

Codifying water rights in contested basins of Afghanistan

Guidance Note

Water Rights Codification in Afghanistan

First Version

Karim Nawaz and Frank van Steenbergen

Water and land Issues in Spate Irrigation in Afghanistan

Land and water rights go together in many cases especially in arid regions of the world where water is scarce. In country like Afghanistan this situation is further aggravated when land availability is more than water supply. The need and demand of water is fluctuating during different seasons due to irrigation requirements. In Afghanistan major water sources include river, melting of snow, springs and flash floods. Underground water resources are not enough in many regions. River and stream's flow fluctuates considerably during the year. Shortage of water gives rise to tension among location and within command areas. Traditionally there are water rules devised to operate and maintain the irrigation system in country. The country has been facing serious internal problems since more than three decades when governance went on decline and has ultimately caused problems at different levels in society. The government institutions have been weakened over time. Land and water issues are now among prime importance to revive and re-formulised according to changing scenario.

During past 140 years, various attempts have been made to register land rights in the country. As far as water rights are concerned usually customary laws are followed. Historically, traditional rules and laws pertaining to water are in common property regime and are frequent in practice in real terms at local levels as compared to larger scale water resources such permanent larger river (Kabul River) where different provinces/regions and ethnicities are involved. The local level resources include a single source of water like Karez, stream, spate river, local runoff etc. and do serve the owners/users needs. Naturally, modern day private tube wells are not in this category. On the other hand, water rights at macro levels are still need to be addressed in order to meet the needs in cases of drought and deficiency. The later case is confronted between different provinces and regions. A typical situation of modern law is described here *"Land management in Afghanistan is governed by an ineffectual and inadequate legal framework. The strict application of existing laws is limited both administratively and judicially. In many respects the situation of land management and use is characterized by informality. While many provisions embodied in existing laws are useful, many other provisions have not been sufficiently adjusted to address the post conflict reality; these provisions require reform. Existing land issues dictate a strong imperative to formulate new, relevant and workable legal paradigms."* 2007 Afghanistan National Land Policy – Rationale."

The Government of Afghanistan has produced a National Land Policy (NLP) document, which was approved by cabinet in September 2007. Based on the outputs from various projects dealing land tenure and allied issues throughout the country have been taken into account including wider public consultation. This also has been evolved through vigorous discussions among inter-ministerial meetings. Now the issue is to implement in its true form and spirit to achieve the intended results.

According to research paper “unfortunately, at this point in time, the formal system is losing the battle as trust in government still has yet to be effectively built. Rather than developing systems that suit central government, recognition and integration of customary practice and procedure should feature strongly in operational processes to increase legitimacy in the eyes of ordinary Afghan citizens.” Thus, there is a need to accommodate local laws and rules, if and when possible and appropriate, into newly developed policies and laws. Afghanistan has long history of, and presents, local sophisticated rules and laws regarding pertaining to land and water. The gap is its formal documentation, recognition, and incorporation into mainstream law, to be part of national judicial system. It is logical to incorporate water rules together with land record authority instead separating it and including with other ministries and department.

During the research in Nimroz province it has been found that issues faced by common people are of following broader categories:

- a) Absence of rules and principles pertaining to land and water rights in certain cases, in other cases rules are available but not applied and practiced due to last 30 years of weakening of institutions at local and country level.
- b) Amendments/modification of rules according to new situation especially in cases of modernization - such as private tube-wells. The private wells are causing continuous depletion of underground water, which is considered a common property and need to be addressed by devising new rules.
- c) New rules to be made in case when government/donor driven water projects (dams, reservoirs, distribution networks, permanent structures etc.). The typical example is mega project of Bund Kamal Khan in Nimroz province where more than 100,000 acres land will be permanently irrigated first time in the history in this location. Since it is altogether a new project and now the source will be available to irrigate lands in its command area. This is a unique case where rule to allocate and distribute water need to be devised. It is not easy to be done in isolation and alone by the government agencies.

Keeping in view the requirement of day in the country, the above issues required addressing mechanism accordingly. As discussed earlier, that in case of local communal rules pertaining to water are there but mainly in oral form. There is a need to document these rules in comprehensive manners and be part of judicial system in the country. Under rule of law these exiting traditional/customary/tribal rules need to be well discussed, understood, interpreted, agreed, documented, and made part of judicial system. Care should be taken to further clarify and understand these rules according to present day requirement and applicability.

In case of modern irrigation structures, rules needs to be made with general consensus of serving communities and then made part of judicial system. Existing customary rules need to be studied as guidance for formulation of rules under modern irrigation structures. In practical terms, the newly formed water user association for newly built irrigation structure should established on similar aspects (Socio-cultural).

In similar situation of neighbouring country (Pakistan), the English rulers documented local rules and laws to water rights and use and made them part of judicial system. In this case, water rights are part of land rights and documented in land record – lands which are irrigated by a common source, i.e. Karez, spring, stream, spate river, glacier, canal etc. In case of dug well (Persian wheel) rules at each time are agreed and applied between owner, user and tenants. Water rights of inundation of big rivers, hand dug well and other sources are also described in land record. The document clearly shows the water resource, its ownership and or user’s rights, with shares, turns, rotations, timings etc.

Here the typical example of two adjoin districts of Pakistan (Dera Ismail Khan and Dera Ghazi Khan) are discussed for comparison and more understanding as they resemble to Afghanistan’s situation. The resemblance is in tribal nature of communities and users and spate rivers in both countries.

Here water rights of minor water resources like Karez, Persian wheel (Hand dug well), spring and spate river made part of land record as an annexes. These have been made during the first land settlement of 1872 by that time British rulers.

Each spate river/stream (usually known as ephemeral river, dry river, hill torrent) has its distribution rules upon occurrence of spate flows. Distribution rules include division among villages, tribes, upstream and downstream and to groups of land plots and individual fields. Distribution also covers division and use of season's flows among owners/users. The document, which is part of land record, particularly describes the spate river's name, its origin with location, tributaries, boundaries of watershed, routes from start, command area, drainage to the end. The most common season of spate occurrence is mentioned besides any abnormal flows. It is worth mentioning that former district Dera Ghanzi Khan has 194 spate rivers in total and been categorized as large, medium and small ephemeral rivers. All 194 spate sources are individually recoded with full detail in the land record.

The documents also includes sketch and map of water source(s), tributaries, location, passages, name of valleys/villages situated along the passage, any mile stone or significant reference point such as mosque, graveyard, hill top etc. along with description. The length of river/stream/karez is mentioned describing the distance to and between each diversion structure with width at different location is also mentioned and past changes in the bed are documented too. Depth of river/stream at various sites, possible erosion danger and or overflow from banks at various locations, slopes towards down streams and left and right direction is also mentioned.

The name of canal, distributary branches, sub canals and water courses (where applicable) with names and their locations are described comprehensively with any changing routes over a time period.

The sites to construct earthen structures for diversion of spate flow are well defined and demarcated physically as well as on cadastral record maps.

The area/fields to be irrigated through each diversion structure is defined with sequence. This area can't be increased even though spate volume is higher. Here timings of irrigation rule may be mentioned particularly, if and when applicable. The document includes total area to be irrigated with spate rights. In case of surplus water or uncontrolled water (in case of breaching structures on its way) draining to next areas having no formal water right during the season. So in this case, such areas get this surplus water.

For possible equity, in certain cases, timing rule is applied instead of land to be irrigated through spate flow.

Construction rules for diversions structure are based on land ownership and are mutually agreed by owners. In certain cases, hereditary tenants also contribute in construction activities according to agreements with land owners.

An annex is prepared for construction, operation, repair and maintenance of spate irrigation structures. This is in the form of certain questions and probability of issues occurrence on special occasions or circumstances and answers are recorded. This annex is over and above to series of general rules and laws pertaining to water rights and use.

Different positions and roles are also defined in cadastral record along with land ownership rights and water rights such as water master, water guards etc. Their roles, responsibilities and administrative powers in managing spate water rights and practices are well defined. Reward and punishment rules are also defined in case of proper functionality and violation accordingly.

Major and minor crops grown in area are also recorded besides fodder crops.

The family tree of shareholders for water are documented with name, father name, tribe/clan, address. The share inheritance is also described from paternal, maternal side, purchased, gifted, and given through a special agreement such as transitional period.

Land department's staff is responsible to measure and report the spate flow data to higher offices on regular basis. For this simple methods of water discharge measuring are applied. For this purpose, local trained staff is employed. In Pakistani context, the lowest cadre staff of land revenue department writes daily diary of his activities including any rainfall and spate flow occurrence.

While preparation of this land record during 1872, the decisions made by actively involving stakeholders were devised keeping in view the entire local rules, loudly narrated in meetings of land and water shareholders, village elders, tribal and religious leaders. The document was then prepared and again recited in general assembly of all local stakeholders (in this case land/water owners and sharing parties/groups) and their signatures/thumb impression were taken along with government/s official signatures and with its official stamping.

Copies of these documented rules are part of land record and kept at three sites – at local level with government functionary called Patwari, sub district level and district level with government administration besides a copy is also maintained at provincial level with archive department.

The civil courts cases related to land and water issues are dealt by courts and the above documented is the key source for decision making. Courts also use this record in case criminal cases are involving land and water issues. This record (land and water) is also used in dealing land acquisition, compensation and resettlements issues by the government.

Copies of these documents (land and water share record) can be obtained by all including non-owners from the relevant land authority(s) (department/ministry/authority/ municipality) against a nominal fee.