firstly

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Expert Group Meeting on Secure Land Tenure: 'New Legal Frameworks and Tools in Asia & Pacific'
UNESCAP, World Bank, UN-HABITAT, FIG at Bangkok, Thailand, December 8-9 2005

the decisions arrived at with the help of neighbours and elders; secondly in those arrived at with the help of the Mosque Council (generally representatives of each Mosque in the neighbourhood) and thirdly those arrived at with the help or endorsement of the *Wakil-e-Gozar*. Often all three sources of mediation and resolution are utilised through the aegis of the Mosque Council which calls relevant neighbours and elders to discuss the case and whose chair is the *Wakil-e-Gozar*. Statutory and formal processes in Afghanistan have their limitations. Thus, as Wiley (2004:41) points out

Formal court records do not provide a full picture of dispute levels...For reasons of fear, futility, or lack of means, many land disputes are never brought to court. The poor and very poor do not take their cases outside the community; they do not possess the status, financial means, documents, or knowledge to pursue the matter successfully. Even those with means often see little purpose in taking their problems to court; they complain of ethnic favouritism in decisions, and note the inordinate time involved with the likelihood of continuous challenge and upward appeal to the Supreme Court...They are also aware of the high failure rate of the Primary or Provincial Courts to resolve disputes and that even if they win the case, the court and police are likely to be impotent to enforce the decision...

3. The Afghanistan Islam & Land Discourse

By way of anecdotal experience, the writer here participated as UN-HABITAT consultant at a workshop on Urban Land Management organised by the Afghanistan Government, Kabul Municipality and several UN agencies in June 2004. On the face of it, there was high level official presence, good receptivity to modern ideas and enthusiastic interventions. However, at the workshop, there was virtually no discussion of customary or Islamic norms or dispute resolution, in contrast to the coffee break and off-court deliberations which were sceptical of the universalist intervention. Some participants said that they assumed that these aspects were not part of the rules of engagement ('agenda'), and did not want to 'expose' themselves as Islamists. One expressed his opinion that he did not care about Islamic law nor did he feel comfortable discussing Islamic and customary realities with foreigners. The direct implication of this internal-external polarised dialogue was that some of the main issues such as women and endowments (*waqf*) were never discussed. Some international experts and national representatives felt they could not offend the Afghan and Islamic sensibilities. Was this the case?

Avoidance of Islamic law suits a range of players. International consultants generally avoid the field which they often suppose to be complex, inscrutable and outdated. Local players fear that a constructive assessment of Islamic dimensions of land could upturn carefully managed status quo driven by obscurantist interpretations of Islam by arch conservatives. Thus, the landed classes fear the land redistributive elements of Islam, the State the fears the loss of control of its nationalised endowments (*waqf*) property and newer responsibilities towards landless claimants, the patriarchal elements in societies fear empowerment of women through land rights and the international actors generally fear either the uncertainty or the knowledge of the energy of religious dimensions in development discourse. Debunking the partial, ahistorical and fragmented appraisal of

Islamic land law, in fact, could pave the way for a variety of solutions to the land problems in Afghanistan.

Afghanistan faces a series of challenges with respect to land management – rapid urbanisation, outdated masterplan, degraded infrastructure, limited resources for servicing, virtually non-existent formal land information system, lack of urban land for new development, demand on land through newer informal settlements, returnees, land mafias and security issues, complex land and a broken and overloaded dispute resolution system. These issues have been dealt elsewhere (Kothari 2004, Wiley 2003). This paper will focus on two issues –religious endowments (*waqfs*) and women’s land rights which may reveal how an Islamic line of argument could go further than the regular land strategies.

Two UN-HABITAT studies have sought to address this gap of knowledge between realities on the ground and the general discourse in relation to Islamic land law. The pioneering *Preliminary Study of Land Tenure Related Issues in Urban Afghanistan* (hereafter ‘the Afghan land study’) of March 2003 was carried out by Nouchine d’Hellencourt, Shuhrat Rajabov, Prof. Nasrollah Stanikzai and Abdul Salam using *in situ* customary processes and focusing on formal as well as informal systems including alternate dispute resolution with respect to land and property rights. It found that *Shar’ia* (Islamic law) is pervasive in land tenure arrangements, the Constitution, civil laws, intermingled in custom (*urf*) and manifested in a range of practices including inheritance, endowments (*waqf*).

During its work in a range of countries from Afghanistan to Indonesia, UN-HABITAT has been increasingly aware of the importance of Islamic land tenure conceptions and land rights. The Land and Tenure Section of UN-HABITAT therefore commissioned two experts Mr. M. Siraj Sait and Dr. Hilary Lim from University of East London, United Kingdom to carry out a year long in depth study of the Islamic and other dimensions of land and property rights in the Muslim world. The summary of the research is available at <http://www.unhabitat.org/programmes/landtenure/publications.asp> and published as Siraj Sait and Hilary Lim, *Human Rights in Islam: Law, Property and Access to Land* (London: Zed, 2006). The research, completed in September 2005 (hereinafter the UN-HABITAT Islamic study) produced eight papers on Islamic dimensions of property theories, land law, human rights, land tenures, women’s property rights, inheritance, waqf (endowments) and microfinance. The general findings of the research are that there are distinctive Islamic conceptions of land and property rights which are varied in practice throughout the Muslim world which need to be squarely addressed. This presentation will focus on two issues – *waqf* and women’s rights to demonstrate how there may be Islamic approaches to Afghan land issues.

4. Waqf land in Afghanistan

Wiley (2003) in her exhaustive study of land tenure systems, only briefly deals with *waqf* property, though it is well known that vast amounts of land have been dedicated as religious endowments. As such, these land may not be bought or sold by are held in perpetuity for the charitable or purpose they were dedicated for. The Taleban 2000

Decree (Justice Decree N. 795) still operational deals with *waqf* in its Chapter 9, Article 86

The property or land that becomes *waqfi* is no longer recognised as private property. Selling, gifting, giving for occupation or inheriting of *waqfi* property or land is not permitted. A property which has been given for *waqfi* for a specific purpose must be used only for that purpose.

Originally controlled by religious institutions, most *waqf* land is now under the control of State land virtually indistinguishable from other government land or public land, though some *waqf* lands are given local mosques for the specific religious purposes. The *waqf* land represent a hole in even in the rudimentary land information system, as often no one really knows what lands are *waqf* (except for locals) and how they are administered. The Afghan land study points out that *waqf* properties are not administered by the Ministries of Housing or Land or even by the municipalities. In Afghanistan, they are centrally managed by the Ministry of Pilgrimage, which has departments at a provincial level only throughout Afghanistan (D'Hellencourt et al: 16). The study discusses the widespread misuse of *waqf* properties with the Ministry of Pilgrimage lacking capacity to deal with illegal occupation, with the powerful warlords retaining use, income or selling the property (despite the prohibition to do so) (D'Hellencourt et al 2003:16).

Like the Kabul workshop 2003, generally consultations or interventions have not addressed the problems relating to *waqf* because they fall outside the scope of the relevant land and housing ministries and there is very little information easily available for consultants to act on. However, the failure to understand the *waqf* doctrine and the lack of engagement with the *waqf* properties, misses a significant opportunity to address some of the basic problems of landlessness and informal settlements. The UN-HABITAT Islamic study argues that innovative approaches to *waqf* lands (and State land) can lead to releasing the potential of high proportion of these lands in public interest by providing access to land. Muslim governments in the past have nationalised and then redistributed large quantum of *waqf* lands to various sections of society. However, if redistribution of the ownership of these unused lands to landless poor poses problems, then the *waqf* model can possibly provide alternatives.

There may be at least three types of land that could be released for the benefit of the landless – State lands, nationalised *waqf* lands and unproductive lands (belonging to no one, but under the control of the State. In the case of State lands, where there have been limited and futile attempts at land distribution, there may be resistance to transfer of ownership. As regards *waqf* lands, there is now a realisation that the State can monitor but cannot efficiently run the *awqaf* it has nationalised, leading to calls for its privatisation. Equally, there are special rules under Islamic law relating to *mawat* or dead land which is not used or owned by anyone. These are easily redistributed to those who use the land, through (the revival of the dead land (*Ihya' al-Mawat*) which is an established economic and legal principle. The UN-HABITAT Islamic study suggested that the *waqf* framework as a potentially workable formula where there is continued State ownership, civil society management and security of tenure to those landless vulnerable groups. For further elaboration see the UN-HABITAT Islamic study.

5. Women's Access to Land in Afghanistan

Women's land rights were a source of human rights concern before and during the Taliban regime, and still are. Wiley argues that "Women, as a whole, have inferior land rights. In legal terms, constitutional and state law may be interpreted as permitting women to own land, and *Shar'ia* (Islamic law) endorses this through its provisions for widows and daughters to inherit at least some share of land. (However) Customary practice permits this to be realised mainly as an exception rather than as a rule" (2003:30). The general impression is that customary norms give women virtually nothing, Islamic law something and while statutory laws promise more but they cannot deliver. The Afghan land study points out that rather than interrogate customary and Islamic laws, the emphasis on statutory gender equality laws has not made a significant difference in women's legal status or access to land. Despite women's property rights being protected by the Statutory Law, they are not customarily respected. In the customary law, which dominates the regulation of transfer of property, land ownership is a 'male right' (d'Hellencourt et al, 2003:37).

One of the key recommendations made by the Afghan land study is that "meetings of religious authorities of the State and communities should be convened to investigate the scope for change in the current Laws from a gender perspective. (d'Hellencourt et al, 2003: 42). Another common theme of the Afghan land study is that *ijtihad* (personal reasoning, a well established methodology under Islamic law) be encouraged. The UN-HABITAT Islamic study demonstrates the numerous ways in which Muslim women's property rights can be enhanced using an Islamic approach. One of the general Western markers for perceived inferiority of the status of women and their rights under Islamic law is their entitlement to generally half the man's inheritance shares. However, inheritance is merely one part of the property flow chart. Under the integrated Islamic approach to women's property rights, her reduced inheritance rights are expected to be compensated by other means of wealth generation. It works on a methodology which offsets the inheritance loss by augmenting and supporting woman's equal access to purchase through earnings, endowments and gifts and special supplements such as savings, (from lack of financial obligations within the family), dower and maintenance.

The compensatory regime – using authentic Islamic arguments to trump gender deprecating customary practices- can be realised through appropriate responses at three levels. Statist family reforms have had virtually no impact on inheritance rights and women's right to property generally. At a normative level, *ijtihad* could be facilitated to clarify rights as per the *usul al fiqh* (Islamic jurisprudential methodology), which lead to consensus and lobby for adoption as policy. The State possesses the power, in public interest and in accordance with Islamic principles to reform gender discriminatory provisions and practice. Most critically, there needs to be through institutional reform, a rearrangement of court jurisdictions or the creation of a specialist institution to interpret Islamic property rights for women holistically and enforce those rights. These proposals are fully dealt with in the UN-HABITAT Islamic land study where the pooling together of Islamic responses is sought to address women's property rights at various stages- within the natal family, during marriage and in case of dissolution of marriage.

6. Conclusions- Towards Islamic Land Tools?

The challenge that land professionals face in Islamic contexts such as Afghanistan or Iraq is access to a body of relevant material which is balanced and objective. Another is to be able to identify appropriate methodologies for utilising such information through an appropriate and effective strategy that is consistent with international standards and practices. The most important objective is to be able to engage with relevant internal land discourses and to ensure that the field is not abandoned to conservative and fundamentalists. Islamic law might not be the dominant matrix but can be used bona fide strategically to defuse political and cultural impediments to a cross-cultural universal approach.

The fear of Islamic law as an outdated, obscurantist model monopolising the development or land rights debate is not real because different forms of Islam, including the moderate, are competing. Islamic dimensions coexist and interact with international, State, customary and informal systems. Not enough work has been done on the ability of Islamic law to respond to the contemporary challenges. On one hand, we find that Islamic theories are located in alternate frameworks, complex and myriad, thus contesting simplified universalist principles. On the other hand, there is significant promise in reworking Islamic land law which could conjure both the authenticity and durability in quest for development and human rights of Muslims through greater access to land.

UN-HABITAT has been working on these challenges at different levels. It has commissioned research, documented and disseminated the findings. It uses a 'best practices' approach to develop affordable, pro-poor and flexible tenure types and land tools, particularly for women. These tools are incorporated into UN-HABITAT's global campaigns and programmes as well as made available to governments, civil society and all stakeholders for their advocacy work and for implementation of relevant laws and policies. These research findings have been part of regional consultations and have led to the *Cairo Initiative on Islamic Land Tools* (December 2005) whereby experts have endorsed the UN-HABITAT Islamic study, the need for such tools as well as calls upon UN-HABITAT to co-ordinate this initiative. Among those endorsing the UN-HABITAT Islamic study is the pre-eminent Islamic institution, the Al-Azhar.

UN-HABITAT and its Partners – States, professional bodies, NGOs, experts - are discussing ways in which these strategies (in the UN-HABITAT Islamic study) can be converted into innovative, pro-poor, gendered, affordable and scalable land tools. At a consultation meeting of the Global Land Tool Network in Oslo in March 2006, the Arab League, Egyptian Government, Islamic Development Bank, NGOs and experts from the Muslim world join others to explore how we could take this forward. There is a demand for authentic and workable tools which can fill in the perceived gaps in land implementation strategies. UN-HABITAT invites all those working in such contexts to contribute to this process.

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