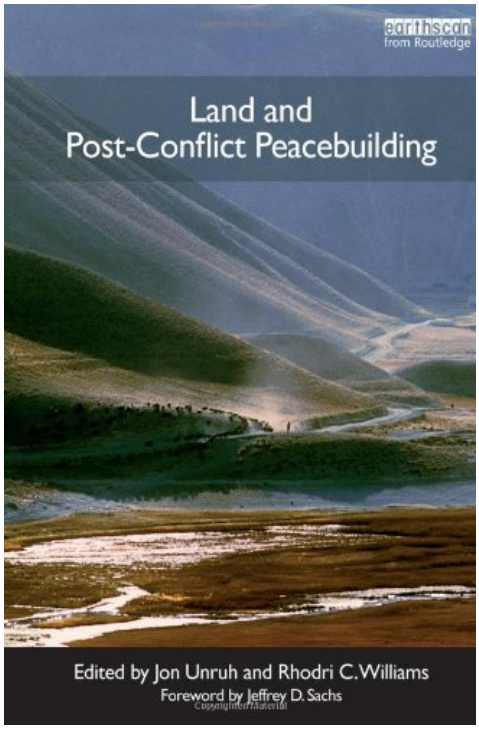

Unexplored dimensions: Islamic land systems in Afghanistan, Indonesia, Iraq, and Somalia

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A common dilemma confronting post-conflict interventions in Muslim societies is whether, or to what extent, to engage with Islamic normative systems and perforce Islamic political dynamics. Will entertaining Islamic arguments add another layer of volatility, frustrate reform, and embolden radicals? Will Muslims intuitively resist universal principles and demand authenticity even at the expense of durable peacebuilding and development? Will canvassing medieval Islamic doctrines, like other customary norms, unravel the hard-won development consensus and jeopardize human rights? Widespread anxieties such as these may reflect the false premises and dichotomies—universal versus Islamic, secular versus faith-oriented, modern versus traditional—that sometimes permeate post-conflict resource management discourses.

Islamic arguments are a distinctive stream of thought that cannot always be subsumed within an all-encompassing "customary, informal, and alternative" category. At the same time, the role of Islamic ideas should not be exaggerated, given the dynamic relationship between Islamic, secular, customary, and state norms where there is legal pluralism. This chapter does not advocate for exclusive or automatic Islamic solutions where Muslims live; rather, it suggests that where Islamic components can be fitted into overall universal strategies, they must be deployed when appropriate, and this deployment must be accompanied by a realistic political assessment of the risks and opportunities. Muslims in post-conflict situations have natural resource concerns, needs, and challenges that are similar to those of any other post-conflict community, so they are likely to welcome global approaches that are adapted to their setting.

Exploration of Islamic best practices is not necessarily aligned with a fundamentalist, ideological, or even pro-faith agenda because Islamic development

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tools can and do work alongside and within secular frameworks and with equal effectiveness (An-Na'im 2008). Notwithstanding the political risks and inherent limitations in using Islamic approaches, a pragmatic, flexible, and inclusive strategy should be able to harness potential tools when they are applicable and appropriate (Sait and Lim 2006; Global Land Tool Network 2006). Although Islam is recognized as a distinctive contributor rather than just another morphing custom, it exhibits internal diversity and mostly combines with customary, secular, state, and other norms and practices to operate through a hybridity of systems.

The short case studies from Afghanistan, Indonesia, Iraq, and Somalia in this chapter offer an opportunity to reflect on the potential of positive Islamic conceptions relating to natural resource management in familiar countries that represent some of the geographical, jurisprudential, and sociopolitical diversity within the Muslim world. The sketches arise out of the author's work with the Global Land Tool Network and the United Nations Human Settlements Programme (UN-HABITAT) since 2003.

Despite a common faith among their majority populations, these four countries have dissimilar socioeconomic trajectories and political narratives, which have prompted the promulgation of distinct laws with differing Islamic law inputs, as well as the creation of particular social, cultural, and political institutions. Contrasts between the rural parts of Somalia and the urban centres of Iraq, for example, could not be more striking. Given the staggering number of Muslim communities and the numerous manifestations of faith among Muslims, attempts to establish a global Islamic post-conflict natural resource management framework would be futile. However, where common theology and language intersect with shared experiences, comparative studies and cross-fertilization of ideas can yield useful perspectives.

The Islamic resource management tools under the lens here are property rights for cultivators of barren (*mawat*) land, Islamic endowments (*waqf*) adapted for community welfare, robust individual usufruct (*tassaruf*) rights over state land, and Muslim collective tenures. (A glossary of Islamic terms is presented as an annex to this chapter.) Such tools have been part of the legendary pursuit, ambitious yet elusive, of global initiatives aimed at strengthening land access, food security, and environmental sustainability (Augustinus 2009; Deininger 2003). These tenure models have been around for many centuries, coexisting with turbulent and violent histories, so it is likely that they will work well in post-conflict natural resource management. Mawat land has been used for reintegration of displaced people, the permanent dedication of waqf has been a bulwark against war-triggered change in political leadership, tassaruf rights have endured in spite of state succession battles, and Islamic cooperatives have been havens during civil wars and other conflicts.

Islamic dimensions of land management are often disregarded because of preconceptions about the incoherence of their content and about the political risks of deploying them. The four country studies, each exemplifying an Islamic concept, are therefore followed by responses to four questions: What are the political risks of entertaining Islamic arguments? Is there added value in differentiating Islamic

from other customary practices? Can Islamic methods help resolve disputes? And what are the human rights and gender trade-offs to be made in an investment in Islamic land management practices?

AN ISLAMIC NATURAL RESOURCE MANAGEMENT FRAMEWORK

It is widely assumed that mawat, waqf, tassaruf, and Sufi cooperatives—all regular Islamic tenures—are adaptable as tools for post-conflict natural resource management, but they have yet to be fully evaluated by research. A modest objective of this chapter is to provide a set of research questions for the study of these tools.

Mawat, waqf, tassaruf, and Sufi cooperatives are distinctly and uniquely Islamic. The descriptor *Islamic* is more accurate than *Muslim* because these are not merely Muslim practices but are consciously derived from Islamic law. Even where colonial and modernist reforms created new tenure types and terminology, the Islamic tenures are influential as concepts, if not always as practice, in many parts of the Muslim world. Reclamation of mawat is a centuries-old practice developed through Islamic jurisprudence. The waqf antedates the English trust, and many experts have argued that it inspired the trust (Cattan 1955; Gaudiosi 1988). The tassaruf is derived from classical Islamic law and has its own unique rules and no obvious equivalent in Roman law (Hamoudi 2008a). The Somali Sufi cooperatives are also consciously derived from Islamic principles.

There is no unified field branded as an Islamic natural resource management framework, but pieces of such a framework emerge from a set of overlapping themes, key concepts, practices, and principles. The framework can be drawn from well-established fields of international law, particularly human rights and humanitarian law, and from emerging fields such as Islamic jurisprudence on environmental protection and sustainable development (Khadduri 1966; An-Na'im 1990; Baderin 2003; Hashmi 2002; Al-Zuhili 2005; Hasan 2006). It would encompass the objectives of Islamic law, explicit Koranic verses, practices of the Prophet's generation (*sunna*), and subsequent jurisprudential peace and development doctrines. Islamic post-conflict and environment studies are evolving, and this presents opportunities to forge new approaches and develop fresh perspectives (Huda 2010; Sait 2007; Sait and Lim 2006).

Islamic doctrines often support natural resource management, particularly in post-conflict situations. Waqf can be dedicated for specific groups or purposes, including land development, waterways, and environmental protection. Mawat land reclamation or land grants (*iqta*) by the state can facilitate greater land access and better post-conflict resource management. Reserves (*hima*) can be established for public welfare, for example, or for conservation and management of rangelands, forests, watersheds, and wildlife. Within such reserves, development, deforestation, grazing, and hunting may be prohibited or regulated. Inviolable sanctuaries or zones (*harim*) for protection of human, animal, or particular plant life can be set up. UN agencies, civil society groups, and land management experts have been working successfully with such tools (Sait 2008).

The most ambitious Islamic laboratory on land matters took shape during the Ottoman Empire (Aytekin 2009). During the sixteenth and seventeenth centuries, the empire's influence straddled several continents, including Western Asia, North Africa, and Southeastern Europe. An assumption is often made that Islamic land law was most evolved in regions formerly within the Ottoman sphere, namely the Middle East and North Africa. This is partly true; the Ottoman Land Code of 1858 continues to echo conceptually or in the law in many Middle Eastern and North African countries, including Iraq, and given the Islamic web of tenures, a broad knowledge of Islamic law and Ottoman practice is vital for the understanding a particular tenure.

Somalia, however, did not come under direct Ottoman influence, and its varied Islamic heritage is evident. Afghanistan was not part of the Ottoman Empire either, but the mawat case study demonstrates how Islamic ideas have flowed freely within the Muslim world even outside the empire. And Aceh, part of present-day Indonesia, was an Ottoman ally as an independent sultanate but did not import Ottoman law because the Acehnese had developed their own customary interpretation of Islamic principles. Given this legal pluralism, it is difficult to map out an Islamic natural resource management framework.

The Islamic philosophy driving the four tools discussed here is as important as the tools themselves. Obligations regarding philanthropy, fairness, and poverty alleviation are influential. Two important ideas are at play: the rights of individuals and the responsibility of state. First, natural resources are subject to divine ownership—a sacred trust—and humans are responsible for their just, equitable, productive, and responsible use. Therefore Islamic practices, from inheritance patterns to microfinance, provide access rights to a broad range of beneficiaries, including women, children, landless people, and minorities.

Second, the concept of access to natural resources under Islamic systems has implications far beyond the material domain as it stresses responsibility, poverty alleviation, and redistribution. In the Islamic welfare state, the public treasury has a specific mandate to support the poor and landless and to ensure fairness and redistribution. State funds comprise not only tax revenue but also individual contributions to the poor (*zakat*) and other donations. The state is expected to fund access to natural resources for the poor, and the principle of public interest (*maslaha*) requires the state to act in the interest of human welfare.

Unease over the seemingly unpredictable substantive and political outcomes of ventures with Islam is not exclusive to external interveners or commentators; it is often demonstrated also in the ambivalence within many Muslim societies. The recent uprisings in Tunisia, Egypt, Libya, and Bahrain did not yield a definitive answer to the recurring probe: Where or what is the Islamic dimension? There are many Islams, with liberal, conservative, or fundamentalist agendas, official (state-selected) or informal (mostly blending with custom). Islam may be under the surface, simmering or irrelevant. Islam is negotiated among competing perspectives and stakeholders in relation to both its role within society and how it is interpreted and applied. Generalizations about Muslims, who constitute about

one-quarter of the world's population (Pew Research Center 2009), are based on the assumption of their shared beliefs, but their experiences are heterogeneous, as are their ideas about religion and politics.

Islam deals with post-conflict issues head-on. Many researchers have it that the Islamic concept of peace (*salaam*), like the Judeo-Christian understanding of shalom, signifies more than cessation of hostilities and extends to a dynamic state of consciousness, wholeness, and balance (Sait and Lim 2006; Bouta, Kadayifci-Orellana, and Abu-Nimer 2005; Rogers, Bamat, and Ideh 2008). Koranic verses extensively refer to the sanctity of life, the importance of peace, and the imperative of fairness and equity. They emphasize compassion, mercy, individual responsibility toward fellow beings and nature, and the unity of and interconnectedness of all creation. Faith-based values contemplate transformational change, justice, and reconciliation. For Muslims, Islam is a religion of peace—within, with God, toward all human beings, and with nature (Bouta, Kadayifci-Orellana, and Abu-Nimer 2005; Rogers, Bamat, and Ideh 2008).

Islamic faith principles and Islamic individuals, organizations, and institutions regularly play positive roles in peacebuilding and development in religious as well as nonreligious settings (Bouta, Kadayifci-Orellana, and Abu-Nimer 2005; Rogers, Bamat, and Ideh 2008). These leaders and organizations have limitations, of course, but they often provide legitimacy, access to networks, and a means of mobilization (Appleby 2003). Theological resources and activities, including interfaith dialogue, can be vital in all three major stages of conflict intervention: prevention, mitigation, and post-conflict reconstruction. Religion can integrate and sequence peacebuilding and natural resource management priorities.

Shifting from an Islam-as-trigger-of-conflict frame to an Islam-as-potential-support-mechanism approach requires peeling away several layers of skepticism. Some view Islam as a violent religion. They are alarmed by the shrill interpretation of jihadist doctrine by a tiny minority who are political extremists. Others extol Islam's peace message. They refer to core Islamic texts and the practices of the overwhelming majority of Muslims. It may not be necessary to arbitrate this intercivilizational debate if Islamic peacebuilding approaches are promoted not as faith-based strategies but as strategies that can be used pragmatically by believers, agnostics, and atheists alike to achieve certain shared objectives.

In addressing implementation challenges, this chapter makes a distinction between political Islam and developmental Islam. Political operatives regularly use Islam as a manifesto to achieve certain political ends, sometimes in concert with exclusionary and violent methods. Whether it is a revival of an idealist past, a critique of Western policies, or a cynical ideological ploy, politicized Islam divides Muslims on tactics and objectives (Tibi 2002). The overwhelming majority of Muslims are not interested in the Islamic state or in jihad for revenge, for their priorities are their personal faith, their livelihood, stability, and the rights encompassed within an Islamic developmental framework. What often works for them are practical Islamic community-driven conflict-resolution tools such as mediation (*sulh*), conciliation (*wasta*), and arbitration (*tahkeem*) (Irani and Funk

1998; Abu-Nimer 2003), alongside an impressive array of culturally supported mechanisms. This chapter explores whether the fear of political Islam can be offset by the promises of developmental Islam, the latter being of far greater significance to the real lives of Muslims.

CASE STUDIES

One reason Islamic principles have failed to inspire tough-minded strategists is that theories of Islamic natural resource management have mostly been discussed in the idealized abstract without consideration of the politics of their implementation, or vice versa. For each of these short case studies, this chapter poses four questions about the content and use of Islam in post-conflict natural resource management. The first query relates to the political risks of employing Islamic strategies. The second question is whether there is added value or utility in recognizing these laws or practices as Islamic instead of subsuming them in the broader category of customary norms. The third issue is whether or how Islamic methods can help resolve disputes, including those over natural resources. The final question relates to possible human rights compromises arising out of these Islamic investments, particularly violation of the rights of women and minorities.

Barren (mawat) land in Afghanistan

A primary focus for post-Taliban reconstruction in Afghanistan is land reform. Driven by a broader agenda of modernization and change, interventions have sought to retract Taliban land laws, which were assumed, without examination, to be a medieval hodgepodge. The Taliban had introduced retrograde and brutal policies, which many saw as a perversion of Islam and which were condemned across the Muslim world. Yet overthrowing the Taliban is not the same as repudiating Islam, and well-meaning efforts toward secularization created tensions and backlash even from Afghan moderates (Suhrke 2007). A ready-made draft modern land code conjured by some of the world's leading land experts did not get the expected traction. As it turned out, the Western-supported Afghan government did not consider all Taliban legislative forays to be simply ideological trash. Some Taliban laws, such as the Land Management Law of 2000, had retained or codified positive features of Islamic land law that had predated the Taliban (Sait 2005).

The Afghan Land Management Law of 2000 refers to numerous Islamic land tenures and strikingly declares that the distribution of dead, or mawat, land (*mowat* in Afghanistan) is one of its key objectives. Few international consultants seem to have understood what this meant or grasped its dramatic implications for land reform in a country such as Afghanistan. It was an invitation to landless persons to claim access, even ownership, of empty lands—lands not owned or used by anyone—that are located away from development and are otherwise

passed off as state lands. At stake was a retenuring of a large proportion of Afghanistan. Except for private, state, pasture, and endowment (waqf) lands, the land law had deemed all deserts, mountains, hills, rivers, arid and rocky lands, and jungles to be mawat. This had the potential to revive swaths of wasteland as well as provide land access to the displaced and the landless after the conflict ended. Mawat creatively offered opportunities for regularizing informal and squatter settlements through innovative use of the doctrine.

Redistribution of barren land is an established Islamic economic and legal process for the revival of dead, barren, or wasteland. Revival of mawat land has been a central feature of Islamic economic history and has also been used historically to generate rights of access to unused streams and rivers (Haque 1984). It is distinguished from the concept of a land grant (iqta), whereby the state gives land to deserving or favored people. Mawat reclamation is not at the discretion of the state but is a right exercised by the individual.

Mawat is derived from the Islamic conception of landownership, which is largely linked to land use. It incentivizes productivity and censures waste through a use-it-or-lose-it approach. Sohrab Behdad explains that while private property rights are protected generally, an individual who uses land will have priority over another who has failed to use it (Behdad 1989). In theory, unworked land cannot be owned. Such was the vigor of the argument against hoarding of and exploitation through land that classical theorists argued that excess land could not be rented out without the landlord's inputs, though this ruling was pragmatically overturned rather quickly (Sait and Lim 2006).

Although mawat is an Islamic tenure, its rules are defined by community practice and custom. It is seen as a natural way of improving food security, providing employment, sustaining communities, and fostering community cohesion. Unlike mere possession of *terra nullius*, where the emphasis is on the empty nature of land, it is productive activity on mawat land that creates rights. Ottoman approaches to mawat land exhibited both creativity and flexibility driven by encouragement for the cultivation and use of land. Thus undeveloped land at a particular distance from any town or village, in accordance with Islamic legal theory, could be enlivened through cultivation or other acts, such as irrigation. The occupier who reported effective use of such land and received the permission of the state would be granted rightful possession.

Afghan land law, far from being a primitive hodgepodge as assumed, has a developed and sophisticated mawat doctrine. Under Hanafi Islamic jurisprudence, which is applicable in Afghanistan, for land to be designated as mawat, it must satisfy several criteria: its ownership history must be unknown, there must be a lack of cultivation and construction, and it must be a particular distance from development (Gebremedhin 2006). The designation signifies more than a mere right to adverse possession. It is also distinguished from *mahlul*, a designation for uncultivated land that allows the state to reallocate property if the holder of title leaves it uncultivated for a period of three years. In the case of mawat, it is not the state but the individual who possesses the rights.

Strict rules determine what may be considered wasteland. The Land Management Law, true to Ottoman practice and Hanafi doctrine, required that an application relating to rights over mawat land be made to the head of state. Still, the application of this project presented tricky questions. How should barren land be defined? At what distance from developed land should the mawat land lie? What acts should constitute reclamation of land? How was the land to be redistributed? War, control by organized crime syndicates, and the disarray of land institutions created a fluidity in which these issues did not receive adequate attention.

The Karzai government did not challenge the authenticity of mawat, it merely indicated that it did not know how to implement it in the current climate. Karzai, who as president was designated to approve allocation, issued a decree in 2002 (Decree No. 99) that froze the distribution of virgin and barren land by government ministries and agencies. Furthermore, distribution of rural land (including arable state land) to landless farmers was prohibited, presumably because of concerns about corruption and nepotism in land distribution. The international community could have seized on the opportunity to implement the mawat law, but there was no real dialogue about it (Gebremedhin 2007).

Another reason for internal resistance to distribution of mawat land is that the Afghan government was not enthusiastic about relinquishing the state lands under its control. The Afghan Civil Code treats mawat as state property even though there is a difference between barren unowned property and state property, and therefore reclamation has dual tenure transfer implications: it not only converts property from mawat to a license to use (which leads to full rights) but also releases the land from the competing land hunger of the Afghan government.

Land interventions in Afghanistan have mostly focused on titling and private ownership, and land development for the poor is rare. Expansion of the land base through reclamation of barren land would be welcome. Mawat can be a pro-poor tool that benefits the landless, internally displaced persons, and members of other targeted categories of people, but it is equally possible that some people will manipulate it as an opportunity for land grabbing. Internally displaced persons and returnees in Afghanistan face formidable odds. In their long absence, their original homes have often been destroyed and their lands occupied by other displaced families or by powerful warlords or other local elites. Access to land through mawat can be a fresh start. There was an opportunity for developing a reliable, equitable, and transparent mechanism for operationalizing mawat. However, lack of familiarity with the mawat doctrine, as well as absence of political will, sank the prospects for establishment of an innovative pro-poor form of land tenure for displaced and landless Afghans.

Waqf in Indonesia

In post-conflict and post-tsunami Indonesia, the destruction of land records was a tragic backdrop of local leaders' and international relief organizations' rethinking of land tenure relations. The reconstruction of land records, often from communal

memory, accompanied a renewed focus on individual and joint titling, as well as the customary tenures (*adat*).[1] Another dimension, Islamic law, was often marginalized by external interveners because of their hypothesis that it is amalgamated within adat.

One example of an innovative Islamic land tenure system is the flexible endowment (waqf) in Aceh (Bowen 1988). The Islamic endowment is a key institution that incorporates vast areas of land in the Muslim world. At one time a staggering one-third of Ottoman land was held in trust; wherever a Muslim community existed, one was likely to find a waqf (Sait and Lim 2006). Though modern reforms in several Muslim countries abolished, nationalized, or strictly regulated endowments, the waqf concept remains influential and is being reinvigorated.

At its heart, the waqf is closely tied to Islamic philanthropic principles, with care for orphans, widows, and old, sick, and landless people featuring regularly on the list of waqf objectives. Though the waqf is distinct from the charitable obligation that finds expression in zakat (a levy on Muslims for distribution to the poor and needy that is one of the five pillars of Islam), it flows from the same principles, and it thrives in post-conflict challenges.

Throughout history, the waqf was intended as a third sector of civil society, which existed independently of both the state and the profit-making private sector. As Jennifer Bremer notes, "The oldest civil society institution, the *waqf* or Islamic endowment, combined the features of a philanthropy, a social service agency, and albeit indirectly, a political voice competing with that of a ruler" (Bremer 2004, 5). For centuries in Afghanistan existing waqfs (or more properly in plural: *awaqf*) were revisited and new waqfs created by civil society to fill the gap in state or external funds. The waqf model was used in Aceh to purchase land for educational institutions, graveyards, mosques, and community centers. Waqfs emerged as an important resource to offer tsunami victims support during the emergency and beyond.

Islamic endowments (*wakaf* or *tanoh wakeueh* in Indonesia) are of considerable significance in Aceh, as in other parts of the Muslim world. Article 215 of the Indonesian Compilation of Islamic Law (Kompilasi Hukum Islam, or KHI) refers to waqf as "a legal act whereby a person or a group of persons or a legal body donate part of their wealth either permanently or for a set period for religious purposes and/or other public purposes in accordance with Islamic teachings." Rules determine who can donate a waqf, who can receive it, what can be donated, and which purposes are in accordance with Islamic law (sharia).

Although there is a national body for waqf management (Badan Wakaf Indonesia), under the 2006 Law on Governing Aceh, local authorities regulate and protect waqfs. Land is normally donated as waqf to the head of the village and the religious leader, who are then responsible for management of the land. In Aceh, waqfs have been created not only by individuals but also by community members in a village.

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[1] For a review of land management in post-conflict and post-disaster Aceh, see Arthur Green, "Title Wave: Land Tenure and Peacebuilding in Aceh," in this book.

The waqf in Indonesia is innovative in several dimensions, partly catalyzed by the profound post-conflict and post-tsunami experiences. A frequently cited limitation of waqfs has been their inflexibility, particularly because of the rule of perpetuity. The "once a waqf, always a waqf" rule was intended as a protection against takeover by the government or other parties, but over generations fragmentation, corruption, and waste often seeped in. The 2004 Indonesian waqf law paves way for temporary waqfs. In a departure from conventional waqf jurisprudence, the Indonesian Islamic endowment does not insist on perpetuity; it can be a trust created for a specified period. It envisages not only contributions from individuals but also collective donations. The reference to "waqf material" implies that it can be land or any other immovable property, and cash waqfs can be an important source of credit, with the endowed capital lent to borrowers.

In principle, land donated in the form of waqf cannot have its status changed or be used for any purpose other than that specified in the waqf document. This rule posed particular problems because the conflict and then the tsunami changed facts on the ground. Also, most registered waqf documents and many land managers and witnesses perished in the tsunami disaster. Disputes arose over changes of land use and beneficiaries. For example, could endowed dried out swamps be converted into housing for poor despite contrary waqf objectives, which were now not possible? Could heirs of the original habitants of housing reclaim waqf land, though the waqf is nonhereditary (IDLO 2008)?

A series of community meetings were held, and a spate of innovative Islamic advisory opinions (fatwas) stated that where the land could no longer be used for the designated purpose because of the natural disaster, it could be exchanged or traded on the basis of the Islamic legal maxims of necessity and public interest. Land and property belonging to tsunami victims who had no heirs would be transferred to the Muslim community through the state welfare treasury. It was ironic that it was fatwas, which frequently hit the headlines because of their obscurantist views, that augmented and liberalized waqf jurisprudence in Aceh.

The waqf in Indonesia has developed in tandem with adat and reflects local and community support. Though it falls directly within the jurisdiction of Aceh's Islamic courts, it is usually first addressed through negotiation, often with the assistance of the local religious office. A 2008 International Development Law Organization report details some of the waqf land negotiations in post-tsunami Aceh (IDLO 2008). A school building was planned for waqf land without any arrangement for compensation; the dispute was resolved through negotiation, with another piece of land given instead. Another parcel of waqf land, which was previously a cultivated rice field, became a site for a mosque. Similarly, burial grounds, a government medical center, and community centers were all built on waqf land, through negotiations and arbitration, and with clearance from the Islamic court where needed. Waqf lands have often been transformed into residential neighborhoods, schools, and community centers with the intervention of communities and through innovative use of waqf procedures, but very little of this has been documented.

Usufruct rights (tassaruf) in Iraq

Reconstruction of post-Saddam Iraq proceeds on the premise that modernizing the land laws could strengthen private property. However, it is estimated that over three-fourths of land in Iraq is state controlled, and the rest shows skewed private landholding patterns. Whether there is cause for despair depends on perspectives on usufruct (tassaruf) rights, which pertain to an estimated 70 percent of state lands (Wiss and Anderson 2008).

To negotiate, let alone reform, Iraqi land management systems requires fluency with Ottoman land tenure, which influences Iraq as well as the 1953 Iraqi Civil Code. Both draw heavily on Islamic law. Current-day land experts can learn from the Iraqi government's abortive attempt in the 1950s to redistribute extensive lands—an effort that stalled due to legal, political, and socioreligious objections.

The two main categories of land in the 1858 Ottoman Land Code were *mulk* and *miri*, which approximate individually owned and state land. The other main tenures are endowment land (waqf), barren land (mawat), public land (*matruke*), and uncultivated, lapsed land (mahlul). Miri land is land registered in the name of the state, but in practice belongs to the individual who has the right to develop and use it. Miri land constituted the vast majority of agricultural land in the Ottoman Empire for which farmers paid taxes. The classical Ottoman land tenure framework thus made a fundamental distinction between the right to cultivate land (tassaruf) and absolute ownership of land (*raqaba*).

There are several striking features of tassaruf. It is neither a customary practice of access nor a concession, but a full-fledged right to use, exploit, and dispose of miri land. Thus the term *tassaruf* is used in other contexts to denote control over assets (such as zakat or charity funds) or the right of a partner to dispose of certain property that is not his or her own as if it were private property. The state cannot ordinarily take such land back and must compensate the rights holder if it does; nor can private parties infringe on the user's rights. Volume 3 of the Iraqi Civil Code regulates property rights such as tassaruf (Stigall 2004). These rights were so strong that the distinction between tassaruf and full ownership appeared blurred. In practice, if the state was willing, a claim over the property could be upgraded to full ownership.

Usufruct rights may be diluted or even lost if individuals fail to pay their taxes or if they violate the relevant laws. Most significantly, a user who abandons the land loses rights over that piece of land. Miri land that is never used becomes mawat land, and the rights go to the individual who reclaims the land. On the other hand, if miri land is abandoned for three years, it becomes lapsed land (mahlul), and another person can apply to use it. It is an oversimplification to say that ownership can be proved by deeds and that tassaruf rights are not registered, for this may not be true. The Islamic continuum of land tenure recognizes land use, rewards productivity, and promotes food security.

Tassaruf rights are also inherited. Unlike privately owned property, which is subject to fixed compulsory shares under Islamic dispensation, miri land can

be bequeathed or transferred in any manner. Female heirs can get shares equal to those of males, or even exclusively. Thus the transfer of tassaruf rights can compensate women for the lesser inheritance shares under Islamic rules, though there is no research on this. Technically, miri property cannot be subdivided, so land consolidation and adjustments regularly take place. Upon the tassaruf holder's death, the right is assigned to the holder's heirs. If they choose not to accept the tassaruf, it is auctioned to the highest bidder.

Tassaruf also promotes access to land and security for a wider range of people. The state has an obligation under public interest (maslaha) to ensure productive use of land to the maximum benefit of the largest number of people, particularly the landless and the poor. Few external commentators and consultants have appreciated the significance of the Iraqi Civil Code of 1953, which despite several amendments and additional laws still prevails. Several Iraqi experts argue that respect for the Iraqi Civil Code is "more or less like American reverence to the Constitution. In Iraq, constitutions come and go, they are politically motivated, they are hard to take as seriously, but the Civil Code is central to the legal theology" (Hamoudi 2008a, 14; Jwaideh 1953). Others find the Iraqi civil law system to be "a sophisticated, modern system, which [in spite of some needed amendments] is more than capable of addressing the need of displaced persons and those who have lost property" (Stigall 2009, 3). It has worked well in practice and is ingrained in the sociojuridical consciousness of the Iraqi polity.

The Iraqi Civil Code is a blend of continental civil law and Islamic law. It was drafted by the leading Muslim jurist Abd al-Razzaq al-Sanhūrī, who was then the dean of the Iraqi Law College. Its substance was taken largely from Islamic law, Egyptian law (which borrowed from the French Civil Code), and Ottoman legacy; in it the three are almost seamlessly stitched together (Arabi 1995). Knowledge of Islamic and Ottoman influences are critical to an understanding of Iraqi law. Dan E. Stigall, exploring Iraqi property laws and quoting from Sait and Lim (2006), argues

> Although secular legal institutions have long held sway in modern Iraq, the importance of Islam should be kept in mind when pondering contemporary legal institutions—even the most seemingly secular. This is not only because Islamic law still exists as a subsidiary source of law under the Iraqi Civil Code, but also because it allows one to better appreciate the cultural context of Iraqi law and the legal issues under consideration. As Sait and Lim note when discussing property law in the Middle East "a lack of engagement with the internal Islamic dialogue risks creating land systems that are bereft of authenticity and legitimacy and thereby of effectiveness and durability" (Stigall 2008, 2).

At a 2010 Iraqi land conference organized by UN-HABITAT and the World Bank, a comment was recorded by local participants: "We are legal experts in Iraq. We are not starting from scratch. Study the principles given to us by the Ottomans and find solutions in them" (World Bank and UN-HABITAT 2010). Iraq has been erroneously viewed as a clean slate or a stage for modernist land

experiments that ignore the country's history and influences. Most land consultants are unaware of tassaruf rights, or if they are aware of them, they merely footnote them as leaseholds or refer to such rights as ownership. Tassaruf rights probably endured the conflict in Iraq without the external commentators knowing of their existence. The Iraqi land code and civil courts are dealing with land matters in Iraq, but to ignore the legal culture in which this takes places diminishes the prospects of success for land reform.

Islamic land cooperatives in Somalia

In addition to promoting responsible individual landownership, Islamic law facilitates collective tenures. Muslim societies are comfortable with joint titling and shared tenures. Land consolidation is a Muslim way of life; it is used, for example, in postinheritance adjustments to prevent land fragmentation and maintain viability. Islamic finance products such as microfinance and insurance are predicated on pooling of resources.

In Somalia it is Sufism, the mystical stream of Islam, that provides an intriguing case study of the Muslim cooperative as a community-based tenure. Somalis have long practiced traditional clan lineage rights with respect to use of and access to resources, and clans fiercely protect their land and resource base. Because Somalis are overwhelmingly Muslim, their customary practices (*xeer*) are inclined toward Islamic principles and dealt with through traditional and Islamic dispute resolution mechanisms.

Modernist reformers in Somalia, who viewed the clan system as backward and divisive, began curbing clan-based practices through the 1973 Unified Civil Code before the 1975 Land Reform Act technically abolished customary tenure (Unruh 1995). Scientific socialism was introduced to transform informal collective land tenures into state enterprises and associations, which were projected as a model that synthesized Islamic, customary, and communist models. The state cooperatives were doomed because the rights of several categories of people, such as the pastoralists, were ignored, and excessive bureaucracy, corruption, rigidity, and mismatch of users and resources took their toll. However, there are still cooperatives in the country, working with mixed results, while the push for individual title yielded uncertain gains for poorer communities (Besteman 1989).

The impact of Sufism in Somalia has varied over time, and much of it has been indirect (Lewis 1998; Vikor 1993). The tension between Sufism and conventional Islam has many twists (most Somalis formally belong to the Shafi Sunni school), but Sufism remains influential in many parts. Various Sufi orders command large followings in Somalia, especially the Qadiriya, the Ahmadiya, and the Salihiya. Each order, or *tariqa* ("path" or "way"), is a vibrant community that is also a sociopolitical, economic, and spiritual organization.

The history of Somali tariqas provides a compelling narrative of how Islam created the basis of innovative Islamic land cooperatives. Sufi leaders who came to Somalia to found the Salihiya order in 1880, for example, sought to establish

communities among the clan-based Somali society. By all accounts, these "saints" were well received and were offered uncultivated land that they used as a base and from which they expanded. The spiritual and political reasons for Somali receptivity towards these saints must have been the latter's spiritual status and perceived neutrality in clan disputes. Membership in the Sufi community is theoretically a voluntary matter unrelated to kinship. Each order has its own hierarchy that creates an alternative to kin-group dynamics. The Sufi communities thus both acted as a buffer between competing clans and promoted spiritual allegiances above clan differences, with mixed success.

The Sufi communities put the lands given to them to good use and expanded their landholdings through productive use and reclamation of empty land (mawat) by cultivation. Though the precise nature of land rights in Somalia is underresearched, these communities lived by Islamic principles that influenced property relations. These communities were preaching and not only practicing Islamic family law, including laws governing inheritance, but also promoting an Islamic economic ethos through equitable land access, rights to grazing land, access to water points, and sharing of responsibilities as well as profits and losses.

Beyond their religious and political activities, such communities used the fertile land along the Shabelle and Jubba rivers to establish farming communities with cooperative cultivation and harvesting. The tariqa was used as an organizational framework for the agricultural community to practice and transmit its way of life and religion. Knut Vikor argues that the spiritual communities were accompanied by scholar groups that debated and refined their methods of organization, in keeping with their interpretation of Islamic economic, political, and spiritual principles (Vikor 1993).

An influential report on Somalia by Gregory Norton, drawing on the limited literature available and quoting from Hoben (1988), describes tariqa land tenures:

> [Tariqas], . . . which have been active in Somalia for centuries, had an important influence on the development of land tenure. . . . These communities became the focus of "significant agricultural settlements" in the middle years of the 19th century and came into existence in large numbers in the first two decades of the 20th century. The founders of the settlements sometimes received land from lineage heads or were given land to establish a buffer between rival lineages, whose disputes they mediated; the land was owned collectively but cultivated individually. The settlements reportedly ranged in size from a few hundred to over 8,000 members and together encompassed 20,000 to 40,000 individuals in the period from around 1900 to 1940. . . . Hoben claims that the lasting significance of these settlements is that they established "an alternative model of land tenure and social political relations to the dominant, faction ridden clan model" and "provided security and access to resources for displaced, low status people, who could not easily obtain resources and be absorbed into the overarching clan system" (Norton 2008, 86–87).

Commentators and researchers on Somalia frequently complain that because of instability, land analysis in the country is informed by very limited original

fieldwork on natural resource management. The Norton study complains that there is "relatively little comment on this (Islamic) development in the general historical and land-related literature on Somalia" (Norton 2008, 85). A closer examination of Muslim cooperatives may or may not deliver a replicable contemporary model, but it would demonstrate that property relations and land management can be developed with reference to faith principles in post-conflict situations. Islamic law is the dominant political discourse in Somalia, so using innovative Islamic ideas to reach universal goals may turn out to be practical.

ANALYSIS OF CASE STUDIES

These Islamic land tenure narratives from post-conflict Afghanistan, Indonesia, Iraq, and Somalia stand in striking contrast to the usual dispatches, which deemphasize Islamic dimensions. However, these case studies present selective, partial views in several respects. They do not fully explain Islamic tools within a cogent land analysis or an explanation of each country's pluralist land systems. The identification of these land tenure systems does not imply that these tools are working or even capable of working, and the case studies do not provide the intervener or practitioner guidance on how to develop technical capacity or negotiate political risks. No systematic or rigorous evaluation of these land tenure systems' design, impact, scale, or replicability has been carried out. This is a serious knowledge gap.

This analysis aims to move research forward by addressing four questions that overhang the case studies: What are the political risks of entertaining Islamic arguments? What is the value of differentiating Islamic from other customary land tenure systems? How can Islamic methods of dispute resolution help? And what human rights trade-offs may be involved in an investment in Islamic land tenure options, particularly with regard to gender?

Political risks

Land is political, and it does not become any less so when Islamic inputs and post-conflict situations are added to the cauldron. Yet the surprise from the case studies is the lack of noticeable links between political Islam and developmental Islam. None of the tools outlined in the case studies are part of hegemonic or even antagonist campaigns by Islamist national liberation movements, terrorists, or Islamist political groups. On the contrary, the armed or ideological movements appeared distinctly disinterested in an Islamic land rights ethos, apparently because of the threat to existing powerful monopolies posed by democratic and economic empowerment.

The approaches of developmental Islam often challenge political Islam, as well as other forces, to cater to broader community interests. It is often the secular or moderate forces that seek to lobby political Islam to yield to developmental Islam, but there can be unintended outcomes. On one hand, the Islamic nature of the land tools makes it convenient to legitimize them, lobby for them, and

disseminate them. On the other, there can be a range of reactions from Muslim political groups—from skepticism to hijacking of initiatives. Donors and the international community can also be resistant to the use of Islamic approaches.

In Afghanistan, the so-called warlords, political operatives, land mafia, opium contractors, corrupt officials, and private speculators jointly opposed mawat land distribution because it undermined their illegal and extortionist land businesses. Land redistribution was an element of the Taliban's political agenda, though it was not a high priority. Mawat is found in the 2000 Afghan land law enacted by the Taliban, and it has been in play as a legal concept and practice for much longer. Appearing in the civil codes of the 1970s, mawat is seen not as a democratic, dictatorial, socialist, Taliban, or mujahideen concoction, but as an Islamic right. This does not mean that Islamic land practices exist in a political vacuum or are always politically neutral. It may well be that the Taliban's promotion of mawat reclamation was part of its political agenda.

The Salihiya tariqa of Somalia, which established the collectives, were also known for their anticolonial struggle. Examples from Hezbollah in Lebanon, the Muslim Brotherhood in Egypt, and Hamas in the Palestinian territories show how social welfare activities can be part of political platforms.

Though there has been concern in the past over religious management of waqfs, the fatwas over waqf matters in Indonesia have not been seen as politicalized outputs. Indonesian faith-based organizations, such as Nahdlatul Ulama and Muhammadiyah, may compete with each other over control of some waqfs as part of their welfare mandates, but the waqf is not their political platform.

Although there are worrying trends in the use of political Islam as an ideology or agenda for power struggles, the vast majority of Muslims use Islam quite the opposite way—for individual peace, harmony, and righteousness in this world and the hereafter. Further research would identify the stakeholders in Islamic land management and their roles, capacities, and objectives in servicing Islamic tools.

Reluctance to entertain Islamic options in post-conflict situations has as much to do with perceptions of the relative utility of those options as it does with skepticism about faith in general or unease about Islam in particular. To many, Islamic law is simply a medieval, monolithic, rigid, autonomous, and unfair system with inequitable outcomes that is driven by a fundamentalist agenda. Indeed, there are several contentious areas of Islamic law—such as gender equality, minority rights, and aspects of criminal law. The controversial interpretations of jihad as a license for unregulated violence are much protested by the overwhelming majority of Muslims, but they sour the appetite for Islamic law among non-Muslims.

Some parts of Islamic law may appear doctrinal, technical, or even abstract, but a significant proportion of Muslims see most of it as geared toward practical goals and subject to *ijtihad* (personal reasoning). Islam is particularly strong when it comes to natural resource management.

For most Muslims, Islamic law is the "epitome of the Islamic spirit, the most typical manifestation of the Islamic way of life, the kernel of Islam itself" (Khadduri and Liebesny 1955, 28). There is debate about and critique of both

Islamic law and negative portrayals of Islamic law, regardless of the faith of protagonists. There is also a trend toward deemphasising the Islamic-law-as-divine-trumping approach, with several recent commentaries suggesting that Islamic law is merely the use of religious resources through human choices and thus not very different from secular or state law (An-Naim 2008; Odeh 2004). The absoluteness of Islamic law is a myth. Pluralism and hybridity are more realistic frames for understanding applications of the law.

Regardless of whether the encounter is with political Islam or developmental Islam, the religious dimension has the propensity to politicize the debate. The line between religion and politics may be blurred, or interventions may have unintended political consequences. However, avoidance of Islamic discourse only abandons the field to the obscurantists, fundamentalists, and extremists. Challenging restrictive interpretations or divisive approaches empowers communities not only in material terms by addressing land rights but also psychologically by letting their voices be heard.

Differentiation of Islamic from customary land tenure systems

Islam is a primary determinant not only of collective identity but also of national constitutions and legal systems. The 2004 Afghan and 2005 Iraqi constitutions leave no room for doubt that Islamic law has primacy. The Somali draft constitution replacing the 1979 constitution emphasizes that all measures are to be sharia compliant. The 1945 Indonesian constitution does not hold Islam to be the only religion, but Aceh has special status and has imposed Islamic law.

However, land analyses of these countries do not pay adequate attention to Islamic dimensions of land management, subsuming them, instead, within the catch-all category of "customary, informal, and alternate" norms and practices. Typical reports on the fifty-seven countries that are members of the Organization of the Islamic Conference deal with custom but do not usually mention Islam. This is a strategic blunder, and the conflation of custom and Islam is specious and anthropologically obfuscating. Whatever the extent and form of Islamic law in a particular Muslim society, in the consciousness of much of the Muslim world, land tenure regimes and concepts are generally constructed with reference to sharia principles.

Islamic tenures differ from customary tenures in several respects—sources, methodology, nature, legal status, and impact. Most constitutions and laws make this differentiation, despite the complex symbiotic relationship between religion and custom. Islamic law recognizes custom (*urf*) unless it directly contravenes Islamic principles. Specific national or local customs, such as adat (Indonesia), xeer (Somalia), *pashtunwali* (Afghanistan), and Arab tribal customs (Iraq), influence the form that the Islamic law takes. In most Muslim societies, a complex and sometimes contentious relationship exists between particular conceptions of Islamic law and other forms of law—state or customary. In many Muslim societies, Islamic and customary norms are seen as almost fused together and a conscious effort is required to distinguish the two.

Islam thus needs to be recognized as distinct from but closely related to custom. An exclusive treatment of Islamic manifestations, as seen in the case studies, could provide a misleading picture because secular state law and custom often operate alongside Islamic law to influence or determine tenure categories. An analysis of Afghan law and legal practice will point to legal pluralism and hybridity (Wardak 2004). Whatever the claims of the Iraqi constitution with respect to Islamic law, its practice has to reflect the larger ethnic, tribal, sectarian, and religious composition of the Iraqi people, and their practices as brought out in the Shia-Sunni-Kurd divisions (Jackson 2006; Rabb 2008). These issues, dealt with during the drafting of the constitution, continue to echo in Iraqi politics (Stilt 2004).

Muslim countries do not present a simple dichotomy of Islamic versus non-Islamic laws. Islamic legal principles generally coexist and overlap with social constructions of race, gender, family, kinship, and the global community through customary norms as well as state secular laws. Irene Schneider notices a clear hierarchy with respect to the different types of discourses found in Afghanistan (Schneider 2007). The secular discourse has been widely ignored, just like the discourse of statutory law. Islamic discourse enjoys the highest prestige, superior even to customary discourse. Yet Islamic law manifests itself in a variety of ways owing to choices between competing norms and methodologies—though there are certain agreed Islamic principles. On the other hand, Islamic laws function alongside a host of other legal cultures through a multiplicity of relationships. Islamic laws sometimes absorb or negotiate foreign elements and at other times conflict with them.

There is considerable divergence among Muslim countries with regard to the form and extent of Islamic law in their legal and political systems, and Islamic law is itself pluralist. Muslims are either Sunni (as in Afghanistan, Indonesia, and Somalia) or Shia (Iran) or both (Iraq). Among Sunnis, laws and practices are dependent on which one of the four jurisprudential schools (*maddhab*) they adhere to, for example Shafi (Somalia and Indonesia) or Hanafi (Iraq and Afghanistan). Following the same school does not lead to identical outputs, for there are other variables. The Somali Sufis follow mystical streams of Islam that offer their own particular approaches, which are very different from conventional Somali Islam. Norton notes that none of Somalia's sharia courts appear to follow a specific maddhab; Somalis are flexible in applying their personal readings according to their existing knowledge of the Koran and Islam (Norton 2008).

Classical Sunni and Shia schools reconciled diversity within their legal theories and material law. Selection between two competing concepts (*takhayyur*) and combination of concepts (*talfīq*) were strategies for improvising legal solutions and achieving equity. Though the Hanafi Sunni school of law officially prevails in Afghanistan, the Afghan Family Law Code of 1977 contains solutions from the Maliki school of law, especially with regard to divorce. Best-practice approaches may thus lead to cross-fertilization and innovation.

Specific historical and colonial contexts, state ideology, and the relationship between Islam and secular and customary laws matter. For example, the formal legal system of Afghanistan is a rich but complex matrix of influences: Western

(particularly French) legal thinking, Marxist agendas (owing to Soviet reforms in the 1970s), and all hues of Islamic jurisprudence. To focus on Islamic law or statutory law alone is to miss how the uncodified customary law, or even the predominating pashtunwali (Pashtun customary law), influences how land is owned and transacted, as established through community practice and group dynamics. A civil law may abolish a practice, such as the bride price, but it may continue as a custom. Colonial fingerprints are seen in all the case studies as well.

Indonesia is one place where "differing ideas of justice," or "multiple norms," prevail; it is the site of long-standing, diverse efforts to shape lives in an Islamic way, but also of even longer-standing and more diverse efforts to shape them according to local complexes of norms and traditions (Bowen 2003, 4). Dutch colonial legal policy privileged the supposedly indigenous customary law, adat, using the reception theory, which held that Islamic rules had the force of law only where they had been received or integrated into the local tradition. Tensions about which regime should govern Indonesia's Muslims give rise to debates at all levels of society about the appropriate role for adat, sharia, and state laws (Cammack 2000).

Customary land tenure, as in Somalia, can appear to be chaotic to the outsider, and there are disputes over its role in the modern world. However, as Michael Van Notten proposes, "customary law is still very much alive. People tend to follow it. They abhor the statutory laws made by politicians and only obey them when forced. Much of the political turmoil in Africa is caused by the fact that Africans find statutory laws oppressive; abolishing statutory laws, many believe, would end much of that political turmoil" (Van Notten 2005, 10). Legal pluralism caused by state reforms can create multiple claims and complicate resolution of tenure disputes. In Somalia, state-sponsored legislative and policy shifts from customary tenure systems to the state system in the 1970s resulted in many instances of multiple claims to land (Unruh 1995). Sharia has also had a substantial influence on the uncodified custom or social contract (xeer), given the long history of Islam in Somalia. Conversely, xeer plays a role in sharia as urf—a custom that is acceptable as long as it does not contradict Islamic principles.

To dismiss Islamic principles as yet another set of customs is to miss the range of opportunities that faith-based approaches can bring to the table that customary law ordinarily cannot. At the same time, to consider Muslim communities to be determined exclusively by religion is to forget a common adage: Islam is influenced by society as much as it influences society. As Mark Cammack asks of a legislative development: Is this "Islamization of Indonesia or Indonesianization of Islam?" (Cammack 1997, 143). Of course, this dynamic differs from country to country, and in some cases custom may be stronger than religion, or religion may be best dealt with as religious custom. To engage with Islamic dimensions is to acknowledge Islam's relationship with other legal, quasi-legal, and informal systems that can be equally important.

Dispute resolution

When new disputes over natural resources emerge in post-conflict situations, the formal legal institutions often are not strong enough to resolve them. In Muslim post-conflict situations, the appeal of Islamic justice is strong. Ali Wardak notes that nearly 80 percent of Afghan rural people have virtually no access to the formal justice system (Wardak 2006, 376), and women and minorities are particularly shut out. In these cases Islamic and customary systems, if they are not active already, reemerge.

There is no singular, all-encompassing dispute resolution mechanism. Just as land rights are governed by more than one legal regime, dispute resolution methods are pluralist. The Bonn Agreement states that Afghanistan's judicial system will be rebuilt in accordance with Islamic principles, international standards, the rule of law, and Afghan legal traditions. However, the pashtunwali customary law has generated its own community-based dispute resolution mechanisms that are based on Islamic principles. The traditional *jirgas* and *shuras* are widely accepted informal institutions that settle disputes by ensuring that the involved parties reach agreement. Likewise, in Aceh land disputes are mostly resolved through consultation at the village level.

When the Somali state collapsed in 1991, much of the population returned to the traditional legal system. It was strongest in rural areas and border regions where the government had been weak. Somali customary law (xeer) predated and survived colonial times and endured through Somali state formalization. The Islamic courts became popular in Somalia because they were procedurally flexible, brought in various constituents, and adopted the guiding principles of negotiation and mediation. Norton quotes a survey that shows that the combination of Islamic law, mediation, xeer, and relevant state laws can create a workable, "'win-win' resolution to a case that all parties will accept" (Norton 2008, 156).

In post-conflict situations, the distinct Islamic conflict-resolution mechanisms lead to much-needed confidence building and trust, and they offer sustainable resolution (Irani and Funk 1998; Abu-Nimer 2003). The concepts of mediation and conciliation are emphasized in the Koran; and the Ottoman Code, which attempted to codify sharia principles, referred to conciliation in contracts. Liz Alden Wily identifies three sets of Afghan mediators for community dispute resolution in property cases: neighbors and elders, the local mosque council, and the chair of the council (Alden Wily 2003). In many instances all three will be used in the same case. To ignore these community-based procedures that operate in most Muslim countries is to miss out on the totality of land law in action.

In Aceh, Afghanistan, and Somalia, primarily in rural areas, customary methods are the first level of dispute resolution. Traditionally, disputes and conflicts in Somali society are resolved through recourse to xeer, an unwritten code of conduct that is agreed on and applied locally by clans in each area, through a gathering of senior elders. Decentralized clan networks interpret and enforce it. The clans

use a mix of traditional and Islamic dispute resolution discourse that is based on broad communitarian principles of precedent, fairness, and justice. Unwritten sets of moral and social rules form the basis for resolution of issues arising within or between clans or subclan groups. Elders, chosen on basis of their knowledge, do not create the law; they discover customs and at the same time reach a compromise that is favored by most. If they are unable to do so, they can bring in an elder from another clan to settle the dispute (Van Notten 2005).

In the continuing civil war in Somalia, confiscation of property and denial of property rights between clans and subclans has been a frequent occurrence. Negotiations toward ending hostilities and exchanging prisoners have included clauses related to the return of looted property and access to grazing land in times of drought. For example, if more rain fell in the land of one clan, a guest community attracted by the pasture would be responsible for protecting the lives and livestock of the host community. Farmers' committees and other organized fora could help with these processes, but in their absence, the xeer offers common guidelines on restitution and the protection of life and property. New xeer rules are developed to address unforeseen occurrences, so the system is a dynamic and evolving one.

Custom and Islamic law are thus symbiotic fields. The community adjudicators are village elders as well as Muslims. Somali Islamic law applies to personal matters such as marriage and inheritance, and the common law of xeer applies to land disputes generally, so there is considerable overlap. The enforceability of the Somali system arises out of the clan approach of involving the extended family, not merely the individual, in decisions. Any compensation or punishment ordered has to be paid or served by the individual, or that person's extended family becomes liable. If a settlement is not agreed on at this stage, a *xeer-beegti*, or jury, may be appointed to pass judgment on a given case, with each party being expected to accept the verdict. The principle of mutual self-interest binds subclans into insurance groups that enforce community decisions or ostracize a perpetual offender. To survive, outlaws can seek membership in another clan.

In Afghanistan a *loya jirga*, or grand council, gathers periodically to decide on important national issues that are central to social and political order, sovereignty, and national unity. Smaller regular jirgas resolve land disputes and clarify property issues in accordance with customary and Islamic laws. Jirga members are also elders, and in southeastern Afghanistan they have at their disposal the *arbakai* (messengers), community police that operate as the tribal security system. The arbakai implement the jirga's decisions, secure the territory of the tribe or the community, and take action against those who perform illegal acts (Tariq 2004).

An in-depth study of the implementation of customary laws in Afghanistan indicates that the competence and legitimacy of village councils stem from their renowned negotiating skills. Laws regarding crimes against property require restoration as well as apologetic behavior on the part of the offender. The formal apology process involves the Islamic clerics and the elders, who take "the culprit to the family of the aggrieved party with a Qur'an [Koran], one or more sheep, money,

rice, wheat, oil or other food stuffs, and a request for forgiveness" (International Legal Foundation 2004, 16). A party who rejects the decision of the community elders is dismissed from the tribe. Conflicts over land arising out of inheritance problems, preemption rights, and the return of occupied land are resolved in this way. Land disputes between villages are also handled by jirgas through mediation between representatives and elders from the two villages and from other villages.

Islamic and customary institutions seem to often act in concert. Courts are careful not to encroach on the power of local religious or tribal leaders, and they often refer matters to the village elders or tribal councils for resolution according to customary law. The judges then incorporate the decisions of tribal councils into their formal opinions. Only when resolution of a dispute is not possible at the village council level does the case enter the primary courts. Unfortunately, statutory and indigenous dispute resolution methods relating to different tenure systems create multiple and potentially contradictory layers. And despite their popularity and efficiency, customary dispute resolution mechanisms should not be romanticized because they often favor wealthier elites, men, and dominant ethnic groups.

In Aceh, the syariah court system (based on Islamic principles) has jurisdiction over inheritance, guardianship, waqf, the legal status of missing persons, and other matters. Although it does not have jurisdiction over land rights per se, it may make landownership determinations when formed as part of a larger inheritance dispute. In 2004 the chief justice of the Indonesian Supreme Court endorsed an increase in the jurisdiction of the syariah courts over civil matters, so long as this jurisdiction was authorized by provincial regulations. In 2005, a fatwa specifically asked that matters relating to landownership and inheritance go to the Islamic courts. The syariah courts in Aceh are therefore key in land matters. In addition, a survey undertaken by the United Nations Development Programme (UNDP) showed that the syariah court system is regarded as considerably more trustworthy and transparent than the system of the general courts (UNDP 2003). UNDP also reports that the quality of recordkeeping is far better in the syariah courts than in the general courts (Fitzpatrick 2008).

Although it is the primary authority on Islamic law throughout Indonesia, the compilation of law known as KHI is a nonbinding guide, and judges may refer to other sources of law, including, in Aceh, fatwas or secular laws passed by the regional legislature. John Bowen argues that the civil and Islamic judiciaries have sought to integrate local property systems into national and Islamic legal frameworks (Bowen 1988). The Islamic courts in Indonesia therefore should not be considered in isolation from their political context. Islamic courts in both Afghanistan and Aceh are influenced by the decrees and policies of the president or cabinet that impact Islamic land law—for example in relation to mawat and women's rights.

The ideology of the Islamic courts and their relationship with the people also depends on who the judges are—or where they come from. In Aceh, the syariah courts come under the Ministry of Religious Affairs rather than the Department of Justice (as the regular secular courts do). Most Somali sharia judges are educated solely through informal religious studies in Somalia. A few

judges have formal Islamic training from Sudan, Egypt, or Saudi Arabia as well. Therefore, Somali Islamic courts do not operate according to any strict formal procedure, but they do adhere to general Islamic principles. In Afghanistan, most Islamic court judges (*qadis*) are products of a twelve-year Islamic education. The elites who studied law at the Faculty of Islamic Law at Kabul University seem to be reluctant to enter the Afghan Islamic judiciary, in part because of their lack of specialization in the field. With support and training, the Islamic courts have the potential to respond to housing, land, and property issues.

In Somalia, Islamic court functions cover civil matters, including registering marriages and divorces, determining inheritance rights, and settling disputes (Le Sage 2005). Unlike Aceh, Somalia has no definitive body of guiding Islamic principles but appears to use general Koranic principles—for example, on the importance of trustworthy witnesses (Norton 2008). Though limited information is available on the Islamic courts' land cases in Somalia, the courts do register land documents.

In most Muslim countries, a dynamic and pluralist legal framework—with overlapping customary, Islamic, and secular laws—is evident. As discussed earlier, Islamic principles along with international standards, the rule of law, and customary law will be used to rebuild Afghanistan's judicial system. In Aceh, the syariah courts, while based on Islamic principles, are considered the benchmark for determining and applying customary law (adat). And in Somalia, sharia court judges assert that there is no conflict between Islamic law and traditional Somali clan law (xeer). They claim that Somali culture and Islam are fully integrated and that thus no conflict was possible (Le Sage 2005). Islamic law is seldom applied exclusively, rather Islamic principles are applied in concert with existing legal frameworks.

Human rights and gender tradeoffs

The four case studies support a range of innovative land rights mechanisms for diverse groups of people. The tools exhibited are widely acknowledged as pro-poor tools for landless people that provide both land access and tenure security. In contrast to charity, the rights created are grounded in law and enforced through or against the state. An extensive literature shows judicial supervision of registered land rights through mawat, waqf, and tassaruf under Islamic systems. These are not merely individual rights. Landholders must exercise the rights responsibly and productively or the rights will be assigned to someone else more deserving.

All four Islamic tools are in theory gender-responsive, inclusive, and non-denominational. There is no requirement in any of these tools that the beneficiary be Muslim or male (except in the case of the Islamic cooperatives, where ostensibly religion is a primary bond). Tassaruf and reclamation of mawat arise out of land use, rather than gender or religious beliefs. The waqf is a gender-responsive Islamic land tenure that has traditionally included women as creators, managers, beneficiaries, and users (Sait and Lim 2006). Often beneficiaries of waqfs are widows and children, including orphans, as in Aceh. Waqfs can also be set up by non-Muslims, or by

Muslims for non-Muslims. However, there is a gaping hole in research as to how these tools work or would work in practice, particularly in patriarchal societies.

Whether tassaruf or mawat reclamation is gender-responsive depends on wider socioeconomic practices, and in a cooperative the nature of gendered land relations depends on broader ideas about the role and status of Muslim women. There is nothing to prevent women from reclaiming land or seeking usufruct rights, except patriarchy, of course.

Because tassaruf is usufruct over state (miri) land, it is useful to consider historical gendered ownership patterns. Colin Inber notes that historically miri land was generally held and passed down by males, but that the changing demography of the Ottoman Empire, as well as willingness to allow more state land into individual productive use, made it possible for women to gain access (Inber 2010). The rules were the same for men and women—the landholder had to pay taxes, cultivate the land, and be accountable. The interesting twist is that women could inherit tassaruf in miri land without the limitations of Islamic inheritance rules, since these did not apply to miri land. With women working more than before, the tools become more gender-neutral, at least in theory.

The key Islamic legal materials generally support women's right to acquire, hold, use, administer, and dispose of property. Muslim women—unmarried, married, divorced, or widowed—have extensive independent rights to property under Islamic law and human rights. There is explicit recognition in the Koran of women's rights to property acquired through purchase, inheritance, *mahar* (property transferred to the wife from the husband as security for marriage), and other transactions. There are no restrictions on the property a Muslim woman can purchase out of her earnings, on the gifts she may receive from her natal family or her husband's family, or on the endowment she may enjoy as a beneficiary of a waqf. In all these respects, she is entitled to equal treatment with male members of the family (Sait and Lim 2006).

However, there are difficulties in terms of fixed Islamic inheritance rules and patriarchal customs practiced in the name of Islam. In Aceh, Afghanistan, Iraq, and Somalia, women are working for their rights within the Islamic framework through social action, political campaigns, and ijtihad, an acknowledged Islamic interpretative process.

In all four countries, and generally in Muslim societies, Islamic law offers far greater rights for women than customary practice. A striking example is the property rights of widows, which are vital in post-conflict and post-disaster situations. Judgments in inheritance cases after the tsunami in Aceh saw the sharia courts grant more rights to widows than traditional courts. When widows' property rights are violated in Afghanistan and Somalia, it is a triumph of customary practices over Islamic norms. For example, the traditional Afghan concept of honor applies to protection of both women and property but can lead to situations in which women are treated as property (Kamali 1985). Another example is *tanazul*, a customary practice in which even the reduced female inheritance share is renounced in favor of a male member of the family; this practice has over time been incorporated into the Islamic legal process (Moors 1995).

The Islamic courts in post-tsunami Aceh debunk several stereotypes. They are proceeding on the basis of the Indonesian constitutional guarantee against discrimination in the absence of any gender-specific terminology in either the marriage law or the KHI. Property rights for women are closely related to marriage and inheritance. Under Islamic law a man can often divorce more easily than a woman, who often needs a judicial decree. But an interesting statistic in post-tsunami Aceh, recorded in 2004, is that an overwhelming majority of those granted divorce were women (UNDP 2003).

In Afghanistan, the civil code allows women to obtain dissolution of their marriage by the court if certain conditions are met. An Afghan man can marry additional wives if certain conditions are met, such as equal treatment of wives, financial capacity to provide maintenance, and lawful benefit from a second or third marriage—for example, to produce children in the case of the infertility of the first wife. In practice these conditions are said to be flouted. Another problematic area is the dowry (mahar), a payment that the groom pays to the bride in cash or property, or promises to pay as financial security in the future. In Afghanistan the dowry is paid by the groom or his family to the head of the bride's household, not to the woman. This practice, called *walwar*, is un-Islamic and illegal, but it continues as a customary practice.

In Somalia, in the absence of formal courts, women "are often not well served" by customary mechanisms, "and customary law has not always kept pace with social changes, though it remains inherently flexible" (Norton 2008, 13). Little research has been done on the gender-responsiveness of Islamic courts in Somalia, though basic information out of the more stable judicial systems of the Somaliland and Puntland regions indicates that there are opportunities for enforcement of Islamic women's rights. Nevertheless, as in Afghanistan, strong customary patriarchal attitudes and the fluidity of civil war have conspired to keep women marginalized. Unlike Indonesia, which signed the Convention on the Elimination of All Forms of Discrimination against Women without reservations, and Afghanistan, which followed, Somalia has not ratified the convention. Yet, the existence of female saints in Somalia, the high social respect for women, their role in the economy, and their participation in Islamic land cooperatives and other cooperatives points to hidden information. The limited research does indicate that Somali women are creating innovative tenures (for example, mother-son partnerships) to circumvent patriarchal structures (Besteman 1995).

The challenge to women's access to justice in Somalia comes from their exclusion from legal proceedings. Where procedural processes of settling property disputes are based on mediation and willingness to reach a compromise, accessibility for Somali women is restricted (IDMC 2008). This is part of the larger issue of women's participation in post-conflict situations and their role in resolution (Nakaya 2003).

Afghan rural women also have limited access to formal courts and mostly do not play an active role in jirgas (though there were 114 women on the loya jirga). However, there have been recommendations that women's shuras (consultations) be institutionalized as part of gender mainstreaming (Ayyubi 2006;

Wordsworth 2008). In Aceh, campaigns are underway for women to be able to serve as judges and for a 30 percent quota for women holding office in political parties. Women's groups are active in Aceh, and to a lesser extent in Afghanistan; there is little documentation of women's civil society organizations in Somalia.

Equal rights for women are a complicated platform in some Muslim societies. Islamic feminists prefer the term *equity* to *equality* because of concerns that Western human rights will dissolve distinctive Islamic gender roles. Working within Islamic discourses, Muslim women and men are seeking ways to reconcile universal and Islamic human rights principles.

In post-conflict situations, the priorities for women are shelter, access to health care and education, and access to credit and livelihood strategies. These are general needs, but they are often articulated as basic Islamic rights too, despite the customary challenges. As Muslim women have become more assertive and visible in their enhanced roles and reclamation of rights, they have taken recourse to Islamic sources to demand more rights on the basis of gender-responsive interpretations (Sait and Lim 2007). The four gender-neutral Islamic land tools could lead to greater opportunities for Muslim women to access land.

FACTORS AFFECTING OUTCOMES

Afghanistan, Aceh, Iraq, and Somalia share Islam as a religion but exhibit numerous differences arising out of their particular histories, local conflict dynamics, and sociopolitical and economic outlook and reforms. These case studies offer glimpses of potential land management tools rather than the full-fledged investigations that are needed. However, several common factors affecting deployment of Islamic strategies emerge from the studies.

Knowledge gaps

Awareness of and use of information on Islamic land management, particularly in post-conflict situations, has been very limited. Participants in key multistakeholder meetings are confused about usufruct rights in Iraq; Afghanistan has frozen the redistribution of barren land because of a lack of distribution mechanisms; the creative transformation of waqfs in Aceh is largely undocumented; and researchers on Somalia have lost the research thread on cooperatives. It is not clear how predictable or durable Islamic principles are as they step into the vacuum of formal legal authority in post-conflict situations. Research on Islamic land management should focus not only on specific land management concepts but on principles such as accountability, universality, philanthropy, productivity, and distribution, which are embedded in the social consciousness of most Muslims.

Legal pluralism

A key challenge is to develop a sound and widely accepted pluralistic legal basis for land rights management. The role of Islamic land law in Muslim societies

should not be exaggerated, as it exists in tandem with customary and secular land regimes. Yet distinguishing Islamic principles from other customary norms may be necessary to counter injurious customary practices, just as legal pluralism offers choices and opportunities for positive interpretations of some Islamic doctrines. An exclusive appreciation of Islamic principles is often as futile as negation of them. Where differences between competing norms and practices arise, protocols to harmonize and resolve incompatibilities and to promote access to land need to be developed.

Community-led approaches

The legitimacy and durability of Islamic land management principles are driven not by their religious appeal but by their acceptance and use by the people. Community practices develop and operationalize these land management tools. The use of Islamic strategies thus requires working with a range of local Muslim leaders for peacebuilding and development.

Ideally the use of Islamic principles will be an empowering experience that gives voice to ordinary people rather than being just an ideological exercise for the few. Islamic law can have positive implications for land rights, but traditional structures, fundamentalist agendas, and conservative interpretations of Islamic law often combine to diminish such rights, particularly for women. Therefore, listening to internal civil society debates and participating in positive interpretation strategies with Islamic scholars are vital to the viability of Islamic land law.

Alternative dispute resolution mechanisms

Using pluralistic approaches is not merely about being open to beneficial faith-based ideas, but also about engaging with Muslim personnel and harnessing Islamic and customary systems of conflict resolution, which often overlap. These alternative or parallel methods can be sophisticated, efficient, flexible, quick, and cheap. Because they are based on the cultural and religious values of the community, these strategies have retained popular support and legitimacy. They are diverse, with sources ranging from irregular religious scholars who issue fatwas to institutionalized Islamic courts. They are capable of translating the extensive property rights in the Koran and other Islamic sources into practical guarantees. Addressing the philosophy, capacity, resources, procedures, and effectiveness of Islamic courts is one way of ensuring their support for equitable access to land, and of raising questions about possibly negative gender impacts.

Abuse of religion

For all the positive scenarios celebrating Islamic principles, the reality is that Islam can be misused for political ends or to frustrate the land rights of others. Therefore, a coherent methodology for using faith-based approaches needs to be developed that engages with religious resources in a nondenominational, professional, and objective manner (Global Land Tool Network 2006).

Planners need to consider which Islamic tools should be used, and when and how they should be used; then they must apply their conclusions on a case-by-case basis. Although faith-based principles are respected for their integrity and authenticity, they must be harmonized with well-acknowledged human rights and development principles. Therefore, the testing of tools must involve both egalitarian Islamic benchmarks and international principles.

LESSONS LEARNED

The existence of tools of Islamic land law does not guarantee their success. The tools have to be located within the dynamic interplay between ideas, customary practices, and formal prescription that is the hallmark of an inclusive, flexible, and results-driven methodology. These tools are not static. They are constantly evolving and being tested by communities.

Most commentators and interveners in Afghanistan, Aceh, Iraq, and Somalia have failed to detect these Islamic land tools because they were not looking for them or were uncritically discounting their relevance. Whether or not the tools ultimately work, decision makers need to be asking questions about the relationship between Islamic land law and customary and state laws, the historical role of Islamic land tenures, and the implications of Islamic philanthropic obligations and financial traditions. They need to know how social structures affect property regimes, particularly in relation to women, and they need to understand community-based conflict-resolution mechanisms. It is beneficial for planners to be acquainted with ijtihad, the Islamic practice of personal reasoning, and to understand its usefulness for the development of pro-poor land management tools. Finally, keeping in mind the roles of various stakeholders, including the state, strategists should consider the implications of Islamic land management practices for environmental sustainability, promotion of land rights, and protection of human rights generally.

Well-intended post-conflict land interventions are often overly selective and miss potential breakthrough strategies. In Afghanistan, the Islamic redistributive principle perished without the support of interveners. In Iraq, heavily funded big hitters of the global land agenda lacked understanding of Islamic land tenures. In Aceh, fatwas were generating creative endowment solutions while the international community's attention was elsewhere, and Somali cooperatives have been similarly overlooked.

Another side effect of the avoidance of the Islamic arguments and faith-based leaders is the attempted secularization of the land agenda in Muslim communities. Even with the drawbacks of existing Islamic and customary systems of property, reform is best carried out with sensitivity for these systems; otherwise it risks alienating the people for whom it is intended. Unsuccessful reforms of customary systems can create tenure confusion and accentuate land conflict. Sustainable peacebuilding and natural resource management requires solutions that are close to people's experiences, and research shows that faith-based players can make a

positive contribution to the securing of land, property, and housing rights. At the same time, care should be taken to involve players who may not subscribe to particular religious views or approaches.

In some cases, Islamic mechanisms are straightforward and enjoy sufficient demand and the necessary support. However, other Islamic tools are complicated, and a series of activities and outputs may be needed before the tools are ready for implementation. It might be necessary to clarify and disseminate doctrines, convert them into policy or laws, create institutions or procedures, generate capacity through training, and develop strategies for design, implementation, monitoring, and evaluation. The use of Islamic tools may involve a wide range of stakeholders, from policy makers and land professionals to representatives of civil society, including women, researchers and trainers, experts on Islamic land law, and traditional Muslim scholars (Global Land Tool Network 2006).

Where potentially cost-effective Islamic tools are innovative, pro-poor, and respectful of women's rights, a professional plan for their implementation or upscaling should be put in place. Strategic decisions in Muslim post-conflict situations should be based on an assessment of the added value of engaging with Islamic ideas over customary norms or statutory laws, as well as evaluation of resources, capacity, and risks.

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