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OF HIGH-QUALITY  
RESEARCH



# LAND GOVERNANCE ASSESSMENT FRAMEWORK (LGAF)

## Afghanistan

Final Report

June 2017





**Afghanistan Research and Evaluation Unit**

Report

**Land Governance Assessment  
Framework (LGAF)  
Afghanistan**

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## About the Afghanistan Research and Evaluation Unit

The Afghanistan Research and Evaluation Unit (AREU) is an independent research institute based in Kabul. AREU's mission is to inform and influence policy and practice by conducting high-quality, policy-relevant research and actively disseminating the results, and by promoting a culture of research and learning. To achieve its mission AREU engages with policymakers, civil society, researchers and students to promote their use of AREU's research and its library, to strengthen their research capacity, and to create opportunities for analysis, reflection, and debate.

AREU was established in 2002 by the assistance community in Afghanistan and has a Board of Directors comprised of representatives of donor organisations, the United Nations and other multilateral agencies, and non-governmental organisations.

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*Note:* This report is the result of extensive research and dialogue that took place during 2015 and was consolidated and finalised by end of 2016. While new developments have inevitably occurred since the initial research for this project was conducted, the LGAF remains a useful resource and ‘situation assessment’ vis-à-vis the issue of land management and builds upon previous AREU work on the subject. Further, the process of consultation during the research was in itself valuable and, therefore, deserving of inclusion in public records, despite an extended delay.

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## Acronyms

AIHRC	Afghanistan Independent Human Rights Commission
AISA	Afghanistan Investment Support Agency
AMLAK	A dedicated land administration authority established within the Ministry of Finance (predecessor of ARAZI)
ANDMA	Afghanistan National Disaster Management Authority
ARAZI	Afghanistan Independent Land Authority
CDC	Community development council
CEO	Chief Executive Officer
CSO	Central Statistics Office
FML	Forest Management Law
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
GDP	Gross domestic product
GIS	Geographic Information System
GPS	Global positioning system
HOOAC	High Office of Oversight and Anti-Corruption
IDLG	Independent Directorate of Local Governance
IDP	Internally displaced person
LAL	Land Acquisition Law
LARA	Land Reform in Afghanistan
LEL	Land Expropriation Law
LGAF	Land Governance Assessment Framework
LGI	Land Governance Indicator
LML	Land Management Law
LOJJ	Law on the Organisation and Jurisdiction of Judiciary
LTERA	Land Titling and Economic Restructuring in Afghanistan
MAIL	Ministry of Agriculture, Irrigation, and Livestock
MEC	Independent Joint Anti-Corruption Monitoring and Evaluation Committee
ML	Minerals Law
MoF	Ministry of Finance
MoJ	Ministry of Justice
MRRD	Ministry of Rural Rehabilitation and Development
MUDA	Ministry of Urban Development Affairs
NATO	North Atlantic Treaty Organisation
NEPA	National Environment Protection Agency
NGO	Non-governmental organisation
NLP	National Land Policy
NRC	Norwegian Refugee Council
NRVA	National Risk and Vulnerability Survey
NSP	National Solidarity Programme

NUG	National Unity Government
TLO	The Liaison Office
UN Habitat	United Nations Human Settlements Programme
UNAMA	United Nations Assistance Mission in Afghanistan
UNHCR	United Nations High Commissioner for Refugees
USAID	United States Agency for International Development
USIP	United States Institute of Peace

## Glossary

### Dari terms

<i>Arbab</i>	Head of a village (malik)
<i>Dewan</i>	Registry book or book of accounts
<i>Gozar</i>	Administrative units smaller than districts in urban areas
<i>Haqaba</i>	Water rights documents
<i>Huqooq</i>	Law
<i>Izharnama</i>	Land declaration
<i>Jerib</i>	Measurement of land equal to 2,000m <sup>2</sup>
<i>Jirga</i>	Traditional assembly of leaders making decisions by consensus and according to the teachings of Islam
<i>Konda</i>	Court records (archive documents) or Land Title Registration Book
<i>Lalmi</i>	Rain-fed agricultural land, mostly located in rural areas
<i>Makhzan</i>	Court archives
<i>Malik</i>	Head of a village
<i>Mara'a</i>	Not clearly defined in Afghan law; it roughly equates to pastureland
<i>Maraka</i>	Interview
<i>Maylati</i>	Tax documents
<i>Mawat</i>	Vacant land
<i>Mena</i>	Specific parcels of land
<i>Meshrano Jirga</i>	Upper house of the bicameral National Assembly of Afghanistan, alongside the House of the People ( <i>Wolesi Jirga</i> )
<i>Mowzeyee</i>	Based on need or necessity
<i>Mujahidin</i>	Guerrilla fighter in Islamic countries, especially those who are fighting against non-Muslim forces
<i>Mustofiat</i>	A branch of the Ministry of Finance in districts and provinces
<i>Nahyia</i>	Area or district
<i>Qabala-e Qatae</i>	Official deed proving land ownership issued after a legal settlement of the land
<i>Safayi</i>	Land/property “sanitation” taxes collected by the municipality from houses located in urban areas
<i>Sanad Rasmee</i>	
<i>Mulkyet</i>	Legal ownership documents
<i>Sharak</i>	Small town near an urban centre
<i>Shari'a</i>	An Arabic word meaning “path” or “way.” Today, the term is used most commonly to mean “Islamic law,” the detailed system of religious law developed by Muslim scholars in the first three centuries of Islam and still in force among fundamentalists today
<i>Shuras</i>	Consultative council
<i>Tasfiya</i>	Land clearance process
<i>Tashkil</i>	Organisational structure
<i>Urfi</i>	Customary documents

<i>Wakil-e-Gozar</i>	A person who attends to some of the needs of the residents of the area under his responsibility, such as certifying identities and residence locations, mediating land and construction disputes, informing people about their responsibilities to the municipality and public utilities, and assembling the needs of the community for communication to the mayor's office
<i>Waqf</i>	Inalienable religious endowment in Islamic law, typically donating a building, plot of land, or cash for Muslim religious or charitable purposes with no intention of reclaiming the assets

### English definitions

Acquisition	Assumption or attainment of rights in property.
Adjudication	Process of final and authoritative determination of the existing rights and claims of people to land.
Long-term unchallenged possession	Possession of land through long-term peaceful occupation as a trespasser or squatter. The right to possession after a statutorily prescribed period of limitation can be gained if there is no legally defensible claim. <sup>1</sup>
Building permit	An approval by the local governing body on land use and planning for the construction or renovation of a property.
Cadastral map	A map showing land parcel boundaries. Cadastral maps may also show buildings.
Cadastral surveying	Surveying and mapping of land parcel boundaries in support of a country's land administration, conveyancing, or land registration system.
Cadastre	A type of land information system that records land parcel. The term includes the judicial cadastre (register of ownership of parcels of land), fiscal cadastre (register of properties according to their value), and land-use cadastre (register of land use).
Classification	A land use and management mechanism to assist decision making. Classification is based on the use of the land, not on the type of ownership or necessarily the rights associated with the land/property.
Collective ownership	Collective ownership of a natural resource is where the holders of rights to a given natural resource are clearly defined as a collective group, and where they have the right to exclude third parties from the enjoyment of those rights.
Concession	A concession is a restricted use right granted to a private party for a large parcel of public land that is granted for a specific purpose (e.g., forestry, bio-fuel, culture/tourism).
Communal land	The definition of communal land is not provided for in Afghan law. Communal land in Afghanistan can be considered as public land, taking into account the issues associated with its definition and the recognition of community rights mentioned above. Nevertheless, the Pasture Law 2000 mentions communal pastures. <sup>2</sup> Art. 2(2) provides the definition of communal pastures as follows: "Communal pasture: Arid land which, in accordance with section (9) of the land management law does not fall within bounds of villages or towns." According to Art. 3 of the same law, "the communal pasture can be used for grazing cattle belonging to the communities," and it cannot be brought, sold, or leased (Art. 6).

1 In the Afghan context, this should not be confused with occupation without explicit state warrant, because the latter is not exceptional, but rather the norm in most places (hence, the occupants are not "trespassers" or "squatters" in any strong sense of the word).

2 Pasturelands are translated as *mara'a* land, meaning that it can refer to grazing land, graveyards, hills, etc. Therefore, common pasture can be certainly considered as *mara'a* land; *Land Management Law (LML)*, Article 82 (*Official Gazette* no. 595), 2008 (SY 1387), Dari version.

Condominiums	A condominium is a collection of individual housing units along with the land on which they sit, also known as strata. Individuals have private rights within the complex/building, but they also have use and access to common facilities, including hallways, stairwells, exterior areas, etc. Typically, there are common property areas included in the property that require management by the commons.
Customary tenure	The holding of land in accordance with customary law. Customs are a set of agreed, stipulated, or generally accepted standards, social norms, and practices. Customary land law regulates rights to enjoy some use of land that arises through customary, unwritten practice, rather than through written or codified law.
Deed	A written or printed instrument that affects a legal action such as a sale contract.
Dispute resolution	Typically, a range of dispute resolution mechanisms is available that could be grouped into formal and informal dispute resolution mechanisms. Formal dispute resolution mechanisms include the formal court system, administrative dispute resolution, and state-administered or sanctioned alternative dispute resolution mechanisms. Informal systems for dispute resolution typically involve community leaders, village elders, village assemblies, or committees in resolving disputes. They may or may not have formal recognition by the state or under the law. Alternative dispute resolution and informal systems may overlap.
Encumbrance	A right that adversely affects the land. Many are registerable in formal real estate registration systems, such as restrictive covenants, easements, mortgages, and registered leases.
Eviction	Eviction is the removal of someone from their occupation of land or property. The term is very commonly used in connection with the eviction of squatters, but may also be used in the context of unlawful eviction.
Exemption (tax)	Release from the obligation to pay tax. Property tax exemption is typically based on criteria such as the particular use of the property (e.g., use as a place of primary residence, public use, agricultural production), ownership (with exemptions for particular types of owners like investors, government, etc.), or other factors (e.g., status of improvements on the land, location or size of the holding).
Expropriation	Expropriation is the act of the state taking away individuals' land due to public interest, but prior to the respect of procedures provided for by law and payment of fair compensation.
First instance	The first judicial instance (court) serves as the place of a first hearing of a dispute in the judicial system. Decisions served in such courts can be appealed and raised to a higher level of the judicial court system.
Forests	The different forest classifications vary with respect to designate uses, management authority levels, and with various effective bi-laws. Management regulations typically outline user rights, production rights, extraction rights, hunting and gathering rights, etc. In a more general sense, forest classifications can extend to a wide range of natural resource management areas, including wetlands, grasslands, deserts, and cleared areas.
Group	A group is a collection of households residing in a locality and operating under some common organisation or set of rules and norms, with or without formal recognition of the state. In rural areas, these groups include indigenous, nomadic, and pastoral communities. In the urban context, they include organised informal settlements, collectively organised migrants who cluster in a particular locality, and clusters of traditional communities.

<i>Huqooq</i>	Law office, Ministry of Justice, charged with the out-of-court resolution of disputes.
Informal settlements	Occupation of an area by a group of individuals (households) that is not legally registered in the name of the occupiers. There is great variety in the form of informal settlements ranging from well-established, well-built communities that simply lack formal recognition to very heterogeneous groupings of houses that are poorly planned and lack access to infrastructure such as roads and utilities.
Indigenous peoples	<p>According to the World Bank definition, indigenous people being located in particular geographical areas can be identified by the presence of the following characteristics (operational directive 4.20, 1991):</p> <ul style="list-style-type: none"> <li>a) close attachment to ancestral territories and to the natural resources in these areas;</li> <li>b) self-identification and identification by others as members of a distinct cultural group;</li> <li>c) an indigenous language, often different from the national language;</li> <li>d) presence of customary social and political institutions;</li> <li>e) primarily subsistence-oriented production.</li> </ul> <p>In the Afghan context, this definition may apply to much of the rural population, particularly in some tribal areas (mainly Pashtun, but not only), where customary principles and tribal mechanisms remain strong, tribes retain a strong sense of identity, and the relationship to land and available resources are governed by ancestral customary principles.</p> <p>In order not to create an overlap with the previous indicator concerning customary rights, “indigenous rights to land” will here apply to nomadic and semi-nomadic tribes, whose practice of land use remains distinct from that of the majority of the sedentary rural population.</p>
Judgment	The decision of a court or other decision-making body about the respective rights and claims of the parties to an action or suit.
Land administration	The processes of determining, recording, and disseminating information about tenure, value, and use of land when implementing land management policies. <sup>3</sup>
Land dispute/conflict	A land dispute is a disagreement over land and occurs when specific individual or collective interests relating to land are in conflict. Land disputes can operate on any scale, from international, between groups, and between individual neighbours.
Land management	Activities associated with the management of land.
Land tenure system	Land tenure refers to the legal regime in which rights to land are exclusively assigned to an individual or entity said to “hold” the land. A land tenure system refers to the regulation for the allocation and security of rights in land, transactions of property, management, and adjudication of disputes regarding rights and property boundaries.
Land use plan	A plan that identifies areas for a designated use for the purpose of land management. Used for classification, resource management planning, and identification of areas for future development uses, including road widening.
Lease	A lease is a contractual agreement between a landlord and a tenant for the tenancy of land.

<sup>3</sup> *Land Administration Guidelines* (Geneva: United Nations Economic Commission for Europe, 1996).

Legal framework	Judicial, statutory, and administrative systems such as court decisions, laws, regulations, bylaws, directions, and instructions that regulate society and set enforcement processes.
Mortgage	A transfer in the interest of land for the security of a debt.
Parcel	A parcel is a defined area of land with a unique record of ownership, use, or other characteristics.
Public good	An asset, facility, resource, or infrastructure provided for the benefit of the public.
Public land	Public land is the land in the custodianship of the State, municipality, or local authority, as opposed to private land. See Section 6.4., which explains the ambiguities of the public land definition in the Afghan context.
Publicly accessible	Referring to information that can be obtained by the public without any special requirements or certifications placed on the person/body making the enquiry.
Registry	The term “registry” or “register” is used to denote the organisation where the information on registered land rights is held. Information on registered land is typically textual and spatial, with the former typically maintained in a registry and the latter in a cadastre office. In some countries, there is a combined organisation holding both sets of data; this office is known as the cadastral office (in the Balkans, for example). In other countries, there are separate registry and cadastre offices. For the purpose of the Land Governance Assessment Framework, unless clearly specified, we use the term “registry” to cover both the registry and cadastre (if one exists).
Recognition	For purposes of the Land Governance Assessment Framework, recognition of rights refers to how rights are legally recognised based on various land-related laws and decrees.
Registration	In applying the Land Governance Assessment Framework, the term “registered” means that the rights are recorded unambiguously in the land administration system, and there are generally few disputes over the recorded information. The term “registered” does not necessarily mean that the final certificate or title has been issued. It is an act of writing down the information about land in the Principal Books of the Afghanistan Independent Land Authority or the courts’ Register of Title Deeds ( <i>kondas</i> ).
Recording	Rights in Afghanistan can be recorded in the Land Statistics Registration Book of the Survey and Cadastre Directorate, which serves as a “probable” ownership record in Afghanistan.
Regularisation/ formalisation	Regularisation of tenure is where informal or illegal occupation of land is legalised by statute, giving occupiers the legal right to ownership, occupation, or use of the land.
Resolution (formal)	Resolving a dispute through an administrative or judicial process where the outcome is legally binding.
Resolution (informal)	Resolving a dispute through a process where the outcome is not legally binding.
Restrictions	A limitation on the use of real property, generally originating from the owner or subdivider in a deed. Also termed a deed restriction.



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Secondary rights	Rights that are beyond the primary rights to transfer property through sale, gift, exchange, or inheritance or encumber property through mortgage, lien, or other charge. Secondary rights are typically associated with use rights that may or may not be eligible for registration.
State land	Property in the custodianship of the central/national government.
Title	(1) Right to or ownership of land; (2) evidence of ownership of land.
Transaction cost	Costs associated with an agreement over property rights and the costs of enforcing those rights. For example, purchase of land may require not only the payment of the negotiated asking price, but also legal land transfer fees to establish the identity of the rightful owner, survey and valuation costs, arrangement of credit, and drafting the legal transfer document. Taxes and duties are not considered as part of the transaction cost. <sup>4</sup>
Valuation roll	A list of taxable properties and associated property values used in assessing property tax within a jurisdiction (typically, a local government authority).

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<sup>4</sup> Given the length of formal and informal processes, opportunity costs also might be relevant here.

## Executive Summary

### 1. Introduction

In the past decade, land and control of resources have been a significant aspect of government and donor concerns in Afghanistan. In the light of social transformations, increased demographic pressure, displacement, and economic evolutions, land is more than ever at the heart of economic and social considerations. At the same time, the legal framework for land governance remains incoherent in many respects and ill-suited to the Afghan reality, while administrative structures with responsibility over land lack clarity in the repartition of their responsibilities and their capacity to carry out their mandate.

The Land Governance Assessment Framework (LGAF), developed by the World Bank in partnership with the Food and Agriculture Organisation, International Fund for Agricultural Development, International Food Policy Research Institute, United Nations Human Settlements Programme (UN Habitat), the African Union, and numerous bilateral partners, is a diagnostic tool to assess the status of land governance at a country level using a participatory process that systematically draws on existing evidence and local expertise as opposed to the knowledge of outsiders. LGAF focuses on nine key general areas relating to a country's good land governance. These areas have traditionally been dealt with separately from each other. LGAF thus aims to bring them into a single framework. For these nine areas, a series of land governance indicators, each divided into several dimensions, has been selected based on international experience. For each dimension, pre-coded statements are scored (from A = best practice to D = weak practice), again based on international experience (please see the Consolidated Scorecard in Section 3 of the full report as well as at the beginning of each subsection in Section 6). It is also important to note that due to a number of specificities particular to the Afghan context, some of the indicators and terminology had to be adapted in order to capture the realities of land governance in the country. These mainly include the key areas dealing with public land and its allocation to private interests (see the detailed modifications in Appendix I).

The implementation of LGAF took place in a number of steps:

- Preparation.
- Background documentation (nine panel reports) to provide the common basis of information that forms an indispensable basis of consensus on rankings or priority actions; three sets of written outputs are needed.
- Expert/subject-matter specialist panels. Intensive half- or full-day work sessions per topic, consisting of five to eight subject-matter experts and users of land systems from different backgrounds. Participants discuss each of the dimensions in detail to arrive at a consensus ranking and agree on policy priorities.
- Synthesis country report. All material (background documentation, tenure typology, institutional maps, background reports, and panel minutes) is synthesised in a well-structured report to be shared widely.
- Country-level validation and policy workshop. The country report is reviewed by experts for input. These results are incorporated, and the report is presented for a national workshop to validate the results and prioritise policy conclusions and associated monitoring indicators for presentation to key policymakers during a policy workshop.

## 1.1 . Legal framework

The Afghan Constitution of 2004 established a legal framework for property rights to safeguard the right of individuals to own property, stating that property shall be safe from violation, no one shall be forbidden from owning and acquiring property, except by law, and private property can only be confiscated by legal order (Art. 40).

Legislation for the classification of land tenure comprises over 30 laws and decrees including the following: Civil Code, Presidential Decree 83 of 2003, Presidential Decree 99 of 2002, Land Expropriation Law (LEL) of 2000, Survey and Cadastre Law of 1988, Law on Pastures and Mara'a of 2000, Forest Law of 2012, Municipal Law 2000, Minerals Law 2015, Land Tax Law of 1976, and Income Tax Law 2007. The Land Management Law (LML) of 2008, which is currently before the MoJ for further amendments, is probably the most comprehensive legislation dealing with a range of land issues. Afghan land laws, however, sometimes contradict each other on the classification of state, public, and private land as well as various other issues.

The National Land Policy (NLP), adopted in 2007, contains international best practices and would constitute a major improvement in Afghan land administration if implemented. Unfortunately, neither the LML 2008 nor any of the other laws enacted since 2007 take the NLP into account, leaving the operationalisation of different provisions an unfulfilled promise.

## 1.2. Land tenure typology

The situation of land tenure in Afghanistan remains opaque, with an ill-suited legal framework, inconsistent legislation, unclear delimitation of boundaries, and conflicting definitions of property, including between the state and private entities (individuals and communities) contesting the state's presumption of ownership over land. Further, patterns of land tenure in Afghanistan present significant regional variations, calling for a context-specific analysis.

Legislation for the classification of land tenure primarily stems from four sources of law: the Civil Code, Presidential Decree 83 of 2003, LML 2008 (currently under revision), and Shari'a. These, however, sometimes contradict each other as to the classification of state, public, and private land. The presence of what may be considered as residual legislation, such as the Taliban-era Rangelands Law, along with non-legal government documents that proffer land classifications, such as the master plan of the Ministry of Agriculture, Irrigation, and Livestock (MAIL), further exacerbates this lack of clarity.

There is general agreement among the authors of studies on Afghan land tenure that the current legal framework is both incoherent and unsuitable to the reality of land tenure and land use in the country. Whereas we observed at least eight types of land based on field research, legal experts agree on three primary types of ownership based on the Afghan legal framework, with different outcomes for their transferability. These are summarised in the table below:

Table ES-1: Three primary types of ownership based on the Afghan legal framework

Type of land	Legal basis	Subcategories	Type of rights	Ownership and responsible organisation	Key challenges
Private	Legal code	Collectively held land without documentation, with customary documentation, or with documentation issued by previous government regimes Individually held land without title Individually held land with non-recognised title (customary title deeds and other informal records) Individually held land with state formal title (from various regimes)	Can be sold, transferred, or inherited Compulsory acquisition possible only for public welfare projects	Individual or legal persons (Afghanistan Independent Land Authority [ARAZI])	Limited possibilities for tenure formalisation Formerly displaced people and refugees who find their land occupied are unable to reclaim it High number of informal settlements in urban settings Some privatised land is perceived as having been acquired by “grabbing” state or public land
Public	No clear definition in Afghan law	Pastures: allocated for public use (collectively held) (MAIL) Forests (MAIL) Graveyards, parks, roads, green areas, playgrounds (municipalities) Schools (Ministry of Education); universities (Ministry of Higher Education); hospitals (Ministry of Public Health)	Cannot be sold, leased, transferred, or exchanged	Municipalities (within the Master Plan), Ministries, and ARAZI (manages all land outside the Master Plan)	Includes land under ancestral customary rights including pastures/forests; ownership is contested between state and public Art. 3(8) of the LML 2008 and Decree 83 blur boundaries between state and public land by emphasising formal documentary proof of ownership Law does not define public land and has no provisions on registering “public land”; this explains why public land is easily claimed as state property and reassigned subsequently to private parties
State	Registered as state land as well as any land that is deemed public but is not registered in the book of government lands	Forests (MAIL) Protected land Arid and virgin land	Only arid and virgin land can be leased or sold under certain conditions (forests and protected land cannot be transferred)	Governmental institutions and ministries (ARAZI)	Lack of adequate mapping Some privatised land is perceived as having been acquired by “grabbing” state or public land

## 2. Presentations of substantive findings per topic

Legend

	Regular scoring as per LGAF indicators
	N/A in Afghanistan or no data available
	Divided indicator
	New indicator established

### 2.1. Land rights recognition

Pan-LGI-Dim				Topic	Score			
					A	B	C	D
<b>PANEL 1: Land rights recognition</b>								
<i>Land Governance Indicator (LGI) 1: Recognition of a continuum of rights</i>								
1	1	1	Individuals' rural land tenure rights are legally recognised and protected in practice.					
1	1	2	Customary tenure rights are legally recognised and protected in practice.					
1	1	3	Indigenous rights to land and forest are legally recognised and protected in practice.					
1	1	4	Urban land tenure rights are legally recognised and protected in practice.					
<i>LGI 2: Respect for and enforcement of rights</i>								
1	2	1	Accessible opportunities for tenure individualisation exist.					
1	2	2	Individual land in rural areas is recorded and mapped.					
1	2	3	Individual land in urban areas is recorded and mapped.					
1	2	4	The number of illegal land sales is low.					
1	2	5	The number of illegal lease transactions is low.					
1	2	6	Women's property rights to land as accrued by relevant laws are recorded.					
1	2	7	Women's property rights to land are equal to those by men.					

The LML provides for a variety of ways to establish legal ownership based on the possession of documents (customary or formal) or long-term physical occupancy. However, in practice, only the formal method of establishing ownership appears secure.

According to Art. 5 of the LML, valid recorded deeds include:

1. Documents issued by a legally recognised court, such as a title deed, donation deed, bequest, division, and court decision;
2. Presidential decree, government degree (Council of Ministers), or a land purchase document from the government's properties;
3. Tax payment documents (*maylati*);
4. Water rights documents (*haqaba*);
5. Customary deeds (*asnad-e orfi*);
6. Official ownership deed (*sanad rasme mulkyet*) from the Democratic Republic of Afghanistan, 1978-79;
7. Official deed for land ownership issued after a legal settlement of land (*qabala-e qatae*).

In terms of undocumented rights, long-term unchallenged possession is ensured in Art. 8 of the LML 2008. However, the article stipulates that in order to prove ownership, the land must be cultivated; further, proof of continued ownership since 1973 is required as testified by neighbours, *de facto* limiting the claims to land acquired after that date. Considering the occurrence of wars since 1973, this article is in reality of limited usage.

In terms of customary tenure rights, their recognition has been at the heart of debates concerning the discrepancy of the statutory land law with the reality of rural Afghanistan, primarily based on customary norms. Art. 5 of the LML 2008 recognises the validity of customary deeds under the condition that they were prepared and submitted before August 1975. In locations where declaration forms were not distributed or the registration book was lost, the LML provides that a customary deed may be recognised if there are no claims to the land and if the land purchase and possession by the buyer have been confirmed by the landowners holding land next to the plot, as well as by the inhabitants of the locality where the land is situated. Additionally, it is only recognised under the condition that the land seller owns the valid deed.

The fact that most properties in rural and urban areas are neither evidenced by formal deeds (at the time of the Bonn Agreement in 2001, court-prepared documents were believed to cover only 10 percent of rural properties and 30 percent of urban properties) nor recorded (there has been no systematic update of records since 1978) has direct implications on the effective rights of rural residents. A Social Impact Assessment conducted by the World Bank on the LML noted that the law demonstrated “strong orientation toward those with formal documentation” when 90 percent of Afghans have no documentation at all. It further noted that the LML, despite provisions such as Art.8, failed to adequately explain instances where undocumented rights could be protected.

Although at the local level, despite the absence of formal legal recognition, ownership is often well recognised and accepted by communities, according to certain provisions of Afghan law (mainly Presidential Decree 83), land with undocumented rights is the *de facto* property of the State. According to Presidential Decree 83, which supersedes all previous laws relevant to establishing ownership property rights, including through customary documents, all land whose ownership cannot be proven shall be considered under the ownership of the state. Given a) the conditions tied to the recognition of customary documentation in the LML 2008 and the difficulty of complying with the min practice, b) the absence of any type of documents for the majority of rural Afghans, and c) the non-recognition of collective tenure, which represents a significant portion of customary tenure, the legal framework for customary land tenure rights appears disconnected from the reality of the majority of rural Afghans.

It is unknown how much land has automatically fallen back to the state. Based on the figures estimated by the Afghanistan Research and Evaluation Unit’s earlier research, the figure could potentially be as high as 90 percent for rural land and 70 percent for urban land.

### **Recording and registering land**

Most Afghan land remains unrecorded and unmapped with considerable regional variations. Yet even in the areas where the rights are documented to various extents, the records have not been updated. Based on different accounts, reportedly only 33-36 percent of the land in the country has been formally registered, with the earliest records dating back to the regime of Daud Khan (1973-78). Additionally, the last nationwide cadastral land survey, which covered only 34 percent of mostly rural and peri-urban private land of the country before being discontinued, was conducted between 1970 and 1978, and has not been updated since.

Since the policy on how to improve land governance has changed with each regime, there are various, and not always interlinked, ways to record and/or register land in Afghanistan. Throughout this research, we have identified three distinctive ways of registering/recording rights in Afghanistan: a) the land clearance process (*tasfiya*) with ARAZI, b) the acquisition of a title deed through the courts, and c) the cadastral survey. Based on the experience of the experts interviewed for this study, the registration through ARAZI’s land clearance process and the court registration through the acquisition of a formal title deed are the only uncontested mechanisms of registering land in Afghanistan.

One of the reasons mentioned for the low registration and formalisation of land is reportedly the widespread corruption of government institutions, which require the payment of bribes. Another cited reason was the perceived complexity of the administrative process. According to the World Bank Doing Business in Afghanistan report from 2015, it takes approximately 250-360 working days for the completion of land tenure recognition in Afghanistan. Paying taxes also deters people from

registering their property, in particular when adding the informal fees, which often have to be paid in addition to regular land taxes. Additionally, the lack of awareness in the general public and the Afghan National Police and Army about land issues and land rights contributes, in certain cases, to the limited land rights recognition in Afghanistan.

Due to the largely customary tenure of Afghan land with only a minimal portion being recorded or mapped, the opportunities for illegal land transactions are enormous. Illegal land sales are more broadly known in Afghanistan as “land grabbing” or “land usurpation.” Presidential Decree 45 on grabbed land policy requested the mapping of all land grabbed across Afghanistan. According to this decree, the list of land grabbers was to be compiled by all ministries from which land had been grabbed, and then submitted to ARAZI. Statistics compiled by ARAZI indicate that more than 1.2 million *jeribs* of land have been usurped over the past decade. A special parliamentary committee created to align a list of land grabbers with the list already drafted by ARAZI includes over 15,000 individuals who have allegedly participated in land grabbing. However, despite the extensive nature of the problem, the current legal framework does not adequately address the crime of land grabbing.

### ***Policy recommendations***

- The minimal duration of continued ownership and land cultivation required in order for the long-term unchallenged possession to be formally recognised should be decreased through an amendment to the current LML.
- Customary deeds prepared after August 1975, but otherwise meeting all the other requirements as per Art. 5 of the LML 2008 should be formally recognised through an amendment to the current LML.
- The efforts of various non-governmental organisations such as The Liaison Office and Checchi to inform Afghan citizens about the information necessary on a customary deed for it to be formally recognised should be further enhanced by involving the government in these efforts.
- A centralised (gradually computerised) system at ARAZI should be created as a one-stop-shop for land registration.
- As an interim measure, a community-based land recording system should be developed, which will be later connected to the ARAZI registering system (when transferred from the courts to ARAZI) and its Principal Books.
- The awareness of the public and Afghan National Police and Army about land issues and land rights has to be increased. Land governance has to be included in the teaching and training curricula of these target groups.
- ARAZI’s plans to implement the National Demarcation Project to identify the boundaries of villages and *gozars* (administrative units smaller than districts in urban areas) should be materialised. As a follow-up step, the land clearance process on large scale should be restarted. The judge should be included in the *tasfiya* delegation to deal with land disputes, if necessary. In the case of more complex land disputes, the fact that the ownership of land is disputed should be indicated on the *tasfiya* report and forwarded to the courts. Adequate financial resources should be allocated for this purpose from the national budget. Financial support as well as technical expertise should be sought from the international community and civil society.
- The possibility of first-stage land clearance done by communities to enable nationwide land identification should be explored.
- The regulation proposed by ARAZI that allows for registering urban properties should be approved promptly.
- Relevant authorities should work together to operationalise the existing efforts to incorporate a provision on land usurpation into the Criminal Code. Where appropriate, donors and civil society stakeholders should provide technical assistance to the drafting process.



- The draft Restitution Policy on Land Grabbing should be supported and approved.
- The prosecution of land grabbers should be made a priority within the Attorney General's Office. Similarly, investigations and the associated technical capacity should be enhanced within the Afghan National Police with the possibility of establishing a special police force tasked with the protection of land against the land grabbing.

## 2.2. Rights to forests and common land and rural land use regulations

Pan-LGI-Dim				Topic	Score			
					A	B	C	D
PANEL 2: Rights to forests and common land and rural land use regulations								
<i>LGI 1: Rights to forests and common land</i>								
2	1	1	Forests and common land are clearly identified in law, and the responsibility for use is clearly assigned.					
2	1	2	Rural group rights are formally recognised and can be enforced.					
2	1	3	Users' rights to key natural resources on land (incl. fisheries) are legally recognised and protected in practice.					
2	1	4	Multiple rights over common land and natural resources on these lands can legally coexist.					
2	1	5	Multiple rights over the same plot of land and its resources (e.g., trees) can legally coexist.					
2	1	6	Multiple rights over land and mining/other subsoil resources located on the same plot can legally coexist.					
2	1	7	Accessible opportunities exist for mapping and recording group rights.					
2	1	8	There exists boundary demarcation of communal land.					
<i>LGI 2: Effectiveness and equity of rural land use regulations</i>								
2	2	1	Restrictions regarding rural land use are justified and enforced.					
2	2	2	Restrictions on rural land transferability effectively serve public policy objectives.					
2	2	3	Rural land use plans are elaborated/changed via public processes, and resulting burdens are shared.					
2	2	4	After a change in use, rural land is swiftly transferred to the destined use.					
2	2	5	Rezoning of rural land follows a public process that safeguards existing rights.					
2	2	6	For protected rural land use (forest, pastures, wetlands, national parks, etc.), plans correspond to actual use.					
2	2	7	Rural land identified for rehabilitation is swiftly transferred to the destined use.					

Although the rights to forests and common (or public) land in Afghanistan and the restrictions on their usage are clearly defined in the Afghan legal framework, the lack of adequate law enforcement leads to their illegal usage, over-exploitation, and destruction. The United Nations Environment Programme (UNEP) conducted a survey in 2003 and reported that an estimated 50-70 percent of land is being used for unspecified purposes in Afghanistan. Taking into account the fact that there are no rural land use plans in Afghanistan, the usage of forests and common land is often unregulated.

Despite the various efforts of MAIL and the Ministry of Rural Rehabilitation and Development (MRRD), natural resources including forests, pastures, and protected areas are affected by the lack of a comprehensive mechanism for the effective and sustainable use of natural resources. For this purpose, programmes were developed in 2014 to manage and protect natural resources in cooperation with the public so as to build community capacity in the area of sustainable utilisation, promote a sense of ownership among the people, and motivate them to contribute to the survival of these resources. The results of these efforts still remain to be seen.



### Policy recommendations

- Mechanisms should be identified to promote forest management in areas that are currently out of government reach such as developing and empowering community-based adjudication groups (comprising elders and influential figures in the community) in order to address violations of rural land use restrictions. One possible option would be channelling rural land management through community development councils (CDCs).
- The awareness of the local population should be raised about the importance of forests and other natural resources and the negative impacts of deforestation in order to encourage communities to take part in maintaining forests, particularly in areas where the presence of the central government is limited.
- Rural land use plans should be developed by MRRD through a participatory and transparent process in which public voices can be heard and burdens shared.
- The surveying of natural resources identified to be at a high risk of degradation should be prioritised.
- The process of land change to protected areas should be expedited by mainstreaming the steps and organisations responsible.

### 2.3. Urban land use, planning, and development

Pan-LGI-Dim				Topic	Score			
					A	B	C	D
PANEL 3: Urban land use, planning, and development								
<i>LGI 1: Restrictions on rights</i>								
3	1	1	Restrictions on urban land ownership/transfer effectively serve public policy objectives.					
3	1	2	Restrictions on urban land use (disaster risk) effectively serve public policy objectives.					
<i>LGI 2: Transparency of land use restrictions</i>								
3	2	1	Process of urban expansion and infrastructure development is transparent and respects existing rights.					
3	2	2	Changes in urban land use plans are based on a clear public process and input by all stakeholders.					
3	2	3	Approved requests for change in urban land use are swiftly followed by development on these parcels of land.					
<i>LGI 3: Efficiency in the urban land use planning process</i>								
3	3	1	Policy to ensure delivery of low-cost housing and services exists and is progressively implemented.					
3	3	2	Land use planning effectively guides urban spatial expansion in the largest city.					
3	3	3	Land use planning effectively guides urban development in the four next largest cities.					
3	3	4	Planning processes are able to cope with urban growth.					
<i>LGI 4: Speed and predictability of enforcement of restricted land uses</i>								
3	4	1	Provisions for residential building permits are appropriate, affordable, and complied with.					
3	4	2	A building permit for a residential dwelling can be obtained quickly and at a low cost.					
<i>LGI 5: Tenure regularisation schemes in urban areas</i>								
3	5	1	Formalisation of urban residential housing is feasible and affordable.					
3	5	2	In cities with informal tenure, a viable strategy exists for tenure security, infrastructure, and housing.					
3	5	3	A condominium regime allows effective management and recording of urban property.					

There are certain restrictions on the transferability of (urban) public land: for example, public land cannot be transferred (sold and bought) to private interests. Taking into account the unclear definition of public and state land in the Afghan legal framework (to be discussed in greater detail in the next section), public land can be easily interchanged with state land, thus allowing the transaction of land that would otherwise be illegal. In terms of urban land use restrictions, there are certain land use restrictions defined in the original master plans of cities. However, in most of cases, the restrictions on land use prescribed by the master plans, including the Kabul master plan, are not enforced. Rampant corruption in the ranks of government and land management authorities allows for the uncontrolled usage of land.

After the start of the internationally backed war in Afghanistan in 2001, Afghanistan's urban land use has undergone significant changes due to, most notably, a massive influx of refugee-returnees to urban centres throughout the country and extensive rural-urban migrants seeking security and/or employment opportunities. Today, approximately one-quarter of Afghans live in urban areas, thus rendering the issue of urbanisation a priority.

Nevertheless, policies for low-cost housing and services remain tenuous. The current provisions of the LML 2008 do not specify low-cost housing for the poor, but instead rely on instalment schemes that typically amount to the normal (not low) cost of the land. Lack of payment can result in eviction. Nevertheless, the state land distribution schemes were developed by the government through Presidential Decrees 104 and 1091 during President Karzai's administration to allocate state land to teachers, low-ranking public employees, and returnees and internally displaced persons (IDPs). However, these are rather an exception from the general policy of not distributing state land. Additionally, the implementation of such distribution policies in addition to rampant corruption and conflicts caused by unclear ownership claims of distributed land does not serve the interests of the poor Afghan population. To make matters worse, the implementation of Presidential Decree 104, allowing for the distribution of land to returnees and IDPs, has been put on hold in recent years.

Additionally, due to rampant corruption, extensive land grabbing, and a great influx of refugees, IDPs, and rural-to-urban migrants, building in Kabul throughout the 1990s and, more recently, the 2000s, has largely remained outside of the third master plan; it is thus considered as "informal" in nature. It is believed that 70 percent of people in Kabul live in informal settlements. Indeed, with the suspension of the third master plan by then-President Karzai at the request of the Minister of Urban Development Affairs, the city has no clear functioning reference for planning purposes. The lack of an updated framework for regulating the urban expansion of the largest city, Kabul, is complemented with little coordination between responsible government bodies, such as the Municipality and Ministry of Urban Development Affairs (MUDA). The carrying capacity of infrastructure has long been overloaded, and the plan for land use has not been updated since 1978. Furthermore, Kandahar, Herat, Jalalabad, and Mazar-e Sharif, the four largest cities in Afghanistan after Kabul, likewise suffer from an outdated urban plan.

Finally, although the United States Agency for International Development (USAID) supported MUDA in drafting the policy on upgrading informal settlements, it has not yet been approved by the Afghan Cabinet. Furthermore, current requirements for formalising housing in urban areas are not clear to the public, and prone to power-brokering and corruption.

### ***Policy recommendations***

- Clear mechanisms for changing the usage of each type of urban land should be devised, including the requirement of permits to do so. Municipalities should establish a monitoring mechanism for this purpose, as well as a database of land use changes, which would be updated regularly and include new spatial information.
- Zoning laws for both national and municipality purposes should be enacted.
- The long-awaited National Urban Policy and new Municipality Law should be enacted.
- An interagency commission between MUDA and the municipalities should be established to clearly delineate the responsibilities between these two institutions in relation to the formulation, implementation, and monitoring of the master plans. In the future, this commission can serve as a forum for the discussion of various pressing issues such as the status of informal settlements in Afghan cities.
- New master plans should be developed for the largest cities in Afghanistan as per MUDA's commitments within "Big Cities Master Plan" initiative with the support of the international community.
- With the development of new master plans for the largest cities, the infrastructural needs of the population and the current state of the cities (considerably changed in comparison to the 1990s) need to be taken into account, and adequate mechanisms to provide the necessary infrastructure should be developed.
- Presidential Decree 104 should be amended (or annulled and new laws adopted) to tackle its shortcomings such as the allocation of non-viable land and cumbersome eligibility criteria. The National IDP Policy (including forced eviction guidelines) should be adequately implemented.
- Initiatives like *maslakh*, where IDPs are given land titles, should be supported and, if possible, reproduced.
- The policy on the upgrading of informal settlements should be approved and implemented.
- A policy on low-cost housing for the poor should be adopted. The policy should be developed in a consultative manner, with input from all stakeholders including civil society representatives, the government, and the public in question. Additionally, anti-eviction laws should be designed (based on forced eviction guidelines already existing within the National IDP Policy) with constitutional protections in mind and, in the case of eviction, a legal commitment to fair compensation should be established.

## 2.4. Public land management

Pan-LGI-Dim				Topic	Score			
					A	B	C	D
<b>PANEL 4: Public land management</b>								
<i>LGI 1: Identification of public land and clear management</i>								
4	1	1	Criteria for public land ownership are clearly defined and assigned to the right level of government.					
4	1	2	There is a complete recording of public land.					
4	1	3	Information on public land is publicly accessible.					
4	1	4	The management responsibility for different types of public land is unambiguously assigned.					
4	1	5	Responsible public institutions have sufficient resources for their land management responsibilities.					
4	1	6	All essential information on public land allocations to private interests is publicly accessible.					
<i>LGI 2: Justification and time-efficiency of acquisition processes</i>								
4	2	1	There is minimal transfer of acquired land to private interests.					
4	2	2	Acquired land is transferred to the destined use in a timely manner.					
4	2	3	The threat of land acquisition does not lead to pre-emptive action by private parties.					
<i>LGI 3: Transparency and fairness of acquisition procedures</i>								
4	3	1	Compensation is provided for the acquisition of all rights regardless of their recording status.					
4	3	2	Land use change resulting in the selective loss of rights is compensated.					
4	3	3	Acquired owners are compensated promptly.					
4	3	4	There are independent and accessible avenues for appeal against acquisition.					
4	3	5	Timely decisions are made regarding complaints about acquisition.					

There is no specific definition of public land in the Afghan legal code. However, the Afghan state does manage some land that would broadly meet the potential definitions of public land. According to the broad definition, land that has been allocated for public use and is the property of neither the state nor the individual is public land. The issue is treated in Art. 3(8) of the LML 2008, which stipulates that any land that is deemed public but is not registered in the book of government lands is considered to be state land. However, Presidential Decree 83 further blurs the boundaries between state and public land by emphasising formal documentary proofs of ownership. Given that the Afghan legal framework does not define public land or provide provisions on how to register public land and that the registration of land occurs rarely in Afghanistan, public land can be easily interchanged with state land. In other words, unregistered land that is under public use can easily be claimed by the state as its property and be reassigned subsequently. Furthermore, public land is prone to various types of illegal occupation, uses, and transactions.

### **Acquisition procedures**

The purpose of land acquisition is that land owned by individuals is appropriated by the state with the aim of being used for public benefit in return for just compensation. In other words, land is only acquired for the execution of public welfare projects such as the construction of hydropower dams, airports, roads, and other infrastructure. Due to the lack of adequate monitoring mechanisms to verify the authorised use of land, it is not clear how much land has been acquired by the state and then used for a project with a private purpose. Nevertheless, it is important to note that from the limited field research conducted for this study, people talked about illegal transfers of land after state acquisition processes. The availability of qualitative evidence combined with the lack of state monitoring mechanisms might suggest that the process of acquisition is at best highly imperfect where the illegal use of acquitted land cannot be ruled out. Furthermore, no database of acquisition processes exists; therefore, it is not possible to estimate how fast the acquired land is transferred to its destined use in a timely manner.

Probably, the most disturbing shortcomings of the current LEL are the provisions on compensation. Compensation is provided only to people holding the legal title deed. Considering the prevalence of informal land tenure in Afghanistan, a considerable number of Afghans are susceptible to land acquisition without any compensation rights. Additionally, there is no stipulation in the LEL about unrecorded rights such as for grazing, right of passage, and gathering forest products. Finally, although the compensation for land, residential buildings, and fruit-bearing trees and other saplings is legally prescribed in Afghanistan, in the majority of cases, the compensation paid is not sufficient for the individual whose land has been acquired to be able to maintain his/her previous living standard. Cases in which the acquired land is located in a central part of the city but the exchanged land is situated on the outskirts can serve as an example of this. Another problem is that there is no deadline for the payment of compensation for land acquisition. Compensation may be made three or four years after the acquisition. When land prices increase during this period, the landowner might be unable to afford an equivalent property. Finally, there is no particular authority where individuals can lodge their complaints against acquisition and the compensation paid to them.

Having mentioned the shortcomings of the current LEL, the newly proposed Land Acquisition Law (LAL), currently under review by the Ministry of Justice (MoJ), would be a major improvement in Afghan land acquisition practices if adopted and properly implemented.

### ***Policy recommendations***

- The newly proposed and amended LML that addresses the shortcomings of the public land definition, classifies four types of land including “land specific to village(s),” contains a clear definition of “public interest,” classifies the types of public land, and delineates responsibilities between the institutions responsible for different types of public land should be enacted.
- ARAZI’s plans to restart the cadastral survey of the remaining 66 percent of land (including public land) should be implemented promptly and adequately financed. The survey, as planned by ARAZI, should start in Bamiyan Province as soon as possible.
- A community-based management of public land should be put in place (potentially thorough *shuras*, *jirgas*, and CDCs) once the definition of public land is clarified. It should aim to raise public awareness about public land, laws, and regulations associated with its use.
- The amended LAL with a clear provision on fair and just compensation, including compensation paid prior to the project start date, compensation for grazing and other rights, identification of the suitable exchanges for acquired land, and provisions on the resettlement of individuals who face losses as a result of the acquisition of their land should be promptly enacted.
- A computerised database with the recording of all acquired land together with cadastral maps and other related-land documents should be developed, kept with ARAZI, and shared with other land institutions.

## 2.5. Transfer of large tracts of land to investors

Pan-LGI-Dim			Topic	Score			
				A	B	C	D
<b>PANEL 5: Transfer of large tracts of land to investors</b>							
<i>LGI 1: Transfer of public land to private use follows a clear and competitive process, and payments are collected</i>							
5	1	1	Public land transactions are conducted in an open and transparent manner.				
5	1	2	Payments for public leases are collected.				
5	1	3	Public land is transacted at market prices unless guided by equity objectives.				
5	1	4	The public captures benefits arising from changes in permitted land use.				
5	1	5	Policy to improve equity in asset access and use by the poor exists and is implemented effectively and monitored.				
<i>LGI 2: Private investment strategy</i>							
5	2	1	Land to be made available to investors is identified transparently and publicly, in agreement with right holders.				
5	2	2	Investments are selected based on economic, socio-cultural, and environmental impacts in an open process.				
5	2	3	Public institutions transferring land to investors are clearly identified and regularly audited.				
5	2	4	Public bodies transferring land to investors share information and coordinate to minimise and resolve overlaps (incl. subsoil).				
5	2	5	Compliance with contractual obligations is regularly monitored and remedial action taken if needed.				
5	2	6	Safeguards effectively reduce the risk of negative effects from large-scale land-related investments.				
5	2	7	The scope for resettlement is clearly circumscribed, and procedures exist to deal with it in line with best practice.				
<i>LGI 3: Policy implementation is effective, consistent, and transparent</i>							
5	3	1	Investors provide sufficient information to allow the rigorous evaluation of proposed investments.				
5	3	2	Approval of investment plans follows a clear process with reasonable timelines.				
5	3	3	Right-holders and investors negotiate freely and directly with full access to relevant information.				
5	3	4	Contractual provisions regarding benefit sharing are publicly disclosed.				
<i>LGI 4: Contracts involving public land are public and accessible</i>							
5	4	1	Information on spatial extent and duration of approved concessions is publicly available.				
5	4	2	Compliance with safeguards on concessions is monitored and enforced effectively and consistently.				
5	4	3	Avenues to deal with non-compliance exist and obtain timely and fair decisions.				

There are five situations permitting state land transactions:

1. Transfer to other government entities: ARAZI transfers state land to other governmental entities based on their request.
2. Exchange: ARAZI provides an exchange of private land in one area with state land in the desired area based on request. Private land is exchanged for state land of the same grade. When land of the same grade is not available in the desired area, the value of the acquired land has to match the value of the original land. Monthly, ARAZI receives seven requests for exchange.

3. Donation: ARAZI allocates the land for donation based on presidential decree. In comparison to distribution, where minimal prices are set for distributed land, donations are free of charge.
4. Lease: such transactions will be discussed in detail in Section 2.5 of this Executive Summary and 6.5 of the main report.
5. Sale/distribution: there is ambiguity in the Afghan legal framework about the sale of state land. For distribution purposes, ARAZI allocates the land based on presidential decree, and the respective ministries are responsible for the actual distribution.

The sale of state land was banned by Presidential Decree 99 in 2002, including virgin and arid land for housing and all other purposes. However, despite the ban on state land sales prescribed by this decree, the LML enacted in 2008 allows for both the selling and leasing of state land and provides guidelines and procedures to this purpose. However, state land is sometimes sold for investment and not always in an open and transparent manner. Of particular interest are the transactions of the Afghanistan Investment Support Agency (AISA), established as a part of the Ministry of Commerce and Industry. The ministry can request ARAZI to transfer state land to AISA, which subsequently sells it to investors. The legality of these transactions remains unclear.

State land leases represent a major opportunity for providing large tracks of land to investors. ARAZI is responsible for managing the leases and ensuring that the requirements of the LML are observed. Contract bidding goes through public auction, which is announced publicly, and the process starts ideally after at least three bidders show an interest. If there are less than three applicants after the determined bidding deadlines, the auction is re-advertised at least twice. If after a third announcement less than three bidders have expressed an interest, the process continues with the existing number of bidders. However, this does not always happen in reality and sometimes ARAZI's Land Lease Procedure is not fully respected, making the transparency on paper unfulfilled in reality. Additionally, the results of land valuations are not made public, further compromising the transparency of land lease process.

Land lease prices are determined either through the valuation commission established based on Art. 69 of the LML 2008, or, if this larger commission cannot be established, based on the type, grade (quality), and size of the land by the smaller Leasing Committee comprised of local representatives of ARAZI, Ministry of Finance (MoF) (*mustofiat*), and the district administration. Although the provisions stated in the Afghan legal framework set clear procedures for land valuation, delays in assessing the land and setting prices are an issue, as the members of the valuation delegation often take time to present themselves. Sometimes it takes over a year to have the lease contract signed by both parties, despite the fact that ARAZI has reduced the number of steps. Taking into account the lack of clarity regarding the formation of the larger commission based on Art. 69 of the LML 2008, the market value of the land is not always taken into account. Additionally, due to the high level of corruption in Afghanistan, powerful strongmen and public officials sometimes put pressure on the valuation committee to decrease the value of the land. Finally, the results of the valuation are not publicly accessible, thus creating transparency issues within the process and providing room for setting the lease price value irrespective of the market price.

The LML 2008 stipulates that any failure to comply with contractual obligations will result in contract termination. The LML also stipulates that ARAZI should monitor the progress of land development under lease every six months. In practice, however, no regular monitoring takes place due to a lack of human resources and financial capacity as well as the poor security situation in some parts of Afghanistan. Thus, only in very rare cases does ARAZI perform monitoring every six months. The lack of proper and regular monitoring creates space for corruption and illegal practices.



### Policy recommendations

- The possibility for state land sales should be clarified through the Cabinet Regulation to clarify the current legal provisions on this matter. Clear categorisation should be developed based on which restrictions on transferability will be applied.
- The status of AISA and its activities should be clarified by clear rules of engagement interlinked with ARAZI's Investment Policy.
- A mechanism to assess the performance of members of the valuation commission should be devised, with poor performance being addressed immediately.
- Corruption in the land valuation process should be addressed.
- The results of land valuation for land lease purposes and the information about land leases for various projects, particularly where it concerns the public, should be made publicly available.
- A clear monitoring system for the application of lease contracts and benefit-sharing mechanisms should be established, with the participation of local communities.

## 2.6. Public provision of land information: Registry and cadastre

PANEL 6: Public provision of land information: Registry and cadastre				
<i>LGI 1: Mechanisms for recognition of rights</i>				
6	1	1	Land possession by the poor can be formalised in line with local norms in an efficient and transparent process.	
6	1	2	Non-documentary evidence is effectively used to help establish rights.	
6	1	3	Long-term unchallenged possession is formally recognised.	
6	1	4	First-time recording of rights on demand includes proper safeguards, and access is not restricted by high fees.	
6	1	5	First-time registration does not entail significant informal fees.	
<i>LGI 2: Completeness of the land registry</i>				
6	2	1	Total cost of recording a property transfer is low.	
6	2	2	Information held in records is linked to maps that reflect the current reality.	
6	2	3	All relevant private encumbrances are recorded.	
6	2	4	All relevant public restrictions or charges are recorded.	
6	2	5	There is a timely response to requests for accessing registry records.	
6	2	6	The registry is searchable.	
6	2	7	Land information records are easily accessed.	
<i>LGI 3: Reliability of registry information</i>				
6	3	1	Information in public registries is synchronised to ensure integrity of rights and reduce transaction cost.	
6	3	2	Registry information is up-to-date and reflects the ground reality.	
<i>LGI 4: Cost-effectiveness and sustainability of land administration services</i>				
6	4	1	The registry is financially sustainable through fee collection to finance its operations.	
6	4	2	Investment in land administration is sufficient to cope with demand for high-quality services.	
<i>LGI 5: Fees are determined transparently</i>				
6	5	1	Fees have a clear rationale, their schedule is public, and all payments are accounted for.	
6	5	2	Informal payments are discouraged.	
6	5	3	Service standards are published and regularly monitored.	



The ways to register land in Afghanistan have numerous shortcomings that prevent a considerable portion of the population (including the poor) from having their rights recognised. Petty bureaucracy in the form of multiple steps and offices creates opportunities for corruption and deters the poor from proceeding with the registration process. This lengthy and time-consuming process can be expedited by informal payments; however, people who cannot afford or refuse to engage in corrupt practices have to follow the proper procedure, which can take over a year to finalise.

Furthermore, only 34 percent of land has been surveyed in Afghanistan. From 1965 to 1978, the state surveyed state and private agricultural and barren land (deserts, pastures, and forests), covering approximately 30 percent of the Afghan territory. Land surveying was put to a halt after the land reforms of the Democratic Republic of Afghanistan. During the communist regime (1978-92), surveying was only available on demand for the purpose of land clearance and the resolution of land conflicts. During the transitional Islamic State of Afghanistan, the surveying process was suspended based on Presidential Decree 99 of 2003. Following this decree, cadastral survey activities were carried out only after the official request of ministries and government institutions that had obtained presidential orders (approximately 4 percent).

Finally, Afghanistan does not have one single registry, so the information is scattered across various registries with different ministries and agencies—ARAZI’s Principal Book of Private and State Land, the courts’ Deeds Registration Book, the Survey and Cadastre Directorate’s Land Statistics Registration Book, MoF’s Land and Property Taxation Book, and the municipal *safayi* tax registration books—with only limited synchronisation. This in turn compromises the reliability of land information and access to it.

### ***Policy recommendations***

- The different registries in Afghanistan should be mainstreamed and interlinked to prevent overlaps as well as outdated and missing information. ARAZI should be established as a “one-stop-shop” for registering land (both within and outside the Master Plans). The *tasfiya* process should be done on a large scale and should always include members of the Survey and Cadastre Directorate to conduct the survey. The land should then be recorded in ARAZI’s Principal Books, and the formal title deed given to the owner. Technical and financial support of ARAZI’s pilot project in Herat, which, if successful, will be extended to all 34 provinces, should be accorded. This process should be subsequently computerised to allow for the interlinkages with other registries, such as those of the courts and MoF’s tax books.
- An independent monitoring body should be created to monitor the process of land formalisation in order to ensure an effective and transparent process.
- ARAZI’s in-house procedures and anti-corruption policies should be reviewed to prevent the lengthy and costly process of land registration.
- ARAZI’s plans based on its Operational Strategy to establish national comprehensive cadastral registration programmes should be technically and financially supported.
- Cadastral records should be connected to both ARAZI’s Principal Books and the courts’ title deed registration system in a consistent manner. Furthermore, the uniform and standard format of a circular form, including the verification of the cadastre, should be developed and include all of the personal information of the buyer and seller, photos, signatures (or fingerprints), physical specification of land, etc.
- As an interim measure, all cadastral maps should be scanned to expedite the manual search that presently occurs in the Survey and Cadastre Directorate, with the subsequent aim to be later included in the computerised system.

## 2.7. Land valuation and taxation

PANEL 7: Land valuation and taxation				
<i>LGI 1: Transparency of valuations</i>				
7	1	1	There is a clear process of property valuation.	
7	1	2	Valuation rolls are publicly accessible.	
<i>LGI 2: Efficiency of tax collection</i>				
7	2	1	Exemptions from property tax payments are justified and transparent.	
7	2	2	All property holders liable to pay property tax are listed on the tax roll.	
7	2	3	Assessed property taxes are collected.	
7	2	4	Receipts from property tax exceed the cost of collection.	

In Afghanistan, there are only four instances when land valuation through the establishment of an impartial commission occurs: when the state acquires private land in order to estimate the amount of compensation, when transferring state land from one governmental entity to another, when leasing state land to private investors, and when estimating land and property transaction taxes.

However, this process is often mirrored by a number of shortcomings as occurs in the following situations: the land valuation process is consistently not done with each transaction; the commission takes more than one month to set the price; the whole process takes more than a year (in cases where an individual's land has been appropriated for state projects), so that by the time the individual is compensated, the compensation amount is less than the current market value; real estate agents do not provide an accurate assessment of the price; and strongmen and powerful individuals whose economic interests are at stake put pressure on the commission so that the set price benefits them. In none of these cases is the land valuation used for land/property taxation purposes. The calculation for taxation purposes is determined according to fixed calculation schemes based on the size and grade of the land. The market values of the land are not used in this procedure.

Although land valuation takes place in certain instances, there are no legal provisions in Afghanistan that require making the valuation rolls public. State organisations can provide information regarding the value of land or property on request as long as an individual has a legal basis for such a request, such as a land dispute case that he/she is involved in.

In terms of tax collection, there are four types of tax related to land and property: land tax (from agricultural land in both rural and urban areas), *safayi* tax (from all properties in urban areas), tax on the transfer of property and land, and tax on rents. No property tax is collected in rural areas.

Tax collection is, however, hindered by numerous shortcomings, one of which is the frequent outdatedness of the tax rolls. Most of the property and land owners are not registered with the provincial taxation offices, because they do not wish to go through the formal procedures of registering their land, which requires payments and taxation. Furthermore, the information sharing between the courts, ARAZI, and MoF is not consistent. The capacity of the provincial and district offices of the MoF to update records and collect taxes is also limited. There is not always enough staff to pursue cases of tax evasion. In some areas, there are no district offices at all, either due to the lack of security or simply because such offices have not yet been formed. This means that in certain areas, land transactions are not recorded, and land tax books are not modified.

Since not all property holders are registered, collecting taxes is challenging. Taking into account the scale of urban informality that touches an estimated 70 percent of Afghan cities, not all due taxes are paid in reality.

### Policy recommendations

- Land valuation as conducted for the four different purposes outlined above should be mainstreamed through a cabinet resolution to bring all valuation practices under one regulation. The land valuation process should also happen regularly with each transaction.
- A clear mechanism should be developed for the activities of the various valuation commissions to expedite the valuation process. Additionally, performance-based evaluations should be introduced for the members, and a corresponding monitoring mechanism should be established to verify compliance.
- Land valuation for acquisition should be done before the acquisition process is announced to prevent a rapid increase in land prices and possible land grabbing by powerful individuals.
- Valuation rolls should be compiled in one national database and made public only after the adequate actions against land grabbing are implemented to prevent land usurpers from benefiting from this action.
- A study should be conducted on the current state of tax collection in Afghanistan and its deficiencies. Clear policy recommendations and guidelines should be devised to establish a well-functioning system that is suitable for the Afghan context. Lessons learned from other countries should be used as a guideline.
- The Land Taxation Law of 1988 should be reviewed, and then drafted and approved by MoJ after taking into account the findings of the aforementioned study.
- The formalisation of largely informal land tenure in Afghanistan is a prerequisite for successful tax collection efforts (see the sections above for more details on land tenure recognition) together with the improvement of the security situation.
- A formal mechanism should be developed for the courts and ARAZI to inform MoF about changes in ownership and land sizes, and an adequate enforcement mechanism should be devised to pursue possible tax evaders.

## 2.8. Dispute resolution

PANEL 8: Dispute resolution						
<i>LGI 1: Assignment of responsibility</i>						
8	1	1	There is a clear assignment of responsibility for conflict resolution.			
8	1	2	Conflict resolution mechanisms are accessible to the public.			
8	1	3	Mutually accepted agreements reached through informal dispute resolution systems are encouraged.			
8	1	4	There is an accessible, affordable, and timely process for appealing disputed rulings.			
<i>LGI 2: Share of land affected by pending conflicts is low and decreasing</i>						
8	2	1	Land disputes constitute a small proportion of cases in the formal legal system.			
8	2	2	Conflicts in the formal system are resolved in a timely manner.			
8	2	3	There are few long-standing (>5 years) land conflicts.			

Afghanistan's court system enjoys competence to address land disputes. However, alleged corruption in courts and, consequently, costliness are the most commonly cited problems among the Afghan population that prevent them from reaching out to the formal legal system. Although notable improvements have been made in Afghanistan's formal justice system since 2001, the informal non-state justice sector still handles what appears to be the majority of disputes in the country.

Even though the informal justice system is widely used in the country, it does not enjoy full legal recognition. Evidence and rulings are shared between state formal mechanisms like the Department of Huqooq and courts, while informal mechanism and non-state dispute resolution occurs only on an ad hoc basis. Often, the court decides the case differently from the *shura* or *jirga*, thus creating obstacles for the implementation of any decision.

Recently, a new wave of interest in the possible linkages of the formal and informal justice systems has arisen among Afghan political circles and the international community. The debate started around the possibility of the revival of the draft law on Dispute Resolution, *shuras* and *jirgas* that was initiated in 2010 and is still pending at the MoJ. Second, the first draft of the Land Dispute Resolution Regulation for ARAZI, supported by United States Institute of Peace (USIP), is currently being drafted. However, the outcome of the current debate on the possibilities of linking the formal and informal justice systems still remains to be seen, particularly in relation to the alleged complaints toward the informal justice system of not respecting the rights of women and minorities.

The majority of Afghans lack access to conflict resolution mechanisms for land disputes. However, the level of access varies dramatically between demographic groups. Adult men of majority populations enjoy the greatest degree of access, whether it is to formal or informal justice systems. Men from marginalised population groups face additional barriers to accessing conflict resolution services. However, women in Afghanistan have extremely limited access to both state and non-state dispute resolution forums. In both instances, strong and strictly enforced social norms discourage women from approaching any dispute resolution forum.

### ***Policy recommendations***

- The computerised case management system implemented by USAID is already being rolled out. However, this system requires the internet, and it does not connect all of the conflict resolution bodies such as the police. Adequate solutions should be developed to enable remote areas to benefit from this system. Additionally, the access to this system should be granted to all conflict resolution institutions such as the Department of Huqooq and ARAZI.
- Computer databases like Oracles, which are cheaper and take less time to implement, should be considered as an interim measure before the fully operational computerised system is in place with a database of all land disputes held within the central office of each formal conflict resolution body.
- Fighting corruption, particularly in the courts, should become the priority of the National Unity Government. The Anti-Corruption Strategy established by President Karzai in 2008 should be implemented through the stronger engagement of the president himself and increased results-based support from the international donor community. Additionally, previous and yet unaddressed cases of corruption should be the priority of the Attorney General's Office.
- The auditing capacities of the High Office of Oversight and Anti-Corruption (HOOAC) should be increased by the provision of technical and financial support, and internal audits should be conducted to prevent corruption within formal justice system.
- Internal audits of all land administration institutions should be conducted on a regular basis.
- Laws devising more effective linkages between formal and informal conflict resolution mechanisms (taking into account lessons learned from projects like the Norwegian Refugee Council's Information and Legal Assistance Centres, Afghanistan PEACE's project, the World Bank's Land Conflict Resolution Project, and USIP/ARAZI's sponsored pilot) should be broadly and inclusively consulted with the public and approved.
- Mechanisms to encourage women to approach the formal justice system should be devised, while sensitising the rest of the community to women's right to equal access to justice.

## 2.9. Review of institutional arrangements and policies

PANEL 9: Institutional arrangements and policies						
<i>LGI 1: Clarity of mandates and practice</i>						
9	1	1	Land policy formulation, implementation, and arbitration are separated to avoid conflict of interest.			
9	1	2	Responsibilities of the ministries and agencies dealing with land do not overlap (horizontal overlap).			
9	1	3	Administrative (vertical) overlap is avoided.			
9	1	4	Information about land rights and usage is shared by public bodies; key parts are regularly reported on and publicly accessible.			
9	1	5	Overlaps of rights (based on tenure typology) are minimal and do not cause friction or dispute.			
9	1	6	Ambiguity in institutional mandates (based on the institutional map) does not cause problems.			
<i>LGI 2: Equity and non-discrimination in the decision-making process</i>						
9	2	1	Land policies and regulations are developed in a participatory manner involving all relevant stakeholders.			
9	2	2	Land policies address equity and poverty reduction goals; progress toward these is publicly monitored.			
9	2	3	Land policies address ecological and environmental goals; progress toward these is publicly monitored.			
9	2	4	The implementation of land policy is costed, matched with benefits, and adequately resourced.			
9	2	5	There is regular and public reporting to indicate progress in policy implementation.			
9	2	6	Land policies help to improve land use among low-income groups and those who experience injustice.			
9	2	7	Land policies proactively and effectively reduce future disaster risk.			

The separation of land policy formulation, implementation, and arbitration in Afghanistan is relatively well ensured. However, two particular issues deserve attention.

Following Decisions 23 of 2009 and 11 of 2013 of the Council of Ministers, ARAZI should aim to become an independent “one-stop-shop” for land issues in Afghanistan. However, concentrating all the responsibilities for land issues in ARAZI, while making the administrative procedures more effective and the management of land issues more coordinated, risks blurring the lines between land policy formulation, implementation, and arbitration. This is of particular concern in relation to land registration and land dispute resolution. ARAZI aims to be responsible for all land registration in the country through promoting itself as a one-stop-shop for Afghan land issues as well as to be responsible for land dispute resolution, even though ARAZI’s Department of Addressing Land Disputes can already informally resolve the dispute, which is then recorded at ARAZI. One has to be careful not to create a similar conflict of interest, such as the one already existent in courts (responsible for both conflict adjudication and land registration).

The NLP was adopted in 2007 after extensive but informal consultations with public institutions over a two-year period. Although the contents of the policy are largely considered to hold up to international best practices, most of the pledges of the NLP 2007 have not yet been “absorbed” into the legal framework of the country.

One example of the provisions meeting international standards is the policy’s pro-poor and equality provisions. However, while the policy is generally intended to alleviate poverty and increase equity among the citizens of Afghanistan, the goals of the policy have not been sufficiently incorporated into the legal framework, nor has a monitoring mechanism been put in place to measure them.

### ***Policy recommendations***

- The role of ARAZI as a dispute resolution body has to be decided, while making sure not to replicate the same conflict of interest as currently affects the courts (being the issuer of title deeds as well as the adjudicator of land conflicts).
- The draft Land Dispute Resolution Regulation prepared by ARAZI, which includes provisions on appellate procedures to establish the district-level commission as a first instance and the provincial-level commission as an appellate stage, should be promulgated and effectively implemented by taking into account the new draft law on *shuras* and *jirgas*.
- The creation of a (gradually) centralised computerised system at ARAZI as the one-stop-shop for land registration and information (as opposed to land registration in the courts) should mainstream the access to land information.
- The current draft of the LML 2014 should be promptly ratified by the Afghan Parliament and enforced by the Afghan National Unity Government, because it builds on the NLP 2007. If necessary, the law should be adopted through presidential decree.
- ARAZI's plans to hold a conference on the NLP 2007 and its possible amendments should be supported.

## **3. Conclusion**

The various stages of the LGAF implementation have identified a number of issues that require immediate attention. Clear policy recommendations along with the responsible institutions for implementing these recommendations were also identified to provide the ways forward on each of the pressing issues. Monitoring indicators for the success or failure of the different approaches were also devised. All of this information has been included in the Policy Matrix (Section 8 of this report), which will serve as a roadmap for Afghan policymakers and the international community in order to improve land governance in Afghanistan.

Based on the discussions during the Policy Dialogue, the participants suggested the following steps for the future implementation of the LGAF recommendations:

8. Follow-up meetings with ARAZI to internalise the Policy Matrix document.
9. Presentation of the document to the High Council on Land and Water chaired by the President of Afghanistan.
10. Review of the measuring indicators and the capacities of the institutions to perform monitoring. If needed, a new measuring system should be devised (led by ARAZI with the participation of all land administration institutions).
11. Review conference on the progress of the Policy Matrix conducted by ARAZI every six months.



## 1. Introduction

In the past decade, land and the control of resources have been a significant aspect of government and donor concerns in Afghanistan. In the light of the country's social transformations, increased demographic pressure, displacement, and economic evolution, land is more than ever at the heart of economic and social considerations. At the same time, the legal framework for land governance remains incoherent in many respects and ill-suited to the Afghan reality, while administrative structures with responsibility over land lack clarity in the repartition of responsibilities and their capacity to carry out their mandate.

Despite efforts of the Afghan government and donors to reform land governance and clarify land tenure, recent research has shown major challenges yet to be addressed due to poor land management and a legal framework ill-suited to the reality faced by the majority of Afghans.<sup>5</sup> Customary rights and collective ownership of land—a major pattern of landholding across the country—remain out of the scope of the legal framework. Deregulated practices of land acquisition and transfer, land grabbing<sup>6</sup> and poor management of urban expansion have increased tensions surrounding land and further blurred an already murky land tenure situation. The status of state and public land also remains opaque. Attempts to recognise private property and clarify the land tenure situation of holders settled on government land has barely gone beyond wishful thinking, with Presidential Decree 83 (2003) even reinforcing government capture of off-farm land by making government land the default form of landholding. Finally, the majority of Afghans still do not hold valid documentation for land ownership. Most landholders probably have no documents at all, with customary documentation that is unrecognised by the state filling some of this gap.

After acknowledging these problems, donors and the Afghan government have pushed for reforms in land administration and governance. As noted by Alden Wily<sup>7</sup> among others, most of these reforms, however, have remained ineffective. The National Land Policy (NLP) of 2007, designed to set property norms and renew land governance, has been unfruitful and mostly ignored in setting the government's subsequent course of action. The four primary bodies of law governing land tenure—the Civil Code, Presidential Decree 83, Shari'a, and the current Land Management Law (LML), amended in 2008 and under constant redraft since—contradict each other in many aspects and insufficiently address the reality of land governance in Afghanistan. Furthermore, supplementary land-related legislation is currently under draft and remains to be implemented.

Although ongoing amendments are a positive sign of a will to reform the current system, significant effort needs to be put into addressing the aforementioned issues and structural problems. Thus said, the emergence of the Afghan Land Authority (ARAZI), whose goals closely reflect the priorities of the NLP to facilitate a reform of land laws, set up a comprehensive, computerised database of landholdings, provide a "one-stop-shop" for the leasing of government land for investment, and establish an efficient, simplified land registration system,<sup>8</sup> might represent an opportunity for reform better tailored to the current reality of land tenure and conflicts in Afghanistan.

5 Liz Alden Wily, "Land, People, and the State in Afghanistan: 2002 - 2012" (Kabul: Afghanistan Research and Evaluation Unit, 2013); Yohannes Gebremedhin, "Land Tenure and Administration in Rural Afghanistan: Legal Aspects" (Kabul: Asian Development Bank/Department for International Development, 2007).

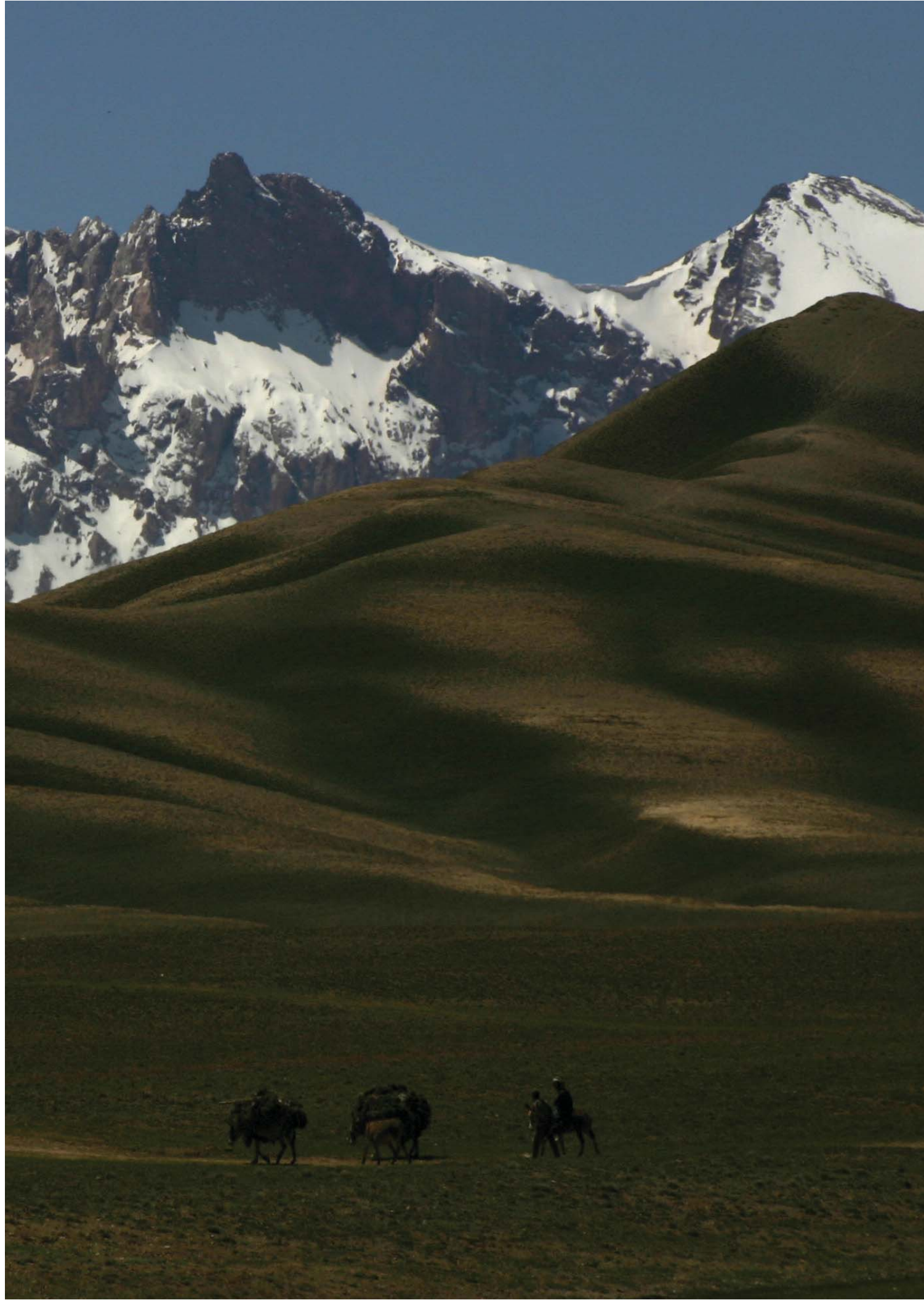
6 Given the wide variety of situations that communities can regard as "land-grabbing," The Liaison Office (TLO) does not define the term here. We instead consider "land-grabbing" as that perceived to be land-grabbing by communities—as it is this perception, rather than any a priori definition, that shapes individual and community responses and action preferences.

7 See, for example, Alden Wily, "Land, People, and the State."

8 Alden Wily, "Land, People, and the State," 16-18.







## 2. Methodology

Governance has been defined as “the manner in which public officials and institutions acquire and exercise the authority to shape public policy and provide public goods and services.”<sup>9</sup> As far as land governance is concerned, this definition includes the ways in which property rights to land (held by groups or individuals) are defined and can be exchanged and transformed; the ways in which public oversight over land use, land management, and taxation are exercised; the types of land that are state owned and the ways in which such land is managed, acquired, and disposed of; the nature and quality of land ownership information available to the public and the ease with which it can be accessed or modified; finally, the ways in which disputes are resolved and conflict is managed.

Within the Afghan historical context, deficiencies in these dimensions of land governance have resulted in poorly managed processes of urban expansion, a concentration of poverty in slums, a lack of clarity on land rights, and resulting conflicts over land. These issues underline the need to strengthen land governance to create the preconditions for environmentally and socially sustainable investments and appropriate economic development.<sup>10</sup>

The Land Governance Assessment Framework (LGAF), developed by the World Bank in partnership with Food and Agriculture Organisation (FAO), International Fund for Agricultural Development, International Food Policy Research Institute, United Nations Human Settlements Programme (UN Habitat), the African Union, and numerous bilateral partners, is a diagnostic tool to assess the status of land governance at a country level using a participatory process that draws systematically on existing evidence and local expertise as opposed to the knowledge of outsiders. LGAF focuses on nine key general areas relating to a country’s good land governance. These areas have traditionally been dealt with separately from each other. LGAF thus aims to bring these into a single framework. The areas are as follows: (1) land rights recognition; (2) rights to forests and common land and rural land use regulations; (3) urban land use, planning, and development; (4) public land management; (5) transfer of large tracts of land to investors; (6) public provision of land information (registry and cadastre); (7) land valuation and taxation; (8) dispute resolution; (9) institutional arrangements and policies. For these nine focus areas, a series of land governance indicators, each divided into several dimensions, has been selected based on international experience. For each dimension, pre-coded statements are scored (from A = best practice to D = weak practice), again based on international experience. In Section 6, the findings of this study will be presented based on each of these nine areas, and the scores will be provided based on the consensus of the technical experts on land governance in Afghanistan. While the Section 6 serves as an assessment of the aforementioned subject areas, Section 7 provides the relevant conclusions and recommendations.

This report is divided in such a way that each sub-section of Section 6 can be used as a standalone report about the particular topic. Therefore, certain repetitions can be found across the different sub-sections. The same is true for the recommendations in Section 7. The Consolidated Scorecards summarised in Section 3 can serve as a directory to navigate the entire report when interested in only certain topics or indicators.

The LGAF process helps to establish a consensus and identify priority actions for these nine areas in terms of the following:

1. Gaps in existing evidence and areas for regulatory or institutional change;
2. Piloting of new approaches;
3. Interventions to improve land governance on a broader scale (e.g., by strengthening land rights and improving their enforcement);

9 “Strengthening World Bank Group Engagement on Governance and Anticorruption” (Washington, DC: World Bank, 2007), 67.

10 The previous two paragraphs were suggested by David Stanfield, land governance expert with extensive experience in Afghanistan and other countries, and currently serving as Professor Emeritus at the Land Tenure Centre, University of Wisconsin-Madison, USA.

#### 4. Criteria to assess the effectiveness of these measures.

Undertaking a LGAF has a number of benefits. In particular, it:

- Helps facilitate communication and collaboration between different government departments as well as the private sector, civil society, and academics to agree on key gaps and priority actions in the land sector as a basis for specific actions to foster change. During this process, it establishes a reference group of qualified and interested stakeholders with a shared understanding of the challenges of land governance and ways to address them.
- Documents good practice against global standards and allows the broad dissemination, evaluation, and eventually upscaling of innovative approaches to improving land governance.
- Puts in place a structure (and associated institutional arrangements) to monitor progress in terms of the quality of land governance and effective service delivery over time that can increasingly be used to inform policy decisions and resource allocation. Key land indicators that are identified and tested can be monitored using administrative data.

The implementation of LGAF occurs in a number of steps:

- **Preparation:** this phase includes a review of the LGAF framework to identify any areas where customisation to country conditions may be needed as well as potential data availability, identification of a team of expert investigators and panel members from a wide range of sectors/stakeholders, formulation of a time plan, and enhancement of government buy-in.
- **Background documentation (nine panel reports):** these provide the common basis of information that is indispensable as a basis of consensus on the rankings or priority actions; three sets of written outputs are needed.
- **Expert/subject-matter specialist panels:** intensive half- or full-day work sessions per topic with five to eight subject-matter experts and users of land systems, from different backgrounds. Participants discuss each of the dimensions in detail to arrive at a consensus ranking and agreed policy priorities.
- **Synthesis country report:** all material (background documentation, tenure typology, institutional map, background reports, and panel minutes) is synthesised in a well-structured report to be shared widely.
- **Country-level validation and policy workshop:** the country report is reviewed by experts to provide input. These results are incorporated, and the report is presented for a national workshop to validate the results and prioritise policy conclusions and associated monitoring indicators for presentation to key policy-makers during a policy workshop. Ideally, this will result in the agreement of follow-up actions, some of which can be supported by government and other partners.

## 2.1 Adapting the LGAF to the country situation

Due to a number of specificities of the Afghan context, some of the indicators and terminology had to be adapted to capture the realities of land governance in Afghanistan. These mainly include the key areas dealing with public land and its allocation to private interests (see the detailed modifications in Appendix I.)

In addition to numerous adjustments in terms of substance, modifications have been made to the methodology of the project itself. Originally, the expert investigators were nominated from the pool of national and international researchers on the topic. However, this approach was changed after the start of the project, and Afghan practitioners of land governance were chosen to develop the panel reports. A lack of writing skills and often-limited knowledge of land governance issues in Afghanistan created a number of problems and delays to the project. To counterbalance the delays, it was decided to skip the development of background reports and separate briefing notes; only the longer panel reports were prepared. Based on the latter, after the panel workshops the final LGAF report was developed.



## 2.2 Government engagement

Government representatives were engaged on a regular basis throughout the entire duration of the project by providing their input for the content of the panel reports, approving the final versions (mainly done by ARAZI), and providing their final validation for the final LGAF report. Additionally, numerous participants for the panel workshops, technical validation workshop, and policy dialogue were suggested by government employees and experts on land governance.

Five out of the nine expert investigators tasked with the development of the panel reports were current employees of state institutions dealing with land governance such as ARAZI and the Ministry of Agriculture, Irrigation, and Livestock (MAIL), while the remaining four were previous employees of government institutions such as the Cadastre and the Afghanistan Independent Human Rights Commission (AIHRC) and independent experts, all with an extensive experience in land issues. Second, the lists of participants for the panel workshops, technical validation workshop, and policy dialogue were developed in close partnership with a number of national experts on land governance in Afghanistan, including the national representatives of the World Bank, government employees, and Afghan civil society organisations (in particular, TLO). Finally, the participation rate at all three types of workshops organised within the framework of this project was relatively high among the government representatives from various ministries and governmental agencies such as ARAZI, MAIL, Cadastre, Ministry of Urban Development Affairs (MUDA), various municipalities, and national and international non-governmental organisations (NGOs). It is worth mentioning that government representatives had a higher participation than the NGO partners, with the highest participation being from ARAZI.<sup>11</sup> In the technical validation workshop and policy dialogue, the following ministries and government agencies were present: Presidential Office, ARAZI, Kabul and Kandahar Municipality, Afghanistan Investment Support Agency (AISA), MAIL, National Environment Protection Agency (NEPA), Ministry of Finance (MoF), Ministry of Mines and Petroleum, AIHRC, Ministry of Border and Tribal Affairs, and Ministry of Justice (MoJ).

In addition to the official outreach activities, the LGAF Country Coordinator often personally approached the MoF, ARAZI, and MAIL to seek clarification on certain issues.

## 2.3 From the collection of background data to the policy dialogue

Nine experts (Afghan practitioners whose names and qualifications are listed in Appendix II) were selected for the development of nine panel reports. Semi-structured qualitative interviews, mainly with the experts from ARAZI, and extensive desk research were used to collect information about land management in Afghanistan. While some officials were interviewed individually, discussions pertaining to a particular indicator were sometimes conducted in groups of two or three officials who jointly decided on the analysis and rating of an indicator. Follow-up interviews were conducted in Kabul to clarify certain issues and scoring dimensions. The desk research included a review of Afghan laws and regulations, reports published by NGOs and international organisations, and data collected by the government. Different sources of information, such as official documents, published literature, and interviews with officials, were used as a triangulation technique to ensure the validity of the information collected. Minimal field research was conducted, mainly due to a specific methodology prescribed for this study; however, previous research conducted by the Afghanistan Research and Evaluation Unit and other research organisations in this field was used.

It is important to note that the lack of reliable statistics about land management and the absence of surveys covering all land in Afghanistan make it difficult to provide an exact and comprehensive picture of the issues discussed through the various indicators. Hence, land experts make informed estimates based on their work experience in the field. However, in a number of cases, the lack

<sup>11</sup> For example, at most of the panel workshops, two or three representatives from different departments of ARAZI were often present. This was mainly because the facilitator of all of the panel workshops was an ARAZI employee and three of the nine expert investigators worked for ARAZI. Since the expert investigator was always present for the panel discussion, ARAZI often had more than one representative present. However, this increased participation could also have been due to the greater level of knowledge of certain ARAZI employees and the unique standing of this organisation among land institutions in Afghanistan.

of data does not permit any estimation. Hence, while this report provides a general overview of public land management issues, many aspects of this topic need more extensive surveying.

Nine panel workshops (see Appendix III for the list of participants) were organised after the finalisation and translation<sup>12</sup> of all panel reports to validate the information, acquire new information on more complex issues, and create a debate among technical experts on the issues of land governance. Despite various problems<sup>13</sup> encountered during the workshops, they attracted a number of experts in the field and hence created a lively debate on certain issues related to land in Afghanistan.

Based on the panel reports, aide-memoires from the panel workshops, and follow-up semi-structured personal interviews, the final report was developed, peer-reviewed by two international experts, and validated through the technical validation workshop (the list of participants is found in the Appendix IV). Aiming to inform Afghan policymakers and create a momentum for a debate on land governance among Afghan policy circles, the Policy Dialogue was organised at the beginning of November 2015 (the list of participants is found in Appendix V).

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12 All nine panel workshops had to be translated into Dari because the majority of participants at the panel reports did not speak English.

13 The unwillingness of participants to read and score the corresponding panel report beforehand, the limited knowledge on certain complex issues, the tendency to speak in general terms without providing detailed information, the translation discrepancies between Dari and English versions of the reports, etc.











### 3. Consolidated Scorecard

#### Legend

	Regular scoring as per LGAF indicators
	N/A in Afghanistan or no data available
	Divided indicator
	New indicator established

Pan-LGI-Dim				Topic	Score			
					A	B	C	D
<b>PANEL 1: Land rights recognition</b>								
<i>Land Governance Indicator (LGI) 1: Recognition of a continuum of rights</i>								
1	1	1	Individuals' rural land tenure rights are legally recognised and protected in practice.					
1	1	2	Customary tenure rights are legally recognised and protected in practice.					
1	1	3	Indigenous rights to land and forest are legally recognised and protected in practice.					
1	1	4	Urban land tenure rights are legally recognised and protected in practice.					
<i>LGI 2: Respect for and enforcement of rights</i>								
1	2	1	Accessible opportunities for tenure individualisation exist.					
1	2	2	Individual land in rural areas is recorded and mapped.					
1	2	3	Individual land in urban areas is recorded and mapped.					
1	2	4	The number of illegal land sales is low.					
1	2	5	The number of illegal lease transactions is low.					
1	2	6	Women's property rights to land as accrued by relevant laws are recorded.					
1	2	7	Women's property rights to land are equal to those by men.					
<b>PANEL 2: Rights to forests and common land and rural land use regulations</b>								
<i>LGI 1: Rights to forests and common land</i>								
2	1	1	Forests and common land are clearly identified in law, and the responsibility for use is clearly assigned.					
2	1	2	Rural group rights are formally recognised and can be enforced.					
2	1	3	Users' rights to key natural resources on land (incl. fisheries) are legally recognised and protected in practice.					
2	1	4	Multiple rights over common land and natural resources on these lands can legally coexist.					
2	1	5	Multiple rights over the same plot of land and its resources (e.g., trees) can legally coexist.					
2	1	6	Multiple rights over land and mining/other subsoil resources located on the same plot can legally coexist.					
2	1	7	Accessible opportunities exist for mapping and recording group rights.					
2	1	8	There exists boundary demarcation of communal land.					
<i>LGI 2: Effectiveness and equity of rural land use regulations</i>								
2	2	1	Restrictions regarding rural land use are justified and enforced.					
2	2	2	Restrictions on rural land transferability effectively serve public policy objectives.					
2	2	3	Rural land use plans are elaborated/changed via public processes, and resulting burdens are shared.					
2	2	4	After a change in use, rural land is swiftly transferred to the destined use.					
2	2	5	Rezoning of rural land follows a public process that safeguards existing rights.					
2	2	6	For protected rural land use (forest, pastures, wetlands, national parks, etc.) plans correspond to actual use.					



2	2	7	Rural land identified for rehabilitation is swiftly transferred to the destined use.					
<b>PANEL 3: Urban land use, planning, and development</b>								
<i>LGI 1: Restrictions on rights</i>								
3	1	1	Restrictions on urban land ownership/transfer effectively serve public policy objectives.					
3	1	2	Restrictions on urban land use (disaster risk) effectively serve public policy objectives.					
<i>LGI 2: Transparency of land use restrictions</i>								
3	2	1	Process of urban expansion and infrastructure development is transparent and respects existing rights.					
3	2	2	Changes in urban land use plans are based on a clear public process and input by all stakeholders.					
3	2	3	Approved requests for change in urban land use are swiftly followed by development on these parcels of land.					
<i>LGI 3: Efficiency in the urban land use planning process</i>								
3	3	1	Policy to ensure delivery of low-cost housing and services exists and is progressively implemented.					
3	3	2	Land use planning effectively guides urban spatial expansion in the largest city.					
3	3	3	Land use planning effectively guides urban development in the four next largest cities.					
3	3	4	Planning processes are able to cope with urban growth.					
<i>LGI 4: Speed and predictability of enforcement of restricted land uses</i>								
3	4	1	Provisions for residential building permits are appropriate, affordable and complied with.					
3	4	2	A building permit for a residential dwelling can be obtained quickly and at a low cost.					
<i>LGI 5: Tenure regularisation schemes in urban areas</i>								
3	5	1	Formalisation of urban residential housing is feasible and affordable.					
3	5	2	In cities with informal tenure, a viable strategy exists for tenure security, infrastructure, and housing.					
3	5	3	A condominium regime allows effective management and recording of urban property.					
<b>PANEL 4: Public land management</b>								
<i>LGI 1: Identification of public land and clear management</i>								
4	1	1	Criteria for public land ownership are clearly defined and assigned to the right level of government.					
4	1	2	There is a complete recording of public land.					
4	1	3	Information on public land is publicly accessible.					
4	1	4	The management responsibility for different types of public land is unambiguously assigned.					
4	1	5	Responsible public institutions have sufficient resources for their land management responsibilities.					
4	1	6	All essential information on public land allocations to private interests is publicly accessible.					
<i>LGI 2: Justification and time-efficiency of acquisition processes</i>								
4	2	1	There is minimal transfer of acquired land to private interests.					
4	2	2	Acquired land is transferred to the destined use in a timely manner.					
4	2	3	The threat of land acquisition does not lead to pre-emptive action by private parties.					
<i>LGI 3: Transparency and fairness of acquisition procedures</i>								
4	3	1	Compensation is provided for the acquisition of all rights regardless of their recording status.					
4	3	2	Land use change resulting in the selective loss of rights is compensated.					
4	3	3	Acquired owners are compensated promptly.					

4	3	4	There are independent and accessible avenues for appeal against acquisition.						
4	3	5	Timely decisions are made regarding complaints about acquisition.						
<b>PANEL 5: Transfer of large tracts of land to investors</b>									
<i>LGI 1: Transfer of public land to private use follows a clear and competitive process, and payments are collected</i>									
5	1	1	Public land transactions are conducted in an open and transparent manner.						
5	1	2	Payments for public leases are collected.						
5	1	3	Public land is transacted at market prices unless guided by equity objectives.						
5	1	4	The public captures benefits arising from changes in permitted land use.						
5	1	5	Policy to improve equity in asset access and use by the poor exists and is implemented effectively and monitored.						
<i>LGI2: Private investment strategy</i>									
5	2	1	Land to be made available to investors is identified transparently and publicly, in agreement with right holders.						
5	2	2	Investments are selected based on economic, socio-cultural, and environmental impacts in an open process.						
5	2	3	Public institutions transferring land to investors are clearly identified and regularly audited.						
5	2	4	Public bodies transferring land to investors share information and coordinate to minimise and resolve overlaps (incl. subsoil).						
5	2	5	Compliance with contractual obligations is regularly monitored and remedial action taken if needed.						
5	2	6	Safeguards effectively reduce the risk of negative effects from large-scale land-related investments.						
5	2	7	The scope for resettlement is clearly circumscribed and procedures exist to deal with it in line with best practice.						
<i>LGI3: Policy Implementation is effective, consistent, and transparent</i>									
5	3	1	Investors provide sufficient information to allow the rigorous evaluation of proposed investments.						
5	3	2	Approval of investment plans follows a clear process with reasonable timelines.						
5	3	3	Right holders and investors negotiate freely and directly with full access to relevant information.						
5	3	4	Contractual provisions regarding benefit sharing are publicly disclosed.						
<i>LGI 4: Contracts involving public land are public and accessible</i>									
5	4	1	Information on spatial extent and duration of approved concessions is publicly available.						
5	4	2	Compliance with safeguards on concessions is monitored and enforced effectively and consistently.						
5	4	3	Avenues to deal with non-compliance exist and obtain timely and fair decisions.						
<b>PANEL 6: Public provision of land information: Registry and cadastre</b>									
<i>LGI 1: Mechanisms for recognition of rights</i>									
6	1	1	Land possession by the poor can be formalised in line with local norms in an efficient and transparent process.						
6	1	2	Non-documentary evidence is effectively used to help establish rights.						
6	1	3	Long-term unchallenged possession is formally recognised.						
6	1	4	First-time recording of rights on demand includes proper safeguards and access is not restricted by high fees.						
6	1	5	First-time registration does not entail significant informal fees.						
<i>LGI 2: Completeness of the land registry</i>									



9	1	4	Information about land rights and usage is shared by public bodies; key parts are regularly reported on and publicly accessible.					
9	1	5	Overlaps of rights (based on tenure typology) are minimal and do not cause friction or dispute.					
9	1	6	Ambiguity in institutional mandates (based on the institutional map) does not cause problems.					
<i>LGI 2: Equity and non-discrimination in the decision-making process</i>								
9	2	1	Land policies and regulations are developed in a participatory manner involving all relevant stakeholders.					
9	2	2	Land policies address equity and poverty reduction goals; progress toward these is publicly monitored.					
9	2	3	Land policies address ecological and environmental goals; progress toward these is publicly monitored.					
9	2	4	The implementation of land policy is costed, matched with benefits and adequately resourced.					
9	2	5	There is regular and public reporting to indicate progress in policy implementation.					
9	2	6	Land policies help to improve land use among low-income groups and those who experience injustice.					
9	2	7	Land policies proactively and effectively reduce future disaster risk.					

## 4. Context

### 4.1 Geographical description

Afghanistan is a landlocked country neighbouring Turkmenistan, Uzbekistan, and Tajikistan to the north, China to the northeast, Pakistan to the east and south, and Iran to the west. It has a population of approximately 28.1 million inhabitants (51 percent male and 49 percent female)<sup>14</sup> with an area of 652,864 km<sup>2</sup>, which makes Afghanistan the 42nd most populous and 41st largest nation in the world.<sup>15</sup> Most of the country is covered by mountains and valleys, with the Hindu Kush splitting the country from east to west. The flattest land is found in the southwest and north of the country, with large areas of sandy desert located particularly in the southwest.

Due to Afghanistan's diverse geological foundation, including its tectonic history as a result of its position to the west of the Himalayas, the country possesses a rich mineral heritage with over 1,400 different mineral occurrences recorded to date, including various precious and semi-precious stones and metallic minerals such as halite, talc, and mica.<sup>16</sup>

Afghanistan's overall dry climate varies from one region to another, as the topography changes dramatically throughout the country. Its arid and semi-arid climate creates very cold winters and hot summers, with large areas experiencing little or no precipitation. The limited rainfall usually occurs in the form of snow in the months of November to April. Consequently, droughts are a major problem in Afghanistan with an estimated two to three years of drought conditions every 15 years. However, in recent years, the drought cycle has occurred more frequently, with droughts experienced in 1963-64, 1966-67, 1970-72, 1998-2006, 2011, and in specific locations in 2013.<sup>17</sup>

### 4.2 Historical evolution

The history of modern Afghanistan started in the 18th century with the Hotaki dynasty in Kandahar and Ahmad Shah's Durrani rise to power in 1747. In the 19th century, Afghanistan served as a chessboard of the British and Russian "Great Game" until gaining its independence in 1919 following the Third Anglo-Afghan War. Since 1970, Afghanistan has witnessed long decades of war starting with the Soviet war (1979-89), followed by the civil war and Taliban era in 1990s, and finally, the United States (US)-led military operation to overthrow the Taliban regime in 2001.<sup>18</sup> After 2001, US and North Atlantic Treaty Organisation (NATO) coalition troops provided military support to Afghan military forces until their partial withdrawal in December 2014. Since then, only approximately 13,000 troops provide training to Afghan military forces with the aim for a complete withdrawal at the end of 2016. The outcomes of the current debates on slowing down the withdrawal still remain to be seen.

### 4.3 Key social and economic indicators

The "Transformation Decade 2015-24" in Afghanistan has certainly not begun easily. The political crisis arising from the outcomes of the presidential elections and the withdrawal of foreign troops in 2014, followed by numerous cooperation issues among the members of the National Unity Government (NUG), the surge in violence by armed opposition groups with increased civilian casualties, and the deadlocked negotiations with Taliban in 2015 are only some of the numerous issues that Afghanistan is currently facing. These all have an enormous impact on the main social and economic indicators in the country.

Afghanistan's gross domestic product (GDP) in 2014-15 was estimated by the Afghanistan Central Statistics Office (CSO) to be 1,209,178 million Afs (USD\$18,940 million), resulting in a GDP per capita of USD\$747, with a \$25 decrease compared to the year 2013. Economic growth also slowed down

14 "Afghanistan Statistical Yearbook 2014-2015" (Kabul: Central Statistics Office, 2015), 3.

15 "Afghanistan Statistical Yearbook 2014-2015," 1.

16 "Afghanistan Initial National Communication to the United Nations Framework Convention on Climate Change" (Kabul: National Environmental Protection Agency, 2012), 14.

17 "Afghanistan Initial National Communication," 14-15.

18 "Afghanistan Initial National Communication," 13.

dramatically from 10.9 percent in 2012-13 to 2.1 percent in 2014-15.<sup>19</sup> The World Bank statistics, which, unlike CSO's, are based on non-opium GDP, also observed a decrease in Afghanistan's real GDP from 14.4 percent in 2012 to 3.7 percent in 2013, with this trend continuing in 2014.<sup>20</sup>

The two largest sectors—services and agriculture—have experienced a decrease or slow down. Although the agricultural sector, in which approximately 49 percent of the Afghan labour force works,<sup>21</sup> increased by 3.7 percent in 2014, its share of national GDP decreased.<sup>22</sup> The CSO cites water shortages as the main reason for this trend.<sup>23</sup> Growth in the service sector, constituting 51.33 percent of national GDP,<sup>24</sup> increased by 2.2 percent in 2014-15. However, this constitutes a slowing down of service sector growth by 4.2 percent in comparison to the year 2013-14.<sup>25</sup>

According to the National Risk and Vulnerability Survey (NRVA), approximately 36 percent of people in Afghanistan live below poverty line, with great disparities between rural and urban areas and among different ethnicities. In rural areas, the incidence of poverty is 9 percent higher than in urban areas, while the Kuchi population is the most vulnerable to absolute poverty.<sup>26</sup>

Migration constitutes another major problem with very complex patterns. According to the NRVA 2011-12, approximately 16 percent of Afghans were born in a different district than where they currently reside, 6 percent in another province, and 3 percent in another country, while urban migration is significantly higher than rural. The majority of Afghan and international migrants migrate to Kabul. Out of the city's 4.2 million inhabitants, around 360,000 people were born abroad and 1.9 million in other Afghan provinces.<sup>27</sup>

The issue of migration is closely linked to that of urbanisation. Following the US-led military intervention in 2001, a massive influx of refugee-returnees began in urban centres. Displaced families, who lost vested investment in their local communities, had become accustomed to a relatively urban life while in refuge, and feared the growth of counterinsurgency in rural areas, often decided to return not to their original villages or provinces, but to urban centres (and, in particular, Kabul) in search of safety and employment opportunities. While the population growth rate for the nation is steady at 2.6 percent, it is only 2.3 percent in rural areas compared to 4.7 percent in urban areas. Today, approximately one-quarter of Afghans live in urban areas, rendering the topic of urbanisation at the core of the country.<sup>28</sup>

Poverty and rapid urbanisation contributes to the fact that the housing conditions of the Afghan population are considered poor, with large differences between urban and rural areas. One issue is the remoteness of Afghanistan, with 14 percent of households located more than 6 km from the nearest drivable road. Only 14 percent of the population—45 percent of urban and 5 percent of rural inhabitants—live in a dwelling that can be considered durable, and approximately 37 percent live in overcrowded dwellings. Rapid urbanisation has contributed to the situation, as 87 percent of the urban population (5.3 million people) live in slum-like conditions.<sup>29</sup>

Finally, the specificity of life for women in Afghanistan is important to note. There have been major improvements since 2001 in terms of women's access to justice and education, their political participation, and cultural acceptance. Nevertheless the disparities between women and men still

19 "Afghanistan Statistical Yearbook 2014-2015," 131.

20 "Afghanistan Economic Update, October 2014" (Kabul: The World Bank, 2014), 2.

21 "National Risk and Vulnerability Assessment 2011-12. Afghanistan Living Condition Survey" (Kabul: Central Statistics Organisation, 2014), 35.

22 "Afghanistan Statistical Yearbook 2014-2015," 132.

23 "Afghanistan Statistical Yearbook 2014-2015," 132; "National Risk and Vulnerability Assessment 2011-12," 35.

24 "Afghanistan Statistical Yearbook 2014-2015," 139.

25 "Afghanistan Statistical Yearbook 2014-2015," 133.

26 "National Risk and Vulnerability Assessment 2011-12," 45-46.

27 "National Risk and Vulnerability Assessment 2011-12," xvi.

28 "Kabul's Hidden Crisis" (London: Overseas Development Institute, 2012), <http://www.odi.org/comment/6688-kabul-refugee-idp-displacement-urban-afghanistan> (accessed 2 September 2015).

29 "National Risk and Vulnerability Assessment 2011-12," 83.



exist, especially in rural areas, and vary from province to province.<sup>30</sup> According to the Asia Foundation survey in 2014, a major improvement can be seen in the likelihood of women taking a dispute to either the formal or informal justice system. In 2013, women were significantly less likely to approach either the Department of Huqooq or *shuras/jirgas* (not the courts), whereas this gap seemed to have disappeared in 2014.<sup>31</sup> In 2015, 47 percent of the Afghan population thinks that courts treat women and men equally,<sup>32</sup> while women's political participation has also improved in the last few years. A total of 69.7 percent of women stated that they voted in the runoff presidential election in 2014 compared to only 43.4 percent in 2009. Nevertheless, women still face major barriers to their political participation such as a lack of voting cards (32.3 percent), resistance from the family (24.6 percent), and insecurity (11.1 percent).<sup>33</sup> In terms of female education, despite the major improvements in the last decade, not all Afghans agree with equal access to education for women. Islamic *madrassa* education is the most accepted type of education for women in Afghanistan (93.6 percent). Even though the percentage of women contributing to household income has increased since 2009, only 64 percent of Afghans agree with women working outside the home compared to 70.1 percent in 2006.<sup>34</sup> In terms of customs and cultural practices, most Afghans prefer the *burqa* as the most appropriate attire for women, with only 1.2 percent in agreement with women who do not cover their head at all.<sup>35</sup>

#### 4.4 Political system and administrative structure

Afghanistan's government is an Islamic republic led by a president with executive powers. After a major political crisis that resulted from the contested runoff presidential elections in 2014, two presidential candidates agreed to sign a deal, and a National Unity Government (NUG) was formed with Ashraf Ghani as president and Abdullah Abdullah as chief executive officer (CEO). The position of CEO shall be further changed to the post of prime minister through a constitutional amendment. This situation provoked numerous questions among Afghan and international legal experts on the constitutionality of such a move. The inability to form a new government, the limited willingness of the members of both camps to cooperate, and the disagreements between the president and CEO on important political issues such as electoral reform did not help to raise the hopes of ordinary Afghan citizens for a better functioning state.

Afghanistan is a presidential democracy with a bicameral parliamentary system. The president is elected every five years by direct vote. To date, three presidential elections have been organised in 2004, 2009 (President Hamid Karzai on both occasions), and 2014 (President Ashraf Ghani). The government of Afghanistan is the main executive organ with the ministers working under the chairmanship of the president. As mentioned above, after the contested runoff presidential elections in 2014 followed by the political crisis and audit of all ballots, the NUG was formed and the new post of CEO with vaguely defined responsibilities created. Parliament as the main legislative organ is comprised of the House of People (*Wolesi Jirga*) and the House of Elders (*Meshrano Jirga*). According to the Afghan Constitution, the *Wolesi Jirga* is elected by the people in a free, general, secret, and direct vote every five years. To date, only two parliamentary elections have taken place in Afghanistan in 2005 and 2010.

The Afghan judiciary is an independent organ of the Islamic Republic of Afghanistan comprised of Islamic, statutory, and common law. No law should contravene the tenets and provisions of Islam.<sup>36</sup> The courts are the primary organs for addressing disputes, although the majority of people refer their disputes to the informal justice system of *shuras, jirgas*, or other ad hoc dispute resolution bodies. The court system consists of primary courts in each district or municipality, provincial

30 It is important to note here that the nationwide statistics are subject to various factors that can influence the final numbers, such as the inability or unwillingness of women to tell the truth, respondents stating what the surveyors wish to hear, major regional disparities that become "buried in" the national statistics, and so forth.

31 Zach Warren, "Afghanistan in 2014: A Survey of Afghan People" (Kabul: Asia Foundation, 2014), 125–43.

32 Zach Warren and Nancy Hopkins, "Afghanistan in 2015: A Survey of Afghan People" (Kabul: Asia Foundation, 2015), 131.

33 Warren, "Afghanistan in 2014," 125–43.

34 Warren and Hopkins, "Afghanistan in 2015," 140.

35 Warren and Hopkins, "Afghanistan in 2015," 132.

36 *Constitution of Afghanistan*, Article 3, 2004 (SY 1382).



courts of appeal in each province, and the National Supreme Court, which includes courts with specialised jurisdiction whose organisation and authority are regulated by the law.<sup>37</sup> The key role of the Supreme Court is dispute resolution, as it is the highest judicial organ of the state. However, it carries out certain administrative roles such as land registration, land transfer, and issuing title deeds, which, among certain experts, are considered to create a conflict of interest in terms of the Supreme Court's judicial role.

The organs of the formal justice system are rarely connected to the informal justice system bodies. While informal dispute resolution mechanisms are legally recognised to a certain extent, due to the lack of clear legislation on the linkages between the formal and informal justice systems, major regional variations exist in relation to the recognition of the informal justice system. Finally, in the areas under the control of armed opposition groups, Taliban courts or other forms of justice are served.

Afghanistan is divided into 34 provinces and 368 districts. Provinces are the primary administrative divisions, led by a governor. However, due to the fact that Afghanistan is a highly centralised state with the majority of executive powers vested in the hands of the president, the governors have limited powers.<sup>38</sup> The provincial governors are appointed by the president, and each province is represented in the Afghan Parliament by two members in the House of Elders (*Meshrano Jirga*). One representative is elected by the provincial council for four years and another by the district councils for three years. Three provincial council elections have so far been held in 2005, 2009, and 2014.

No district council elections have been organised in Afghanistan since 2001. This now creates major difficulties, particularly when amending the constitution to create the new post of prime minister as a part of the deal between Ashraf Ghani and Abdullah Abdullah to end the political crisis after the 2014 runoff presidential elections. The amendment of the constitution requires the agreement of the *Loya Jirga*, "the highest manifestation of the will of the people of Afghanistan."<sup>39</sup> The *Loya Jirga* comprises the members of the National Assembly as well as the presidents of the provincial and district assemblies. Without the district council elections, the *Loya Jirga* seems highly unlikely to take place.

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37 *Constitution of Afghanistan*, Article 16, 2004 (SY 1382).

38 The relative power of each governor varies considerably between provinces as a result of historical circumstances, ethnic allegiances, and the military strengths of the respective governors.

39 *Constitution of Afghanistan*, Article 110, 2004 (SY 1382).

## 5. Land Tenure System, Tenure Typology, and Institutional Organigram

### 5.1 Legal framework

The Afghan Constitution of 2004 established a legal framework for property rights to safeguard the right of individuals to own property, stating that property shall be safe from violation, no one shall be forbidden from owning and acquiring property, except by law, and private property can only be confiscated by legal order (Art. 40).

Legislation for the classification of land tenure comprises over 30 laws and decrees, including the following: Civil Code, Presidential Decree 83 of 2003, Presidential Decree 99 of 2002, Land Expropriation Law (LEL) of 2000, Survey and Cadastre Law of 1988, Law on Pastures and Mara'a of 2000, Forest Management Law (FML) of 2012, Municipal Law 2000, Minerals Law (ML) 2015, Land Tax Law of 1976, and Income Tax Law 2007. The LML 2008, which is currently before the MoJ for further amendments, is probably the most comprehensive law dealing with a range of land issues. Afghan land laws, however, sometimes contradict one another on the classification of state, public, and private land and various other issues.

The NLP containing international best practices was adopted in 2007 and, if implemented, it would constitute a major improvement in Afghan land administration. Unfortunately, the LML 2008 and other laws enacted after 2007 did not take the NLP into account, leaving the operationalisation of different provisions an unfulfilled promise.

### 5.2 Evolution of land governance in Afghanistan

Afghanistan has had four major periods of land administration throughout its history: traditional (until 1933), moderate (1933-78), radical (1978-2001), and modern (2001 to present).<sup>40</sup> The moderate period witnessed concrete efforts to survey land, document land rights, and unify land administration systems. However, the ensuing years of conflict disrupted many of the gains made, and each successive regime sought to reform land relations in Afghanistan. The post-2001 era, known as the modern era, has seen significant constitutional, legal, and policy reforms that sought to strengthen land management and administration. However, despite these gains, there remain significant legal ambiguities and gaps as well as practical challenges in terms of a lack of resources and enforcement capacity.

Afghanistan started its first formal recording of properties toward the end of the traditional period. During this period, land was passed on as entitlements from kings to private individuals, mostly to clan heads. From the early 1930s on, largely for the purpose of collecting tax revenues, the MoF began to keep a record of private properties.

During the period of moderate land administration (1933-78), the courts and the Ministry of Interior began to play a key role in land administration. This period saw a relative modernisation in land management and land administration. A dedicated land administration authority, named AMLAK, was established within the MoF. Efforts were made to modernise land administration by mainstreaming the documentation of property rights. AMLAK was given the main tasks of managing state land and recording the allocation of state land to private persons.<sup>41</sup> This was partly motivated by a desire to improve tax collection, centralise land use planning, and facilitate private investment.<sup>42</sup> These goals continue to inform land administration in the present context. To this end, "land books" were created so that official records could be kept.

40 Jawad Peikar, "Historic and Current Institutional Developments in Afghanistan's Land Sector" (presentation, Housing Land Property Task Force, Kabul, 22 April 2014).

41 Alden Wily, "Land, People, and the State," 19.

42 Alden Wily, "Land, People, and the State," 2, 19.

This period also saw a greater Western influence in land administration in Afghanistan. Under the United States Agency for International Development (USAID) funding, a Directorate of Cadastre Survey was established within AMLAK. USAID also funded a survey institute in Kandahar, and 640 surveyors graduated from the institute.<sup>43</sup> In 1965, a Survey and Statistics Law was passed with a view to move Afghanistan closer to a title system. Under the new regime, a title deed would be issued to the owner, and future transactions would only be legal if they were recorded by a court, for a file specifically created for that property.<sup>44</sup>

Under the USAID initiative, an ambitious programme to survey land in Afghanistan commenced. Between 1965 and 1978, approximately 34 percent of the country was surveyed.<sup>45</sup> However, as funding diminished, the cadastral survey was reduced to a mere record of owners and the location of their land.<sup>46</sup>

However, many of these gains to centralise and mainstream land administration were disrupted during the period known as the “radical administration.” Key developments during this period included land ceilings and redistribution policies. For example, President Daoud introduced land ceilings where farm sizes were prescribed at 20 hectares, and additional land had to be sold privately or passed over to the Afghan government.<sup>47</sup> The Communists radically reduced this ceiling from 20 to 6 hectares. The Communist regime also established a policy of acquiring land without compensation, and redistributing land among the landless, poor farmers, and nomads.

Over the years of conflict, each regime attempted to change land ownership schemes and their systems of administration. During 1992-96, under the mujahidin era, land ownership became particularly problematic as property rights in urban and rural districts became dependent on the commanders that controlled the area. In 1996, after the Taliban came into power, they sought to reform land laws; however, many of their initiatives were mere replicas of laws from the past.<sup>48</sup>

During this “radical period,” many land records, including ownership and taxation books, taxation receipts, and municipals records were lost or destroyed. At the time of the Bonn agreement in 2001, court-prepared documents were believed to cover approximately 10 percent of rural properties and 30 percent of urban properties.<sup>49</sup> The private land sector was reduced to 5-12 percent of the country.<sup>50</sup> Multiple legal frameworks applied to property transactions, including customary, religious, civil, statutory, and constitutional laws.

Since 2001, Afghanistan has seen several major policy initiatives in the land sector. The 2004 constitution *inter alia* provided for the protection of private property, the right to settle in any part of the country, and just compensation where land rights are acquired for public purposes.<sup>51</sup> In 2007, Afghanistan adopted its first NLP providing for a strategic outlook for the land sector. The latest iteration of the LML was adopted in 2008. Some of these initiatives have been criticised for taking Afghanistan back to the pre-1964 constitution position, “as if forty years of land reform had never happened.”<sup>52</sup> In particular, the LML was criticised for instituting a strong bias toward owners with documentation, even though “up to 90 percent of Afghans have no documentation over their holdings.”<sup>53</sup>

In terms of land institutions, AMLAK was restructured and renamed the Afghanistan Independent Land Authority (ARAZI). It is now an independent agency and reports to an inter-ministerial board. ARAZI has ambitious plans to adhere to international best practice and become a “one-stop-shop” for land

43 Alden Wily, “Land, People, and the State,” 2, 19.

44 Alden Wily, “Land, People, and the State,” 2, 19.

45 Peikar, “Historic and Current Institutional Developments,” 1.

46 Alden Wily, “Land, People, and the State,” 2, 19.

47 Alden Wily, “Land, People, and the State,” 1, 26.

48 Alden Wily, “Land, People, and the State,” 1, 22.

49 Alden Wily, “Land, People, and the State,” 1, 22.

50 Alden Wily, “Land, People, and the State,” 1, 22.

51 *Constitution of Afghanistan*, Articles 9, 10, 14, 15, 32, 38, 39, 40, and 41, 2004 (SY 1382).

52 Alden Wily, “Land, People, and the State,” 1, 18.

53 Alden Wily, “Land, People, and the State,” 1, 18.

administration.<sup>54</sup> Although its aim of following international best practice is commendable, serious concerns remain about its lack of technical capacity and the financial viability of its long-term plans.

Despite these significant legal and policy advances, serious practical challenges remain in terms of administering and managing land in Afghanistan. Land grabbing in both the urban and rural areas remain a serious challenge. Land grabbing under the “colour of the law,” by returnees, armed actors, and powerful elites even within government remain largely unaddressed. Informal settlements especially in urban areas are widespread without any concerted efforts to formalise or upgrade them. Additionally, land-related conflicts, including involving armed actors, continue and, in some cases, are increasing.

### 5.3 Tenure typology

The situation of land tenure in Afghanistan remains opaque, with an ill-suited legal framework, inconsistent legislation, unclear delimitation of boundaries, and conflicting definitions of property, including between the state and private entities (individuals and communities) that contest the state’s presumption of ownership over land.

Legislation for the classification of land tenure primarily stems from four sources of law: the Civil Code, Presidential Decree 83 of 2003, LML 2008 (currently under revision), and Shari’a. These, however, sometimes contradict one another on the classification of state, public, and private land. The presence of what may be considered as residual legislation, such as the Taliban-era Rangelands Law, along with non-legal government documents that proffer land classifications, such as MAIL’s master plan, further exacerbates this lack of clarity.

A minority of landholders in Afghanistan appear to possess some form of land document from the Afghan state. The lack of statutory process to legalise the rights of those who possess land, but do not own formal deeds places them in an ambiguous legal position. Moreover, land documents, especially those dating from previous regimes, have often been lost following decades of conflict and displacement.

There is a general agreement among the authors of studies on land tenure in Afghanistan that the current legal framework is both incoherent and unsuitable to the reality of land tenure and land use in the country.<sup>55</sup>

Various historic, demographic, and social realities have contributed to the current incoherent land regime in Afghanistan:

- Ancestral customary rights of ownership and land use of communities are currently (though not for the first time) in conflict with the state’s definition of tenure. This discrepancy has become more pronounced with the increasing attempts to capture land by the state in the past decade, notably through presidential decrees (Decree 83 of 2003).
- After their return from displacement, communities and individuals who find their land has been occupied in their absence are sometimes unable to reclaim their rights over land in their place of return. Although no precise records exist, in some areas, nearly 100 percent of the local population appears to have been displaced at some point during the last 30 years.
- Ongoing conflict-induced, disaster-induced, and/or economic migration and subsequent informal occupation of land by communities. This phenomenon has notably become prominent in urban and peri-urban areas with the rural exodus and rapid urbanisation.
- Land grabbing (as perceived by communities) and/or unregulated acquisition of land by wealthy, well-connected individuals and powerholders.

<sup>54</sup> “ARAZI: An Operational Strategy to Become a Modern Public Land Services Institution” (Kabul: Afghanistan Independent Land Authority, 2014).

<sup>55</sup> See, for instance, Gebremedhin, “Legal Issues in Afghanistan’s Land Titling and Registration”; Alden Wily “Land, People, and the State.”

Patterns of land tenure in Afghanistan further present significant regional variations, calling for a context-specific analysis.

As such, in order to capture the existing forms of land tenure in the country, the following typology will focus on observations stemming from existing field research on land issues in Afghanistan, and not primarily on land-related legislation. Further specific research will be needed in order to assess precisely the reality of tenure holdings in Afghanistan, across regions, and diverse rural/urban realities.

With these points in mind, research on this issue suggests three types of collectively held land tenure (Sections 5.3.1-3 below); four types of individual land tenure (Sections 5.3.4-7 below); and one type of state land (Sections 5.3.8 below). No conclusions have yet been drawn on the “validity” or “invalidity” of the holdings under each tenure type. Each tenure type probably exists throughout the country, and, more often than not, each exists under a cloud of dubious legality or significant community resentment.

### 5.3.1 Collectively held land without documentation

In the framework of this report, collectively held land refers to off-farm barren land, rangeland, and mountain/forestland. Based on the Pasture Law from 2000, it can be considered as specific pasture (Art. 3(2)) located in proximity to a village. However, in the past, various tribes were given land not only in proximity to villages. Therefore, for the purpose of this report, collectively held land does not only refer to specific pastureland, but includes all collectively held land irrespective of its proximity to the village. Collective ownership of land constitutes a major pattern of landholding across the country (in all likelihood encompassing the majority of land in Afghanistan). However, this type of land ownership is not recognised under Afghan law.

One noteworthy example of the prominence of collective holding is Afghanistan’s southeast region (Khost, Paktia, and Paktika provinces),<sup>56</sup> where much land is perceived as commonly owned by tribes and other groups. As such, in virtue of (perceived) ancestral norms of landholding, entire areas are considered to be under the control of a single tribe or group, who then regulates the use of the land and its resources on the basis of custom, including resource division based on the number of members within each group (with this being calculated in various ways).

For the great majority of collective holdings in the southeast, delimitations of boundaries are based on oral tradition passed on from father to son as well as physical markers like rock formations; these holdings are not documented by legally recognised documentation or customary documents. Nevertheless, at least when discussing the issue with outsiders, these groups present the ownership and boundaries of such land as being well-established, and there is significant resistance to “outsiders” claiming ownership or management rights of the land.

It cannot be confirmed that collective landholdings in other parts of the country fit these patterns exactly. However, the southeast is used here as an example, and it is likely that undocumented collectively held land in other areas also displays at least some of these characteristics.

Afghan state law contests the ownership of off-farm barren land, rangeland, and forestland, creating a notable discrepancy between *de facto* and *de jure* ownership and administration. Afghanistan’s legal framework also remains internally inconsistent as to the status of such land—certain paragraphs of the law consider it public land, while others state land. This notably creates a situation of uncertainty in terms of which land is destined for public use to benefit the public, and which land, owned by the state, can be made available for private investment or other non-public use.

<sup>56</sup> On patterns of landholding in Khost Province, see “Major Land Disputes and Land Titling Systems in Khost Province: Implications for a Collaboration between Traditional Dispute Resolution Mechanisms and ARAZI,” (Kabul: The Liaison Office/United States Institute of Peace, October 2014).

Finally, proposed amendments to the LML by ARAZI in 2012 could formalise some community claims by introducing a new type of land called “special village land.”<sup>57</sup> This proposed classification of land might ameliorate some of the challenges of the existing state/private land dichotomy, which denies rights to community ownership. Circulated drafts of the revised FML and Rangeland Law would also recognise some forms of community management, if not ownership, based on the community’s geographical proximity to the resource.

### 5.3.2 Collectively held land with customary documentation

At least in part to address disputes arising between communities over the boundaries of their land or its extension due to demographic pressure and economic motivations, Afghanistan has witnessed the development of customary written documentation for the collective types of holdings described above. That being said, there is no precise information on the extent to which this documentation is used, and it appears to stem mainly from non-state processes of dispute resolution in order to forestall the re-ignition of conflicts.

### 5.3.3 Collectively held land with a title issued by previous government regimes

Past regimes, including Abdurrahman Khan’s for the resettlement of the *naaqilin*<sup>58</sup> and Nader Shah and Zahir Shah’s for tribes in the southeast, granted, by decree, entire areas to specific tribes or groups as a reward for their support in the reestablishment of the Durrani monarchy. Documents provided at the time have often been safeguarded and kept by the concerned groups, who consider them as valid, if not indubitable evidence of their prerogatives over the land. Current Afghan law, however, remains silent on this matter. As mentioned above, only individual property is recognised by the state, and all land for which individual, legally valid proof of ownership cannot be provided is considered as state land as per the Afghan legal framework.

### 5.3.4 Individually held land without any title

As noted, the state recognises land ownership only in cases where individuals possess legally valid title documents. However, after various sorts of collectively held land, individually held land without documentation might constitute the most common type of land tenure in the country. As with collectively held land, many local populations consider the ownership of this land as uncontested—as it has passed from owner to owner via family inheritance without contestation outside of the family, but also without any kind of recording.

### 5.3.5 Individually held land with a non-recognised title

There is no precise information regarding the date of the introduction of customary land documentation for individuals. The phenomenon, however, seems to have gained momentum, as the production of written documentation has reportedly increased over the past decade to avoid competing claims over a parcel of land following transfer or to formalise the resolution of a dispute over individually held land. The relatively widespread use of informal deeds also stems from the need to adapt to an evolving situation where land is less often transmitted via non-commercial processes (e.g., inheritance), but increasingly sold and purchased. Written customary land documentation thus compensates for the presence of “new” parties outside of traditional ownership structures and fills in the gaps left open by non-existent or poorly maintained government registration.

In most cases, however, individual customary documents do not appear to meet the conditions regarding legally valid documentation for ownership, and their owners are thus not legally entitled to own the land. Indeed, as laid out by the LML 2008, customary deeds are theoretically

57 Alden Wily, “Land, People, and the State,” 45.

58 Land distribution initiative that took place during the administration of King Zahir Shah. During his reign the north and northeast of Afghanistan were deemed to be under-populated based on the extent of cultivation the land could support. The King resettled primarily Pashtun families from the south and southeast of Afghanistan to these areas to cultivate the land, and to extend his political reach. For generations, these types of distribution projects have resulted in conflicting land grants and multi-party disputes fueled by ethnic differences and struggles for local power.



recognised as valid documentation if prepared before 6 August 1975, and either recorded in the Books of Ownership and Taxation of 1977-78 or in areas where these books were never prepared or have been lost, if all neighbours of the land attest to its ownership.<sup>59</sup> Much of the existing customary documentation, however, was produced after 1975. For the minority of citizens owning customary land titles from that era, let alone titles recorded by the administration, synchronising these records with what is in many cases a highly complex record of land transfer and occupation may be close to impossible.

### 5.3.6 Individually held land with a state title from a pre-Karzai regime

In the majority of cases when formal documentation is present, research indicates that tax documents (*maylati*) prior to 1975 are used to evidence ownership. Nevertheless, these only contain a limited amount of relevant information: while they do specify the amount of land on which tax was paid, they do not specify its boundaries. What is more, in order to avoid heavy taxes, many landholders only partially recorded their land; leading, for example, to a complex situation in which land was transferred between two private parties, but only part of it is legally recognised as the property of its holder.

Royal-era land documents are another somewhat common form of government-issued land documentation. These were mainly issued under Nader Shah and Zahir Shah on the demand of individuals who had settled a dispute over purchased land and obtained informal documentation that they could convert into formal titles with the royal administration, or who had settled their dispute in a government court, or who were members of tribes with connections to the royal family (particularly in the South of Afghanistan). However, these documents are rarely sufficient to delineate the precise boundaries of a parcel and are sometimes barely decipherable. Many were lost during Afghanistan's protracted conflict, although copies of some are reportedly kept in provincial administrations. Even when the documents remain intact, they often do not record transfers by inheritance or other forms of transfer.

### 5.3.7 Individually held land with a title from the Karzai and Ghani regimes

There are no comprehensive data on the extent of land registration under the current government, but it appears to be a minority phenomenon. In some areas, no official land registration seems to have taken place since 2001. In areas where registration has occurred, the process seems to take place over a period of several months and involve a large number of steps. If the applicant completes the process, he or she then receives a land title from the local court. In many cases, people seem to seek the government land title pursuant to a commercial land transaction or when receipt of the land is tied to a government distribution scheme. However, as regards commercial land transactions (let alone small-scale or "ordinary" transactions), one can assume that most parties, most of the time, do not apply to a court or state agency to register the transaction.

Factors impeding land registration and the provision of legal title documents include the lack of capacity for land management on behalf of the state, the complexity of the titling or formalisation process, the repeatedly modified registration process,<sup>60</sup> fear of tax payments,<sup>61</sup> negative perception of the court (responsible for the issuance of land titles), general wariness

59 Given the ambiguous wording of the LML, the possibility remains that the "pre-1975" requirement does not apply to areas where registration books were not prepared. However, this reading raises the question as to why post-1975 land transactions would be treated so much more favourably in areas without records than in areas with records. In any event, research by TLO and others suggests that it is exceptionally rare for courts to treat any customary deed as valid.

60 Under the LML, holders of land under customary systems may in theory "convert" their customary ownership to state-recognised ("formal") ownership. However, this process requires both parties to produce highly detailed customary ownership documents prepared before 1975 and accompanied by ample attestations regarding the land use since that time—along with procedural steps that many parties find burdensome.

61 Although the Afghan government does not currently assess land tax, some individuals seem to fear the assessment of pre-Communist back taxes and the future re-imposition of land tax should their holdings be known to the state.



of government involvement in land affairs, and widespread corruption of the administration (at the very least, exacerbating the other difficulties). Many purchasers/owners of land have thus not fulfilled the legal formalities required for the competent court to formalise ownership, and, assuming the existence of a deed, they consider a customary deed, a deed from a pre-Karzai administration, or any other form of documentation as sufficient proof of their ownership.

Conversely, and particularly in peri-urban areas that have witnessed increased settlement in the past decade, there are indications that some dwellers have sought a formalisation of their titles through the court in order to secure their rights to tenure. Nevertheless, the registration process remains quite unclear in practice, as research for this report uncovered repeated mentions of fraud by the administration itself across several regions of Afghanistan. This can take the form of bribes paid to the court to obtain the required document, or pressures exerted by powerholders and their connections in the government. This has added complexity to the tenure landscape, with, occasionally, competing claims over land between holders of pre-Karzai documentation, which seems to have been issued by regular processes, and holders of newly acquired court documentation, which might have been procured fraudulently.

### 5.3.8 Land owned by the state (versus public land)

As mentioned previously, inconsistencies in the legal framework for tenure rights and its discrepancy with the reality of urban and, especially, rural tenure render the practical status of state-owned land opaque. On the one hand, the LML 2008,<sup>62</sup> supplemented by Presidential Decree 83, has set up a system whereby, in the absence of legally recognised documentation, ownership of land reverts to the state. On the other hand, our research for this report indicates that the majority of Afghans do not hold valid documentation for land ownership. Most landholders, especially in rural areas, have no documents. As such, informal documentation, unrecognised by the state, often fills the gaps left open by absent state documentation. Given the lack of recognition of collective ownership in Afghan law, the state is the *de jure* owner of an estimated 80 percent of land in Afghanistan. However, the state has the capacity to administer only a small fraction of that land—either due to a general lack of human and technical capacity or because many of these areas remain outside of state control or even legitimate state ownership.

The current framework also does not provide for specific and clear distinctions between state and public land. It notably remains vague on the status of *mara'a* land,<sup>63</sup> *waqfi* (endowment) land, and the case of land owned by government agencies, which appear, in practice, to be owners of the land under their control or management with the capacity to rent or lease it, albeit without clear legal authorisation to do so.

As mentioned above, the realities in Afghanistan differ substantially from the legal framework. Whereas we have listed at least eight types of land based on field research, legal experts agree on three primary types of ownership based on the Afghan legal framework, with different outcomes for their transferability. Table 1 below summarises the characteristics of these three types of ownership.

62 According to the LML 2008, state land includes: “1. Plot or plots of land containing *bogi*, *abi*, *lalmi*, *tapaha*, *chamani*, *jabazar*, *jungalzar*, *alafchar*, *naizar* and other lands that have been officially registered by the government in its principal registry. 2. Lands that are deemed *malkiat-i-auma*, but that have not been officially registered by the government in its principal registry.”

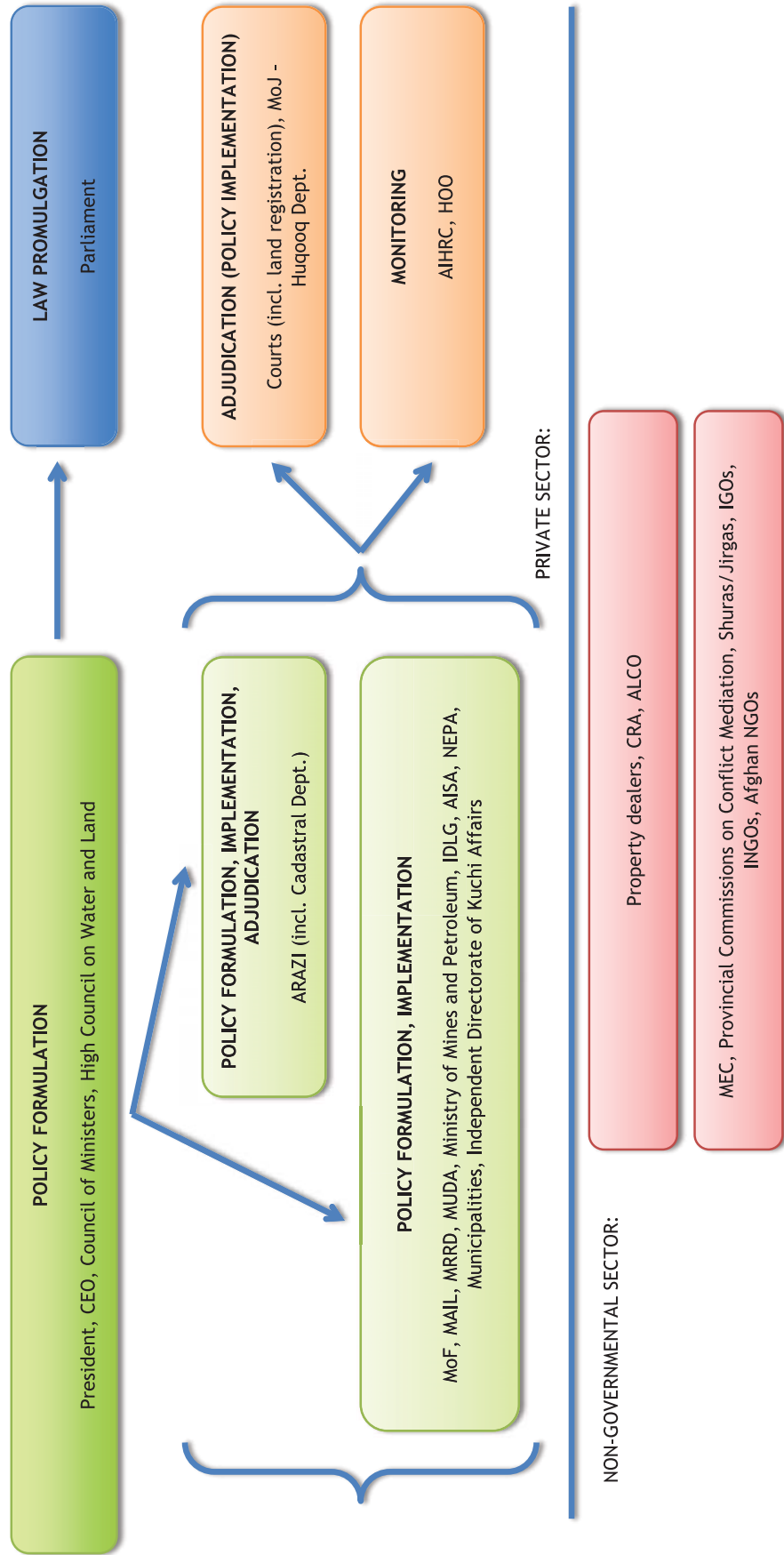
63 The term equates approximately to pastureland, but is used in Afghan law without a precise definition.

Table 1: Three primary types of ownership based on the Afghan legal framework

Type of land	Legal basis	Subcategories	Type of rights	Ownership and responsible organisation	Key challenges
Private	Legal code	Collectively held land without documentation, with customary issued by previous government regimes Individually held land without title Individually held land with non-recognised title (customary title deeds and other informal records) Individually held land with state formal title (from various regimes)	Can be sold, transferred, or inherited Compulsory acquisition possible only for public welfare projects	Individual or legal persons (ARAZI)	Limited possibilities for tenure formalisation Formerly displaced people and refugees who find their land occupied are unable to reclaim it High number of informal settlements in urban settings Some privatised land is perceived as having been acquired by “grabbing” state or public land
Public	No clear definition in Afghan law	Pastures: allocated for public use (collectively held) (MAIL) Forests (MAIL) Graveyards, parks, roads, green areas, playgrounds (municipalities) Schools (Ministry of Education); universities (Ministry of Higher Education); hospitals (Ministry of Public Health)	Cannot be sold, leased, transferred, or exchanged	Municipalities (within the Master Plan), Ministries, and ARAZI (manages all land outside the Master Plan)	Includes land under ancestral customary rights including pastures/forests; ownership is contested between state and public Art. 3(8) of the LML 2008 and Decree 83 blur boundaries between state and public land by emphasising formal documentary proof of ownership Law does not define public land and has no provisions on registering “public land”; this explains why public land is easily claimed as state property and reassigned subsequently to private parties
State	Registered as state land as well as any land that is deemed public but is not registered in the book of government lands	Forests (MAIL) Protected land Arid and virgin land	Only arid and virgin land can be leased or sold under certain conditions (forests and protected land cannot be transferred)	Governmental institutions and ministries (ARAZI)	Lack of adequate mapping Some privatised land is perceived as having been acquired by “grabbing” state or public land

### 5.4 Institutional organigram

The detailed information on various institutions, their interaction, and possible overlap are explained in detail in Appendix VI. The following organigram aims to identify the main actors in Afghan land governance in terms of policy formulation, implementation, and adjudication along with their interaction.













## 6. Presentation of the Substantive Findings per Topic

### 6.1 Land rights recognition

Pan-LGI-Dim		Topic	Score				
			A	B	C	D	
<b>PANEL 1: Land rights recognition</b>							
<i>LGI 1: Recognition of a continuum of rights</i>							
1	1	1	Individuals' rural land tenure rights are legally recognised and protected in practice.				
1	1	2	Customary tenure rights are legally recognised and protected in practice.				
1	1	3	Indigenous rights to land and forest are legally recognised and protected in practice.				
1	1	4	Urban land tenure rights are legally recognised and protected in practice.				
<i>LGI 2: Respect for and enforcement of rights</i>							
1	2	1	Accessible opportunities for tenure individualisation exist.				
1	2	2	Individual land in rural areas is recorded and mapped.				
1	2	3	Individual land in urban areas is recorded and mapped.				
1	2	4	The number of illegal land sales is low.				
1	2	5	The number of illegal lease transactions is low.				
1	2	6	Women's property rights to land as accrued by relevant laws are recorded.				
1	2	7	Women's property rights to land are equal to those by men.				

#### 6.1.1 Recognition of a Continuum of Land Rights

The LML provides for a variety of ways to establish legal ownership based on the possession of documents or long-term occupancy. However, in practice, only the former method of establishing ownership is secure.

According to Art. 5 of the LML, valid recorded deeds include:

1. Documents issued by a legally recognised court, such as a title deed, donation deed, bequest, division, and court decision;
2. Presidential decree, government degree (Council of Ministers), or a land purchase document from the government's properties;
3. Tax payment documents (*maylati*);
4. Water rights documents (*haqaba*);
5. Customary deeds (*asnad-e orfi*);
6. Official ownership deed (*sanad rasmee mulkyet*) from the Democratic Republic of Afghanistan, 1978-79;
7. Official deed for land ownership issued after a legal settlement of the land (*qabala-e qatae*).

#### ***Land tenure rights recognition in rural areas (including customary tenure rights recognition)***

As mentioned above, one of the main challenges concerning the recognition of rights of the majority of Afghans relates to the discrepancy between the existing legal framework and the reality of land tenure in the country, which is overwhelmingly informal and inconsistent within the legal framework itself.



In terms of undocumented rights,<sup>64</sup> long-term unchallenged possession is ensured by Art. 8 of the LML 2008. However, the article stipulates that in order to prove ownership, the land must be cultivated, and proof of continued ownership since 1973 is required as testified by neighbours, *de facto* limiting the claims to land acquired after that date. Considering the occurrence of wars in the period after 1973, this article is of limited usage.

In terms of customary tenure rights, their recognition has been at the heart of debates concerning the discrepancy between the statutory land law and the reality of practices in rural Afghanistan, primarily based on customary norms. Although the constitution is silent on the authority of customary law, it is *de facto* recognised so long as it is perceived not to interfere with Shari'a—which permits the practice of customary law—and is embedded in the constitution.<sup>65</sup>

Art. 5 of the LML 2008 recognises the validity of customary deeds under the condition that they were prepared and submitted before August 1975. In locations where declaration forms were not distributed or the registration book was lost, the LML provides that a customary deed may be recognised if there are no claims to the land; and the land purchase and the buyer's possession has been confirmed by the neighbouring landowners as well as the inhabitants of the locality where the land is situated. Additionally, it is only recognised under the condition that the land seller owns the valid deed.

At the local level, and despite the absence of formal legal recognition, ownership is often well recognised and accepted by communities. However, while this system often functions well within the community, it is not always accepted by the “outsider(s)” (members of other communities, government officials, etc.). Local residents mainly rely on customary documentation (*urfi*) developed by informal justice forums such as *jirgas* and tribal *shuras*, which are not legally recognised except under very stringent (generally unrealistic) conditions. Most of these customary documents take the form of a bilateral agreement between the two transaction parties made in the presence of local leaders and witnesses. Current grey literature suggests that informal deeds generally tend to include the following information: name and address of the transferor and transferee, a description of the boundaries of the land, the price of the transaction, and the fingerprints or signatures of two or more witnesses.<sup>66</sup> Often, however, these deeds lack necessary information such as dates, signatures/fingerprints, and the exact land boundaries.

Though in some instances, court documents have formalised customary rights of tenure, there remain some significant gaps and contradictions between statutory law and customary practices as related to land rights. An employee of the municipality in Kandahar, for instance, reported: “Individuals and communities can claim land only if they have legal documents. Some communities think that the lands near them belong to them. ARAZI never accepts this. According to the law, communities do not have the right to possess those lands.”<sup>67</sup> This statement underlines, as above, the existing discrepancy between communal perceptions of landholding and the legal framework, which refuses to recognise them.

The second major problem in the recognition of rural tenure rights is that Afghan land laws do not protect collective ownership, despite its very common use in the country.<sup>68</sup> Particularly in the rural context with its historical, tribal, and ethnical linkages, most land is held collectively without any or with only customary documentation, but according to a World Bank assessment, there are “weak or no real provisions” to protect collectively owned land. In Herat, for instance, respondents spontaneously mentioned land commonly held by tribes and

64 This will be further discussed in the subsequent sections of the report.

65 For example, Art. 130 specifies that if there is no superseding legal source, Afghan judges shall rely on Hanafi Shari'a.

66 “Major Land Disputes and Land Titling Systems of Khost Province,” 38.

67 Interview with municipality employee, Kandahar, 9 July 2014.

68 Explaining why collective ownership is not provided for in the Afghan legal framework is beyond the scope of this study. However, the existence of various regimes over the course of Afghanistan's modern history, each of which introduced different, sometimes contradictory approaches to land governance, can be one explanation of why collective ownership did not find its place in the current Afghan body of law.

subdivided according to water availability among tribal members. This reality was observed in other areas of Afghanistan and is notably widespread in the southeast—though different practices of land repartition are in use. When it is recorded (only in a minority of cases), such land is usually in the name of a single tribal leader or under the name of the head of the family. This issue will be explained in greater detail in Section 6.2 below.

The fact that most properties in rural areas are neither evidenced by formal deeds<sup>69</sup> nor recorded (there has been no systematic update of records since 1978) has direct implications on the effective rights of rural residents. A Social Impact Assessment conducted by the World Bank on the LML noted that the law demonstrated “strong orientation toward those with formal documentation” when 90 percent of Afghans have no documentation at all.<sup>70</sup> It further noted that the LML, despite provisions such as Art. 8, failed to adequately spell out instances where undocumented rights could be protected.

According to Presidential Decree 83, which supersedes all previous laws relevant to establishing ownership property rights, including through customary documents, all land whose ownership cannot be proven shall be considered under the ownership of the state. Given a) the difficulty in meeting the conditions required for the recognition of customary tenure according to the LML 2008, b) the absence of any documentation for the majority of rural Afghans, and c) the non-recognition of collective tenure, which represents a significant portion of customary tenure, the legal framework for customary land tenure rights appears disconnected from the reality of the majority of rural Afghans.

It is unknown how much land has automatically fallen back to the state. Based on the figures estimated by the Afghanistan Research and Evaluation Unit’s earlier research, the figure could potentially be as high as 90 percent of rural land (70 percent of urban land). Further, even with the existence of the LML, a recent report by the United Nations Assistance Mission in Afghanistan (UNAMA) Rule of Law notes that it is “unknown how many individuals have successfully asserted ownership and obtained land titles pursuant to the LML,” and that “it is unknown how much untitled land is being used by the government or is part of a government development project, or is otherwise claimed by the government, any of which could negate a customary claim by those individuals who occupy or use the land.”<sup>71</sup>

Echoing a similar sentiment, an ARAZI official in Balkh Province evaluated that approximately 90 percent of rural villages could thus be regarded as illegal, as they have been built on land that is considered as government land.<sup>72</sup> Although this figure has not been verified, it is further indicative of the discrepancy between the reality of landholdings and the legal framework for their recognition—leading to the consideration that most rural land is illegally occupied. This was a recurrent comment by land administration officials in all four provinces where interviews were conducted for this study. As reported by an ARAZI official in Khaki Jabbar District of Kabul: “Most of the land is government land. But from a customary perspective, people consider this land as much as their own as government property. People actually use government land according to customary rights. But this is not a legal right.”<sup>73</sup>

### ***Indigenous rights recognition***

In the Afghan context, the definition of indigenous groups may apply to much of the rural population, particularly in some tribal areas (mainly Pashtun, but not only), where customary principles and tribal mechanisms remain strong, tribes retain a strong sense of identity, and the relationship to the land and its available resources are governed by customary principles perceived as ancestral. There are no castes or legally recognised ethnic groups in Afghan Law. Nevertheless, the existence of the Independent Directorate of Kuchi Affairs and the recognition of

69 At the time of the Bonn Agreement in 2001, court-prepared documents were believed to cover 10 percent of rural properties and 30 percent of urban properties. See Alden Wily, “Land, People, and the State,” 22.

70 Alden Wily, “Land, People, and the State,” 44.

71 “The Stolen Lands of Afghanistan and its People: The Legal Framework” (Kabul: UNAMA Rule of Law Unit (RoL) and the Civil Affairs Unit (CAU), 2015), 5.

72 Interview with an ARAZI official, -e-Sharif, Balkh, 30 June 2014.

73 Interview with an ARAZI official, Khaki Jabbar, Kabul, 5 June 2014.

a separate political constituency for Kuchi groups within Parliament indicate that there is a formal recognition of their distinct identity. In order not to create an overlap with the previous indicator concerning customary rights, “indigenous rights to land” will therefore apply here to nomadic, semi-nomadic, and recently settled nomadic tribes (Kuchi and Jat communities).

The definition of Kuchi is nevertheless contested, but it appears to involve the consideration of both lifestyle and ethnicity. Indeed, in the past decades, many Kuchis have settled, adopted a sedentary lifestyle, and acquired land, thus facing similar problems to other sedentary groups.

Art. 14 of the 2004 constitution provides for “improving...the settlement and living conditions of nomads.” In practice, this has mostly translated into state policies of settlement of nomadic tribes and land distribution plans often met with resistance from the local populations. The Environment Law (2007) requires the demarcation of “areas appropriate for use of pastoralists” (rangeland), including migration corridors, and the consultation with nomadic communities in terms of land use and resource management plans (Ch. 1<sup>74</sup>). According to Art. 4<sup>75</sup> of the FML, the management and custody of the forests are the responsibility of MAIL. According to Art. 7 of the FML, all products of the forest belong to the state; individuals and private organisations can use the products from the forest, provided a fee is paid to MAIL. However, in practice, local tribes and villages use forest resources according to their own established procedures. In turn, the new Rangeland Law, intended to clarify the conditions of use of rangeland (which represents 80 percent of Afghanistan’s rural land), is still under draft.

However, the reality in Afghanistan differs from the prescriptions of the legal framework. In most cases, conflicts over land involving Kuchis relate to public or state land. This may be either on their traditional *mena* or in peri-urban areas where services and livelihood opportunities are perceived as more accessible. By laying claim to rangeland, Kuchis may be able to settle there informally and provisionally, but their tenure is necessarily among the least secure, because of the rival claims of other communities and the risk of the state deciding to uphold its right to ownership. Thus, even when Kuchis try to permanently settle on land used for generations as temporary winter abodes, they are often technically landless in what they consider their place of origin.<sup>76</sup> Throughout the research conducted for this study, the settlement of Kuchis was mentioned as particularly problematic in Gozara, Pashtun Zargun, and Enjil districts of Herat, where respondents denied that nomadic Kuchis had any right to settle. The settlement of Kuchis in Arghandab District of Kandahar and in the suburbs of Kandahar city was also reported to create tensions with settled communities. Another example from more recent times relates to the Presidential Decrees in 2010 and 2012, which provided for the settlement of 5,000 Kuchi families in Logar, Laghman, and Nangarhar; some perceived this as the use of a legal instrument to provide land privileges to a certain group based on proto-ethnic considerations, and consequently, local residents resisted this decision.

The violent conflict over land use rights between Kuchi nomads and the local population in Hazarajat can serve as another example for the limited recognition of nomadic tribes in Afghanistan. Historically, from 1892 onwards, Amir Abdul Rahman Khan issued a series of decrees, according to which pastures and vast swathes of agricultural land were taken away from the local Hazara people and allocated (ownership rights) to certain Pashtun and Kuchi ethnic groups as recompense for their cooperation in the war and/or to appease them.<sup>77</sup> This land was converted into settlements, residential houses, and/or agricultural land, thus downsizing the rangeland in the process. This situation persisted until the time of Amir Amanullah Khan, who issued a decree according to which arable land was restored to the Hazaras and upstream land remained as pastures for the Kuchis. During the rule of Nader Khan and Zaher Khan, instructions were issued to provincial governors in

<sup>74</sup> *Environment Law (Official Gazette no. 912), 2007 (SY 1386).*

<sup>75</sup> *Forest Law of Afghanistan, Article 4 (Official Gazette no. 795), 2012.*

<sup>76</sup> Fabrizio Foschini, “The Social Wandering of the Afghan Kuchis: Changing Patterns, Perceptions and Politics of an Afghan Community” (Kabul: Afghan Analysts Network, 2013), 16.

<sup>77</sup> Gholam Mohammad Ghobar, *Afghanistan dar masir-e tarikh (Afghanistan in the Course of History)* (Lahore: Jomhoori Publications, 2005).

the north and centre for the usage of pastures<sup>78</sup> to be given to the Kuchis,<sup>79</sup> who continue to hold them today. Relying on these decrees, the Kuchis claim their usage rights over this land (at times, special pasturelands located in close proximity to villages), thus causing conflicts with the local agriculturalists who also claim their usage rights.<sup>80</sup>

Such conflicts are less intense during winter. Field observations in the southeast further indicate that nomads' rights to temporary settlement in the cold season are, to an extent, recognised by communities on specific parcels of land (*mena*). Notably, these often relate to fallow land, where nomads are temporarily allowed to settle until the start of the agricultural season.

Nevertheless, the violent Kuchi-Hazara conflict in the Hazarajat over the use of pastureland (Kuchis for grazing herds and local residents for grazing livestock or *zamin-e lalmi*, non-irrigated agricultural land) indicates that land-related conflicts involving Kuchis do not only relate to their permanent settlement, but also involve complex considerations of access to summer pastures and the recognition (or non-recognition) of communities' rights to access and exploit them.<sup>81</sup> To this end, ARAZI suggested the establishment of a technical working group comprising MAIL, Ministry of Rural Rehabilitation and Development (MRRD), Ministry of Energy and Water, Independent Directorate of Kuchi Affairs, Commission for Dispute Resolution for Kuchi and Nomad Affairs, the Parliament, and ARAZI to provide technical input on adequate solutions to issues regarding the Kuchi communities in Afghanistan. This effort is yet to materialise.

The situation of Jat communities is distinct from that of the Kuchis.<sup>82</sup> Comprising an estimated 20,000 to 30,000 individuals who have recently settled in peri-urban areas, mainly surrounding Kabul and Mazar-e Sharif, these communities are notably characterised by social, economic, and political marginalisation, political exclusion, as well as a distinct lifestyle, including nomadic practices distinct from other nomadic groups.<sup>83</sup> Considered stateless, most are refused citizenship by the Afghan authorities. As such, studies indicate that approximately 80 percent of households are not registered and do not hold any form of identification document, which inhibits, among other things, their legal access to land ownership.

### ***Land tenure rights recognition in urban areas***

The difficulties for land tenure recognition in urban areas are similar to those in rural areas, but for different reasons. In urban areas, rapid urbanisation, extensive land grabbing, and large informal settlements create serious problems for urban land tenure recognition. At the time of the Bonn Agreement in 2001, it was assessed that court-prepared documents were believed to cover only 30 percent of urban properties.<sup>84</sup> In light of the tendency of the Afghan legal framework to prioritise state ownership over any other, previous research conducted by the Afghanistan Research and Evaluation Unit's earlier research estimated that approximately 70 percent urban land has fallen back to the state due to the inability of potential owners to prove their rights.

Numerous legal and policy provisions aim to provide urban land tenure security. Presidential Decree 104 enacted in 2005 puts the provisions in place regarding the distribution of land for housing to eligible returnees and internally displaced persons (IDPs). The National Policy on Internal Displacement approved in November 2013 addresses the right to adequate housing and access to land (Art.7.1.3). It notably urges the Afghan government to take measures to ensure that IDPs

78 The government gave only the right of usage to the Kuchis, not the ownership rights.

79 Based on *Pasture Law*, Article 3 (*Official Gazette* no. 795), 2000 (SY 1421), pastures cannot be sold, bought, or leased; they can only be used.

80 Based on the author's experience and analysis.

81 Foschini, "The Social Wandering of the Afghan Kuchis," 17-21.

82 The categorisation of Jats (also known as Jogi and Chori Frush) in an ethnic category is also contested, and the denominations "Jat," "Jogi," and "Chori Frush" are exogenous to the communities themselves. See "Jogi and Chori Frush Communities: A Story of Marginalization" (Kabul: Samuel Hall Consulting/UNICEF, 2011).

83 "Jogi and Chori Frush Communities."

84 Alden Wily, "Land, People, and the State," 22.

and returnees<sup>85</sup> are permitted to upgrade their settlements, explore community-level initiatives to lend, rent, or sell land in IDP settlements, and identify possibilities to grant IDPs security of tenure. This includes the identification of available land, the clarification of arrangements with landowners and hosting communities, and usufruct schemes.

However, in practice, urban tenure security has been severely impacted by a drastic increase in urbanisation over the past decade, with a rate of urbanisation close to 5 percent per year, one of the highest in the world.<sup>86</sup> Additionally, the situation of recent IDPs and returnees, most of whom settle in cities in search of livelihood opportunities and greater access to services, remains one of the major challenges in terms of urban tenure security in the country. Finally, land grabbing is another major issue that prevents the urban population from securing tenure rights. The abovementioned issues will be discussed in greater detail in Section 6.3.

## 6.1.2 Respect for the enforcement of rights

### *Opportunities for tenure individualisation*

As mentioned above, it is common (though not legally recognised) for a parcel of land to be used and/or collectively held by more than two parties, with one original document in the name of a village or, most commonly, in the name of an ancestor whose descendants share the use of the land. Requests for tenure individualisation mainly come from heirs aspiring to divide inherited land among themselves. Art. 25 of the LML 2008 provides for the formalisation of individual tenure recognition that was recorded collectively under the name of an elder or a community through the settlement. According to ARAZI officials, there are currently two types of individualisation procedures to be made through either the courts or the land clearance process (*tasfiya*), which is the responsibility of ARAZI.

The *tasfiya* process covers only land legally held under the LML. It includes the mobilisation of a land clearance delegation (comprising two members from each of MoF, MAIL, and five members from ARAZI, two of which are from the Survey and Cadastre Directorate), which is in charge of verifying the original document and proceeding to the division of the land based on the available information.

The court process is reportedly similar, following a petition made to the court by the parties, who are provided with a “document of division” (*taraka khatt*), considered as a valid formal deed as per Art. 5 of the LML. If none of the documents specified in Art. 5 of the LML are available, the process is done according to Art. 8 of the LML, which recognises the tenure of a person if he has held the land in question for at least 35 years.

However, a major issue concerning the opportunities for tenure individualisation is the general absence of legal documentation across the country and the difficulties of landholders to comply with Art. 8 of the LML, given both the high trends of displacement during the past decades and the extent of landholding by the government. Moreover, the dispositions in the existing LML for land clearance remain insufficiently descriptive in terms of the set of procedures and mechanisms to be used.

Indeed, the opportunities for tenure individualisation remain limited in Afghanistan. Additionally, due to the unclear process of tenure individualisation, the high levels of corruption in public institutions, the uncontested customary ownership rights mainly in rural areas, and the fear of paying taxes, the motivation for collectively held areas to be individually registered is very low. Nevertheless, there have been scattered reports of the formalisation of traditionally distributed land—usually government land—in some provinces (such as the southeast province of Khost), with communities registering the individual ownership of various members with the court. Yet these

85 Returnees are persons who return to Afghanistan after being compelled to leave the country due to persecution or a situation of generalised violence, including returning asylum seekers and refugees; see Caroline Howard and Jelena Madzarevic, “Security of Tenure and the Forced Eviction of IDPs and Refugee Returnees in Afghanistan” (Kabul: Internal Displacement Monitoring Centre and Norwegian Refugee Council, 2014), 7.

86 Shobha Rao and Jan Trustka, “Enhancing Security of Land Tenure for IDPs” (Kabul: UN Habitat, 2014), 15.



practices were reported to have occurred after the substantive use of corruption and bribes.<sup>87</sup>

### ***Recording and mapping of rural and urban land***

Before engaging in the discussion on recording land, it is important to clarify the terminology used for the purposes of this report based on the Afghan context. *Recognition* of rights refers to how rights are legally recognised based on various land-related laws and decrees. *Registration* is the act of writing down information about land in the Principal Books of ARAZI or the courts' Register of Title Deeds (*kondas*). Rights in Afghanistan can be *recorded* in the Land Statistics Registration Book of the Survey and Cadastre Directorate, which serves as a "probable" record of ownership.

However, most Afghan land remains unrecorded and unmapped with considerable regional variations. Even in the areas where rights are documented to various extents, the records have not been updated. Based on different accounts, reportedly only 33-36 percent of land in the country has been formally registered, with the most recent records dating back to the regime of Daud Khan (1973-78). Additionally, the last nationwide cadastral land survey, which covered only 34 percent of mostly rural and peri-urban private land before being stopped,<sup>88</sup> was conducted between 1970 and 1978, and has not been updated since.

As the policy on how to improve land governance has been modified with each regime change, there are various (and not always interlinked) ways to record and/or register land. Based on the experience of the experts interviewed for this study, registration through ARAZI's *tasfiya* process and court registration through the acquisition of a formal title deed are the only uncontested mechanisms of registering land in Afghanistan. A summary of the different ways of recording land is found in Table 2 below:

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87 "Major Land Disputes."

88 There is no data available on the types of land that were surveyed. According to the expert's anecdotal understanding, all types of land were surveyed.



Table 2: Types of recording land in Afghanistan

	Formal	Customary	Non-documentary evidence
<b>Registration at ARAZI: land clearance (tasfiya)</b>	<p>Land registration at ARAZI is probably the most valid proof of ownership in Afghanistan, because when transacting the land through court registration, the validation of the registration in the Principal Books of ARAZI is required. However, this is possible only through the land clearance process (<i>tasfiya</i>).</p> <p><i>Tasfiya</i> is a process in which a team (currently including members of the Survey and Cadastre Directorate) goes to the field and by using different measuring techniques establishes the boundaries of the land, water rights, taxation status, and the legitimate owner based valid legal documents (all legally valid documents proving the ownership of land as set out by the LML 2008).<sup>1</sup></p> <p>However, <i>tasfiya</i> is currently conducted only in cases when a major dispute over land exists, a large development or mining project is planned, land is located near state land, or in specific cases, when powerful people are involved. It is very difficult for ordinary Afghan citizens to have their land cleared by ARAZI and hence be registered in its Principal Books.</p>	<p>A customary deed must have been prepared before 1975, and the seller must possess the original legal deed for it to be considered legal. The buyer and seller invite to their house or the local mosque two to three persons, comprising elders, the <i>arbab/malik</i> (head of village) in rural areas or <i>wakil-e-gozar</i> (community representative) in urban areas, and the mullah. The mullah or one of the participants writes the details on a piece of blank paper, which includes the date, the buyer(s) and seller(s) name, father's name, and grandfather's name, the size of the property, its boundaries, cost according to the market value, and a statement of agreement by both parties. The buyer and seller then add their signature or fingerprint to the bottom of the deed. The elders, mullah, and <i>arbab</i> or <i>wakil-e-gozar</i> sign the deed as witnesses. This is prepared in two copies, one for the buyer and one for the seller.</p> <p>The <i>tasfiya</i> team accepts the customary deeds provided that they fulfil the abovementioned requirements. If the rights holder does not have a copy of the original valid title deed, he/she has to seek the validation from the court against their archives (<i>makhzans</i>).</p> <p>The majority of Afghans do not possess the original valid title deed. Due to the wars, many legal documents were destroyed. Also, the condition stating that only customary deeds prepared before 1975 are valid excludes holders who acquired their rights after that year.</p>	<p>The <i>tasfiya</i> delegation conducts their investigation on long-term unchallenged possession, which is recognised when proven through the testimonies of neighbours, stating that the person has lived on and cultivated the land for more than 35 years, and that there are no other claims over it. However, to prove long-term unchallenged possession is problematic, taking into account the decades of war and internal and cross-border migration.</p>
<b>Court registration: acquiring the title deed</b>	<p>Courts in Afghanistan do not equally weight the government documentation listed in the LML as valid evidence of ownership.</p> <p>The objective of acquiring a title deed is to formalise land ownership after the transaction (purchase) of land. This type of recording of rights can only occur when completing a transaction.</p> <p>Although the courts are legally bound to accept all seven legal documents proving ownership as listed in the LML 2008, judges often refuse to accept tax and water payment receipts, as well as <i>sanad rasmee mulkyet</i> (documents proving ownership during the Democratic Republic of Afghanistan in 1978-79) out of fear of accepting forged documents.</p>	<p>Customary deeds are accepted in theory as long as they meet all abovementioned requirements. Often, however, the required information such as the signatures or fingerprints of witnesses is missing from the customary deed; these documents cannot be accepted by the courts. It is only possible to formalise customary title deeds when transacting (selling) land. There is thus no mechanism whereby one could, after meeting all the necessary requirements, turn a customary deed into a formal title deed. Only the buyer, when purchasing land based on the seller's customary deed, can obtain the formal title deed after going through the court registration. There were efforts by the Judicial Reform Commission to push for an approval of a Customary Deed Registration Law in 2005, but this draft law is yet to be enacted.</p>	<p>Long-term unchallenged possession is accepted in theory by the courts as long as all requirements as per Art. 8 of the LML are met, taking into account the difficulty of proving this in praxis. There is no process of formalising long-term possession based on non-documentary. Similarly to customary deeds, one has to transact the land in order for the buyer to acquire a formal title deed.</p>

<p><b>Cadastral recording and mapping</b></p>	<p>The entry of the owner's name on the forms of the cadastral survey (ownership list and card) is not necessarily official confirmation of ownership. It is rather a statement of "probable ownership" based on field data collected about each surveyed parcel. This is mostly because the cadastral team does not have the responsibility to investigate who is the rightful owner.</p> <p>a) National Cadastral Survey started in 1964. Its objective is to provide maps and spatial information about land and link this information to other land registries. The last survey conducted in 1970-78 surveyed only 30 percent of land. Only an additional 4 percent of land has been surveyed in the last five years after various presidential decrees.<sup>2</sup></p> <p>The cadastral map is the most valuable output of this process. The outcomes of the cadastral mapping are sent to ARAZI for recording.</p> <p>b) National Inventory Survey (<i>mowzeyee</i> survey): the methodology changed from a cadastral to inventory survey to accelerate the mapping process.<sup>3</sup> This shorter and simpler methodology has been used until now, although only in rare cases as mentioned above. It is possible for an individual to have land surveyed on demand; however, the approval of the ARAZI's CEO is needed. In cases of large tracts of land like whole villages, the approval of the president must be sought. This is done by submitting a letter of request to the Administrative Office of the President. However, in reality, land inventory occurs rarely for ordinary citizens in Afghanistan.</p>	<p>Customary deeds are accepted, taking into account that the Survey and Cadastral Directorate does not have the responsibility to determine the rightful owner. The word "customary" is written on the ownership list and in the cadastral records.</p>	<p>Long-term unchallenged possession based on all required non-documentary evidence is accepted. The words "under claim" is written on the ownership list and in the cadastral records.</p>
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1. The *tasfiya* form has 57 columns to be completed by the team; with information such as if the land is shared or inherited, if there are any encumbrances like loans, etc.
2. After 1978, the National Cadastral Survey was halted by a presidential decree. Only on the president's approval can the Survey and Cadastral Directorate conduct further surveys. Please note that the name of the Afghan cadastre was formerly the Cadastral Survey Department when it was part of the Afghan Geodesy and Cartography Head Office (AGCHO). Now a part of ARAZI, its name has been changed to the Survey and Cadastral Directorate.
3. The use of different equipment, avoiding the use of astronomical observations, triangulation, measurements by steel tape, etc.

Although some geographical variations were observed,<sup>89</sup> only a minority of landholders in Afghanistan register their land. Hence, the majority lack any form of land documentation from the Afghan state, while informal documents still being the most widespread form of documentation (if any documentation exists at all).

One of the reasons mentioned for the low frequency of registration and formalisation is reportedly the widespread corruption of government institutions, which require the payment of bribes. According to the agencies involved in addressing land issues, most rural residents prefer the use of customary deeds as the process for formalisation and registration requires the payment of informal fees. Customary deeds are thus considered cheaper, they do not require travelling to the nearest centre, and include little or no payments.<sup>90</sup>

Another cited reason was the perceived complexity of the administrative process. According to the World Bank's 2015 report "Doing Business in Afghanistan," it takes approximately 250-360 working days for the completion of land tenure recognition.<sup>91</sup> Therefore, most people prefer to deal directly with community representatives to divide land among heirs, distribute land among tribal members, or sell parcels. There were further instances of individual parties documenting transfers "themselves": for example, concluding a bilateral agreement without the assistance of a judicial forum (formal or informal). Officials, despite usually tolerating customary forms of land ownership, do not regard these documents to hold any legal value.<sup>92</sup>

Paying taxes also deters people from registering their property, in particular when adding the informal fees, which often have to be paid in addition to regular land taxes. People try to avoid paying taxes due to a lack of financial resources or because they do not believe that the government will spend the money to their benefit. Some high-ranking officials and wealthy individuals do not pay taxes, knowing that they will not be pursued.

### ***Illegal land transactions***

Due to the largely customary tenure of Afghan land with only a minimal portion being recorded or mapped, the opportunities for illegal land transactions are enormous.

Illegal land sales are more broadly known in Afghanistan as "land grabbing" or "land usurpation." This occurs more in urban than rural areas, because land values are higher, although all types of land (private, public, and state) are usurped. The term has been defined as the "use, control, occupation or ownership of land by one without a bona fide right."<sup>93</sup> This definition captures many forms of illegal land transactions including the following instances: "the use of physical force, intimidation or violence by powerful people to remove others from land; individuals occupy and improve empty land; individuals obtain title through a land allocation scheme that feels to meet legal requirements; individuals obtain title through fraud."<sup>94</sup>

89 These variations were not so much observed on a regional basis, but within small pockets of districts. For instance, although landholders in Balkh Province appeared to often hold more formal documentation than in the other three provinces, the Balkh district of Shur Tapa was reportedly deprived of formal deeds. Similar variations were observed within Kabul Province, where the district of Shakardara has relatively more documentation than Surobi and Khaki Jabbar, as well as between the districts of Kabul city, where less than 1 percent of PD 13 residents hold formal documentation.

90 A development worker interviewed in Balkh Province provided the following anecdotal evidence: "In Sar-i Pol, you have to pay 6,000 Afghanis when you want to register your land if you refer it to the courts. And they see the size of your land and based on that, they ask for additional bribes to give Qabala-e Shariayi. And it then gets delayed. This is a chronic issue." Interview with a development worker, Mazar-e Sharif, 30 June 2014.

91 World Bank, "Doing Business 2016: Registering Property" (Washington, DC: World Bank, 2015) <http://www.doingbusiness.org/data/exploreconomies/afghanistan/#registering-property> (accessed 4 September 2015).

92 Interview with community leader and district administration officer, Zendan, Khaki Jabbar, 7 June 2014.

93 "The Stolen Lands of Afghanistan and its People: The Legal Framework," 38. This definition was also used in the Draft Policy Paper entitled "Addressing Land Grabbing through the Criminal Justice System" (Kabul: Policy Advisory Group on Land, 2014).

94 "Addressing Land Grabbing through the Criminal Justice System."

Presidential Decree 45 on grabbed land requested the mapping of all land grabbed across Afghanistan. According to this decree, a list of land grabbers was to be compiled by all ministries from which land had been grabbed, and subsequently, submitted to ARAZI. Statistics compiled by ARAZI indicate that more than 1.2 million *jeribs* of land have been usurped over the past decade.<sup>95</sup> A Special Parliamentary Committee created to align a list of land grabbers with the list already drafted by ARAZI includes over 15,000 individuals who have allegedly participated in land grabbing.<sup>96</sup>

A recent report by the Independent Joint Anti-Corruption Monitoring and Evaluation Committee (MEC) identified one of the most common means of land usurpation to be document forgery.<sup>97</sup> During the registration process, documents and deeds are removed or replaced with fake deeds in the court archives (*makhzans*). Land is also usurped through forged powers of attorney, customary deeds, and inheritance. Additionally, documents that are stored in poor-quality conditions have made them vulnerable to deterioration. In particular, forgeries carried out by court employees have been identified as one of the main forms of land usurpation. The report also notes that there have even been instances of deliberately destroying existing records.<sup>98</sup>

Additionally, field data collected for this report showed that illegal land transactions represent a widespread practice across the country. It was notably mentioned as a serious problem by local ARAZI offices. The district ARAZI office in Balkh District, for instance, mentioned land grabbing as the main challenge, and insisted that most land grabbers had not been identified by the government.<sup>99</sup> In Balkh in general, but also in Herat Province, land grabbing by local powerholders and former jihadi commanders, who then illegally sell the appropriated parcels, was notably mentioned as a widespread phenomenon by several interviewees. Most parks within Mazar have similarly been grabbed by local powerholders, allegedly with the tacit support of government employees.<sup>100</sup> In other areas, such as Kandahar city, illegal land sales by land grabbers were reported to occur on a “huge scale.”<sup>101</sup> ARAZI officials, despite mentioning the wide-scale occurrence of illegal land sales, reported that they had no precise information about the extent of these practices in their areas. Others provided approximate figures concerning illegal land sales in their areas. In Guzara District of Herat Province, for instance, illegal land sales reportedly reach 35 percent of all transactions—mostly through the use of forged documentation. In Pashtun Zarghun District of the same province, 10 percent of sale transactions are reportedly considered as illegal. The proportion reportedly rises to 60 percent in Spin Boldak District of Kandahar. No information, however, was provided concerning the criteria used to define “illegal land sales,” which, as above, may cover different realities.

Despite the extensive nature of the problem, the current legal framework does not adequately address the crime of land grabbing.<sup>102</sup> The LML contains a criminal provision relating to land grabbing; however, this provision has been criticised, as it does not define the act of land grabbing, set out the elements of land grabbing, or provide for any penalties.<sup>103</sup> Similarly, land grabbing is not separately criminalised in the Penal Code. While there are possibilities to prosecute the crime of land grabbing as “theft” under the Penal Code, it has been argued that the current theft provisions only cover moveable property.

Given the limited reach of government authorities in most parts of the country and the widespread occupation of government land according to customary norms unrecognised by the State, transactions over land that is legally state-owned but customarily or *de facto* occupied by communities who consider it their rightful holding might also be considered as illegal.

95 “Public Inquiry into Land Usurpation,” 9.

96 “The Stolen Lands of Afghanistan and its People: The Legal Framework,” 42 n. 184.

97 “Public Inquiry into Land Usurpation,” 9.

98 “Public Inquiry into Land Usurpation,” 10.

99 Interview with District ARAZI, Balkh District, 3 July 2014.

100 Field research, Balkh and Herat provinces, June/July 2014.

101 Interview with a provincial ARAZI official, Kandahar, 9 July 2014.

102 “The Stolen Lands of Afghanistan and its People: The Legal Framework,” 9.

103 “The Stolen Lands of Afghanistan and its People: The Legal Framework,” 9.

Another form of illegal land sales includes the sale of state or public land, which is not allowed under Afghan law, the sale of leased land, or the sale of land with partially forged documentation. Illegal private land leases as opposed to illegal land sales were mentioned to be scarce, allegedly due to the low revenues drawn from leases as compared to sales. Given the high proportion of unrecorded land and the potential of lease transactions between individuals, one cannot exclude, however, that the practice does exist.

Illegal state land leases according to Art. 19 of ARAZI's Land Lease Procedure include the following:

- Leasing state land for agricultural purposes and using it for business purposes, because the price of leasing land for agricultural purposes is lower;
- Subleasing already leased government land at a higher price than the original lease;
- Leasing state land for business purposes with harmful effects to the environment;
- Leasing state land for a specific purpose without using it.

The procedures for leasing state land and the associated issues will be explained in greater detail later in this report. At this stage, it is important to note that illegal state land leases do take place in Afghanistan. One such example is that of state land in Ade Torkhum in Jalalabad. This land was leased for agricultural purposes by two businessmen, but later turned into a residential area where the plots were sold to third parties.

### **Women's formal rights**

Women's rights to ownership and acquiring land are embedded in the Afghan Constitution, particularly in Art. 40 that provides that "no one shall be forbidden from owning property and acquiring it." Art. 22 further mentions: "The citizens of Afghanistan, man and woman, have equal rights and duties before the law." Additionally, Art. 34 of the Elimination of Violence Against Women Law of 2009 establishes short-term imprisonment for those who prevent a woman from possessing or acquiring personal property, such as a salary, house, and other goods. According to Shari'a, the Afghan Constitution, as well as other statutory laws, there is no prohibition on women obtaining equal property rights to men. Daughters and wives are thus entitled to a share of their brothers and husbands' inheritance.

Despite the formal legal provisions that allow women to own land, very few women do in reality. Daughters tend to abandon their inherited land rights in favour of their brothers, while widows who inherit land commonly transfer it to their sons (known as the practice of renunciation or *tanazul*). The rare cases in which women retain control of inherited land are when they are brother-less and unmarried, thus keeping the land due to the lack of support from brothers and husbands. Widows and female heads of household are sometimes recognised at the local level as the owners of a parcel, but rarely do they register these rights in their own name, preferring to register them in the name of a male member of the family (son, nephew, etc.).

Studies have found that almost all land is registered in the name of the male head of household: less than 2 percent of women own land, and the majority are widows.<sup>104</sup> Field research largely confirmed these findings, although slight geographical variations were observed: a reported 10 percent of women own land in several Balkh districts, although it remains unclear if the land is effectively recorded in their names or in that of their late father, husband, or son, which appears to be the case in most areas across Afghanistan.

The reasons for this trend are the strong social and customary barriers to property ownership among women, as patriarchal structures prevail. Afghan women often believe that it is not appropriate to inherit from their parents, because they will have a right to their husband's property after marriage. In practice, this is not applicable most of the time, particularly for divorced women.

<sup>104</sup> "USAID Country Profile: Property Rights and Resource Governance: Afghanistan" (Washington, DC: United States Agency for International Development, 2010), 8.



In this case, women rarely inherit property from their husbands. Similarly, when a woman is widowed and childless, she often does not inherit property due to the popular belief that she will remarry; the inherited land would thus end up in hands of her new husband. On the contrary, when a woman has children, inheritance rights are often granted to her. Moreover, the complexity of the formal process of registration deters many women from registering their rights, because they lack knowledge and access to the relevant institutions. In urban settings, where female heads of household and widows are increasingly asserting their rights to land, they are still unlikely to try to register their rights formally, because the process is time-consuming and costly, and because, due to social pressure, they are less familiar with administrative processes.

## 6.2 Rights to forests and common land and rural land use regulations

Pan-LGI-Dim				Topic	Score			
					A	B	C	D
<b>PANEL 2: Rights to forests and common land and rural land use regulations</b>								
<i>LGI 1: Rights to forests and common land</i>								
2	1	1	Forests and common land are clearly identified in law, and the responsibility for use is clearly assigned.					
2	1	2	Rural group rights are formally recognised and can be enforced.					
2	1	3	Users' rights to key natural resources on land (incl. fisheries) are legally recognised and protected in practice.					
2	1	4	Multiple rights over common land and natural resources on these lands can legally coexist.					
2	1	5	Multiple rights over the same plot of land and its resources (e.g., trees) can legally coexist.					
2	1	6	Multiple rights over land and mining/other subsoil resources located on the same plot can legally coexist.					
2	1	7	Accessible opportunities exist for mapping and recording group rights.					
2	1	8	There exists boundary demarcation of communal land.					
<i>LGI 2: Effectiveness and equity of rural land use regulations</i>								
2	2	1	Restrictions regarding rural land use are justified and enforced.					
2	2	2	Restrictions on rural land transferability effectively serve public policy objectives.					
2	2	3	Rural land use plans are elaborated/changed via public processes, and resulting burdens are shared.					
2	2	4	After a change in use, rural land is swiftly transferred to the destined use.					
2	2	5	Rezoning of rural land follows a public process that safeguards existing rights.					
2	2	6	For protected rural land use (forest, pastures, wetlands, national parks, etc.) plans correspond to actual use.					
2	2	7	Rural land identified for rehabilitation is swiftly transferred to the destined use.					

### 6.2.1 Introduction

Approximately 80 percent of the rural Afghan population depends on the land to secure their day-to-day livelihood. The country's future stability and economic development is also dependent on the management of natural resources, including forests, common land, and pastures (rangelands).

Currently, pasturelands cover 30.1 million hectares of land, constituting around 45 percent of the country's overall area,<sup>105</sup> excluding the vast swathes of land considered as "non-arable" or "arid" and used for grazing in winter. Therefore, the total area used for grazing in Afghanistan constitutes 70-80 percent of its total land area. These pasturelands provide habitat and fodder for around 35 million livestock as well as wildlife. Pasturelands constitute

<sup>105</sup> "National Plan for Sustainable Rangeland Management," Fourth Draft (Kabul: Ministry of Agriculture, Irrigation, and Livestock, 2012).



major sources of revenue for the rural population who use them to make livestock by-products and grow herbs.<sup>106</sup>

Forests are one of Afghanistan's most important national assets, which play a significant role in supplying construction timber, fuelwood, and industrial timber. Forests are crucial in terms of protecting the environment, mitigating floods, and preventing soil erosion. In the mid-20th century, Afghanistan had 3.1 to 3.4 million hectares of forestland; however, recent reports and surveys have estimated the current area of forestland to be less than 1-1.3 million hectares.<sup>107</sup> If deforestation continues at the same rate, the total degradation of the country's forests over the next 20-25 years will not be far from reality, and the country will face an absolute loss of construction timber and fuelwood as well as the devastating repercussions of floods and excessive soil erosion.

Afghanistan's natural resources have been severely destroyed by natural factors such as droughts and floods as well as man-made disasters such as wars, poor management, and a lack of rule of law in the recent past. An increasing population, climate change, deforestation, overgrazing, degradation of water reservoirs, reduction in water supplies, salinization, soil degradation, and loss of biodiversity have contributed to the desertification of many parts of the country.<sup>108</sup>

### **Concept definitions**

*Rural land* is land located in rural areas, such as pasturelands (including deserts, cemeteries, mountains and hills, and river banks), forests, protected areas, agricultural, arid and virgin land, rain-fed land, and *khermanjay* (a special field for cultivating wheat).

*Common land* is viewed as equivalent to public land in Afghanistan; it can include pasturelands and forests. Public land is not adequately defined in current Afghan statutory law. Given that Art. 3(8) of the LML 2008 stipulates that any land deemed public and not registered in the book of government lands is considered as state land, that the definition of public and state land according to Presidential Decree 83 is blurred, and that land is rarely registered in rural areas, public (and also private) land can be easily interchanged with state land. Hence, in some cases, public land has been given away by the state to private owners.<sup>109</sup>

*Pasturelands* are the "entire land stretches, including wastelands, hillock and the meadows, marshy lands on both sides of a river and woodlands covered with herbaceous plants and natural shrubs and bushes and which can be used as animal fodder" according to the Pasture Law (2000). However, this definition and the ownership rights over pasturelands are not clear. According to Art. 3(9) of the LML 2008, grazing land, which is a subgroup of pastureland, is imprecisely defined as follows: "if a person having loud voice and standing at the last home of village or town calls loudly, this land up to the place where the voice of the loud voice having person is heard, is considered to be grazing land." In relation to ownership rights, according to Art. 3(8) of the LML (2008), pastures are included in government land, whereas Art. 3(9) and 82(1) explain that pasturelands are "those virgin and arid lands, on which state and individual possession has not been proved legally and they are deemed public property. An individual or the state cannot possess pasturelands, unless otherwise stipulated by the Shari'a." Taking into account the prevalent traditional customary claims on pastures, the conflicts over them are numerous: as an example, consider the local communities in Hazarajat, central highlands, with the concurrent understanding of land ownership among the Kuchi tribes and local communities, and, most importantly, the continuing claims of both sides stemming from the allocation of land by different regimes. Additionally, the ambiguity regarding the tenure of pasturelands leads to diverse interpretations on the use of this land. Art. 3 of the Pasture Law (2000) divides pastureland into two types: specific and communal pastures. It stipulates that "The right to use a pasture shall confine to cattle grazing. Only the cattle of the nearby villages can be grazed on the specific pasture and the communal pasture can be used for

106 "Afghanistan Initial National Communication," 16.

107 "Afghanistan Initial National Communication," 4.

108 "Afghanistan's Environmental Recovery: A Post-Conflict Plan for People and their Natural Resources" (Kabul: United Nations Environment Programme Post-Conflict Branch, 2006).

109 Alden Wily, "Land Governance at the Crossroads."

grazing cattle belonging to the communities.”<sup>110</sup> However, returning to the example of the conflict over pastures in Hazarajat, the Kuchi communities consider that the pastures are state land to be used by all and that the local communities cannot restrict their usage; inevitably, this creates major conflicts.

Based on the definition in Art. 22(5) of the FML 2012, “forest includes at least half a hectare of land with surface coverage of at least 10 per cent of fertile and infertile trees.” Forests are considered as government (state) land (Art. 3(8), LML 2008) and can be used by all citizens of the country (Art. 5, FML 2012). According to Art. 4<sup>111</sup> of the FML, management and custody of the forests lies with MAIL, while according to Art. 7, all products of the forest belong to the state; individuals and private organisations can use the products of the forest, provided a fee is paid to MAIL. However, in practice, local tribes and villages use forest resources according to their own established procedures. Although no ambiguity exists in the definition of forest ownership and usage rights according to statutory law, the customary claims over some parts of Afghanistan’s forest areas exist, thus creating conflicts over their usage.

## 6.2.2 Rights to forests and common land

### *Definition of forests and common land*

The Afghan legal codes provide a clear definition of forests, of which there are various types. Based on Art. 3(11) of the FML, a “state forest” is a forest that belongs to the government and is utilised and protected by state organisations. Art. 3(9) of the same law defines a “city forest” as a forest on state land inside a city that is exploited for its produce, housing animals, water protection, as well as recreational and educational purposes. Art. 3(12) identifies a “private forest” as a forest created by people on their own private or leased land. Finally, Art. 3(13) defines “protected forests” as those declared to be protected because of environmental reasons.

User rights are also stipulated in the legal code. As mentioned above, citizens can use state forests based on the MAIL’s regulations. Art. 25 and 26 of the FML 2012 provide the provisions for “the arbitrary and unlicensed utilisation, exploitation, transportation and processing of forest products.” The illegal use of forests can lead to criminal penalties.

The Department of Forests within MAIL is responsible for the management of forests.<sup>112</sup> Art. 17 of the FML also stipulates that the responsibility of protecting and maintaining forests falls on the citizens and government organisations.

While common land is considered equivalent to public land in Afghanistan, the current body of laws does not provide a clear definition of public land (issues relating to the unclear definition of public land will be explained in more detail in Section 6.4.). The contradicting articles in the LML along with the fact that most land, especially in rural Afghanistan, is neither registered nor surveyed create major problems in terms of identifying public land ownership and usage rights. A weak legal understanding of common property particularly undermines the interests of those who own small farms or no land at all. The rights of such people are endangered by those with influence, and the legal standards are not able to protect their rights. Disputes over outlying land such as rain-fed agricultural land and pasturelands are commonplace, thus putting into conflict the rights of individuals versus the local population as well as the interests of different ethnic groups.<sup>113</sup>

### *Rural group rights and the mapping, recording, and boundary demarcation of communal land*

Rural groups regard themselves as a number of families who live in the same rural area, share the same traditions and culture, have a similar standard of living, and share certain bonds with each

<sup>110</sup> Art. 82(2) of the LML 2008 also stipulates that pastures shall be used by local villagers.

<sup>111</sup> *Forest Management Law (FML) (Official Gazette no. 795), Article 4, 2012 (SY 1391).*

<sup>112</sup> See *FML*, Art. 4.

<sup>113</sup> Liz Alden Wily, “Looking for Peace on the Pastures,” (Kabul: Afghanistan Research and Evaluation Unit, 2004).

other. In the context of Afghanistan, the plethora of *qawms*<sup>114</sup>—tribes, clans, and subclans—can be considered to be rural groups. A group right is a right shared between two or more persons such that each member of the group has certain user rights to each portion of the commonly held land (as opposed to land divided into numerous smaller parcels depending on the number of group members). However, as collective property rights are not provided for in the current body of laws, no mapping or recording of group rights has taken place.

Even though the NLP (2007) defines “community land,” this term is not embedded in any of the other existing laws in relation to land management. The Draft Rangeland Law, currently being prepared by MAIL, provides the framework for the management of private, community, and public rangeland. Currently under revision, it is yet to be approved. Under this draft, nomadic or semi-nomadic people may acquire pastureland for grazing their livestock after making an application to the local authorities stating their need for the land and identifying the vacant land (*mawat*).

Additionally, considering public ownership as a group right, Afghanistan has not established a process of legally recognising the public as the owner of public land. Despite the general understanding that public land (although not properly defined in Afghan laws) is owned by the public, there is no legal way to prove this during the *tasfiya* process. According to Art. 2(8) of the LML 2008, which stipulates that all land for which ownership cannot be legally proven belongs to the state, all such public land thus legally belongs to the latter.

Even though group ownership rights are not formally recognised in Afghan statutory law, in customary law, tribes, villages, clans, and families can be perceived by others and consider themselves as the owners of pieces of land over which they exercise user rights. These rights are usually recorded in the name of one person in the village/tribe/clan and are customarily considered as group rights. There is technically no difference between the land owned by a group and that owned by one individual who could, in principle, use that registration to exclude other persons from the land. This leads to legal vulnerability for the rest of the group. However, through witnesses (a common process in rural Afghanistan), it is possible to find out if the land belongs to one individual or a group.

In the past, the legal concept of collectively held land existed, and land was sometimes allocated to different tribes or clans. Such examples can be found in Shewa, Badakhshan, where during the reign of Zahir Shah, the Kuchi tribes were allocated land to use every summer for a period of three months. The reminiscence of collectively held land still exists today, with the majority of rural land being collectively held. However, the current body of law is silent on the status of collectively held land from the past, thus giving no possibility for its legal recognition. Furthermore, such land is not properly mapped.

The definition of communal land is not provided for in the Afghan body of law, and so communal land can be considered as public land.<sup>115</sup> Nevertheless, the Pasture Law 2000 mentions communal pastures.<sup>116</sup> Art. 2(2) provides the definition of communal pastures as follows: “Communal pasture: Arid land which, in accordance with section (9) of the land management law does not fall within bounds of villages or towns.” According to Art. 3 of the same law, “the communal pasture can be used for grazing cattle belonging to the communities,” and it cannot be brought, sold, or leased (Art. 6). This concept still exists, and people distinguish between special and communal pastures, although the boundaries of communal pastures are not demarcated.

### **Recognition of user rights to key national resources**

For the purposes of this study, key natural resources are defined as forests and their products, pastures, water, and other natural resources like wood. Multiple articles within the laws cover user rights. According to Art. 5 of the FML 2012, citizens can use state forests based on MAIL’s

114 This term more precisely means “solidarity group” and can be used to refer to small entities like an individual’s family or large groups like a clan or tribe.

115 Issues relating to the confusing definition of public land and the recognition of community rights are discussed in Section 6.4 below.

116 *LML*, Art. 82, Dari version: pasturelands are translated as *mara’a* land, meaning it can be grazing land, graveyard, hills, etc. Therefore, common pasture can certainly be considered as *mara’a* land.

regulations. Art. 22 of the same law stipulates that “the license to use and exploit state forests is awarded by the MAIL at the request of forestry associations.” Art. 3 of the Pasture Law (2000) states that pastures can be used by communities for grazing cattle. Finally, Art. 2 of the Water Law enacted in 2009 stipulates that water is owned by the public and that it should be managed and protected by the government.

Even though the Afghan legal code provides some clarity in relation to key natural resources, there were and still are numerous conflicts over the usage of pastures and forest in Afghanistan, as already mentioned with the conflict between Hazara and Kuchi communities or the conflicts over water rights, particularly during the dry season in Ghazi in Sarab District and Gedargu.<sup>117</sup>

In addition to insecure user rights, communities suffer from the illegal use of natural resources. The lack of security and the inability of the government to implement the rule of law throughout the country often lead to the destruction of forests, logging, and smuggling. Other violations include converting forestland to residential areas and using forestland for private purposes. Since 1992, forests have been, contrary to the law, converted into farmlands, orchards, and unplanned settlements in Balkh, Samangan, Baghlan, Kunduz, and Takhar provinces. This trend has taken place as a result of the lack of law enforcement in these provinces, and it has continued up to the present day. Furthermore, in Samangan, Ghor, and Badghis provinces, pistachio forests that represent a large proportion of residents’ income have been cut down to be used for trade and as firewood, leading to widespread deforestation. In Kabul, Zabul, Kandahar, Helmand, Farah, and Nimruz, the usage of forests for timber smuggling has persisted for at least the last three decades and still continues today. A prominent example is the firewood markets in Kabul and its neighbouring provinces, where the timber is usually illegally procured.<sup>118</sup> Even though the state and international community have invested in reforestation since 2002, the redevelopment of these forests has not yet been completed.

Another recent example relating to the lack of respect for community rights and the absence of rule of law and good governance is in the area around the Amu Darya River. Around 1,560 *jeribs* of public pastureland and forest, located adjacent to the Amu Darya, were leased by the local ARAZI department in Imam Saheb District of Kunduz Province to some 31 people in Qaraqarawal, Shalbafi, Barzangi Arabia, and Hajji Talab areas of the district. However, the land was converted into arable land after cutting down the forests and destroying pastureland. As a result, around 1,600 families were deprived of their right to use these pasturelands, in contravention of Art. 3 of the Pasture Law. Also, around 1,000 *jeribs* of land—recently protected from the Amu Darya floods—were converted into arable land and subsequently leased. Finally, around 500 families have lived in Imam Saheb’s public forest for many years. However, after converting this forest and pastureland into arable land, one of Afghanistan’s largest natural and biological resources was destroyed in the process.<sup>119</sup> It is correct to think that the state should employ measures to prevent such land conversion and unsustainable land use. However, this process must begin by recognising the rights of the local communities to these pastures and forests.

### ***Multiple rights over common and private land and its natural resources***

Multiple rights over common (public) land and its natural resources can coexist in Afghanistan. Prominent examples include the Kuchi and local communities’ sharing of pastures in summer time, when the Kuchi communities have the right to use certain pastures otherwise used by the local communities. In some areas, this arrangement functions well, while in other areas, there are intercommunal conflicts over usage rights. Even though Afghan laws and practices provide venues for dispute resolution, in praxis, there are many examples of lengthy and complicated disputes that remain unresolved. Taking into account the slowness and costliness of court proceedings,

117 For further information, see Vincent Thomas, “‘Good’ Water Governance Models in Afghanistan: Gaps and Opportunities” (Kabul: Afghanistan Research and Evaluation Unit, 2013); Vincent Thomas, “Water Rights and Conflict Resolution Processes in Afghanistan: The Case of the Sar-i-Pul Sub-basin” (Kabul: Afghanistan Research and Evaluation Unit, 2013); Vincent Thomas, “Unpacking the Complexities of Water Conflicts Resolution Processes in Afghanistan” (Kabul: Afghanistan Research and Evaluation Unit, 2014).

118 Interview with ARAZI employees, Kabul, 27 March 2015.

119 Author’s personal experience.

this possibility is not effective in swiftly resolving disputes arising from the multiple rights over common land and its natural resources.

Multiple rights over the same plot of land and its resources can nevertheless legally coexist. One prominent example is sharecropping, which is frequently used in rural Afghanistan. Sharecropping is an agricultural system in which the landowner allows a tenant to use the land in return for a share of the crops produced on the land. Another example is when the municipality decides to plant trees on the side of roads on plots that belong to individuals; they conclude contracts with them wherein all the provisions, rights, and duties are stipulated and can vary from contract to contract.

### ***Multiple rights over land and mining resources located on the same plot***

Art. 38 of the ML 2015 stipulates the rights and obligations of the surface owner and license holder:

*A landowner may not use the surface of land which is within an Area subject to a License for the purpose of cultivation, planting trees, waterway, grazing livestock, constructing buildings or infrastructures, except with written agreement of the Holder.*

*The Holder of a License shall conduct Mineral Activities in accordance with the provisions of this Law and avoid any unsafe [unprotected] activities, which may create hazardous waste dumps or other hazards likely to endanger the livestock, crops or any lawful activity of the landowner or local residents.*

Art. 39 stipulates that the violations of the abovementioned provisions result in fines and compensation. Art. 93 clarifies that when a dispute arises between a license holder and state entities or between a license holder and non-state actors, the parties may settle the dispute by mutual agreement or through the authority defined in the contract for dispute resolutions. Where such authorities are not defined in the contract, the parties may refer to one of the following:

- Arbitration by an expert upon the agreement of the parties;
- Assignment of a Dispute Resolution Panel of independent experts, selected by the commission, that shall be comprised of not less than three and more than five members.

If the party or parties do not consent to a decision made by experts, they may, within 30 days of such a determination, refer the dispute to one of the following for final resolution:

- Financial Dispute Resolution Commission as stipulated in the Da Afghanistan Bank Law;
- International Centre for Settlement of Investment Disputes;
- Arbitration under the United Nations Commission on International Trade Law.

Whether or not the government is able to implement the ML 2015 remains to be seen. Past experience has shown that the government is unable to monitor the application of mining contracts. Recently, the Minister of Mines, Minerals, and Petroleum stated that security issues and corruption have impeded transparency and accountability in terms of both contract bidding and implementation.

In addition to the venues for dispute resolution in the ML, other dispute mechanisms exist to resolve the conflicts between parties, ranging from informal consultations between the relevant ministries to the involvement of the Parliament or President of the Republic and even the courts for conflicts of a more complicated nature.



### 6.2.3 Effectiveness and equity of rural land use regulations

#### *Restrictions on rural land use*

Rural land that has been allocated for specific use includes pasturelands, forests, agricultural land, and protected areas. None can be used for purposes other than those specified by the law. Agricultural land (private or state) cannot be changed to residential land, nor can roads and highways be built on agricultural land; pastures can only be used for grazing animals and graveyards, and forests for harvesting products and hunting animals; finally, protected areas limit the usage of the land to prevent its degradation because of its value to the entire nation. All of these restrictions serve the public purpose. On the contrary, based on Art. 46-49 of the LML, arid and virgin land can be transferred, sold, or leased providing that certain conditions are met; hence, its usage can be changed.

Although the restrictions on rural land use are stipulated in the Afghan legal codes, in praxis, this land is sometimes not used for the purposes specified by the law. One example would be the Jamal Mina suburb of Kabul, where people have built houses on steep hills. Hills are considered as pastures according to the Pasture Law—defining pasture in part as “hillocks and meadows”—and therefore, they cannot be used for residential purposes.<sup>120</sup> However, around 20 percent of Kabul’s population, or one million people, live on the hills surrounding the city.<sup>121</sup>

#### *Restrictions on rural land transferability*

Pastureland and forests along with other public land in rural areas cannot be transferred, leased, or sold. Art. 6 of the Pasture Law prohibits selling, leasing, or buying pastureland. The general understanding of public land stipulates that it can only serve the public purpose; hence, it cannot be sold or leased to private interests.

Privately owned agricultural land can, on the contrary, be sold or leased, as can arid and virgin land. Art. 46(3) and 48 of the LML 2008 address the transfer of virgin and arid land, stipulating that:

*Selling of virgin and arid lands to individuals, agriculture and livestock institutions, private and joint domestic companies by MAIL shall take place on the basis of auction after being approved by the president of the Islamic Republic of Afghanistan...Sale of virgin and arid lands for the sake of establishing agriculture farms, to domestic private and joint-stock companies shall take place upon considering the volume of capital.*

Due to the unclear definitions of pastureland and public land as well as the frequent illegal usage of this land including forests, the transferability restrictions are not always enforced and followed. Table 3 below summarises rural land use and transferability restrictions:

120 It is important to note that this provision of the Pasture Law is somewhat absurd considering that Afghanistan is a largely mountainous country.

121 “Living in the ‘Burbs, Kabul Style: The Human Wave of Homes for One Million People Sweeping up the Steep Hills around Afghan Capital,” *Daily Mail*, 10 October 2012, <http://www.dailymail.co.uk/news/article-2215793/Poverty-Kabul-style-One-million-residents-populate-steep-hills-Afghan-capital--long-way-high-life.html>.



Table 3: Rural land use and transferability restrictions

Type of land	Legal basis	Type of land	Legal restrictions on ownership	Legal restrictions on transferability	Legal restrictions on use (land use change)
Pastureland (incl. hills, mountains, and river banks)	Pasture Law 2000, LML 2008	Discussion on whether state or public	Discussion on whether state or public ownership	Cannot be leased, sold, bought, transferred, or exchanged.	Only for animal grazing and graveyards (no land use change allowed). The state can implement development projects based on the Art. 3(3) of the LEL, which requires an exception of the Council of Ministers.
Forest	FML	State	State-owned only	Cannot be leased, sold, bought, transferred, or exchanged.	Harvesting products and hunting animals (no land use change allowed).
Protected areas	Environment Law, Law on the Preservation of Afghanistan's Historical and Cultural Artefacts	State	State-owned only	Cannot be leased, sold, bought, transferred, or exchanged.	Limited usage to prevent degradation including protective measures (no land use change allowed). The process of transforming land into a protected area follows a complicated procedure and takes months or even years.
Arid and virgin land	LML 2008 (Art. 46-49)	State (discussion on whether arid and virgin land can be considered as pastureland)	State-owned (discussion on whether arid and virgin land can be considered as pastureland)	Can be leased or sold provided that certain condition <sup>1</sup> are met (Presidential Decree 83 and LML 2008 create ambiguity regarding the possibility of selling state land).	No restrictions; land can be changed to residential areas and agricultural land (no concrete mechanism developed for this purpose).
Agricultural land	LML (Art. 90)	Private and state	No restrictions	No restrictions <sup>2</sup>	Land cannot be changed to residential areas or used for public infrastructure unless after gaining the approval of ARAZI's CEO and the president.
Disaster prone areas	Municipality Law, LML (Art. 46)				Residential buildings cannot be built in these areas. State land cleared by <i>tasfiya</i> gives a report about the feasibility of developing residential areas. It is the responsibility of the concrete government entity to which the land is transferred to inform people. If the land is private, the <i>tasfiya</i> team makes recommendations, but compliance monitoring does not occur.

1. President Karzai enabled foreign investors to lease government land for 30 years in 2002 with Decree 134. In 2003, Presidential Decree 89 made surplus government land available to the High Commission for Investment for allocation to investors. The Private Investment Law 2003 enabled leases of up to 50 years (Art. 21).

2. As above.

### ***Rural land use plans and mechanisms for land use change***

No plans exist for rural land use in Afghanistan. With certain rural land such as pastures, forests, agricultural land, protected areas, and other public land, there are restrictions on land use change. In fact, changes are not allowed in most cases according to Afghan law (see Table 3 above). Likewise, rural land cannot generally be converted into urban land, unless the proper acquisition procedure is followed.<sup>122</sup> Only the use of arid and virgin land can be changed, as can the conversion of rural land to protected areas.<sup>123</sup>

When changing the usage of land, acquisition processes are used in most cases without any public consultation. Due to the absence of data on the number of land use changes and the time needed, it is difficult to estimate their duration in Afghanistan.

### ***Protected rural areas and rural land identified for rehabilitation***

As mentioned in the previous sections, some rural land like pastures and forests is protected in terms of transferability and usage. There are only two national parks in Afghanistan: Band-e Amir in Bamiyan, which is Afghanistan's first national park established in 2010, and the Wakhan corridor in Badakhshan, established in 2014. Other protected areas exist such as the Nawor Desert, Great Pamir, standing waters of Ghazni, Aajar Valley, and underwater lake of Hashmad Khan.

The lack of enforcement of protective regulations was explained above, as was the consequent degradation of protected rural land. Additionally, proposals for the creation of more protected areas—in Nuristan Province, Badghis Forest, and the Buddha monuments in Bamiyan—were made to NEPA in 2002; however, these are still pending.

Afghanistan's natural resources have been severely degraded in the last few decades due to overgrazing, the collection of surface vegetation for fuel, the conversion of forest and pastureland into arable land, deforestation,<sup>124</sup> and timber smuggling by mafia, war, decreased rainfall, and climate change. As a consequence, in 2006, MAIL launched a natural resources management programme to effectively rehabilitate and protect forests, pastures, and protected areas by constructing water reservoirs, reconstructing and building new irrigation canals, and managing water for farmland. The overall objective of this programme is to ensure the sustainable exploitation of existing water and renewable energy resources and enhance the livelihood of residents in rural areas. These programmes pursue the following objectives: first, improving irrigation systems to protect water, develop agriculture, and increase access to potable water; second, motivating local communities to protect forests, pastures, and water, and offering technical assistance on the renewability of these resources.

The purpose of the natural resources management programme is to rehabilitate natural resources for their effective use by rural people. To fulfil this purpose, MAIL has developed a policy framework: its natural resources management strategy is based on an effective and sustainable regime aimed at using pastures, forests, wildlife, protected areas, herbs, and water resources, including water infrastructure, in such a way that their use and right to access are regulated. Afghanistan's environment is an inseparable part of its comprehensive agricultural development strategy and a major component of the natural resources management programme. Activities to manage natural resources focus on three areas:

1. Surveying and planning natural resources;
2. Managing and protecting natural resources with the participation of the public;
3. Developing and modernising irrigation systems.

<sup>122</sup> Discussed in Panel 4 of the LGI (see Section 6.4 below).

<sup>123</sup> See Art. 46–49 of the LML 2008 for the re-zoning of arid and virgin land as well as the Environment Law for the re-zoning of rural areas to protected areas.

<sup>124</sup> "Afghanistan's Environmental Recovery."

Nevertheless, natural resources including forests, pastures, and protected areas are affected by the lack of a comprehensive mechanism for their effective and sustainable use. For this purpose, programmes were developed in 2014 to manage and protect natural resources in cooperation with the public so as to build community capacity in the area of sustainable utilisation, promote a sense of ownership among the people, and motivate people to contribute to the survival of these resources. The aims of this procedure are as follows:

- Building the capacity of associations and local communities to develop plans for the rehabilitation and regulation of natural resources like forests, pastures, and protected areas;
- Developing projects from the development budget by social forestry associations in accordance with contracts;
- Mobilising forestry associations and increasing public participation in the regulation of forests, pastures, and protected areas.

Additionally, MRRD has a major rural rehabilitation strategy in its portfolio, particularly through its flagship rural development programme—the National Solidarity Programme (NSP)—which aims to empower rural communities to be able to make decisions affecting their own lives and livelihoods through various participatory mechanisms that promote local governance and aim to reduce poverty. The NSP is implemented through four main activities:

1. Establishing a national network of community development councils (CDCs) that empower communities to make decisions;
2. Funding priority sub-projects that improve access to infrastructure, markets, and services;
3. Strengthening community capacities through participatory processes and training;
4. Promoting accountability and the wise use of public and private resources.

Finally, forest and pasture associations in Afghanistan are accountable to all members of society. These associations develop rules and regulations on the management and regulation of social natural resources, the way in which these resources can be used, their pricing, and participatory benefits; they also assign responsibilities and prepare the budget of natural resources; finally, they supervise external assistance. Associations are created as per the FML in order to administer, survey, research, protect, rehabilitate, construct, reform, use, exploit, and operationalise forestry-related scientific, technical, and economic concepts and applications in various provinces. The operational method, obligations, powers, and other affairs related to forestry associations are regulated by a bylaw. The legal personality of a forestry association is established after its bylaw is registered and licensed with MAIL.<sup>125</sup> The Department of Natural Resources allows public partnerships to protect and sustainably use land, pastures, forests, and water resources, meet their daily needs in a safe environment by using scientific and community knowledge of natural resources, and help solve problems related to people's free access to natural resources.

<sup>125</sup> *Forest Law*, Article 6 (*Official Gazette* no. 1087), 2012 (SY 1391).

## 6.3 Urban land use, planning, and development

Pan-LGI-Dim				Topic	Score			
					A	B	C	D
PANEL 3: Urban land use, planning, and development								
<i>LGI 1: Restrictions on rights</i>								
3	1	1		Restrictions on urban land ownership/transfer effectively serve public policy objectives.				
3	1	2		Restrictions on urban land use (disaster risk) effectively serve public policy objectives.				
<i>LGI 2: Transparency of land use restrictions</i>								
3	2	1		Process of urban expansion and infrastructure development is transparent and respects existing rights.				
3	2	2		Changes in urban land use plans are based on a clear public process and input by all stakeholders.				
3	2	3		Approved requests for change in urban land use are swiftly followed by development on these parcels of land.				
<i>LGI 3: Efficiency in the urban land use planning process</i>								
3	3	1		Policy to ensure delivery of low-cost housing and services exists and is progressively implemented.				
3	3	2		Land use planning effectively guides urban spatial expansion in the largest city.				
3	3	3		Land use planning effectively guides urban development in the four next largest cities.				
3	3	4		Planning processes are able to cope with urban growth.				
<i>LGI 4: Speed and predictability of enforcement of restricted land uses</i>								
3	4	1		Provisions for residential building permits are appropriate, affordable and complied with.				
3	4	2		A building permit for a residential dwelling can be obtained quickly and at a low cost.				
<i>LGI 5: Tenure regularisation schemes in urban areas</i>								
3	5	1		Formalisation of urban residential housing is feasible and affordable.				
3	5	2		In cities with informal tenure, a viable strategy exists for tenure security, infrastructure, and housing.				
3	5	3		A condominium regime allows effective management and recording of urban property.				

### 6.3.1 Introduction

Since the start of the international intervention in 2001, urban land use has undergone significant changes due to, most notably, a massive influx of refugee-returnees to urban centres throughout the country and large numbers of rural-urban migrants seeking security and/or employment opportunities. An estimated 20 percent of Afghanistan's total population (6,110,000 individuals of the total 30,550,000 population) are classified by the United Nations High Commissioner for Refugees (UNHCR) as returnees from Pakistan, Iran, and other countries.<sup>126</sup> These returnees, primarily displaced through the series of conflicts beginning with the 1979 Soviet-Afghan war, often moved to cities on their return. The easy access to the urban centres of Kabul, Kandahar, Jalalabad, Herat, and Mazar-e Sharif along with the focus of international aid in these cities in the early 2000s resulted in an extensive international presence there. Displaced families, who had sometimes not returned to Afghanistan for nearly three decades, often lost vested investment in their local communities. Further, they had become accustomed to a relatively urban lifestyle while in refuge and feared the growth of counterinsurgency in rural areas. As a result, they often decided not to return to their original villages or provinces, but rather to urban centres (and, in particular, Kabul) in search for safety and employment opportunities. While the population growth rate for the nation remains steady at 2.6 percent, it is only 2.3 percent in rural areas versus 4.7

126 "2015 UNHCR Country Operations Profile—Afghanistan" (Geneva: United Nations High Commissioner for Refugees, 2015), <http://www.unhcr.org/pages/49e486eb6.html>, accessed on 24 September 2015.

percent in urban areas.<sup>127</sup>

Today, approximately one-quarter of Afghans live in urban areas, rendering the topic of urbanisation essential.<sup>128</sup> It is estimated that 31 percent of the country's population will live in cities by 2025, jumping to 50 percent by 2060.<sup>129</sup> These demographic shifts have altered the map of urban areas, rendering previous urban and development plans and regulations outdated.

It is important to further emphasise the lack of reliable figures related to urban land use, even for basic matters such as the population of Kabul, which remains contested. As noted by UN Habitat in its Discussion Paper on "Understanding Urbanisation," a "lack of clarity characterises all other Afghan cities," thus rendering evidenced-based policy and programme planning difficult if reliant on quantitative data. Available data are typically "not urban disaggregated, or not done in a way that makes it clear what is *rural* and what is *urban*," while "city-specific data is very limited, which makes city comparisons nearly impossible." Given that "no systematic urban monitoring systems exist"<sup>130</sup> and data is weak or non-existent, this panel focuses on the qualitative material and experience available to the experts instead of relying on disputed quantitative information.

At the heart of urban planning issues lies the issue of informal settlements. This issue is most contentious and visible in Kabul. The city's current population is estimated between 5 and 5.5 million:

*It is estimated that at least 70% of the population of Kabul is currently residing in property which has not been formally registered or that falls outside the formally planned parts of the city. This percentage represents an approximate number of 2.5 million people. Although many of these residences are legitimate occupiers, they have no security of tenure and no means by which to formalise and register their rights of tenure.*<sup>131</sup>

Of particular issue is a specific set of informal settlements in Kabul, which house approximately 40,000 individuals in about 51 informal settlements.<sup>132</sup> Families are primarily returnees, IDPs, and some economic migrants. They not only lack tenure security, but they also have poor levels of health, education, and safety, and lack protection from the local police forces or powerful brokers. Nearly every national-level legislation dealing with urban land use over the past ten years makes mention of the informal settlements, emphasising their importance in the realm of urban development. Fundamentally, there exists a fierce internal debate within the Afghan government about the future of the informal settlements. Should they remain and be "formalised," or should they be destroyed? Similar issues exist in Kandahar city, where greater government collaboration and internal agreements have resulted in efforts to upgrade the infrastructure of the settlements, thereby beginning the "formalisation" process.

### 6.3.2 Restrictions on rights

#### *Ownership and transferability*

The LML 2008 forms the backbone of restrictions on urban land ownership and transfer. There are several common types of ownership rights in urban areas:

1. Private ownership with legal title deed (*qabele sharayee*): "Those who acquired their land legally from the government (through a grant or a rightful purchase) typically have a *sharayee* title deed that certifies their ownership of the land. Those who inherit the land or buy it also acquire a legal title, provided they go through the required legal process to transfer the title to their name."<sup>133</sup>

<sup>127</sup> "Kabul's Hidden Crisis."

<sup>128</sup> "Kabul's Hidden Crisis."

<sup>129</sup> "Afghanistan's Urban Future," Discussion Paper 1, State of Afghan Cities (Kabul: UN Habitat, 2013), 1.

<sup>130</sup> "Understanding Urbanization: Monitoring Urban Dynamics in a Fragile and Resource-Constrained Context," Discussion Paper 9 (Kabul: UN Habitat, March 2015), 1.

<sup>131</sup> "White Paper on Tenure Security and Community Based Upgrading in Kabul" (Kabul: Ministry of Urban Development, 2006), 4.

<sup>132</sup> "Winter Assistance to the Kabul Informal Settlements 2014/2015—Report on the Post-Distribution Monitoring Survey" (Kabul: Task Force on the Kabul Informal Settlements, 2015), 2.

<sup>133</sup> "Kabul Urbanization and Development Challenges: A Synthesis Report" (Kabul: Aga Khan Trust for Cul-

2. Private ownership with customary deed (*urfi*): “This is the type of document that most informal settlement dwellers and some property owners in the formally developed parts of the city (those who purchased the land from a rightful owner but failed to complete the ownership transfer process) hold. In settlements built on former agricultural land, the *urfi* title is often based on a legal *sharayee* original (given that the initial landlord of the un-subdivided land has in many cases a legal *sharayee* title).”<sup>134</sup>
3. Privately registered lease: a title is applicable for a specified period (for instance, wedding halls on the airport road in Kabul city).
4. Private ownership without title: “This situation usually pertains to the first generation of squatters on confiscated public or private land. Although with time the possession of a *safayi* book can reportedly strengthen the hand of squatters in the face of possible eviction.”<sup>135</sup>
5. State ownership within the master plan: non-private land included in the city’s master plan belongs to the Municipality, which ultimately decides upon its usage/ownership. Such land can be roads, parks, public schools, hospitals, and so forth. However, ownership is contested due to the unclear definition of public land in the current legal framework. This will be explained in the following section of the report.
6. State ownership outside the master plan: this non-private land is located within the boundaries of the city, but is not included in the city’s master plan; instead, it belongs to the state (or state institution).
7. Private ownership of endowed land (*waqf*): in addition to the land owned by ministries and other offices, *waqf* land is for specific public use and is under the technical ownership of the government (but for the people).
8. Public ownership: this type of land is disputed due to the unclear legal framework stipulating the ownership rights between state and public land. Roads, green areas, parks, playgrounds, cemeteries, and other infrastructure are generally considered as public land.

There are no restrictions on land ownership, owner type, size, or price in Afghanistan. One objective of the LML 2008 was to create “a favourable environment for private sector investment in land,”<sup>136</sup> and all subsequent amendments aimed to serve this purpose by facilitating the wide variety of people who could have access to land, including foreigners. In 2002, Presidential Decree No. 134 had already enabled foreign investors to lease government land for 30 years, and Decree No. 89 in 2003 made surplus government land available to the High Commission for Investment for allocation to investors.<sup>137</sup> The Private Investment Law 2003 enabled leases for up to 50 years (Art. 21).

However, there are certain restrictions on the transferability of public land, i.e., public land cannot be transferred (sold and bought) to private interests. Given the unclear definition of public and state land in the Afghan legal framework, public land can be easily interchanged with state land, thus allowing the transactions that would otherwise be illegal.

In practice, the lack of clear delineations of responsibility render the ownership and transfer of land a game of powerbrokers that does not serve public interest. The regulations themselves are generally justified and aim toward the benefit of the public good. However, because of the government’s unwillingness or inability to enforce the regulations in question, their usefulness is limited.

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ture, 2011).

134 “Kabul Urbanization and Development Challenges.”

135 “Kabul Urbanization and Development Challenges.”

136 *Land Management Law*, Article 2(8) (*Official Gazette* no. 958), 2008, (SY 1388).

137 *Law on Domestic and Foreign Private Investment in Afghanistan*, Decree no. 134 (*Official Gazette* no. 803), 2002 (SY 1382); and *Decree on the Transfer of Government Property*, Decree no. 89 (*Official Gazette* no. xxx), 2013 (SY 1392).



### **Urban land use**

The primary reference for regulations on urban land use is found in the LML 2008, which outlines the various types of land ownership and possible land uses (agricultural land, private residential land, etc.). Additionally, there are certain land use restrictions defined in the original Kabul master plan: for example, land in residential areas cannot be purchased for industrial purposes.

Master plans in Afghanistan date back to the time of Daud Khan and have continued to the present day. Although most of the master plans of Afghan cities are outdated (as will be discussed below), they serve important functions. First, they constitute maps and pictures in terms of how planners should conceive the city; therefore, they control urban development by clearly stating what is and what is not in the map. This approach, however, does not allow urban planners to promote development or mobilise resources; it rather brings their focus on mere monitoring and checking of urban growth.<sup>138</sup> Second, urban planning in Afghanistan is considered as an important part of actual state-building, where only the municipality is recognised in terms of its ability to implement the master plan. Therefore, the entities responsible for urban planning are given a special identity.<sup>139</sup>

However, in most cases, the restrictions on land use prescribed by the master plans, including the Kabul master plan, are not enforced. Rampant corruption in the ranks of government and land management authorities allows for the uncontrolled usage of land, irrespective of residential areas. The example of informal settlements built on the mountainous slopes within and on the outskirts of cities like Kabul is an apt example of the friction caused by urban use restrictions. Mountains and hills are considered as pastureland, meaning that they are destined for public usage. By appropriating what is technically public land for private interests, people are deprived from using the mountains for pastures. The fact that Kabul's third master plan was abandoned on the request of MUJA by the Karzai administration renders the urban planning of the city non-regularised and only enhances the possibilities for corruption.

Additionally, President Ghani enacted Decree No. xx prohibiting constructions on arable land. However, some arable land is included in the master plans, sometimes dating back 50 years and thus creating the obstructions for their implementation. Additionally, Art. 90 of the LML 2008 stipulates that the "construction of roads, buildings and establishments and non-agriculture activities are not allowed on agriculture lands."<sup>140</sup> However, this is possible in exceptional cases with the approval of MAIL and the president of the Islamic Republic of Afghanistan. In reality, the restrictions on the modified use of agricultural land are not respected. Particularly in peri-urban areas such as Bagrami in Kabul and Behsud in Nangarhar, arable land is being converted to urban use at a rapid pace, and sellers often transfer land as agricultural land to facilitate a lower price and attract buyers, with the full knowledge that construction will subsequently occur.<sup>141</sup>

Further reference should be made to the National Disaster Management Law of 2012, developed to "regulate activities related to disaster response, preparedness and risk reduction" with the establishment of the Afghanistan National Disaster Management Authority (ANDMA) as a step toward the adoption of the Strategic National Action Plan. This plan aimed to reduce the risk of disasters as well as their severity as experienced by the public through the establishment of a National Disaster Risk Reduction Platform that prioritised local solutions to disaster risk. The final reference point is the 2010 National Disaster Management plan, a chief component of which involved the assessment and reduction of disaster risks in both rural and urban settings, thus referring to ANDMA as the primary source of response. Based on these policies and regulations, the government has a right to specify an area as prone to natural disasters and so restrict residential building. These regulations are, however, not specific to Kabul Municipality, which stated that efforts are currently underway to develop a policy on land use for disaster risk without providing any further information.<sup>142</sup>

138 Tommaso Giovacchini, "Governance and Representation in the Afghan Urban Transition" (Kabul: Afghanistan Research and Evaluation Unit, 2011), 9.

139 Giovacchini, "Governance and Representation," 9.

140 LML, Art. 90.

141 Personal communication with United States Institute of Peace land expert, 7 October 2015.

142 Interview with an employee of Kabul Municipality, 12 March 2015.

Legal frameworks also exist for land that is at non-disaster-related risk. In 2004, the government adopted a Law on the Preservation of Afghanistan’s Historical and Cultural Artefacts that built on the 2002 and 2003 inscriptions of the *Minaret and Archaeological Remains of Jam* and *Cultural Landscape and Archaeological Remains of the Bamiyan Valley*, respectively, of the UNESCO World Heritage List. The law defines historical and cultural artefacts (Art.3) and specifies the legal requirements to protect such artefacts and monuments. Similarly, natural heritage was recognised under the law, with the subsequent declaration of two national parks in the country: Band-e Amir in 2009 and Wakhan National Park in 2014. Given the thriving black market for looted historical and cultural artefacts coupled with the generally poor enforcement of protection measures, much of Afghanistan’s cultural heritage can be considered at risk. Such legal measures are the key to providing a legal foundation for heritage protection.

While the legal framework has been well developed to serve the needs of the Afghan public, the government has been unable to enforce the regulations and practices put in place in urban areas. While disaster risk and natural heritage regulations exist in Afghanistan’s urban areas, the main urban actors—namely, the respective municipalities and representatives of MUDA and MAIL—have given little attention to the actual implementation of disaster risk regulations due to a presumed lack of resources, high rates of corruption, a focus on other issues (e.g., lack of sufficient urban infrastructure), and so on.

### 6.3.3 Transparency of land use restrictions

#### *Urban expansion and infrastructure development*

The process of urban expansion and infrastructure development is shared between local urban municipalities (Kabul, Jalalabad, Kandahar, etc.) as well as MUDA, formally tasked with developing urban policy for the country. Actual collaboration has developed informally and depends heavily on the individual municipal and ministerial objectives and ideologies. When shared ideology and objectives are weak, urban expansion and infrastructure development remain primarily outside of the formal realm. Planning objectives differ with each municipality as well as MUDA, with no specific planning objective existing across the board. Objectives remain overly individualised and often in conflict with one another, resulting in numerous stalemates in policy planning.

In Kabul city, for instance, the responsibility is shared with the municipality’s Plan Implementation Office and MUDA.<sup>143</sup> Due to fundamental disagreements between the Office and Ministry in terms of the implementation of the third and final master plan of Kabul, partially upheld by the formal suspension of the master plan in 2005 through a presidential decree, clear information about planned urban expansion does not often reach the public. Despite efforts to develop a fourth plan, no plan for the urban space within Kabul’s city limits has yet been established.<sup>144</sup> Focus has instead been placed on developing legal mechanisms to change the urban landscape of Kabul, with the 2009 plan for urban expansion *outside* of the city (“Kabul Jadid”—New Kabul City) attempting to incentivise Kabul residents to move outside of the city in the hopes of reducing the city’s population to a more manageable level. The lack of a legal framework has resulted in a process that lacks transparency and can be dismissive of the facts on the ground.

Formal planning mechanisms from MUDA should be shared with the public through official announcements as well as through local authorities like the municipality; these should respect all citizen rights as outlined in the LML 2008, the Constitution of Afghanistan, and relevant articles in the Civil Code. However, the information is not always shared with the public in a consistent manner. While occasional announcements on urban expansion are made, these are limited to major urban changes (i.e., release of plans for New Kabul City) and are generally not detailed. People are usually unable to obtain more information about planned urban expansion if they do not have previously established social networks with individuals working in relevant municipal or ministerial departments. Most discussions on expansion and development thus remain inaccessible to the public.

143 Pietro A. Calogero, “Planning Kabul: The Politics of Urbanization in Afghanistan” (PhD diss., University of California, 2011), 79.

144 Calogero, “Planning Kabul,” 80.

What is important to note is that the withholding of information is sometimes allegedly used to prevent the illegal and corrupt behaviour of citizens.<sup>145</sup> Based on the example of New Kabul City, where the information was made publicly available in the media and MUDA reports, people who realised the potential increase in their land value after construction began making claims over the land based on forged documentation. However, when people are not informed about planned urban expansion, landless families, returnees, IDPs, or rural migrants are considerably more tempted to build informal settlements outside of the master plan than if the information were available. Finally, with the absence of publicly available information on planned urban expansion, oversight in the form of public scrutiny is missing from the planning and implementing of urban expansion projects.

### ***Changes in urban land use plans***

Decisions on changes to urban land use do not involve the public. Construction projects are developed based on the legal documents that give permission to the particular organ for changing urban land use. The uncertain status of the LML 2008<sup>146</sup> coupled with disputes over the implementation of the third master plan and the relatively weak authority of the government has rendered the legal framework for changes in urban land use convoluted, underdeveloped, and disregarded by enforcement authorities. While exact figures of land use change and requests are not obtainable,<sup>147</sup> requests for changes in land use do not have an exact process to be followed nor has a proper mechanism or database for land use changes been developed. Disputes between MUDA and local municipalities make it difficult to distinguish the appropriate authority for such requests. Additionally, the lack of public involvement in decisions about land use changes often renders the implementation of the project impossible due to the lack of documented ownership among the original landowners.

The poor legal framework is matched by an unprecedented influx of refugee-returnees into urban areas in Afghanistan (most notably, Kabul, Herat, and Jalalabad) as well as rural-to-urban migration. Urban land use changes are most commonly visible through informal processes, with formal requests being rare. Requests for changes in urban land use rarely come from the public and are typically put forth by powerbrokers that can manipulate or better navigate the request process. Such changes thus provide little benefit to society in general. Table 4 below details the aspects relating to possible changes in urban land use.

145 Based on the accounts of a number of land experts participating in our discussions.

146 The president has powers to enact laws in Afghanistan, which should be brought before Parliament for approval. Yet this does not often happen, as with the adoption of the LML 2008, where the approval of the Parliament was not sought.

147 Please see the explanation for the lack of data in the introduction.

Table 4: Possible land use changes in urban areas

Type of land	Legal basis	Type of land	Restrictions on ownership	Restrictions on transferability	Restrictions on usage
Residential area within the master plan	Municipal Law 2000, Presidential Decree 83, LML 2008	Private and state	No restrictions	No restrictions (ambiguity about selling state land)	Cannot be changed to an industrial area, but can be changed to a commercial area (unclear administrative process).
Residential area outside the master plan: informal settlements <sup>1</sup>	No policy yet adopted	Private and state	No restrictions	No restrictions (ambiguity about selling state land)	No policy has yet been adopted to upgrade informal settlements.
Agricultural land	Art. 90 of LML 2008	Private and state	No restrictions	No restrictions	Land cannot be changed to a residential area, and public infrastructure like roads cannot be built except with the approval of ARAZI's CEO and the president (in reality, changes occur illegally without presidential approval).
Roads and other public infrastructure, green areas, etc.	Municipal Law 2000	Ambiguity over public or state	Ambiguity over public or state ownership	Cannot be sold, leased, or transferred	Cannot be changed to anything other than its original purpose (in reality, changes occur illegally).

1. All residential areas outside the master plan are considered as informal settlements. Given that urban expansion often does not follow the master plan, most residential settlements in Afghan cities are thus considered as informal.



### 6.3.4 Efficiency in the urban land use planning process

#### *Policy on low-cost housing and services*

Policies for low-cost housing and services remain tenuous. While efforts in the 1970s aimed to shift government-owned land to the poor, provisions have since decreased, with significant changes in state obligations to the poor. As noted by Alden Wily:

*Firstly, allocation of lands to needy persons is no longer an obligation; secondly, the definition of eligible recipients has been broadened to include any person in the district (Article 35[2]), which could include large landowners; and thirdly, the proposed amendments (to the LML) are silent on the need to include urban dwellers in need of housing in its purview.<sup>148</sup>*

Current provisions do not specify low-cost housing offers to the poor, but instead rely on instalment schemes that typically amount to the normal (not low) cost of the land. A lack of payment can result in evictions.<sup>149</sup> Focus has also been placed on providing incentives for families living in informal urban settlements to move outside of urban centres and into semi-urban areas, rural areas, or “new towns” (such as New Kabul City) or “small towns” near urban centres (locally known as *sharaks*).

State land distribution schemes were developed by the government through Presidential Decrees 104 and 1091 during President Karzai’s regime to allocate state land to teachers, low-ranking public employees, and returnees and IDPs. However, these are rather an exception from the general policy of not distributing state land.<sup>150</sup> Additionally, these distribution policies, mired by rampant corruption and conflicts caused by unclear ownership claims over the distributed land, fail to serve the interests of the poor Afghan population. Based on research by UNAMA, for example, the governmental settlement town of Sar-e Dowra, which should have been distributed to low-income government employees, was actually grabbed by high-ranking officials and then sold on to others at high prices. No land was allocated to ordinary landless people.<sup>151</sup> What is worse, the implementation of Presidential Decree 104, allowing for the distribution of land to returnees and IDPs, has been put on hold in recent years.

There were also initiatives to introduce mortgage systems to allow Afghans to acquire proper housing by borrowing the money from banks and repaying the loan in instalments. However, due to the high levels of poverty and unstable security situation that renders the livelihoods of Afghans insecure, this idea was set aside. The new NUG Minister of MUDA stated that the focus of his term in office would be to provide adequate low-cost housing for people; however, the outcomes of this statement still remain to be seen.

Nevertheless, the responsibility to provide low-cost services to households in urban centres has been adopted by international organisations and NGOs such as the Norwegian Refugee Council (NRC) (providing basic shelter services and assistance to IDP and refugee returnee households in urban areas), UNHCR, and so on. Adequate shelter and associated services are, in practice, dismissed by the Afghan government and shifted onto international organisations and NGOs. With a per capita GDP of only US\$662,<sup>152</sup> the need for low-cost housing is visibly high. While no government or large-scale NGO projects allocating low-cost (not free) housing exist in urban areas, banks such as the First Microfinance Bank of Afghanistan began as early as 2005 to offer housing microfinance loans to Afghans. Thus, while low-cost housing itself does not exist in urban areas due to a highly competitive market fuelled by international aid and military intervention funds, some limited opportunities exist to support those searching for a new home.

148 Alden Wily, “Land Governance at the Crossroads,” 18.

149 *Land Management Law*, Article 99, Chapter 11: Penalties (*Official Gazette* no. 595), 2008 (SY 1388).

150 Based on ARAZI and Ministry of Education records, to date, 154,000 *jeribs* of land have been distributed to Afghan returnees from Iran or Pakistan.

151 “The Stolen Lands of Afghanistan and its People: The Legal Framework,” 31-32.

152 “Fact-sheet on GDP per Capita” (Washington, DC: World Bank, 2013), <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD> (accessed 15 August 2015).

### ***Urban spatial expansion in the largest city***

Land use planning in urban areas formally began in the 1923, with King Amanullah Khan attempting to establish a “New Kabul” with the creation of the Kabul City Government tasked with the area’s urbanisation. During this time, Daruloman Palace and its radial avenues to Chihilsitoun Palace and Tapa-e Taj Beg were constructed, creating the appearance of authoritative grandeur, along with the gridded districts including Karteh Seh and Char. By the time of King Nadir Shah’s reign in 1930, Amanullah’s projects were abandoned until their revival by King Zahir Shah who focused on transforming the “urban core” through “state-led development” and “major, planned urban expansions.”<sup>153</sup> Under the reign of King Zahir Shah, the country developed the first and second master plans of Kabul in 1964 and 1970, respectively.<sup>154</sup> The last master plan was established under the reign of Daoud Khan in the 1970s, and envisioned the expansion of Kabul to house 2 million residents.

Decades of conflict and the associated migration revamped the urban fabric of Afghanistan, resulting in rapidly growing cities unable to handle the mass inflow of residents. The latest master plan—developed in 1978—was created by the city plan-making office of Kabul, with the backing of the United Nations and other international support. An analysis of the three master plans indicates an awareness of the expanding population: the first master plan of 1964 was designed for 800,000 residents, the second master plan of 1970 for 1,200,00 residents with the enforcement of a six-storey limit, and the third master plan of 1978 for 2,000,000 residents with a 16-storey limit.<sup>155</sup> Kabul Municipality currently employs the 2011 master plan developed by the Japan International Cooperation Agency in partnership with the Afghan government; it relates to the New City Development Area (in Deh Sabz) as well as the current boundaries of Kabul city. The status of this plan, however, remains tenuous and is not implemented by MUDA. Given the reality of Kabul’s current population (estimated between 5 and 5.5 million residents), it is reasonable to note that no effective urban spatial expansion exists in the country’s largest city.

Due to rampant corruption, extensive land grabbing, and a great influx of refugees, IDPs, and rural-to-urban migrants, building in Kabul throughout the 1990s and, more recently, the 2000s, remains largely outside of the third master plan and is thus considered as “informal” in nature.<sup>156</sup> Indeed, with the suspension of the third master plan by then-President Karzai at the request of MUDA’s minister, the city has no clear functioning reference for planning purposes. Similarly, though less contentious, issues remain in other major urban areas where recent urban building and planning have likewise occurred largely outside of the original plans and thus occupy a grey space of legality. The lack of an updated framework for regulating the urban expansion of the largest city is reinforced by the minimal coordination between responsible government bodies like Kabul Municipality and MUDA. The carrying capacity of infrastructure has long been overloaded, and the plan for land use has not been updated since 1978. While proposals for piecemeal infrastructure development have been proposed internally to the government and by international NGOs, no comprehensive strategy for the provision of new infrastructure and services has been adopted or considered by the government, primarily due to the unresolved issue of the Kabul informal settlements. The question also beckons as to whether the development of new master plan for Kabul is something preferable and effective, or if new community-based approaches (for example, through the development of community action plans) should be evaluated to obtain the cooperation of the people for upgrading the informal settlements and providing their residents with safe homes.<sup>157</sup>

153 Calogero, “Planning Kabul,” 85.

154 Calogero, “Planning Kabul,” 85.

155 Calogero, “Planning Kabul,” 105.

156 The distinction should be made here between Kabul’s informal settlements often pursued by the poor and informal constructions in the richest parts of the city.

157 Suggestion made by David Stanfield, land governance expert with extensive experience in Afghanistan and other countries, currently serving as Professor Emeritus at the Land Tenure Centre, University of Wisconsin-Madison, USA.

### ***Urban development in the four largest cities***

Kandahar, Herat, Jalalabad, and Mazar-e Sharif—the four largest cities after Kabul—suffer from outdated urban plans. Still in use in Jalalabad, the 50-year-old plan is no longer in line with the present landscape of the city<sup>158</sup> with “local authorities [unable] to guide urban growth and control land use.”<sup>159</sup> Data on the current status of the city of Herat was previously collected in 2011 at a joint conference held by the University of Florence and Herat University called “Herat: A City Quickly Growing.”<sup>160</sup> The conference resulted in the provision of socio-demographic data on Herat, providing useful information about its demographics associated with current land use. The conference also sparked interest from the local Department for Urban Development regarding a draft of a “new urban master plan for managing the city’s rapid expansion”; as yet, no updated plan has been developed for Herat.<sup>161</sup> As is the case for other cities, Mazar and Kandahar’s plans are severely outdated, with the former’s plan “designed for a population probably a fifth of its current size” with continued weak “investment in service provision.”<sup>162</sup>

In all four cities, government officials have been unable to maintain a clear hierarchy of land use plans and responsibilities, resulting in extensive land grabbing or seizing “by power individuals for their own profit, or spontaneously occupied by economic migrants.”<sup>163</sup> USAID continues to work with urban authorities throughout Afghanistan to map governmental and non-governmental activities, while attempting to understand “Who Does What, Where.”<sup>164</sup> Similar activities are ongoing in major urban centres through the State of Afghan Cities Programme, implemented by the government of Afghanistan with technical support from UN Habitat. This programme has held multiple city consultations throughout Afghanistan to understand the current status of urban land use and develop policy shaping with key stakeholders.<sup>165</sup>

While MUDA has committed to developing updated urban land use plans that match the carrying capacity of infrastructure and acknowledge the present status of cities as part of its “Big Cities Master Plan” (for Kabul, Mazar, Herat, Kandahar, Bamiyan, Jalalabad, and Kunduz), no plan has yet been updated for the cities in question.

However, with ineffective urban planning, insufficient investment, poor coordination, and a lack of adequate municipality and land management, Afghan cities are not able to develop to their full potential in supporting social and economic development and state-building in Afghanistan.<sup>166</sup> Additionally, a complicated web of corruption and political opportunity has made it clear that “Afghan master plans tend to be a map without a strategy.”<sup>167</sup> While, in practice, the responsibility of the master plans remains highly centralised with MUDA, local municipalities exercise a significant amount of control in their actual enactment and coordination.<sup>168</sup> Master plans are graphical representations used as planning instruments, but are not regulations in themselves. This places master planning in a grey area among policy makers and their implementation “piecemeal and fragmentary.”<sup>169</sup>

158 United States Agency for International Development, “Mapping a Future for Jalalabad,” <https://www.usaid.gov/results-data/success-stories/mapping-future-jalalabad>, 13 February 2012 (accessed 12 September 2015).

159 United States Agency for International Development, “Mapping a Future for Jalalabad.”

160 Farnesina Ministero degli Affari Esteri e della Cooperazione Internazionale, “Cooperation: Herat, A Database Designing a Future City,” [http://www.esteri.it/mae/en/sala\\_stampa/archivionotizie/approfondimenti/2011/10/20111018\\_coopher.html](http://www.esteri.it/mae/en/sala_stampa/archivionotizie/approfondimenti/2011/10/20111018_coopher.html), 18 October 2011 (accessed 12 September 2015).

161 Farnesina, “Cooperation.”

162 Stefan Schutte, “Poor, Poorer, Poorest: Urban Livelihoods and Vulnerability in Mazar-e-Sharif” (Kabul: Afghanistan Research and Evaluation Unit and European Commission, 2006), 4.

163 USAID, “Mapping a Future for Jalalabad.”

164 USAID, “Mapping a Future for Jalalabad.”

165 “Participatory City Workshop Held in Herat City, Afghanistan” (Herat: UN Habitat, 2015).

166 “Afghanistan’s Urban Future,” vii.

167 “Afghanistan’s Urban Future,” 23.

168 “Afghanistan’s Urban Future,” 14.

169 “Afghanistan’s Urban Future,” 29.

Most current infrastructure development in urban areas continues through either private investors or international aid organisations, donors, development corporations, and so on. In both situations, bureaucratic processes can be considered as expedited for these bodies compared to ordinary citizens. This also implies the continued piecemeal development of infrastructure that lacks clear cohesion. Most of the infrastructure development and expansion is not implemented with sufficient consideration of the city's ground realities or coherence; this characteristic activity does not seem to have a visible end date in sight.

### ***Ability of planning processes to cope with urban growth***

The Afghan government has little ability to cope with urban growth. As a result, most growth takes place outside of formal planning processes. In 2005, an estimated 65 percent of Kabul city residents lived in informal settlements, leaving urban planning authorities unable to cope with the increasing demand for services units and land.<sup>170</sup> The figure is believed to have increased with the rise in population from 3.6 million to approximately 5-5.5 million, and now 70 percent are estimated to live in informal settlements.<sup>171</sup> This is a marked shift from the city in the 1960s, when the vast majority of residents lived in formal, "mapped" settlements. Today, however, most new residential building constructions in Kabul are considered as informal (constructed outside of the third master plan's framework), a trend that has grown since 2001. A range of settlement types reveals a complicated landscape with squatters on public land, informal homes on private land, grabbed land, and more. The wide range of possible classifications attempts to clarify the situation on the ground, but this instead renders the situation illegible. An informal settlement may, for instance, qualify under more than one settlement type according to the legal typology, resulting in a contradictory range of regulations related to it. The legal framework, while attempting to be sensitive to the ground realities through nuanced classifications, fails to acknowledge the similarities between categories that ultimately result in over-classification. Further regulation on urban growth and required service provision can be found in the LML.<sup>172</sup>

Unregulated urban expansion, where people build houses without an official building permit, has resulted in a decrease in available green spaces and agricultural land in Afghan cities, a myriad of informal land ownership claims, and consequently, a high number of land disputes. Khushal Khan Square in Kabul should, according to the master plan, be a protected green area. However, it currently houses shops and other buildings. Some of the owners have customary legal documents proving ownership, but these do not correspond to the city's master plan. Therefore, when the government decides to implement a project according to the master plan, citizens will claim ownership of the land in question and obstruct the implementation.

170 Yohannes Gebremedhin, "Preliminary Assessment of Informal Settlements in Kabul City" (Kabul: USAID, Emerging Markets Group, 2005), 3.

171 "Knowing Kabul," 2.

172 *LML*, see Chapter 2 on Title Deeds, Chapter 3 on Settlement of Land, and Chapter 4 on Restoration of Appropriated Lands to their Owners.



### 6.3.5 Speed and predictability of enforcement of restricted land use: Residential building permits

Our research shows the following classification in relation to the requests made for residential building permits throughout Afghanistan (Table 5):

Table 5: Process of acquiring of residential building permits

Applicant		Process
Individual	Within the master plan	Providing that the applicant holds a valid title deed, the request is sent to the Municipal District Office ( <i>nahyia</i> ) to verify its conformity to the master plan. The application then goes to the municipality's Property Office, where the engineering section gives approval for the building design. Designs must be provided by applicants, who must approach private companies to acquire the building design. This process may prolong the application.
Individual	Outside the master plan	No procedures exist for acquiring a building permit in areas outside the master plan and in rural areas. People often proceed with building without the approval of the authorities.
Construction company	Less than five storeys	A request letter is taken to MUDA's provincial office. After verifying the location and design of the building and its conformity to the master plan, a building permit is issued. This process should usually take no more than three months.
Construction company	More than five storeys	When a building has more than five storeys, a request letter is submitted to MUDA's provincial office, but it must be approved at MUDA's headquarters in Kabul. Companies often take the letter to Kabul in person to prevent long delays. When posting the letter, it can take up to one to two months to reach Kabul.

For construction companies and large construction projects, certain conditions must be met before MUDA provides building permits. The construction company must have a physical office in the country and qualified engineers, architects, and administrative employees; it must also possess the necessary construction equipment and supplies and prove sufficient financial resources by providing bank statements. The ranking of companies ranges from one to five, with one being the highest rating given to companies that can construct buildings with more than ten storeys, while five is given to newly established companies. Two evaluation officers are sent annually to monitor and evaluate the achievements of construction companies and provide the ranking. When licensing construction companies, the authorised number of storeys is mentioned on the building license.

However, the current legal framework for building permits remains convoluted. While several actors, including the government and World Bank, aim to develop "a procedure for quickly providing building permits,"<sup>173</sup> no national-level policy has been identified for residential building permits.

173 "Kabul Urban Land Crisis: A Summary of Issues and Recommendations," Kabul Urban Policy Notes Series no. 1 (Kabul: World Bank, 2005), 4.

Given the convoluted legal framework relating to building permits—legal texts often being littered with holes and opportunities for bribery<sup>174</sup>—it is rare for building permits to be granted in strict compliance with the regulations in place. Similarly, while the cost of building permits may be considered as affordable, the lack of compliance with these fees by public institutions and the need for informal payments render the actual cost of permits expensive. Available funds can also render the technical requirements of building irrelevant. Poor government resources restrict the possibility of public audits for most building projects, and a lack of technical expertise and the existence of corruption render it all the more difficult to adhere to a standard of technical requirements for new constructions or expansion.

As the regulations on residential building permits are not clear or unified, with the existence of several types of valid ownership documents without a clear hierarchy or validity, it cannot be known whether Afghan citizens comply with the requirements to obtain a residential building permit. Residential building permits often occur between individual landowners in urban centres and buyers who identify potential plots; permits cost 2,000 Afs compared with 5,000 Afs for commercial building permits. Building permits are generally granted within three months in corruption-free environments, but the realities of Afghanistan typically prolong the required time.

### 6.3.6 Tenure regularisation schemes in urban areas

#### *Formalisation of urban residential housing*

Residential dwellings in Afghan cities are mostly informal, while owners often lack legal documentation to prove their ownership. According to the LML 2008, if a landowner does not possess formal title deeds or other documents demonstrating formal ownership of a piece of land, he/she may make a claim “on the basis of his long-term unchallenged possession” (Art. 8). Further details on the formalisation of ownership of urban property are detailed in Art. 10 (Granting the Document to the Seller). Efforts toward tenure formalisation remain limited, with MUDA noting in a 2006 White Paper that 70 percent of informal settlements in Kabul lack tenure security.<sup>175</sup> USAID supported MUDA in drafting the policy on upgrading informal settlements, but it is yet to be approved by the Afghan Cabinet.

Prior to the publication of the White Paper, a conference was held in Kabul to, among other objectives, “draft an action plan and proposal to the government on methodologies for the formalisation of property rights in informal settlements.”<sup>176</sup> The White Paper recommended a doctrine of adverse possession based on Islamic jurisprudence to be implemented with regard to the formalisation issue as well as an Informal Property Formalisation Law to “formalise property in urban areas” and “prevent expansion of informal settlements in urban areas.”<sup>177</sup> Recommendations for tenure formalisation aimed to formalise informal settlements while requiring them to address construction issues. These proposals have not yet advanced, but their drafting remains an important step in the improvement of formalisation processes.

In practice, urban tenure security has been severely impacted by a drastic increase in urbanisation over the past decade, with an annual rate of urbanisation close to 5 percent, one of the highest in the world.<sup>178</sup> A significant problem is the absence of title deeds for most urban residents as well as the lack of proper land records.<sup>179</sup> Indeed, studies,<sup>180</sup> consultations with NGOs and agencies active in urban areas on land issues (e.g., UN Habitat,

174 This includes texts like the LML that outline general requirements and goals, but lack specific procedures for implementation.

175 “White Paper on Tenure Security and Community Based Upgrading in Kabul” (Kabul: Ministry of Urban Development Affairs, 2006), 4.

176 “White Paper on Tenure Security,” 4.

177 “White Paper on Tenure Security,” 12.

178 Rao and Trustka, “Enhancing Security,” 15.

179 Interview with UN Habitat, Kabul, 26 June 2014.

180 Tommaso Giovacchini, “Jalalabad City Profile” (Kabul: Land Reform in Afghanistan (LARA), United States Agency for International Development, 2013).

NRC, UNHCR), as well as government authorities indicate that the vast majority of urban landholdings remain informal in various forms (approximately 70 percent of the urban space), thus rendering them insecure, while most dwellers do not hold legally recognised documentation.<sup>181</sup>

Additionally, in the past decade, IDPs and returnees, most of who settled in cities in search of livelihood opportunities and greater access to services, remain one of the major challenges in terms of urban tenure security in the country. When they settle on government-owned land, economically disadvantaged IDPs face the reluctance of the authorities to consider them as permanent citizens of the city, preferring instead to push them to their places of origin. This rapid and uncontrolled urbanisation has created a situation of increased vulnerability, especially for the recently displaced, who lack access to land and adequate housing.<sup>182</sup> In some areas, however, municipalities are starting to consider local integration and the potential upgrading and regularisation of settlements.

Current requirements for formalising urban housing are not clear to the public, and prone to power-brokering and corruption. Insecurity of tenure for urban dwellers has drawn the attention of the international community in the past decade and led to several initiatives attempting to secure the rights of land tenure holders in urban areas. These include the Regional Afghan Municipalities Programme for Urban Populations, Land Titling and Economic Restructuring in Afghanistan (LTERA), and Land Reform in Afghanistan (LARA) programmes all funded by USAID, along with UN Habitat programmes and shelter programmes run by NGOs and agencies like UNHCR, NRC, and Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), among others.

UN Habitat has notably been involved in initiatives to secure tenure and formalise rights in four municipalities across Afghanistan (Herat, Kandahar, Mazar-e Sharif, and Jalalabad), using land records to improve property tax collection. Despite the absence of documentation, this initiative notably contributed *de facto* to securing property rights for approximately 80,000 households by providing municipalities with records on landholding in the target areas.<sup>183</sup> Similarly, in Mazar-e Sharif, UNHCR and NRC intervened in Hamdard Shahrak, an informal settlement in the south of the city, in order to urge landlords to issue individual title deeds to households settled on his land. Another significant initiative is the Maslakh informal settlement in Herat, where a joint UNHCR/UN Habitat project carried out in 2013 aimed to formalise the settlement through the provision of basic services and support for livelihood opportunities, in close cooperation with local authorities (the Municipality and Governor of Herat, Independent Directorate of Local Governance [IDLG], MUDA, MAIL, and ARAZI).<sup>184</sup>

Both the LTERA and LARA projects funded by USAID aim to support the government with the following:

*Informal settlements upgrading, formalisation, cadastral mapping, laws for urban planning and land use regulation, and training in planning and enforcement strengthening of tenure security by supporting the Supreme Court and communities with rights formalisation and informal dispute resolution.*<sup>185</sup>

The LARA project involved the development of a policy on upgrading informal settlements, currently awaiting Cabinet approval. Faced with a lack of support from MUDA, UN Habitat has been supporting the ministry to finalise this policy, including improvements in terms of access to services and transportation. If this policy is adopted, it could provide greater strategic direction to facilitating improved access to basic services and tenure security.

181 See, for instance, Liz Alden Wily, "Land and the Constitution: Current Land Issues in Afghanistan" (Kabul: Afghanistan Research and Evaluation Unit, 2003); Alec McEwan and Sharna Nolan, "Water Management, Livestock and the Opium Economy: Options for Land Registration" (Kabul: Afghanistan Research and Evaluation Unit, 2007).

182 Rao and Trustka, "Enhancing Security."

183 Interview with UN Habitat, Kabul, 26 June 2014.

184 Rao and Trustka, "Enhancing Security."

185 United States Agency for International Development, "Land Reform in Afghanistan (LARA)," <https://www.usaid.gov/news-information/fact-sheets/land-reform-afghanistan-lara>, 30 December 2013 (accessed 21 September 2015).

The LARA project launched in 2009 by USAID had similar objectives for urban upgrading and security of land tenure, including legal, urban development, and capacity-building components. Urban development initiatives were notably carried out as part of a pilot project in two locations in Jalalabad with the provision of services and the use of *safayi* notebooks for recording landholdings. LARA also included components for the formalisation of informal settlements through community outreach to raise people's awareness about their rights to formalise their landholdings, capacity building, and coordination with government authorities, including IDLG, the General Directorate of Municipal Affairs, MUDA, ARAZI, and municipal authorities.

Municipalities have also been engaged in upgrading programmes. Kabul Municipality, for instance, has been involved in upgrading District 7 (Murad Khani area). When addressing the issue of IDPs and returnees settling in the outskirts of the city, the prevailing approach of the authorities when addressing land tenure in urban areas is to focus on long-term settlements, with a reluctance to consider newly settled areas. As explained by an employee of Kabul Municipality interviewed for this study:

*Until now, we have decided that the areas that have been recently settled on or constructed would not be addressed, and that we would focus on the areas of old settlement, where people have been staying for years or decades and can be considered as legitimate occupants of the land. We can intervene there, because we can consider this land is not unduly occupied, grabbed, or usurped.<sup>186</sup>*

While such efforts are a positive step toward strengthening the tenure rights of urban dwellers, this raises concerns about the rights of the increasing number of recently settled populations in urban areas; most studies indicate that these individuals plan to settle there permanently.

Despite the upgrading activities undertaken by the international and national NGO community along with municipalities, these efforts are not coordinated, leading to an unclear picture of what has been done and where, and preventing the identification of best practices to develop more comprehensive policies on the upgrading of informal settlements.

### **Strategy for tenure security, infrastructure, and housing**

The unexpected influx of migration to Kabul city has resulted in the development of a legal framework (led by MUDA, MAIL, and MoJ along with Kabul Municipality) that aims to regulate the on-the-ground situation of the capital, primarily through the formalisation of urban services, active debates on the issue of informal settlements, and the streamlining of titles and other forms of ownership documents. An impressive strategy (as mentioned above) has been proposed by MUDA for improved tenure security and housing, with further regulations passed regarding infrastructure requirements of buildings in urban areas.<sup>187</sup> Further recommendations are found in the draft NLP of 2007 that aims to offset the “ongoing failure of the formal land allocation, adjudication and registration systems” that have “caused uncontrolled informal developments in urban and rural areas.”<sup>188</sup> Bertaud recommended an urban development strategy to address the urban tenure issues in Kabul city<sup>189</sup> along with what he termed the city’s “main problem”: “infrastructure and access to legally subdivided land.”<sup>190</sup> The growing acknowledgment of informal tenure as a major problem, coupled with the initial efforts made to develop formal regulations and strategies, demonstrates the progress made toward a sustainable resolution.

### **A condominium regime**

Urban condominiums primarily take two forms: (1) privately owned, publicly managed apartment complexes like the Macroyan neighbourhoods; (2) privately owned, privately managed apartment complexes, undeveloped plots of land, commercial areas, and so forth (e.g., Sharak Haji Nabi) that are monitored by government officials.<sup>191</sup> Further regulations on common land are outlined

186 Interview with a Kabul Municipality employee, Kabul, 8 July 2014.

187 “White Paper on Tenure Security.”

188 *National Land Policy (NLP) (draft)*, Article 2.1.1 (*Official Gazette* no. 958), 2007 (SY 1386).

189 Alain Bertaud, “Kabul Urban Development: Current City Structure, Spatial Issues, Recommendation on Urban Planning” (Kabul: World Bank, 2005), 16.

190 Bertaud, “Kabul Urban Development,” 12.

191 The status of some *sharaks*, including Sharak Haji Nabi, remains blurred. While recognised by MUDA, the *sharak* is not officially recognised by Kabul Municipality. The monitoring of construction and develop-



in the LML, which provides guidelines for dispute resolution (in situations “[w]here the title deed belonging to various landowners are prepared on the basis of common boundaries and where the areas of their lands are held in common”<sup>192</sup>). Apart from limited references in the LML, no regulations for the specific classification, recordkeeping, development, or management of condominiums were identified. Legal regulations fall short of the detailed management guidelines and are limited to the recognition of common property.

In practice, condominiums are growing in demand in places like Kabul, where limited access to land has resulted in a vertical expansion of the city and concerns about insecurity and cultural values have prioritised the formation of smaller communities, like those existing in Macroyan or in small towns (*sharaks*). Urban condominium property, particularly when privately managed, involves the payment of a premium for improved management services that are often delivered to families in these areas.

## 6.4 Public land management

Pan-LGI-Dim				Topic	Score			
					A	B	C	D
<b>PANEL 4: Public land management</b>								
<i>LGI 1: Identification of public land and clear management</i>								
4	1	1	Criteria for public land ownership are clearly defined and assigned to the right level of government.					
4	1	2	There is a complete recording of public land.					
4	1	3	Information on public land is publicly accessible.					
4	1	4	The management responsibility for different types of public land is unambiguously assigned.					
4	1	5	Responsible public institutions have sufficient resources for their land management responsibilities.					
4	1	6	All essential information on public land allocations to private interests is publicly accessible.					
<i>LGI 2: Justification and time-efficiency of acquisition processes</i>								
4	2	1	There is minimal transfer of acquired land to private interests.					
4	2	2	Acquired land is transferred to the destined use in a timely manner.					
4	2	3	The threat of land acquisition does not lead to pre-emptive action by private parties.					
<i>LGI 3: Transparency and fairness of acquisition procedures</i>								
4	3	1	Compensation is provided for the acquisition of all rights regardless of their recording status.					
4	3	2	Land use change resulting in the selective loss of rights is compensated.					
4	3	3	Acquired owners are compensated promptly.					
4	3	4	There are independent and accessible avenues for appeal against acquisition.					
4	3	5	Timely decisions are made regarding complaints about acquisition.					

### 6.4.1 Identification of public land and clear management responsibilities

There is no specific definition of public land in the Afghan legal code. However, the state does manage some land that would broadly meet the definition of public land. To explain the blurred boundaries between public and state land, an explanation of each land category is thus needed (Table 6).

ment in the area is thus not clear.

192 LML, Art. 28.

Table 6: Distinctions between state and public land

Type of land	Definition	Ownership and responsible organisation	Restrictions on transferability
Public	<p>According to the broad definition, land that has been allocated for public use and is the property of neither the state nor an individual is public land. Yet Art. 3(8) of the LML 2008 stipulates that any land that is deemed public, but is not registered in the book of government lands, is considered as state land. Presidential Decree 83 further blurs the boundaries between state and public land by putting the emphasis on formal documentary proofs of ownership. The fact that the Afghan legal framework does not define public land or provide provisions on how to register it and that the registration rarely occurs means that public land can be easily interchanged with state land. In other words, unregistered land under public use can easily be claimed by the state as its property and subsequently reassigned.</p>	<p>State and public ownership is contested. The responsibilities over public land, although not stipulated clearly in the LML 2008 and scattered across other laws such as the Forest, Pastureland, and Municipality Laws are, in praxis, divided as follows: MAJL (forests and pastures); municipalities (graveyards, parks, roads, green areas, playgrounds); Ministry of Education (schools); Ministry of Higher Education (universities); Ministry of Public Health (hospitals); ARAZI (all land outside the master plans).</p>	<p>Cannot be sold, leased, transferred, or exchanged.</p>
State	<p>Mountains, hills, deserts, river banks, arid and virgin land, state-owned agricultural land, and pastureland (with ambiguity) are registered as state land in ARAZI's Principal Book of State Land. When an individual cannot prove ownership, the land falls under the category of state land after the <i>tasfiya</i> process is done or disputes are resolved in courts. Considering that the majority of Afghans do not possess formal documents proving ownership, the difficulty to formalise customary deeds and prove long-term unchallenged possession according to Art. 8 of the LML 2008, and, most importantly, the impossibility of public land to be registered as such, most land can be considered as state land in Afghanistan.</p>	<p>State (can also be owned by concrete governmental organisations and ministries with land being registered in ARAZI's Principal Books as institutional land) with the responsibility given to ARAZI.</p>	<p>Cannot be sold,<sup>1</sup> but possible to lease, transfer, or exchange land. With the different regulations on the transferability of state or public land, the lack of a clear definition is problematic.</p>

1. Taking into account the ambiguity of the legal framework in relation to this question.

Public land can be easily interchanged with state land. Hence, in some cases, public land has been given away by the state to private owners.<sup>193</sup> This is particularly problematic in terms of ownership rights over virgin and arid land, which can include pastureland,<sup>194</sup> even though the latter cannot be sold or leased contrary to the former.<sup>195</sup> However, based on the concurrent Art. 46-49 of the LML 2008, the state, providing certain conditions are met, can allocate and distribute arid and virgin land to individuals and other legal persons. In the current body of laws, the definition of pastureland is highly ambiguous,<sup>196</sup> and very often, visual characteristics are used to distinguish pastureland from arid and virgin land. However, in extremely wet or dry seasons, for instance, pastureland can resemble arid and virgin land.<sup>197</sup> In this case, the testimonies of witnesses are used to distinguish between these two types of land. However, the distinguishing factors—visual characteristics and witness testimonies—provide considerable room for corruption and create a situation in which public land, despite not being able to be sold or leased, can indeed be distributed to individuals and other legal persons.

In this manner, the country's best pastureland that has historically been used for grazing has been classified as arid and virgin land and then leased by ARAZI to investors for agricultural and residential purposes. This has led to disputes between livestock raisers and investors in number of areas in Afghanistan, such as the conflict between the Kuchi Ibrahim Khail tribe and lessees in Dur Baba Plain (Laghman), land around the Amu Darya River, and so forth. Additionally, the long-lasting conflict between Kuchi tribes and local communities in the Central Highlands is a prominent example of the unclear identification and definition of public land in Afghanistan.

Another important feature of the definition of public land is the fact that it is allocated only for public use to serve the common interest and welfare of residents of a particular area. Using public land for purposes that have not been set out by law is thus not permitted. For example, pastures that have been allocated for animal grazing and used as graveyards must not be used for a different purpose. However, the current body of laws (LML 2008 and the Land Acquisition Law [LAL] of 2000 with its amendments) do not clearly define the terms “public interest,” “public need,” “public purpose,” “public reasons,” or “public welfare.” The law uses these terms interchangeably, which creates space for numerous interpretations.

Article 5(4) of the newly proposed and amended LML tries to address the abovementioned shortcomings in the definition of public land by stating that public land is “land that the public people can commonly use for their interests such as *mara'a*, cemetery and site for harvesting, and such land is not owned by the state and the individual.” The amended LML thus classifies four kinds of land:

1. Private land;
2. State land;
3. Land specific to village/villages; and
4. Public land.

193 Alden Wily, “Land Governance at the Crossroads,” 1.

194 Based on the definition of pastureland in LML, Art. 3(9).

195 LML, Art. 82(1): “Pastures shall be kept unoccupied for the sake of public requirements of local villagers (for cattle grazing, graveyard, threshing ground and etc.)”; and *Pasture Law*, Article 6 (*Official Gazette* no. 795), 2000 (SY 1379): “Buying, selling and leasing a pasture is prohibited.”

196 See the very unclear definition of pastureland in Art 3 (9.2): “If a person having loud voice and standing at the last home of village or town calls loudly, this land up to the place where the voice of the loud voice having person is heard, is considered to be grazing land.”

197 Arid and virgin land can grow plants during the wet season, while pastureland can dry up significantly during the dry season.

Of these four categories of land, the last two comprise public land with a clear definition given for “land specific to village/villages”:

*Land that is managed by the Land Authority (ARAZI), is situated adjacent to one or more villages and is commonly used by the residents of the village or villages as a legal entity in order to realise their interests and fulfil their determined purposes; such lands are not the property of the state.<sup>198</sup>*

### **Recording of public land**

Between 1966 and 1977, a national cadastral survey was conducted on 34 percent of all land in Afghanistan, including arable and non-arable land, forests, and pasturelands. The remaining 66 percent of arable and non-arable land is yet to be surveyed. It is not clear what proportion of unsurveyed land is public land. ARAZI has a five-year strategic plan according to which it intends to conduct a cadastral survey of the remaining land. The survey is set to start in Bamiyan Province as soon as possible.<sup>199</sup>

In addition to the unclear definition of public land, the classification of different types of public land in the LML is not clear, making its identification impossible on the ground. The problems with the legal definition and visual identification of arid and virgin land and pastureland were mentioned above. Further, the distinction between specific pasture located close to the village and communal pasture (according to the Pasture Law 2000) is not developed in the body of the law.<sup>200</sup> The limits of pastureland are also established in accordance with the very ambiguous definition provided in Art. 3(9) of the LML: “Pastureland is land that extends as far as the human voice may be heard from the edge of the village.” The determination of the boundaries of pastureland based on the audibility of the human voice is not compatible with present-day conditions; as a result, the recording of public land is incomplete and virtually impossible.

### **Accessibility of information on public land**

Information on public land is not made public. First, the unclear definition of public land and the impossibility of registering it as such based on the current Afghan framework make access to this information impossible. Second, Presidential Decree 83 in 2003 halted the surveying and mapping of land previously conducted by the Survey Department of the Afghan Cadastre. President Karzai allowed the Survey Department to conduct surveys only on his request and/or after his approval for the surveys made on demand (Art. 15(1)), while the Cadastre could not make the survey information public (Art. 15(2)). This, however, led to complaints that the survey offices made records only available to the elite who then used the information to change the ownership in their favour. This practice has not necessarily stopped, adding to the extreme concentration of power over land matters in the hands of the president.<sup>201</sup>

### **Management of public land**

The government has entrusted MAIL, the Ministry of Hajj and Endowment, municipalities, and ARAZI with the management of public land. MAIL’s Directorate of Natural Resources manages two major types of public land, namely pasturelands and forests. The third type of public land, namely endowed land, is administered by the Ministry of Hajj and Endowment. MUDA and the respective municipalities are responsible for the management of public infrastructure, green areas, playgrounds, schools, hospitals, mosques, cemeteries, and parks within the master plan.<sup>202</sup> The remainder of public land is managed by ARAZI. Even though the level of government, including provincial and district municipalities, responsible for public land seems to be appropriate, a conflict between the ministries and other state agencies sometimes occurs.

First, the ambiguous definition of public land and its different types render the clear delineation of responsibilities almost impossible. Of particular importance is the delineation of responsibilities between MAIL and ARAZI. Based on Decision 23 of the Council of Ministers of September 2009, the

198 Newly proposed amendment to the LML, Art. 5(4).

199 Interview with ARAZI employees, Kabul, 11 March 2015.

200 Alden Wily, “Land Governance at the Crossroads,” 19.

201 Alden Wily, “Land, People, and the State,” 33.

202 For the activities of MUDA and the municipalities, see the institutional map in Appendix VI.



land management authority AMLAK was renamed ARAZI (Afghanistan Independent Land Authority) and restructured within MAIL. ARAZI operated under MAIL's structure until September 2013, when its status was changed by Presidential Decree 11. Since then, ARAZI has been an independent body. With this decree, all land responsibilities formerly attributed to MAIL were transferred to ARAZI. However, since ARAZI was established as an independent body only in 2013, its responsibilities are not outlined in the current LML 2008.

Second, the unclear division of responsibilities between MUDA and the municipalities explained in the previous section renders the management of public land (among others) ineffective and inequitable.

Finally, the lack of professional land experts and financial resources in Afghan land administration for the implementation of day-to-day activities is another challenge that makes it difficult to put strategic and action plans into practice. In ARAZI, for instance, although the merging of the Department of Cadastral Survey of the Directorate of Geodesy and Cartography with ARAZI strengthened the latter's professional capacity, ARAZI continues to lack a sufficient technical structure to address countrywide land matters. In specific terms, ARAZI's provincial capacity is limited in terms of human resources and integrated cadastral maps.<sup>203</sup> Other problems faced by ARAZI include a lack of modern technical equipment for cadastral surveys, insecurity in some provinces, and a shortage of provincial cadastral departments. For these reasons, the establishment of new departments has been proposed in ARAZI's *tashkil* (organisational structure) for the coming year; these departments are needed in order to effectively address land affairs in the country.<sup>204</sup>

These problems are of greater severity in smaller provinces compared to Kabul and the larger provinces, which generally makes land management, including public land management, in these provinces unequal.

In certain provinces (mostly in rural areas), the community-based management of public land is very common, particularly in relation to the management of forests and specific pastures located in close proximity to villages. Restrictions are placed on cutting trees and collecting products, unless allowed by the community. The community also sets the dates for harvesting, penalties for non-compliance, and so forth. In some areas, woodcutting is also regulated and monitored by the community and is prohibited when trees are still green. Specific pastures are monitored so as not to allow communities from neighbouring villages to graze their animals there. In remote areas, graveyards are also managed by the community. Various national and international NGOs have developed projects to support community-based public land management, particularly in relation to pastures.

### **Public land allocations**

Only state land can be allocated (leased) to private and public interests, while private land can be acquired for public interest. Public land cannot be allocated (sold, leased, transferred, or exchanged) to private interests under any circumstances. However, the ambiguous definition, particularly of virgin and arid land, leaves room for the illegal transfer of public land into private hands. According to Art. 46-49 of the LML 2008, the state can allocate and distribute arid and virgin land to individuals, while pastureland as public land can be simultaneously classified as arid and virgin land without any clear distinction between the two land types in the Afghan legal code. The examples of ARAZI leasing arid and virgin land in Dur Baba Plain and along the Amu Darya River can serve as an example of the convoluted legal framework.

As public land allocations to private interests are illegal in Afghanistan, there is no information recorded about these transactions, even though public land is, in reality, sometimes forcibly acquired (grabbed) and transferred to private investors.

203 "ARAZI: An Operational Strategy," 6.

204 Interview with ARAZI employees, Kabul, 11 March 2015.

### 6.4.2 Justification and time-efficiency of acquisition processes

The purpose of land acquisition is for land owned by individuals to be appropriated by the state so that it may be used for public benefit in return for just compensation. In other words, land is only acquired for the execution of public welfare projects, such as the construction of hydropower dams, airports, roads, and other infrastructure. Due to the lack of adequate monitoring mechanisms to verify the authorised use of land, it is not clear how much land has been acquired by the state and then turned into projects with private purposes. It is important to note that from the limited field research conducted for this study, interviewees spoke of illegal transfers of land after state acquisition processes. The availability of qualitative evidence combined with the lack of state monitoring mechanisms might suggest that the process of acquisition is at best highly imperfect; indeed, the illegal use of acquitted land cannot be ruled out. Furthermore, no database of acquisition processes exists; therefore, it is not possible to estimate how quickly the acquired land is transferred to its destined use in a timely manner.

Various state organisations such as municipalities and ministries can be considered as the appropriating authority to determine if a project is needed for public welfare. The current law is not transparent in terms of which departments have powers of expropriation as well as the limits of power of the implementing officials.<sup>205</sup> As a result, this can encourage corrupt practices. Art. 3 of the LEL 2005 lists three different categories of public projects with examples for each. If the project is on the list, the state organisation can proceed with the appropriation. The appropriating authorities then determine the land that needs to be appropriated. If the land is within the master plan, the municipalities and MUDA can acquire it; if outside the master plan, any government institution can be the appropriating authority. The expropriating authority then creates a land valuation committee<sup>206</sup> to determine the value of the land.

The final price of the land produced by this committee requires the approval of the Council of Ministers (Art. 10, LEL 2005). According to Art. 20 of the same law, the owner is informed to vacate the land three months prior to the start of the project. No independent third-party institution is appointed to assess if the project truly serves the public welfare. In theory, ARAZI is the responsible institution to monitor leases and transfers of state land every six months to ensure that land is used for the purpose for which it was acquired. However, this creates a conflict of interest, since ARAZI is both the leasing and monitoring authority.<sup>207</sup> Nevertheless, no regular monitoring takes place due to the lack of financial and human resources and limited security in certain areas of the country.

The proposed LAL, currently under review by the MoJ, is an improvement of the LEL 2005. LAL proposes 19 different categories of public projects along with examples for each, as compared to the three categories detailed in the LEL 2005. The land required for planned public welfare projects is assessed, and Art. 7(3) of the proposed LAL requires the organisation to estimate the least amount of land required for the project. This provision is absent from the LEL 2005, and thus, the expropriating authorities are not required to estimate the least amount of land for their projects. According to the proposed LAL, after the project has been approved by ARAZI (from the list of 19 types of public projects) or by the Council of Ministers (when not on the list), the state organisation that implements the project is required to announce its implementation to all local citizens who will directly or indirectly be affected by the project. The announcement must be done through the media nine months (compared to three months in the LEL 2005) before the start of the project (Art. 7(15)). The new LAL also suggests the creation of a third-party monitoring body to assess whether the leased and transferred land is used for its destined purpose. If adopted and adequately implemented, this law would certainly be an improvement in land acquisition practices.

Another issue worth mentioning is the duration of acquisition processes, which is often prolonged due to the occasional resistance from landowners. This prolongs the three-month period even further and delays the implementation of public projects. This occurs for various reasons, one

<sup>205</sup> Alden Wily, "Land, People, and the State," 49.

<sup>206</sup> The detailed process of land valuation will be explained in Section 6.7 below.

<sup>207</sup> Interview with ARAZI employees, Kabul, 11 March 2015.

of them being that the LEL 2005, currently in effect, does not make any provisions for public consultation regarding public welfare projects. This can undermine the principle of transparency and accountability, as the local communities who are most affected by the project have no say in the process. Furthermore, the acquisition of land owned by individuals for the implementation of public welfare projects is a compulsory process without any possibility for appeal. Once decided that the project has a public benefit, it is the duty of the state to implement it and the individual owner to give up their land without complaint and, sometimes, without compensation. However, the proposed LAL makes provisions to ensure good governance through a process of consultation with local communities (Art. 7(10)).

After the announcement of the acquisition process, pre-emptive actions are taken, which usually lead to an increase in the value of the land. Before the government determines the land value, numerous instances of land grabbing and land sales at a minimum price take place in order to sell the land later at a higher price. These pre-emptive actions slow down the development of the project, because at the time of the announcement, the expropriating authorities already have a fixed budget for this purpose. By the time that the land valuation commission estimates the already increased value of the land, the project's budget risks being insufficient to pay compensation and other expenses.

When owners are not satisfied with their compensation, the acquisition process can be lengthy and complicated, resulting in many conflicts with the evicted owners. In such cases, residents try to obstruct the implementation of development projects and sometimes even refuse to vacate their houses to put pressure on the government to reach an agreement on better compensation. Nevertheless, the acquisition of land owned by individuals can, in some cases, cause public dissatisfaction, particularly when people face losses as a result of the acquisition, thus suggesting insufficient compensation being paid. Regardless, people are forced to give up their land for the implementation of such public projects.<sup>208</sup>

Finally, there is no accurate statistical information about acquired land and whether or not such land has been transferred to its destined use in a timely manner. Various projects are underway in different parts of the country, and the land acquired is recorded per project, but there is no specific nationwide institution that gathers and keeps these records.

### 6.4.3 Transparency and fairness of acquisition procedures

#### *Compensation*

Compensation is provided only to people holding the legal title deed. Considering the prevalence of informal land tenure, a considerable number of Afghans are susceptible to acquisition without compensation rights. The legal code makes numerous provisions for land acquisition. According to Art. 6(1) of the LEL 2005, rights to ownership and damages will be compensated. Art. 6(2) and (8) of the LEL 2005 allow (unless rapid evacuation is necessary) for rights to be compensated according to the price of the land, residential houses, buildings, and other constructions located on the land as well as fruit-bearing or ornamental trees and other saplings planted on the land (Art. 8 of the LEL 2005). There is no stipulation in the LEL about unrecorded rights, such as for grazing, right of passage, and gathering forest products.

In terms of valuing the land, residential buildings, and products produced on the land, according to Art. 69 of the LML 2008, the land price for compensation purposes is determined by a special valuation committee with the following members:

1. Provincial governor or their representative (chairperson);
2. Competent representative of the local ARAZI office (deputy chairperson);
3. Competent representative of ARAZI's Department of Cadastral Survey (member);
4. Competent representative of MAIL's Promotion Department (member);

<sup>208</sup> Interview with ARAZI employees, Kabul, 11 March 2015.

5. Competent representative of MoF (member);
6. Competent representative of MUDA (member);
7. Competent representative of the acquisition authority (member);
8. Owner of the land to be acquired or their legal representative or, in the case of multiple owners, their legal representative (member);
9. Two informed people from private real estate agencies (members);
10. If necessary, representatives from other institutions (members).

Each member has clearly defined responsibilities. The determination of the land price is governed by several articles of the LEL:

*The price of lands subject to expropriation shall be approved by the Council of Ministers and the grade [quality] and location of the land shall be considered for determining the price of the land (Art. 10).*

*The price of residential houses, buildings and other constructions belonging to the owner or user of the land shall be determined by a committee of Kabul Municipality, in accordance with the Unified Table for Valuation (Art. 11).*

*The price for fruit-bearing or ornamental trees or other saplings set on a land subject to expropriation, which belong to the owner and user of such land, shall be determined as decided by the municipality and the administration for agriculture (Art. 15).*

Although the compensation paid for land, residential buildings, and fruit-bearing trees and other saplings is legally prescribed in Afghanistan, in the majority of cases, the compensation is not sufficient for the individual whose land has been acquired to maintain his/her previous standard of living.<sup>209</sup> Cases when the acquired land is located in a central part of the city but the exchanged land is situated on the outskirts can serve as an example of this.

Another problem in the applicable law is that there is no deadline for the payment of compensation. Compensation may be made up to three or four years after the acquisition. When land prices increase during this time period, the landowner might subsequently be unable to afford the same standard of living as before. Additionally, the acquisition process is lengthy in itself, as it can take up to 120 weeks to complete. Since the actual payment of compensation requires the landowner to have the land title verified by court,<sup>210</sup> it takes several weeks to call upon all members of the valuation committee and convene a meeting. Since the price is rarely set during one meeting, and no clear method is prescribed for how the committee values the land,<sup>211</sup> the actual payment can be inadequate and delayed. In light of Art. 40 of the Afghan Constitution, which states that private land can only be expropriated in exchange for a prior and just compensation, it can be argued that most of the acquisition processes are unconstitutional.

If grazing land is (mistakenly or illegally) used for the construction of a public project (i.e., an airport), the people who formerly used the land for grazing can no longer use it. However, no provisions in the current legislation support compensation for the loss of grazing rights. Finally, an adequate resettlement policy has not been incorporated into the applicable law, and provisions lack for providing clear and fair resettlement options for people whose land has been appropriated.

Art. 24 of the proposed LAL states that if locals such as Kuchis (nomads) or villagers who previously used the land for grazing incur losses, then the organisation that has appropriated the land shall, in consultation with ARAZI, compensate these communities by finding alternative grazing land. Additionally, the LAL tries to offset the shortcomings of the current LEL by stipulating in Art. 36 the possible exchanges that may be made against the acquired land:

<sup>209</sup> Interview with ARAZI employees, Kabul, 11 March 2015.

<sup>210</sup> Jawad Peikar, Asta Olsen and Sanjay Upadhyay, "The Proposed Law on Land Acquisition and Just and Fair Compensation in Afghanistan" (presentation, Annual World Bank Conference of Land and Poverty, Washington DC, 23-27 March 2015).

<sup>211</sup> For the issues relating to the valuation of land and prices, see Section 6.7 below.



1. Land equivalent to the acquired land in terms of degree, type, location, and commercial value;
2. If sufficient land is non-existent, exchange in cash according to the requirements set out in Paragraph 1 of this article;
3. If land is completely non-existent, exchange in cash;
4. Other methods of exchange are regulated by a special bylaw.

Additionally, Art. 37 of the amended LAL states that “Individuals who do not own lands in the project implementation area but lose their professions, jobs and working opportunities as a result of project implementation have priority in employment for the project.”

The amended law also makes provisions for the resettlement of individuals who face losses as a result of the acquisition of their land. Art. 44 stipulates: “When residents of an area lose their residential houses as a result of project implementation, the acquisition authority has the responsibility to relocate and resettle them, so they can continue their living before the commencement of project implementation.”

It is important to note that none of the land-related laws include any provisions that would stipulate the right for compensation in the case of land use changes outside of the acquisition process. For example, issues such as the conversion of rural to urban land and its effect on secondary rights such as access to grazing are not considered in the laws. Despite research conducted in peri-urban areas,<sup>212</sup> little is known about how land use change influences the livelihood of rural citizens.

Only the recently approved ML 2015 makes some provisions for land use changes. Art. 39 thus stipulates:

*If during the mineral activities, any damage is caused to the landowner's properties, the holder shall be required to pay compensation in accordance with the applicable Laws. If the holder of a license fails to pay compensation as demanded by the landowner, or if the owner of the land is dissatisfied with any offer, such compensation may be determined by an expert appraiser. Where the parties may not reach any agreement, the issue shall be resolved by the competent court.*

### **Appeal against acquisition**

According to Alden Wily, “the owners cannot appeal against the expropriation, to receive payments in front of a judge, to buy the property back if the land was not used in the manner intended and to choose whether to be paid in cash or in kind.”<sup>213</sup> There is no particular authority to which individuals can lodge their complaints against acquisition processes and appeal against the compensation paid to them. Complaints offices (not specific to land acquisition) exist through the courts, and people can also approach the Council of Ministers, but not all individuals have access to these institutions. Access strongly depends on the extent of a person’s social network and ability to provide informal payments. This *de facto* means that certain mechanisms for lodging complaints exist, although not equally accessible to all. Although those affected can ultimately approach the court system, resorting to courts should be the last instance to launch a lawsuit as opposed to only presenting a common complaint. Furthermore, rampant corruption and lengthy processes in the judiciary leaves lawsuits filed by such individuals unaddressed for long time. At the same time, individuals whose land has been acquired cannot easily defend their rights against powerful figures and/or state institutions. For example, a farmer whose land has been acquired by the Ministry of Interior or Defence cannot easily sue these legal entities in court and defend their rights if they are dissatisfied with the acquisition. For these reasons, ordinary individuals often refrain from approaching the judicial system.<sup>214</sup>

Nevertheless, there is no accurate statistical information on the number of lawsuits launched in relation to land acquisitions or the time needed for their resolution in courts. However, it is estimated that it takes the court approximately one year or more to decide a lawsuit.<sup>215</sup>

<sup>212</sup> See Foschini, “The Social Wandering of the Afghan Kuchis”; and “Justice and Security: Practices, Perceptions, and Problems in Kabul and Nangarhar” (Kabul: The Liaison Office and Cordaid, 2014).

<sup>213</sup> Alden Wily, “Land, People, and the State,” 49.

<sup>214</sup> Interview with ARAZI employees, Kabul, 11 March, 2015.

<sup>215</sup> Interview with ARAZI employees, Kabul, 27 March, 2015.

To address this issue, the amended LAL has proposed the creation of a complaints hearing committee. Based on Art. 40, the proposed composition of this committee includes land experts, an expert engineer, a representative from the organisation that has appropriated the land, a representative of the valuation committee, and the owner of the appropriated land or his/her representative. The objectives of this committee are to ensure that the rights of individuals are not violated by powerful figures or state institutions and to shorten the time taken to adjudicate complaints. This committee could prove effective in addressing normal complaints within a shorter period of time. However, the structure of the complaints hearing committee is the same as that of the valuation committee, which clearly constitutes a conflict of interest.<sup>216</sup>

## 6.5 Transfer of large tracts of land to investors

Pan-LGI-Dim		Topic	Score			
			A	B	C	D
<b>PANEL 5: Transfer of large tracts of land to investors</b>						
<i>LGI 1: Transfer of public land to private use follows a clear and competitive process, and payments are collected</i>						
5	1	1				
5	1	2				
5	1	3				
5	1	4				
5	1	5				
<i>LGI2: Private investment strategy</i>						
5	2	1				
5	2	2				
5	2	3				
5	2	4				
5	2	5				
5	2	6				
5	2	7				
<i>LGI3: Policy implementation is effective, consistent, and transparent</i>						
5	3	1				
5	3	2				
5	3	3				
5	3	4				
<i>LGI 4: Contracts involving public land are public and accessible</i>						
5	4	1				
5	4	2				
5	4	3				

216 Interview with ARAZI employees, Kabul, 11 March, 2015.

### 6.5.1 Transfer of state land to private use

The analysis of this section makes the assumption that the indicator speaks of “state land” as opposed to “public land” in the context of Afghanistan. State land transactions can hence occur in five situations:

1. Transfer to other government entities: ARAZI transfers state land to other governmental entities based on their request.
2. Exchange: ARAZI makes an exchange of private land in one area with state land in the desired area based on a request. The private land is exchanged for state land of the same grade. When the same grade land is not available in the desired area, the value of the acquired land must correspond to the value of the original land. ARAZI receives seven-ten monthly requests for such exchanges.
3. Donation: ARAZI allocates the land for donation based on a presidential decree. In comparison to land distribution for which a minimal price is set, donations are free of charge.
4. Lease: these transactions will be discussed in detail in this section of the report.
5. Sale/distribution: there is an ambiguity in the Afghan legal framework about the sale of state land. For distribution purposes, ARAZI allocates the land based on a presidential decree, and the respective ministries are responsible for the actual distribution.

The sale of state land was prohibited by Presidential Decree 99 in 2002. This decree banned the sale of state land, including virgin and arid land, for housing and all other purposes (Art. 1). The philosophy behind this was to prevent misuse and corruption related to state land distributions.<sup>217</sup> The allegations of corruption of the mayor of Kabul for distributing townships to parliamentarians or the case of Sar-e Dawra township<sup>218</sup> can serve as examples of the corruption, lack of transparency, and oversight in state land distribution processes. However, despite the ban on state land sales prescribed by this decree, the LML enacted in 2008 allows for both the sale and leasing of state land and provides relevant guidelines and procedures. According to Art. 47 of the LML 2008, “Lands being specified for sale shall be the net property of the state, or shall be virgin and arid lands, and shall not be under state projects, urban master plan, forests, pastures, mines and historical monuments.” According to Art. 46(3), such land is subject to sale and transfer to individuals, agriculture and livestock institutions, and private and joint domestic companies by ARAZI upon auction and subsequent approval by the president. The law also allows for the sale of virgin and arid land contingent to presidential approval (Art. 46(3), 47), which brings us back to the issue of the ambiguous definition of arid and virgin land that can be considered as both public (i.e., pastureland) and state land with different impacts on transferability restrictions.

State land is sometimes sold for investment not always in an open and transparent manner. Of particular interest are the transactions of AISA, established as a part of the Ministry of Commerce and Industry. The ministry can request the transfer of state land from ARAZI to AISA, which then sells it to investors. The legality of these transactions remains unclear. Furthermore, ARAZI has currently stopped transferring land to AISA due to the lack of clarity and coordination of their respective investment policies (AISA implements policies such as selling land to investors at very high price, which can discourage investors) as well as the ambiguity in relation to its legal status. Although created under the Ministry of Commerce and Industry to support private investment, AISA now claims to be an independent entity.

<sup>217</sup> “The Stolen Lands of Afghanistan and its People: The State Land Distribution System,” Part 2 of a 3-Part Series (Kabul: UNAMA Rule of Law & Civil Affairs Unit, 2015).

<sup>218</sup> All governmental institutions were given a quota of land that they distributed among their staff by lottery. No land was earmarked for non-governmental landless persons. The price for a plot of 450m<sup>2</sup> was 5,000 Afs, equivalent to about US\$100. The low price of the plots provided an opportunity for officials to buy multiple plots and derive large profits from reselling them. Allegedly, some high officials bought up to 200 plots and sold them on the open market at a price of up to \$7,000 each, 70 times higher than the governmental price (see “The Stolen Lands of Afghanistan and its People: The State Land Distribution System,” 29).

State land can be leased<sup>219</sup> to individuals, organisations, and domestic and external private and joint-venture agricultural companies based on an agreement and according to the provisions of the law.<sup>220</sup> ARAZI is responsible for managing leases and ensuring that the requirements of the LML are observed. To attract private investment for agriculture, livestock, and farming, ARAZI has the authority to lease fertile land for up to 50 years and virgin and arid land up to 90 years.<sup>221</sup> The authority for leasing land up to 1,500 *jeribs* is ARAZI. For 1,500 to 5,000 *jeribs*, the Economic Committee of the Council of Ministers makes the final decision. For land over 5,000 *jeribs*, it is the Council of Ministers.<sup>222</sup> In addition, ARAZI is authorised to lease land for investment purposes other than for agriculture, livestock, and farming if the purpose complies with the Private Investment Law, such as land for the installation of commercial television and radio antennas,<sup>223</sup> restaurants, hotels, pumping stations, fishing farms, poultry, orchards, agri-business, food processing, factories, car washes, green houses, universities, entertainment parks, and so on. ARAZI therefore categorised land leasing for the following purposes:

- Installation of telecommunication facilities, such as television, radio, and mobile antennas;
- Agricultural purposes;
- Development projects.

In the past, ministries and municipalities were authorised to lease out state land under certain conditions, including the requirement that the land be “relevant landed” properties of the ministry or department.<sup>224</sup> Such land could not be leased for more than five years and had to be leased through public auction.<sup>225</sup> To mainstream the leasing of state land, cabinet Resolution 5 of 2014 requires all ministries and municipalities to transfer their surplus land to ARAZI for further leasing. This, however, is not always implemented in practice.

To attract investments, ARAZI has made efforts and developed a detailed procedure under the LML to simplify the process, save time, reduce the administrative steps, and relax the leasing process. Investors can initiate a land lease request (reactive procedure), or ARAZI can proactively announce a bidding process for land leasing in the media and mosques (proactive procedure). The initiation of the leasing process by individual investors starts from the district where the land is located, before going through the local and then provincial ARAZI office, and finally being processed by the land lease directorate and approved by ARAZI management. In this case, individuals must go through the different ministries that are mentioned in Art. 69 of the LML 2008 and involved in the land valuation process to obtain their opinion on the land value. This creates enormous space for corruption. However, proactive land leases are more common nowadays.

The steps for reactive land leases (with slight differences for each category) as defined by ARAZI’s Land Lease Procedure are as follows:

1. A person makes a lease request to the local ARAZI office.
2. The local ARAZI office sends the request along with the *personal information form* and *form of the approval of the local shura* to the district administration (3 days).

219 LML, Art. 59(1).

220 LML, Art. 64(1).

221 LML, Art. 64.

222 LML, Art. 66(2).

223 LML, Art. 64(2).

224 LML, Art. 64(3).

225 LML, Art. 64(3-5).



3. At the district level, Art. 69 of the LML 2008 should be applied. If not possible,<sup>226</sup> a smaller leasing committee is formed (this is not possible in the case of state land leases for development projects). This committee includes representatives from ARAZI and *mustofiat* (local taxation office of MoF) as well as the district administration representative. The committee expresses its opinion about the specifications of the land and its spatial dimensions, and the minimum price for the land is set by the committee based on its type, size, and grade (three days).
4. After receiving the information from the committee, the main ARAZI office makes an announcement for public auction about the land lease. If there is no media in the district, the announcement is made through the mosques (two days). This does not occur with state land leases for telecommunications purposes.
5. Any applicant can submit a bid (including the person who initiated the entire procedure). The bid must be sent in a sealed envelope containing all of the necessary documents such as a business plan to the ARAZI office no later than the announced deadline. It is important to note that if the initiator of the process proposes a rent higher than those proposed by another applicant, he/she is automatically considered as the winner. If this is not the case, a letter is issued to the initiator to negotiate an increase in the rent value.
6. The lease documentation is collected by district ARAZI officials. After the legal procedures are completed internally, the district ARAZI office sends an official letter with the documents to the provincial ARAZI office (three days).
7. The provincial ARAZI office, after verifying that the documents have been processed properly in accordance with ARAZI lease procedures, sends the documents to the ARAZI leasing office in Kabul.
8. MAIL, the ARAZI leasing office, and the authorised provincial representative assess the documents and business plans (two days). This only occurs for state land leases for development project purposes. For agricultural and telecommunications projects, such assessments are not conducted.
9. When approved, the documents are sent to ARAZI's CEO for approval (five days).
10. The lease contract is prepared (four days) for the signature of ARAZI's CEO (three days).
11. The contract is then sent to the Leasing Department, which makes four copies and sends them to the district ARAZI office to obtain the signature of the lessee (four days).
12. After obtaining the lessee's signature, the district ARAZI office sends one copy of the contract to the provincial ARAZI department and another to Kabul (three days).
13. The district ARAZI office sends one copy of the contract to the lessee and keeps one copy in the archives of the Leasing Department (three days).<sup>227</sup>

For proactive procedures, the steps are similar, with the exception of the first two steps, and the process starts with the formation of the committee based on Art. 69. There is no possibility to form a smaller committee.

### ***Transparency and efficiency of lease processes***

The leases of state land are a major venue for providing large tracks of land to investors. The bidding for contracts goes through public auction, which is announced publicly, and the process starts ideally after at least three bidders show interest. If there are not at least three applicants after the determined bidding deadlines, the auction is re-advertised at least twice. If after a third announcement less than three bidders have expressed interest, the process continues with the existing number of bidders. However, this does not always occur in reality and sometimes ARAZI's Land Lease Procedure is not fully complied with, making the theoretical transparency unfulfilled in reality. Additionally, the results of the land valuation are not made public, further compromising the transparency of land lease processes.

<sup>226</sup> Without any specification, that is to say, when the commission does not have to be formed.

<sup>227</sup> ARAZI Land Lease Procedure, (Kabul: Afghanistan Independent Land Authority, 2012).

Reducing the number of administrative steps from 53 to two - eight steps, depending on the type of lease, has shortened the amount of time required to finalise a lease. The detailed procedures for leasing state land developed by ARAZI also aim to ensure transparency and accountability to both investors and the public. The timelines set forth for each administrative step along with the publication of business plan templates, appendices, and all the required forms (including instructions on how to proceed with the land lease process) have made the leasing of state land a more effective and faster process.

All information about the leasing process is available in ARAZI offices. Nevertheless, sometimes it is difficult to obtain the exact information in a timely manner. Particularly in provinces and districts, the low staff capacity and occasional corruption can prevent access to the required information relating to the procedures or forms, for example. Additionally, although the new procedures have simplified the process and are much less time-consuming, these steps cannot always be completed in the time required due to corruption or incomplete, incorrect, or missing information. When the required information is missing or the entered data is incorrect or incomplete, the documents have to be sent back to the province or district. Hence, the duration exceeds the specified time as per procedural requirements.

### ***Collection of payments for state leases***

Revenues from leasing state land are collected in two ways. Leasing revenues for agriculture and farming purposes are collected after the harvest as per the contract. For telecommunication and development projects, rents are collected at least one year in advance. The contractor must proceed with the payment no later than 60 days after the signature of the contract. If the contractor fails to comply, a fine of 2 percent of the annual lease sum must be paid for a delay of one to thirty days and 50 percent of the lease sum for a delay of 31-180 days. If the payment is delayed for more than 180 days, this constitutes a grave violation of the contract, which may be terminated.

The procedure for lease collection based on ARAZI's lease procedure is as follows. The contractor/ lessee receives the invoice at the local ARAZI office and then pays it directly via a bank transfer onto government's MoF account. The local ARAZI office is responsible for reporting all collected lease rents at the end of the month to the national ARAZI office in Kabul. Based on the information obtained from the land lease directors at ARAZI and the database for land lease contracts, allegedly only 10 percent of the total agreed payments fail to be collected.<sup>228</sup> However, due to the poor security situation in some areas, which can lead to the loss of information from ARAZI's state lease database, it can be assumed that this figure might fluctuate to a certain extent. Additionally, some state leases were conducted during the Taliban regime, when no records were made. This has a direct impact on collecting payments for state land leases.

### ***Land valuation***

Land lease prices are determined through the valuation commission established based on Art. 69 of the LML 2008, or, if this larger commission cannot be established, through a smaller leasing committee based on the type, grade (quality), and size of the land (see point 3 of ARAZI's Land Lease Procedure above). Based on the accounts of some land experts,<sup>229</sup> when there is no land record with ARAZI or when the land is leased for the first time, the delegation as per Art. 69 of the LML determines the price. As the members of the valuation commission approach local property dealers and make a comparison with the current lease prices of land of a similar type and grade in the area, the price is allegedly determined based on market value.<sup>230</sup> If the smaller committee is formed, the market value of the land is not taken into account.

Although the provisions stated in the Afghan legal framework set clear procedures for land valuations, delays in assessing the land and setting prices are a genuine issue, as the members of the valuation commission often take time to present themselves. Sometimes, it takes more

228 This document in Microsoft Excel format contains all the relevant information, such as the contractor's personal details, type of contract, location, duration of contract, rent, contract start and end date, etc.

229 Interview with ARAZI representatives, 24 September 2015.

230 The various problems associated with the process of land valuation will be discussed in greater detail in Section 6.7 below.

than one year to have the lease contract signed off by both parties, despite the fact that ARAZI has reduced the number of steps. Taking into account the lack of clarity as to when the larger commission based on Art. 69 of the LML 2008 should be formed, the market value of the land is not always taken into account. Additionally, due to the high level of corruption in Afghanistan, powerful strongmen and public officials sometimes put pressure on the valuation committee to decrease the value of the land. Finally, the results of the valuation are not publicly accessible, thus creating transparency issues within the process and providing room for setting the lease price irrespective of the market value.

### ***Public capture of benefits***

In urban areas, one way for the public to benefit from a land use change after the leasing of state land is *safayi* (land/property) tax. Depending on the size of the construction, the tax increases; this money is then used by the municipality for the development of the community. However, public benefits from collecting taxes are rarely seen in communities. In rural areas, *safayi* tax is not collected; only taxes from agricultural land apply. Thus, land tax is only collected if the investor uses the leased land for agricultural purposes. Hence, the possibilities for capturing public benefits from state land leases are limited.

In the mining sector, some efforts were undertaken to this end, but they were unsuccessful. There was a proposal to amend the ML so that 5 percent of the profits from mines would be spent in the relevant province. However, this law was not approved by the cabinet when it was proposed in 2013.

It is correct to say that communities sometimes benefit from the increased employment opportunities related to the greater investment in the area, but the implementation of relevant policies to enable the public capture of benefits arising from changes in permitted land use has largely been ignored, thereby resulting in some members of society unduly benefiting and others not at all.

### ***Policy to improve equity in asset access and use by the poor***

The LML 2008 stipulates that any Afghan can access land leases. ARAZI's Land Lease Procedure even gives priority to women by providing them with a decrease of up to 10 percent in lease rents.<sup>231</sup> ARAZI is now taking steps to amend the procedures to include other marginalised groups such as handicapped people, IDPs, returnees, and so on. Additionally, as mentioned above, there are some land distribution schemes available at minimal prices for returnees, handicapped people, teachers, and municipality and MUDA employees for social housing purposes. Nonetheless, the implementation of these laws and regulations faces numerous challenges such as corruption, a lack of political will to implement them, and an inability of the government to establish rule of law in insecure parts of the country. For example, land grabbing by powerful individuals can easily limit the poor's access to grazing land. Field research also shows that state land has not always been distributed to those who are eligible.<sup>232</sup>

## **6.5.2 Private investment strategies**

### ***Identification of land suitable for lease***

The legal code is clear regarding the type of land that can be leased, the people who can lease land, and the state organisation responsible for its oversight. However, the lack of clarity as to what constitutes state land (as opposed to public land) makes the identification of suitable land for lease at best murky.<sup>233</sup>

<sup>231</sup> ARAZI Land Lease Procedure, Art. 9(7) (Kabul: Afghanistan Independent Land Authority, 2012).

<sup>232</sup> Refer to the examples of Sar-e Dawra township or the distribution of state land to low-ranking public officials above (and in the UNAMA report, "The Stolen Lands of Afghanistan and its People: The State Land Distribution System").

<sup>233</sup> For an explanation of the blurred boundaries between state and public land, see Section 6.4 above.

Art. 59(1) of the LML 2008 identifies the type of land that can be leased: “State and private lands shall be leased on the basis of a written agreement between lesser and lessee in accordance with the provisions of law.” Further, Art. 66 makes provisions for the lease of virgin and arid land, stipulating that 250 *jeribs* of land can be leased to individuals and up to 5000 *jeribs* to private and joint-venture agricultural companies. However, public consultations with local communities regarding land leases and private investment do not have strong legal backing and do not take place). Hence, secondary right holders can potentially be left out of the process.

### ***Selection of investments***

ARAZI is responsible for the transfer of state land. As per the LML provisions, an investment is selected based on the type of project. Art. 64 and 69 further elaborate the types of projects; ARAZI then considers all of the required parameters, and the land can be leased or transferred only after a comprehensive evaluation.

If a potential lessee requests land for a food processing project, for instance, he/she must develop a business plan that includes information such as the availability of capital, equipment, availability of skilled, semi-skilled, and non-skilled staff, salary information, source of raw materials, identification of a market for the final product, potential existence of competitors, how the company will compete in the market, and so forth. Other factors such as the proximity to residential areas and environmental impact should also be included in the business plan. If the land is requested for building a university, different factors must be clear in the business plan: size of land, potential number of students, number of faculties, professors, number of administration workers, official approval of the Ministry of Higher Education, inclusion of parking and green areas, and so on.

The selection of investments mainly occurs after the evaluation of the business plans by MAIL, ARAZI’s Leasing Office, and the authorised representative from the provincial sector.<sup>234</sup> For telecommunications and simple agriculture leases, no economic assessment is conducted. However, in the case of development projects and proactive leases requested by individuals, a proper business and action plan is required. More than three bidders are needed in order to proceed with the process. The selection criteria are based on analysis of the market, competitors, and skilled, semi-skilled, and non-skilled labour.

Although the land leasing process and legal codes require the environmental, social, and economic assessment of investment projects, a formal mechanism of benefit sharing that takes local benefits into consideration has not been developed. Given the high level of corruption in Afghanistan, some investments proceed despite not respecting policy and having unfavourable outcomes.

### ***Public institutions responsible for transferring the state land***

ARAZI was established through cabinet Resolution 5 of 2014 as the only organisation to manage the transfer and lease of state and public land. However, various other state organisations continue to lease state land on an ad hoc basis without following proper procedures and without coordination with ARAZI.

ARAZI is audited through the High Office of Oversight and Anti-Corruption (HOOAC) and MEC. The provisions on the frequency of these audits are not clear in the legal framework, although the last audit was conducted at the beginning of 2015. Sometimes, special audits are conducted if a case of corruption is being investigated. Furthermore, both AISA and ARAZI lack qualified staff to carry out all of their obligations. AISA in particular does not have offices in some provinces, while ARAZI has offices in most provinces.

### ***Monitoring of compliance with contractual obligations***

The LML 2008 stipulates that any failure to comply with contractual obligations will result in contract termination. It also stipulates under Art. 67(3) that ARAZI will monitor the progress of the land development under lease every six months.

<sup>234</sup> For the step-by-step process of ARAZI’s lease procedure, see Section 6.5.1 above.



In praxis, however, no regular monitoring takes place. Only in very rare cases does ARAZI perform monitoring every six months due to a lack of human resources and financial capacity, as well as the poor security situation in some parts of Afghanistan. The lack of proper and regular monitoring creates space for corruption and illegal practices. One such example is the leased land in Canal-e-Nangarhar where the state leased agricultural land that was supposed to be used for agricultural purposes. However, the land was converted into a residential area by influential political figures in Nangarhar Province. Another case in Nangarhar is that of Kabul Ada, similarly leased for agricultural purposes, but then converted into commercial land. Both cases are currently under investigation, with no tangible outcomes. The discovery of such cases of non-compliance is rare, and remedial action is almost never taken. Nevertheless, there is little information about whether leased or transferred land is used for its intended purpose and whether the terms of the agreement are followed or violated.

### ***Existence of safeguards***

Based on Art. 61 of the LML 2008 and Art. 31 of ARAZI's Land Lease Procedure, the lease contractor is obliged to consider and protect environmental protection principles. One of the requirements of the lease contract is thus that the contractor must be committed to these environmental protection principles. Further, one of ARAZI's monitoring obligations is to assess the environmental impacts of projects and ensure that they do not pose a threat to the environment or have a negative environmental impact.<sup>235</sup>

In addition, NEPA and the Environment Law make provisions for environmental protection. NEPA is responsible for ensuring that no project threatens the environment, and it has the authority to stop any project that has a negative environmental impact. Art. 6 of the Environment Law makes provisions regarding government rights and obligations in terms of environmental protection, while Art. 7 discusses individuals' rights and obligations toward the environment.

Environmental, socio-cultural, and economic impacts of an investment project are also mentioned in the new ML 2015. Art. 89 of the ML 2015 makes the following provisions for assessing the environmental and social impact of investment projects in the mining sector:

1. *The license holder shall comply with the conditions set forth in the license and other applicable laws and as the case may be, conduct an assessment of environmental and social impacts which shall include:*
2. *A detailed study of the natural and artificial environment of the license area prior to any mineral activities, based on measurements and indices with respect to the quality of air and water, soil, trees, and animals, and other flora and fauna in order to provide a comprehensive environmental baseline to be measured from that time; and*
3. *An environmental and social management plan that includes a detailed description of reclamation activities and mine closure including:*
  - a. *Detailed data regarding contaminating substances and resources;*
  - b. *Identification of likely negative environmental impacts, including water, air and soil pollution damage to flora and fauna, and injection of poisonous and destructive substances into the environment;*
  - c. *A review of the negative impacts of tailings;*
  - d. *Mitigation actions to be taken with respect to each environmental impact of each contaminating source;*
  - e. *The availability of equipment required to mitigate environmental impacts and measures to be taken to anticipate expected impacts;*
  - f. *The timetable for implementation of the plan;*
  - g. *The projected budget and its timetable to achieve environmental objectives;*
  - h. *An introduction of employees responsible for implementation of environmental mitigation;*

<sup>235</sup> ARAZI Land Lease Procedure, Art. 13(5) (Kabul: Afghanistan Independent Land Authority, 2012).

- i. *An introduction of monitoring officer, the methodologies to be used for monitoring, and sources of funding for monitoring activities;*
- j. *Meet with local communities and relevant government agencies in relation to environmental and social impacts; and*
- k. *Submission of an environmental and social management plan in accordance with the provisions of the law.*

If the license holder proposes to amend the work programme, sufficient reasons must be given to the relevant agency to ensure that an appropriate environmental and social management plan is implemented. Based on Art. 90 of the ML 2015, investors are required to provide annual reports on the environmental and social impact of the project.

ARAZI incorporates some safeguards in the requirements of bidders. When ARAZI provides a lease for a chicken farm, for instance, it should not be located in cities or overly populated areas. When leasing land to petroleum companies, companies are not allowed to erect petroleum pumps in green areas. Environmental protection is mandatory and is included in the contract of investors when leasing land from ARAZI. In fresh vegetable and fruit packaging warehouses, employees must wear sanitary clothing. However, due to the minimal monitoring, the compliance with safeguards is not possible to verify.

### ***Resettlement and rehabilitation policy***

The Afghan legal framework does not provide for a resettlement and rehabilitation policy, despite the fact that many large-scale development projects, as in the mining sector, can lead to the mass displacement of local communities. Art. 40 of the ML states that resettlement should be used as a last resort, but it only requires a license holder to “consult” with local populations; there are no provisions if the local population does not want to accept the terms offered. This can potentially lead to forced eviction by investors.

However, the proposed LAL drafted by ARAZI has clear provisions in line with most of the world’s best practices. Nevertheless, it is still in draft form and is yet to be approved. It can be speculated that the government might not be financially able to pay compensation for large-scale investment projects.

### **6.5.3 Policy implementation**

As mentioned above, investors’ business plans are evaluated based on information provided to ARAZI. Based on the Land Lease Procedure, ARAZI is responsible for assessing a project’s technical viability, community consultations made by the provincial office, availability of resources, project risks prior to implementation, and mechanisms for monitoring progress. ARAZI currently carries out these obligations and conducts technical viability and market assessments. It also assesses market demand, competitors, risks, possible customers, marketing strategy, funding, budget, staffing, and environmental impacts.

The concrete steps for the approval of leasing state land to investors were mentioned in Section 6.5.1 above, as was the timeline for each administrative step depending on the type of the project (telecommunications, agricultural, or development). It usually takes around 45 working days to finalise the process. However, the leasing process is negatively affected by numerous factors. It is sometimes difficult to process the administrative steps in a timely manner due to missing, incorrect, or incomplete information on the forms, the absence of local ARAZI officials, their limited capacity, and bribery. In the case of missing or incomplete information, the file is sent from the provincial to the district office.

As discussed in the introduction, the only landholder that can lease and transfer land for private investment is the state. The leasing process as per Afghan law should occur through public auction; therefore, it does not require negotiations. Yet the public has been left out of discussions about investment projects, even though they can exercise certain user rights over public land. Taking into account the lack of clarity surrounding the definitions of public and state land, it can be assumed that these rights are not always recognised; hence, the need for public consultation is not upheld.

In terms of public disclosure of benefit-sharing modalities, the actual contracts include provisions allowing the public to share benefits. These include provisions that unskilled labour from the community should be hired; materials should come from the community if available, and products should be preferably sold to the community. All these provisions, however, depend on the type of project.

However, there is a gap between the legal framework and the reality due to a multitude of reasons: lack of proper monitoring, weak local governance at the provincial and district levels, and the absence of effective mechanisms to implement the provisions of law in a consistent manner (in less secure areas, for example). This is mainly because of corruption, a lack of public knowledge regarding the laws, and the inaccessibility of contracts to the public.

#### 6.5.4 Public accessibility of contracts involving state land

If a parcel of land has already gone through the *tasfiya* process or ARAZI has taken the global positioning system (GPS) coordinates of the land beforehand, then the spatial data is available with ARAZI. Otherwise, every parcel of land to be leased or transferred must go through the *tasfiya* process or be assessed using GPS measurements. Spatial data is thus available for all leased land except for leases made prior to the availability of GPS technology or those located in insecure areas inaccessible to ARAZI officials. Additionally, there is a special column in the lease contract to note the GPS information and land boundaries.

The maximal land lease contract duration is determined by the LML. Currently, arid and virgin land can be leased for up to 90 years and agricultural land for up to 50 years while accounting for the type of the project, investment, and business plan. Nevertheless, each project can have a different duration as long as it does not exceed the maximum authorised lease period. This information (contract duration, project type, spatial data, etc.) is not accessible to the public.

The fact that ARAZI is responsible for both state land leases and their monitoring creates a conflict of interest.<sup>236</sup> Third-party monitoring is conducted by civil society on an ad hoc basis. Organisations like Integrity Watch Afghanistan and Extractive Industries Transparency Initiative thus occasionally investigate whether contracts for mining or development projects adhere to the contracting terms. Furthermore, HOOAC and MEC conduct sporadic monitoring of ARAZI. Yet HOOAC's lack of capacity prevents rigorous and regular third-party monitoring. It should also be noted that the Afghan media has addressed some cases of gross violations of lack of compliance with contracts. Nonetheless, in the absence of adequate safeguards and formal procedures as well as the lack of public information, investors are less likely to cooperate with third parties like NGOs and the media.

Given the limited third-party monitoring of leasing projects and ARAZI's irregular internal monitoring, the question beckons as to the number of cases of non-compliance that ARAZI is actually able to "catch" in order to proceed with their resolution. Issues such as contract violations (if observed by the ARAZI monitoring team) should be resolved by the local ARAZI office and approved at the centre (in Kabul). Based on the accounts of one ARAZI official,<sup>237</sup> this monitoring process is effective and efficient, and the cases are resolved locally. If the issue cannot be resolved, it is referred to the main office in Kabul or the relevant authorised court for a resolution and final decision.

<sup>236</sup> Interview with ARAZI employees, Kabul, 11 March 2015.

<sup>237</sup> Interview with ARAZI employee, Kabul, 1 September 2015.

## 6.6 Public provision of land information: Registry and cadastre

PANEL 6: Public provision of land information: Registry and cadastre				
<i>LGI 1: Mechanisms for recognition of rights</i>				
6	1	1	Land possession by the poor can be formalised in line with local norms in an efficient and transparent process.	
6	1	2	Non-documentary evidence is effectively used to help establish rights.	
6	1	3	Long-term unchallenged possession is formally recognised.	
6	1	4	First-time recording of rights on demand includes proper safeguards and access is not restricted by high fees.	
6	1	5	First-time registration does not entail significant informal fees.	
<i>LGI 2: Completeness of the land registry</i>				
6	2	1	Total cost of recording a property transfer is low.	
6	2	2	Information held in records is linked to maps that reflect the current reality.	
6	2	3	All relevant private encumbrances are recorded.	
6	2	4	All relevant public restrictions or charges are recorded.	
6	2	5	There is a timely response to requests for accessing registry records.	
6	2	6	The registry is searchable.	
6	2	7	Land information records are easily accessed.	
<i>LGI 3: Reliability of registry information</i>				
6	3	1	Information in public registries is synchronised to ensure integrity of rights and reduce transaction cost.	
6	3	2	Registry information is up-to-date and reflects the ground reality.	
<i>LGI 4: Cost-effectiveness and sustainability of land administration services</i>				
6	4	1	The registry is financially sustainable through fee collection to finance its operations.	
6	4	2	Investment in land administration is sufficient to cope with demand for high-quality services.	
<i>LGI 5: Fees are determined transparently</i>				
6	5	1	Fees have a clear rationale, their schedule is public, and all payments are accounted for.	
6	5	2	Informal payments are discouraged.	
6	5	3	Service standards are published and regularly monitored.	

### 6.6.1 Cadastral and inventory land surveys

A decision was made in 1965 to conduct the first nationwide cadastral survey, a comprehensive mapping of land parcels, with the aim to gather information about the probable ownership of each mapped parcel. The parcel mapping was to form the basis of a new system of land registration as well as an inventory of land resources for property taxation and programme planning in the various governmental sectors as described and regulated in the Land Survey and Statistics Law of 1965. This law also established the structure and mandate of the Cadastral Survey Directorate in the MoF. Upon enforcement of the law, the nationwide cadastral survey started in Kandahar and then expanded to other provinces. From 1965 to 1978, it surveyed state and private agricultural and barren land (deserts, pastures, and forests) covering 27,411,493 *jeribs* or 5.64 million hectares.<sup>238</sup> Land surveying was put to a halt after the land reforms of the Democratic Republic of Afghanistan. During the communist regime (1978-92), surveying was only available on demand for the purposes of land clearance and the resolution of land conflicts. It cannot be estimated how much land was surveyed at the time, as there was no proper registry system. During the transitional Islamic State of Afghanistan, the surveying process was suspended based on Presidential Decree 99 of 2003. Following this decree, cadastral surveys were carried out only upon the official request of ministries and government institutions that had obtained presidential orders. To date, only 34 percent of land in Afghanistan has been surveyed.

238 Directorate of Land Statistics, "Surveyed Lands Report, 1344 - 1357 (1965-1978)" (Kabul: Cartography and Cadastral Survey General Directorate, Cadastral Survey Statistics Report, 1978).



One aforementioned shortcoming of the cadastral recording of land rights is the fact that the entry of the owner's name on the cadastral survey forms does not necessarily represent an official confirmation of ownership, because the cadastral team in the field does not conduct investigations into the rightful owners of the land in question. It is rather a statement of "probable ownership" based on field data that the survey teams collect about each surveyed parcel.

The destruction of records during the three decades of conflicts only adds to the complexity of the issue. As many people were killed, disappeared, or were displaced as refugees and IDPs, their properties were taken over by others. Some of this land was then sold, leading to a significant number of contested ownership cases. However, the courts do not provide any consolidated data on the number of such cases. This issue was meant to be addressed by Art. 28 of the LML 2008, which says that:

*in places where principal property and tax books as well as valid land documents which could confirm the property of a person are destroyed, and in case of non-existence of the books in the centre, the landholding area of persons shall be settled after the property is being confirmed legally.*

This, however, proves to be problematic in the current context of Afghanistan considering the limited recognition non-formal ownership documentation in the courts.

## 6.6.2 Mechanisms for the recognition of rights

### *Recognition of rights*

The Afghan Constitution of 2004 established a legal framework for property rights to safeguard the right of individuals to own property, stating that property shall be safe from violation, no one shall be forbidden from owning and acquiring property, except by law, and private property can only be confiscated by legal order (Art. 40). Additionally, more than 30 laws and regulations were developed to ensure the rights of all individuals to own land and property. Nevertheless, the ways of registering land in Afghanistan, already explained in Section 6.1, have numerous shortcomings (see Table 2) that prevent a considerable proportion of the population (including the poor) from having their rights recognised. Although the legal code for land ownership has progressively evolved to a more comprehensive legal framework, its emphasis on formal documentary evidence of land ownership as well as numerous contradictions, in particular the definition of public and state land, can, if implemented, deprive a considerable part of the Afghan population of their rights. Furthermore, petty bureaucracy in the form of multiple steps and offices creates opportunities for corruption and deters the poor from proceeding with the registration process.

For example, when registering a property with the courts, the existing circular form has to go through at least five different offices (see Table 7 below). This lengthy and time-consuming process can be expedited by informal payments. However, people who cannot afford the payments or refuse to engage in corrupt practices have to follow the proper procedure, which can take over a year to finalise.

In addition, as mentioned in Section 6.1, it is believed that most of the rural population has only customary deeds to prove their ownership (*sanad-e-urfi*) or has no documentation at all. Two conditions must be met for customary deeds to be formally recognised:

- a. During the land transaction, both parties must complete all documents properly and accurately (e.g., signature or fingerprints of both parties, signatures or fingerprints of two witnesses). The customary deeds are then prepared in two copies, one for the buyer and one for the seller.
- b. The customary deeds must have been acquired before 1975, and the seller must have a valid title deed (LML, Art. 5(5)).

Even if these two conditions are met, there is no mechanism to formalise the customary deed without going through the *tasfiya* processor selling the land, where the future owner receives a formal title deed registered with the courts.

Additionally, non-documentary evidence is only used as a last resort to prove individual land ownership. Non-documentary evidence is particularly crucial in the context of Afghanistan, since in many places the principal property and tax books as well as the valid land documents that could confirm the landowner were destroyed during the years of war, thus leaving no official record of the owner of the disputed land. Also, 35 years of unchallenged possession is not always possible, due to the three decades of wars in Afghanistan's modern history. During the wars, many Afghans were internally displaced or migrated outside the country. Their land and properties were then occupied without the permission of the owners. This provided the opportunity for powerful men and militias to grab land. They occupied houses and took over commercial centres and stores. Additionally, there are also concerns that the longer these people remained on the grabbed land/property, the more likely they were to establish rights based on the very same article.

One type of non-documentary evidence often used in the Afghan context is the testimony of witnesses (for the authentication of formal and customary deeds) and neighbours (when certifying 35 years of unchallenged possession). According to the Civil Procedure Code, at least two witnesses are necessary.<sup>239</sup> Nevertheless, due to the extensive migration of the population after decades of war, this is not an effective way to secure ownership. There are many cases in which witnesses moved from their place of origin, and the claimants for land ownership do not have any means of contacting them.<sup>240</sup>

### ***First-time recording of rights***

As already mentioned in Section 6.1, there are several ways of registering or recording ownership rights in Afghanistan, each with a different procedure and different costs (Table 7).<sup>241</sup>

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239 *Civil Procedure Code*, Art. 294.

240 See Section 6.8 below for more information on the recognition of informal land rights through non-state justice mechanisms such as *jirgas* and *shuras*, frequently used by the rural population.

241 See Section 6.1 for more information on the efficiency and effectiveness of the methods of land registration.

Table 7: Costs and time needed for land registration in Afghanistan

Type of registration	Steps	Forms and costs	Other costs (taxes, service fees, or informal payments)	Time
State's recognition of private land rights ( <i>tasfiya</i> process)	Initiation by ARAZI or other governmental entity (individual cannot request land clearance); Request for presidential approval; Approval of the president.	N/A	No taxes or service fees; possible informal payments.	1-15 days depending on the land size. An existing ownership dispute delays the process. If the <i>tasfiya</i> team cannot resolve the dispute informally, <sup>1</sup> the case goes to court.
Cadastral recording and mapping	National cadastral survey Request made by the president through presidential decree. Survey and Cadastre Directorate forms a team. Team makes technically complicated and time-consuming measurements of the land.  Inventory survey An individual requests ARAZI to conduct the inventory survey. ARAZI's CEO gives approval. Cadastral team makes a simplified measurement of the land. For large tracts of land (e.g., whole villages), presidential approval is necessary after submitting a letter of request to the Administrative Office of the President.	N/A N/A	No taxes or service fees; possible informal payments. 550-1350 Afs based on the land grade plus 50-200 Afs per <i>Jerib</i> (based on Cadastral Bill of Service Fees, Art. 4).	15 days after presidential approval <sup>2</sup> (possibly longer in rural areas due to accessibility, lack of public media, etc.)

<p>Submission of a petition form to the respective civil court and receipt of the circular form. The circular form is taken to the court archives (<i>makhzan</i>), and the title deed compared to court records (<i>konda</i>). <i>Makhzan</i> certifies the circular form. If no court records exist for the seller's title deed, the process cannot continue. In recent praxis, the courts no longer accept tax and water payments as valid ownership documents (due to fears of accepting forged documents). The circular form is taken to ARAZI and certified based on its Principal Books. However, since the courts do not communicate the change in ownership to ARAZI, often ownership cannot be certified, because the previous owner figures on ARAZI records. When all or part of a plot of land is sold several times through court registration, ARAZI does not have the information about the current owner or land size. However, based on the accounts of ARAZI officials, if the seller has tax or water payment receipts, the presidential decree, or a valid customary deed, the circular form can be verified. The circular form is taken to community experts to estimate the land value, size, and other relevant information.</p> <p>The circular form is taken to MoF's Revenue Office (<i>mustofiat</i>) to verify the payment of all taxes. However, since MoF tax records have not been updated since 1978 after Daud Khan's assassination,<sup>3</sup> most tax payers are not registered with MoF. If the tax payments are not registered, no certification can be accorded. The circular form certified by the abovementioned offices is taken to the head judge of the respective court for signature.</p> <p>The property valuation commission comprised of MoF, MoJ, the municipality, and ARAZI as the main members, and possibly members of the Attorney General's Office, National Directorate of Security, and local elders, revises the price estimated by the buyer and seller.</p> <p>The court determines the tariff to be paid for court registration and transaction tax. Sometimes, buyers and sellers report a lower transaction amount in order to pay less tax. In such cases of tax evasion, the courts are often unable to confirm the actual transaction cost.<sup>4</sup></p> <p>The seller brings the receipt of payment to the court. Witnesses go to the head judge for testimonies to confirm the authenticity of the seller's ownership claims. The new title deed is written and signed by the head judge of the respective court. The court archive documents (<i>konda</i>) have two parts: one for the new owner and one kept for archiving purposes. The certification of the Survey and Cadastre Directorate is not necessary in terms of land spatial information. In the past, this certification was required (old circular form), but it has since been abolished. Sometimes, when the land is situated next to state land, the judge may decide to use the old circular form requiring the cadastral certification. Similarly, the certification of the Ministry of Water and Energy was formerly required to verify water rights, but it has since been abolished.</p>	<p>Petition form: 5 Afs (plus 100-500 Afs in informal fees for the court clerk to fill it in); circular form is free (again, an informal fee is often paid for clerks to fill it in) N/A (one circular form to five offices) 3-9. N/A 200 Afs for title deed (<i>qabala</i>)</p>	<p>1-6. No taxes or service fees. 7. 3% for court registration tax and 1% for transaction tax to MoF's Revenue Office (<i>mustofiat</i>).</p> <p>The entire process can be done through a dealer: 1% of the property or land value from the buyer and 1% from the seller. The payment of informal fees throughout the whole process is often required.</p>	<p>The certification from all offices on the circular form can take up to 7-10 days when the owner possesses the formal title deed. In other cases, the process is often stopped. The other steps depend on the amount of informal payments that the seller is willing to pay, as well as personal networks. In some cases, the process can take up to 7 months.</p>
<p><b>Court registration (acquiring the title deed)</b></p>			

1. The *tasfiya* team can be considered as one of the informal dispute resolution forums. Previously, the *tasfiya* delegation included a judge to support dispute resolution, but this practice was abandoned. Our research team did not find any conclusive evidence as to why this occurred.
2. Presidential approval can take months to obtain.
3. During Daud Khan's regime (1973-78), the so-called *izharnamas* (land declarations) were collected for taxation and tenure security purposes. People had to declare (although often stating a smaller size of land to prevent paying high taxes) how much land they owned, and on this basis, MoF's tax books were developed. This process stopped after Daud Khan's death.
4. Interview with an ARAZI official, Kabul, 27 March 2015.



### 6.6.3 Completeness of the land registry

#### *Total cost of recording a property transfer*

Although the amount of registration fees for the three abovementioned procedures is not extremely high, during the course of preparing the paperwork, several informal payments must be made to expedite the process. Additionally, the total duration of the procedure can last up to seven months to one year, which makes the process very cumbersome. These problems particularly affect people living in rural areas, as they have to travel long distances to go to one of the land registry sites, while the lengthy procedure and corruption increase the costs of registering land. As a result, people are more likely to bypass such issues and refer to the village elders to formalise land transactions through customary deeds. Hence, there are no effective and proper safeguard requirements for recording rights to prevent costs and abuse. Furthermore, while the formal registration of rights has been compulsory in previous versions of the LML, this is not explicitly the case in the 2008 version or the proposed amendments of the law.<sup>242</sup> In the absence of a legal obligation to register land, people use customary registration or do not register their land at all.

#### *Recordkeeping*

The only office in Afghanistan that records the location of land with spatial information (based on survey measurements) and maps is the Survey and Cadastre Directorate. As mentioned already, only 34 percent of the land in Afghanistan has been registered with spatial specifications: 30 percent of land was recorded by the Cadastre between 1965 and 1978, while 4 percent has been surveyed since based on presidential decrees. Although local land registry offices might have a recording of privately held land in the area under their responsibility, identifying this on maps is not necessarily possible, since the Survey and Cadastre Directorate does not have maps of all land in the country.<sup>243</sup> The survey records include the boundaries of the land and its spatial specifications. However, taking into account that much of the recorded and mapped land has changed drastically in recent years—for example, 75 percent of arable land has been changed<sup>244</sup> to residential areas—the records available in Survey and Cadastre Directorate cannot be considered as reliable or complete.

When registering land with the courts, two types of circular forms are used. One is the latest version approved by the Supreme Court, and the other is the old circular form. The choice of form lies with the court. The new circular does not include cadastral certification, whereas the old one does. The fact that the new circular form does not contain the exact spatial information about the land provides room for corruption for potential land grabbers and illegal usurpers of the land. The old form is more often used when the land transaction occurs adjacent to state land; in such instances, the courts pay more attention to prevent corruption.

When the *tasfiya* delegation visits the land in question, the team allegedly includes members of the Survey and Cadastre Directorate, or otherwise the *tasfiya* members should draw a sketch of the land at the very least. Yet it is impossible to verify how often these processes occur in practice.

Private encumbrances such as conflicts over land and mortgages are recorded during the surveying process. Information about private encumbrances is recorded in the cadastral ownership lists by cadastral surveyors when conducting the survey. In these cases, the surveyors mark the forms as “non-finalised.” The same procedure is in place for state land. However, since only 34 percent of irrigated land has been surveyed and recorded but not updated, the information cannot be considered as reliable. Additionally, land conflict cases that are taken to court are recorded therein. ARAZI and the municipality record all information about land or houses, including encumbrances like the existence of a guarantee over the land. A potential buyer must verify this information with ARAZI and the municipality. The buyer can also verify with MoF if the property is free of any charges and taxes. However, the obligation to verify the existence of any encumbrances is not legally binding for the offices certifying the circular form during the land registration process. Therefore, unless the individual proactively seeks this information, the possibilities of buying land

242 Alden Wily, “Land Governance at the Crossroads,” 15.

243 Interview with ARAZI officials, Kabul, 11 March 2015.

244 Interview with an ARAZI official, Kabul, 1 September 2015.

with encumbrances are very high.

Finally, public restrictions and charges are not recorded. In the past, the violations of public restrictions were recorded in ARAZI's Principal Books (e.g., when public land was used for a purpose other than the one specified). The law on pastures based on King Zahir Shah ruling required the registration of all violations; however, this requirement was later removed from the law. The reasoning behind the removal of these provisions was that if there are fewer records about any aspect of public land (e.g., violations), it is easier to change the records in order to take public land for state land and distribute or use it for private purposes. Recently, in the new LML awaiting approval, provisions have been made to record violations and charges.

***Access to the registry records***

To access records on land ownership, people have to go to different public institutions to obtain information or a copy of a document (Table 8).

Table 8: Types of registration books in Afghanistan and their accessibility

Organisation responsible	Registration book	Information and documents	Accessibility <sup>1</sup>	Costs <sup>2</sup>	Time
ARAZI	Principal Books of State and Private Land	Registration of private and state land; land declaration forms ( <i>izharnamas</i> )	Publicly available (information on state land only accessible to the government or powerful figures)	Free of charge	1 week
Court archives ( <i>makhzans</i> )	Land Title Registration Books ( <i>konda</i> )	Copy of title deed; copies of other documents (petition form)	Publicly available (computerised system installed by LTERA project is not publicly available)	Petition form (5 Afs) <sup>3</sup>	2-3 months
Survey and Cadastre Directorate	Land Statistics Registration Book	Matching maps with existing legal documents; property subdivision; inventory survey on demand; requests of owner lists; area coordinates on trace paper	Publicly available (information on state land only accessible to the government or powerful figures)	Fee based on the grade and size of the land (Bill of Cadastral Fees)	1 week
MoF	Property and Land Taxation Books	Payment of land and property taxes	Publicly available	Free of charge	Depending on the age of the original records (2-3 months if records are dated)
Municipality Property District Office	<i>Safayyi</i> Tax Book	Payment of <i>safayyi</i> tax	Publicly available	Free of charge	1 day
Ministry of Hajj and Endowment	Registration Book of Endowed Land	Endowed land (only accessible to owners, not third parties)	Publicly available (information on state land only accessible to the government or powerful figures)	Free of charge	Depending on the availability of the ministerial officials
Respective ministries	Book of Properties	Properties and land owned by ministries	Not publicly available	Free of charge	Depending on the sensitivity of the particular land
Archive of the Office of the President	Archives	Land distributed by presidential decree	Publicly available in theory (in praxis, only accessible to the government or powerful figures)	Free of charge	Impossible to estimate, but generally months

1. Note that third parties are never granted information (e.g., information about somebody else's private land or state land) unless the person is powerful. Therefore, "publicly available" in this context means that the access to information is granted to the land owner. In reality, the access to information differs between provinces and districts based on the individual decisions of ARAZI employees to disclose the information or not. Note that there is always a possibility of informal payments.

2. To acquire a copy of a title deed, the entire registration process must be conducted with all the associated costs.

Land information is generally available to individuals, but not to third parties: information about somebody else's land or state land is not accessible to the public. Nevertheless, powerful figures have priority access to information, which throws doubt on the transparency of land registration processes. The process, particularly in courts (two-three months), is time-consuming and cumbersome due to the high informal payments necessary to keep the process going. Additionally, the records are only available through a manual search, thus prolonging the delays to access the information.

Formally registered land/property ownership documents have both a personal and general registration number. A record of these documents is registered and kept in the courts. As mentioned, through the LTERA project, some court archives have been computerised. This digitalised portion of court archive records can be searched by the owner's name, father's name, date of issue, and special court number.<sup>245</sup> However, the land tenure records in the Survey and Cadastre Directorate and ARAZI have not yet been computerised to link ARAZI's Principal Books with the cadastral maps.

The cadastral records and maps can be manually searched by parcel number and owner's name. However, since these records have not been updated since 1978, searching for the owner can be a rather challenging task, because some individuals are no longer the rightful owners or are now deceased. Additionally, Presidential Decree 83 forbids rendering survey information public (Art. 15(2)) due to complaints that survey offices made records available to elite persons who then used the information to acquire ownership. Even though this practice has not necessarily ended, this restriction placed more power over land matters in the hands of the president.<sup>246</sup> Copies or extracts of documents recording property rights can be obtained by anyone who makes a request and pays the necessary formal fee. The client is requested to pay a certain amount of money to ARAZI's account at a local bank and bring back the receipt to obtain the copy of the deed. The process only takes one day.

In 2003, RONCO-USAID started a project to reorganise the legal documents in court archives. Pursuant to this, LTERA-USAID began to digitalise court archives. Land records have thus been computerised in 22 provinces to various degrees. However, access to these computerised records is not open to the public, based on the reasoning that if the records were public, they could be exploited by powerful people who would utilise them for their own private interests. Thus, only the archive heads have access to these records. This reasoning, however, is somewhat dubious, particularly in light of the existing corruption in the Afghan justice system despite the lack of publicly available land information.

#### 6.6.4 Reliability of registry information

Afghanistan does not have one single land registry. The information is instead scattered across various registries with different ministries and agencies with only limited synchronisation (Table 9):

<sup>245</sup> It is not known what aggregate percentage has been digitalised.

<sup>246</sup> Alden Wily, "Land, People, and the State," 33.

Table 9: Linkages of various registration books in Afghanistan

Registration book	Organisation responsible	Information recorded	Issues and comments (linkages)
Private land			
Principal Book of Private Land (including <i>izharnama</i> registry from Daud Khan's regime) <sup>1</sup>	ARAZI	Name of the owner, his father, and grandfather, type of ownership documentation, water rights, taxation, type of transaction (e.g., inheritance)	Associated with the court's Land Title Registration Book ( <i>konda</i> ) through the circular form (a title deed can only be acquired after ARAZI certifies the circular form, i.e., when land is recorded in ARAZI's Principal Books).
Deeds Registration Book ( <i>konda</i> )	Courts	Names of the buyer and seller, date, boundaries with names of neighbours (north, south, east, west), title deed number, price, signatures or fingerprints and photographs of the buyer, seller, and witnesses (cadastral maps not included)	See above. Courts inform ARAZI only sporadically about new landowners; people rarely record the change themselves. ARAZI certification is mere verification if the land is private, due to the often missing information about the new owner and land size, which can also relate to partial sales.
Land Statistics Registration Book	Survey and Cadastre Directorate	Name of "possible" owner, his father and grandfather, land size and grade, boundaries with names of neighbours (north, south, east, west), type of ownership document, existence of sharecroppers, cadastral map	Only connected to ARAZI as the former Cadastral Survey Department was merged with ARAZI. During the <i>tasfiya</i> process, cadastre members are included in the delegation.
Land Taxation Book	MoF	Name, date, land size, amount of taxes paid	Interlinked with other land registries only sporadically, often outdated, and without an effective mechanism to update records. Provincial and district finance offices ( <i>mustofiat</i> ) collect land tax based on their taxation books, which contain information about eligible tax payers based on land declaration forms ( <i>izharnamas</i> ) dating back to Daud Khan's regime (1973-78), sporadic exchanges of official letters between the courts and MoF informing about new landowners, and even more rarely, voluntary reporting by new owners. Tax records are therefore often inaccurate. Many Afghans avoid official land registration channels, thus completely circumventing the updating mechanism of the courts and ARAZI. No effective enforcement mechanism exists to search for non-registered tax eligible persons. When land is transacted outside of close family, <sup>2</sup> without records in the taxation books or the new owner registering with the <i>mustofiat</i> office, the MoF cannot trace eligible tax payers, hence land taxes are not paid in full.
Property Taxation Book	MoF	Name, date, property size, amount of taxes paid	See above.



<i>Safayi</i> Tax Book (only urban land and property)	Municipality Property Office	Information on physical characteristics of the property, including geographic information system (GIS) images	Not connected to MoF's property and land taxation books, because municipalities are allowed to spend their own taxation revenues.
Registration Book of Endowed Land	Ministry of Hajj and Endowment	Boundaries and names of neighbours (north, south, east, west), land grade and type, past transactions	Not connected except when the Survey and Cadastre Directorate makes the survey and records the land as <i>waaf</i> .
State land <sup>3</sup>			
Principal Book of State Land	ARAZI	Boundaries (newly cleared or surveyed using GPS coordinates), otherwise names of neighbours (north, south, east, west), land grade and type, past transactions, rarely cadastral map	Connected to the property book of each ministry when land was transferred by ARAZI. Surplus land should be given to ARAZI for further lease, but this has not yet happened in full (some properties were not declared to ARAZI).
Land Statistics Registration Book	Survey and Cadastre Directorate	Land size and grade, boundaries and names of neighbours (north, south, east, west), type of ownership document, existence of share croppers, cadastral map	Only connected to ARAZI as former Cadastral Survey Department was merged with ARAZI. During the <i>tasfiya</i> process, cadastre members are included in the delegation.
Book of Properties	Each ministry	Different for each ministry, but main data includes boundaries (newly cleared or surveyed land transferred by ARAZI using GPS coordinates), otherwise names of neighbours (north, south, east, west), land grade and type, past transactions, rarely cadastral map	Connected to ARAZI's Principal Book of State Land (see above for exceptions).

1. More than 80 percent of Afghanistan has the *izharnama* registry (not in the south, where it was banned); interview with a land expert, Kabul, 13 September 2015.

2. When the land stays within the family, the tax payments can be traced back based on the father's or grandfather's name. When the transaction takes place outside of the family, this is not possible.

3. There is no registration of public land.

Adding to the issue of the synchronisation of the various registries, their reliability is further compromised by outdated information. The cadastral survey records and maps have not been updated since 1978, while the MoF tax records and ARAZI's Principal Books lack an adequate mechanism for updating data. The fact that approximately 66 percent of the land has not yet been surveyed and that customary land tenure is often not formally registered only aggravates the situation. Finally, some documents were destroyed during the years of war, while document forgery is a recurrent issue, which renders difficult the updating of registries and compromises the reliability of registry information. It is also important to note that information concerning changes to land records in the provinces is not necessarily forwarded to the centre. Hence, no centralised land database exists in Afghanistan.

### 6.6.5 Cost-effectiveness and sustainability of land administration services

#### *Financial sustainability of land registration*

As explained in Tables 7 and 8, the fees collected by the land administration authorities are very limited (excluding informal payments). The only organ that can procure registry fees is the courts. However, these are not kept in court accounts but sent to MoF, because they are not authorised to use the revenue. Although the courts can receive registry fees, these do not cover all of their expenses. The only organ that uses such revenue is the municipalities; all other public sector bodies send their revenue to MoF, which in turn distributes it through the national budget.

The service fee collected by the Survey and Cadastre Directorate is specified in the Bill of Cadastral Service Fees. This is the only organisation to have such a list of fees. The cadastral service fees are not connected to land registration, but are rather payments for different services such as the provision of certain information, copies of the documents, and so on. These, however, fall short of the operation costs of the Survey and Cadastre Directorate.<sup>247</sup>

Despite numerous efforts by the international community to support this sector, the capital investment in land administration is not sufficient. Based on the Afghanistan Statistical Yearbook prepared by the CSO for 2014-15, the total budget for ARAZI was 194 million Afs in the year 2014, with 15.5 million Afs for the development budget and 178.5 million Afs for the operating budget. Yet ARAZI's operating budget constitutes only 0.06 percent of the country's overall operating budget<sup>248</sup> and 0.01 percent of the overall development budget. Considering the financially demanding tasks that ARAZI is (or should be) undertaking (land surveys and clearance processes, state land lease contracts, monitoring, etc.), the capital investment in primary land administration is insufficient according to the views of technical experts consulted for this study.<sup>249</sup>

### 6.6.6 Fees are determined transparently to cover the cost of service provision

#### *Fees have a clear rationale, their schedule is public, and all payments are accounted for*

The Cadastral Survey Department was the first state organisation in the country to introduce cadastral service charges. Cadastral service fees are set and clear; however, they are not publicly accessible. The Bill of Cadastral Survey Services Fee is only available at Cadastral Survey Offices. In courts, there is no list of fees available to the public. No other land-related organisation has a publicly available list of fees.

Receipts are issued for all transactions, because individuals have to go to the bank to process the payments for the court registration fee and MoF transaction tax. The receipt is issued in the bank, which then serves as a proof of the payments, based on which the process of registration can continue. In terms of receipts for service fees, the issuance is not very consistent. Additionally, since the taxes are not paid based on these receipts, there is no motivation to issue receipts regularly.

<sup>247</sup> Interview with ARAZI officials, 11 March 2015.

<sup>248</sup> For comparative purposes, the National Olympic Department received 0.06 percent of the operational budget.

<sup>249</sup> See the list of participants in the Panel Workshops in Appendix III.

### *Deterrence of informal payments*

Informal payments are widespread within government institutions. There are measures and policies in place for monitoring civil servants and dealing with corruption issues. For instance, MEC and HOOAC are the most prominent organisations dealing with such issues. Nonetheless, due to limited capacities of both institutions and the rare internal audits in some land-related organisations, corruption remains rampant in the country.

The issue of corruption was already discussed in the previous sections within the various land administration institutions. It is important to note, however, that ARAZI was considered by the Asia Foundation as the least corrupt institution in Afghanistan. Internal audits are conducted on a monthly basis or in urgent cases. The MEC unit provides reports, although not often in timely manner. When the report is made, it is up to ARAZI's CEO to take the appropriate measures. In the past, some ARAZI employees were fired or had to pay a financial penalty, or their cases were forwarded to the Attorney General's Office.

Nevertheless, ARAZI's operational strategy does not address the issue of corruption, and it contains no measures to ensure transparency and accountability.<sup>250</sup> While ARAZI claims "Client Orientation" to be one of its main organisational values, there are no procedures in place to obtain feedback from clients in order to assess service delivery.

Finally, ARAZI is the only organ among the public institutions that deal with land issues to have certain service standards written in its strategic plan. There are several values and virtues to be followed, such as client orientation, equal treatment of similarly situated customers, and preferential treatment of women. Standards are set for a specific activity to be completed within a certain period of time. ARAZI publicly provides all information about their achievements on their official website.

## 6.7 Land valuation and taxation

PANEL 7: Land valuation and taxation					
<i>LGI 1: Transparency of valuations</i>					
7	1	1	There is a clear process of property valuation.		
7	1	2	Valuation rolls are publicly accessible.		
<i>LGI 2: Efficiency of tax collection</i>					
7	2	1	Exemptions from property tax payments are justified and transparent.		
7	2	2	All property holders liable to pay property tax are listed on the tax roll.		
7	2	3	Assessed property taxes are collected.		
7	2	4	Receipts from property tax exceed the cost of collection.		

### 6.7.1 Introduction

MoF began taxing land and properties in the early 1930s. Around 1960, King Zahir Shah's land policies emphasised the documentation of land titles to facilitate tax collection, mainly to enable the collection of state revenues and increase tenure security. Initially, a land department, AMLAK, was established for this purpose as part of MoF.<sup>251</sup> There was a system of progressive taxation, with land being divided into three categories depending on production: land with the highest production paid higher taxes.<sup>252</sup> Taxes were also introduced for land transactions and "stamp duty." Land and property record thus evolved. Many landholders retained receipts of their land/property tax,

<sup>250</sup> "ARAZI: An Operational Strategy."

<sup>251</sup> Mohammad Yasin Safar and David Stanfield, "Cadastral Survey in Afghanistan, Capacity Building for Land Policy and Administration Reform" (Kabul: Asian Development Bank/Department for International Development, 2007).

<sup>252</sup> Interview with ARAZI employees, Kabul, 3 August 2015; interview with an MoF employee, Directorate General for Revenue Collection, Kabul, 4 August 2015.

and these receipts were later used to indicate land ownership. The receipts contained<sup>253</sup> limited information: the name of the payee, year, village, and number of *jeribs* for which the tax had been paid.<sup>254</sup> There was no other indication in terms of the location of the land or a link to the cadastral maps. The land registration books were updated every 10 years.<sup>255</sup>

In 1973, Daud Khan's regime set the effective system of taxation as a main priority, and the information in the land registration books was expanded. By 1978, land registration books contained a significant amount of information. The Books of Integrated Land Size and Progressive Taxation (commonly referred to as Books of Ownership) included the list of owners, village, and size of properties.

*[This information was] based on the self-reported land tax forms filed by owners, endorsed by village leaders, and submitted to district AMLAK Offices. Information includes the name of the owner, his ID number, name of his father, name of forefather who paid tax, tax payment number under the 1970s system, and amount of taxes paid. Each parcel was also given a land number. No maps accompanied these submissions.*<sup>256</sup>

These books were referred to as the "Principal Books" or "Basic Books," and they contained updated information on owners. The books were sent from the provinces to AMLAK in Kabul.<sup>257</sup> During the war years, property records were destroyed. Allegedly, according to Alden Wily, some influential community members destroyed records like the Books of Ownership to grab more land, particularly during the mujahidin era of the 1990s.<sup>258</sup> However, it cannot be estimated how many books were destroyed and in which parts of the country they were destroyed. Almost three decades of war in Afghanistan after 1979 have contributed to the difficulties with maintaining the system of taxation as it was in Daud Khan's era.

Tax collection from 1979-2001 was very limited, since the country was struggling with wars and violent conflicts. For instance, the mujahidin government (1992-96) was not able to collect land and property tax. Nonetheless, some land and property owners paid taxes to either *mustofiat* or the provincial governor's office. Since the tax was nominal, the owners willingly paid the tax to retain receipts as proof of land/property ownership, regardless of whether they had title deeds or not.<sup>259</sup>

Since 2001, there have been efforts to reform the land and property tax system in the country. The international community has been helping the Afghan government to restart property and land taxation, mainly to generate revenue for the country. Tenure security was another reason behind these efforts to build a strong central administration, which was perceived to be crucial to establishing the rule of law and peace necessary to nurture land-based investment and growth.<sup>260</sup> The current government also views tax collection from both rural and urban areas as a significant means of revenue generation. For example, President Ashraf Ghani's "Manifesto" states that:

*...by expanding cities we can collect hundreds of millions of dollars through municipalities and since municipalities have the legal right to spend, it is our pledge that we will create the widespread participation of citizens...so that people take part in creating and boosting conditions for urban living.*<sup>261</sup>

However, tax collection faces numerous challenges, and it is not done uniformly.

253 Based on an interview with an ARAZI employee, Kabul, 3 August 2015, the format of the tax receipts has not changed since the introduction of taxation in Afghanistan.

254 Alden Wily, "Land, People, and the State," 25.

255 Interview with ARAZI employees, Kabul, 3 August 2015.

256 Alden Wily, "Land, People, and the State," 28.

257 Alden Wily, "Land, People, and the State," 28.

258 Alden Wily, "Land, People, and the State," 28.

259 Based on email correspondence with a World Bank expert.

260 Alden Wily, "Land, People, and the State," 44.

261 Ashraf Ghani Ahmadzai, "Manifesto and Change and Continuity Team" (2014), 71.

### ***Land tax from agricultural land in both rural and urban areas***

Land tax is paid for owning agricultural land; it is fixed and calculated based on the size and grade of the land, as per the Land Tax Law. Land tax from rural areas is usually collected at the district level. A receipt given to tax payers states the amount of the tax paid. In rural areas, the tax officers deliver tax slips to landowners who must then go to the district MoF office (*mustofiat*) and pay the land tax annually.<sup>262</sup> The tax is collected in cash through the *mustofiat*, and the money is then deposited in the provincial bank account.<sup>263</sup> The land tax collected in rural areas is kept in the provinces and used for provincial development projects, including district-level projects. The provinces send a report to Kabul to inform about the amount of tax collected. MoF then deducts the equivalent amount of money from the provincial budget, which is normally transferred from MoF to the provinces.<sup>264</sup> If an owner does not pay land tax, a fine of 1 percent is paid in the first year, 2 percent in the second year, and so forth. However, there is not an adequate enforcement mechanism to pursue tax evaders.

### ***Safayi tax from urban properties***

*Safayi* or sanitation tax significantly differs from land tax. First, it is only collected in urban areas and only from properties with buildings (not land-only properties). Only the municipalities are allowed to collect and spend *safayi* revenues. However, the MoF does not make information public in terms of how much tax municipalities collect annually. The municipality provides property owners with *safayi* notebooks, which indicate the amount of taxes to be paid. *Safayi* is paid once a year, and the fee increases should the owner fail to pay the tax on time.<sup>265</sup> Recently, information from the *safayi* notebooks has been collected centrally by various organisations (e.g., UN Habitat, Democracy International) at the start of a given project, but after the project is finalised, the government takes over; data collection is thus not systematic.<sup>266</sup>

### ***Tax on the transfer of property and land***

Art. 25 and 30 of the Income Tax Law 2005 set the transfer tax rate at 1 percent of the market value of the property: the courts administer and process this tax.<sup>267</sup> A committee comprised of MoF, MoJ, the municipality, and ARAZI (occasionally, more members depending on the rural/urban area) verifies the accuracy of the price written on the title deed and the market value of the property/land by acquiring information from local property dealers and community members. Currently, MoF is working on a new draft of the Income Tax Law.

### ***Tax on rents***

The Income Tax Law 2005 makes some provisions regarding the taxation of property based on the income derived from land and property. Art. 17 and 27 state that rent received from renting and leasing immovable property as well as gains from the sale, exchange, or transfer of property, except by inheritance, is subject to income tax.

Property dealers are required to send a copy of the rental agreement to the MoF for taxation purposes. Art. 65(6) of the Income Tax Law 2005 stipulates that “property dealers are required to send a copy of the agreement to the MoF as soon as it is signed. If a property dealer makes a false agreement or delays sending the agreement, the MoF will officially notify the MoJ to take necessary action.”

According to Art. 65(5), if it is proven that the rent in a lease agreement is more than 20 percent lower than the market value, the MoF calculates the rent according to the market value as determined by an authorised committee. This is applicable if the MoF finds evidence and documents showing that the rent in the contract is less than the rent paid (Art. 65(7)).

<sup>262</sup> Interview with an ARAZI employee, Kabul, 3 July 2015.

<sup>263</sup> Interview with ARAZI employees, Kabul, 3 June 2015.

<sup>264</sup> Interview with ARAZI employees, Kabul, 3 June 2015.

<sup>265</sup> Interview with ARAZI officials, Kabul, 8 June 2015.

<sup>266</sup> Interview with UN Habitat employee, Kabul, 6 August 2015.

<sup>267</sup> Interview with ARAZI employees, Kabul, 3 June 2015.



## 6.7.2 Transparency of valuations

### *Process of property and land valuations*

In Afghanistan, there are only four instances when land valuation occurs after the establishment of an impartial commission: during the acquisition of private land by the state to estimate the amount of compensation; when transferring state land from one governmental entity to another; when leasing state land to private investors; when estimating land and property transaction tax. In none of these cases is the land valuation made for the purposes of land and property taxation.

Valuations for the acquisition process, transfer of state land to other governmental entities, and state land leases (development projects)

There are clear legal provisions for the assessment of “land values,” particularly in terms of land and property expropriation. Once a person or organisation requests an assessment of the land or property value, ARAZI forms a commission to evaluate and set the price. Art. 69 of the LML defines the structure of this commission as mentioned in Section 6.5 above.

To determine the market value of the land, the commission obtains quotations from three local real estate dealers, verifies the price of land located in proximity to the land/property, and requests the courts to share information about the most recent transactions in the area.<sup>268</sup>

In practice, a number of problems arise during the land assessment and valuation process.<sup>269</sup>

- The commission takes more than one month to set the price, as it is not easy to convene all the members for meetings. The process only occurs on time if there is pressure from the leadership or those with an economic interest.
- Sometimes, the commission members do not cooperate and refuse to share information. For example, the courts often refuse to cooperate and send a price assessment.
- The entire process, from the time that the commission sets the price until the individual obtains the land, can take more than one year (e.g., private land appropriation for state projects). Hence, by the time the individual is compensated, the compensation amount is less than the current market value.
- Real estate dealers might not provide an accurate price assessment.
- Corruption can lead to valuations not necessarily based on market values.
- Strongmen and powerful individuals whose economic interests are at stake can put pressure on the commission so that the set price benefits them.

For the abovementioned reasons, the set price of the land or property does not necessarily reflect the market value.

### *Valuation for land leases (telecommunications and agriculture)*

In the case of the land valuations for state land leases, when the larger commission based on Art. 69 cannot be formed, the simplified procedure is used. Land lease prices are determined based on the type, grade (quality), and size of the land by the leasing committee (see point 3 of ARAZI’s Land Lease Procedure in Section 6.5) comprised of local representatives of ARAZI, MoF (*mustofiat*), and MAIL. The market value of the land is not taken into account in this procedure.

<sup>268</sup> Interview with ARAZI employees, Kabul, 11 March 2015.

<sup>269</sup> Interview with ARAZI employees, Kabul, 27 March 2015.

### ***Valuation for land and property transaction tax***

When property or land is sold during the process of court land registration, a property transaction tax of 1 percent is paid. A committee comprised of MoF, MoJ, the municipality, and ARAZI (occasionally more members depending on the rural/urban area) verifies the accuracy of the price written on the title deed and the market value of the property or land. The committee asks the community, local property dealers, and the relevant land offices about the most recent purchase prices. The seller then receives a receipt from the court, and the payment is deposited in MoF's bank account.

### ***Calculation for land taxation purposes***

The calculation for taxation purposes is determined according to a fixed calculation scheme based on the size and grade of the land. The market value of the land is not used in this procedure. Based on the Land Tax Law, the seven land grades are as follows:

- First-grade land (e.g., orchard, vineyard): factor 1.00;
- Second-grade land (e.g., land that can be cultivated for two seasons): factor 0.85;
- Third-grade land (e.g., land that can be cultivated for one season): factor 0.67;
- Fourth-grade land (e.g., land that can be cultivated for one season, but only 50 percent of the land can be cultivated): factor 0.40;
- Fifth-grade land (e.g., rain-fed land that is cultivated every year): factor 0.20;
- Sixth-grade land (e.g., rain-fed land that is cultivated every second year): factor 0.15;
- Seventh-grade land (e.g., rain-fed land that is cultivated every three or more years): factor 0.10.

Taxation based on the land size is calculated as follows:<sup>270</sup>

- Up to ten *jeribs* are taxed at 45 Afs per *jerib*;
- 11-20 *jeribs* are taxed at 60 Afs per *jerib*;
- 21-50 *jeribs* are taxed at 85 Afs per *jerib*;
- 51-100 *jeribs* are taxed at 120 Afs per *jerib*;
- 101-200 *jeribs* are taxed at 175 Afs per *jerib*;
- 201-500 *jeribs* are taxed at 235 Afs per *jerib*;
- 501-1000 *jeribs* are taxed at 310 Afs per *jerib*;
- 1000+ *jeribs* are taxed at 400 Afs per *jerib*.

The calculation is based on land records, and so it is mainly applicable to registered land. As the procedure for tax valuation is fixed, there has been no proper updating of the tax values.

### ***Calculation of safayi taxes by municipalities***

All properties within the municipal boundaries should pay *safayi* tax, which is calculated based on the combined assessed value of the land and its improvements. The value is calculated as the land area (m<sup>2</sup>) multiplied by the value + volume of the building (m<sup>3</sup>) + length of the boundary (m) multiplied by value. The value of land depends on its location, so a land value zoning map is needed for each city. The distance from the city centre, main road, commercial areas, and so on also influence the value. The value of the building improvement depends on its volume, use (e.g., residential, commercial), and quality and type of the materials (e.g., concrete, bricks, mud).<sup>271</sup>

<sup>270</sup> *Land Tax Law (Official Gazette no. 355), 1976 (SY 1355).*

<sup>271</sup> "Managing Land, Mobilizing Revenue: Strengthening Municipal Finance and Land Administration through Property Registration and Taxation," Discussion Paper 3 (Kabul: UN Habitat, 2015), 2.

In the absence of a land cadastre, the *safayi* system relies on on-site surveys. When the implementing agencies and municipality decide to introduce the *safayi* system in a certain district, the surveyor teams go to each property and record its physical characteristics. The surveyors use a standard form and then enter the information into the digital property database, including in the GIS. The district offices (*nahyia*) use the property information to calculate the tax and issue an invoice for the property; the invoices are then hand delivered to the properties or residents are informed to collect their tax invoices. Residents then pay the tax. Until 2012, residents paid taxes in cash, but now they have to pay them directly into the municipal account at the local bank that issues a receipt. The *nahyia* offices then register these payments and issue a “*Safayi Certificate*” as proof of payment.<sup>272</sup>

After one area is surveyed, the team moves to another area and so on. The surveying is not done regularly (i.e., annually or monthly); only the areas identified with outdated information are surveyed. The other areas are left to the government to manage.<sup>273</sup>

The information collected in the GIS along with the Integrated Financial Management System contains the necessary data to build an approximate “book of rights,” although this information does not have any legal recognition in Afghanistan. It can certainly help when a person claims ownership in the land registration procedure and seeks the acquisition of the land title, but it does not constitute proof of ownership.<sup>274</sup>

It is important to note that only the implementing agencies and one municipality (Kandahar) use GIS maps. The majority<sup>275</sup> of municipalities lack the capacity to update the GIS maps, so they use printed maps, while putting red dots on the properties that have already paid taxes.<sup>276</sup> The GIS maps are currently being updated by the implementing agencies working in a given area. After the project’s end, the updating does not continue, because the government lacks the capacity to do so.

### ***Accessibility of valuation rolls***

There are no legal provisions that require making the valuation rolls public. State organisations can provide information regarding the value of land or property on request as long as an individual has a legal basis for making such a request (e.g., land dispute).

For example, the municipalities can provide generic information regarding the price of property/land in urban areas. This list (*laya*) identifies zones in urban areas with a corresponding estimation of land prices based on the accounts of local property dealers. As an example, Kabul is divided into five zones, and each zone has different land values written in the *laya*. If an individual intends to buy a parcel of land from zone three, he/she goes to Kabul municipality to obtain the land values in zone three. The municipalities update this list annually. These valuations are not used for taxation purposes, because they only provide generic information on the land prices in a certain area.

Based on the accounts of various government officials involved in this project, the limited public availability of valuation rolls is a protective measure given the prevalence of corruption and the possibility of powerful individuals using the information to promote their economic interests. This assumption, however, can be challenged (by the same argument used in relation to the cadastral survey information) that the prevalence of corruption is still high despite the information not being made public.

In general, information regarding land/property valuations, particularly in cases of expropriation, is collected. However, there is no consolidated national database for this information; likewise, no national database for taxation exists.

272 “Managing Land, Mobilizing Revenue,” 3.

273 Interview with UN Habitat employee, Kabul, 6 August 2015.

274 Interview with UN Habitat employee, Kabul, 6 August 2015.

275 UN Habitat is currently working in five of the largest cities in Afghanistan (Kandahar, Mazar-e Sharif, Herat, Jalalabad, and Lashkar Gah).

276 Interview with UN Habitat employee, Kabul, 6 August 2015.

### 6.7.3 Efficiency of tax collection

#### *Exemptions from property taxes*

Currently, tax exemption is applicable to individuals who own less than two *jeribs* of land or those whose land/property has been affected by natural disasters. Art. 21 of Presidential Decree 1365 states that if arable land is destroyed by natural disasters, the owner is exempted from tax until the land is restored. Accordingly, the MoF and provincial government administration decide the tax exemption period, which can be for a period of up to three years and renewed if more time is necessary. There is also a legal provision for the exemption of tax on agricultural produce. Art. 23 of the same law gives the MoF and provincial government administration the authority to exempt farmers whose produce has been completely or partially destroyed as a result of natural disasters.

The prevalence of corruption in the civil service can prevent the transparent implementation of tax exemption policies. For example, land that does not meet the criteria for tax exemption can be recorded as exempted from tax if the landowner makes a deal with civil servants. A farmer can thus extend the exemption period by paying off state officials. Furthermore, farmers who genuinely qualify for tax exemption might be asked for bribes so that their land is exempted from tax. Corrupt practices can thus continue and even increase in rate, particularly in the absence of the public's awareness about the tax exemption policies.<sup>277</sup>

#### *Tax rolls*

Most property and land owners are not registered with provincial MoF offices, either because they do not wish to go through the formal procedures of registering their land or because the information sharing between the courts, ARAZI, and MoF is inconsistent. It is also possible that landowners do not view registration to be necessary, as customary deeds and transactions are more common in Afghanistan. Hence, tax rolls are often incomplete. Furthermore, the capacity of the provincial and district MoF offices to update records and collect taxes is limited, and staff are lacking to pursue cases of tax evasion. In some areas, there are no district MoF offices, because of a lack of security or simply because such offices have not yet been established. This means that in certain areas land transactions are not recorded and land tax books not modified.

Various projects have attempted to facilitate the process of land registration and tax collection (with the aim to regularise tenure recognition), particularly in urban areas, such as UN Habitat's project in Herat, Kandahar, Mazar-e Sharif, and Jalalabad mentioned in Section 6.1. As described above, house-to-house surveys have been conducted based on the decision of the municipality and implementing organisations to introduce the *safayi* system. In this manner, over 100,000 parcels have been entered into the municipal system of Kandahar. The *safayi* notebooks are not yet classified as provisional entitlements, but the information provided in each notebook is sufficient if, in the future, such documents are accepted as a basis for formal entitlement. Even though the person still has to go through the regular legal procedure of acquiring the land title, the *safayi* notebook can help this process, particularly in the case of the government's decision to distribute land.<sup>278</sup> Each parcel is given a unique number, and a map of its location is drawn based on satellite images of the neighbourhood.<sup>279</sup> This data is updated with information obtained from the district property manager responsible for the *safayi* who reports any changes to the central office. People also can come and self-report any changes.<sup>280</sup>

Another example is the 2004-09 USAID-funded LTERA project, also mentioned in Section 6.1. LTERA upgraded and regularised the tenure for 59,100 households in Kabul, Mazar-e Sharif, Kunduz, and Taloqan. The project "facilitated existing routes to legal entitlement, depending on community-based clarification of rights, followed up by municipal registration of claims, revision of master plans, and court adjudication of claims based on quiet possession."<sup>281</sup> Following LTERA is the USAID LARA project, which similarly works through community-based organisations in two

277 Interview with ARAZI employees, Kabul, 24 April 2015.

278 Interview with ARAZI employees, Kabul, 24 April 2015.

279 Alden Wily, "Land, People, and the State," 61.

280 Interview with UN Habitat employee, Kabul, 6 August 2015.

281 Alden Wily, "Land, People, and the State," 61.

informal settlement sites in Jalalabad. The beneficiaries are all returnees. As Alden Wily stated:

*Occupants will receive provisional occupation permits valid for 35 years. This innovation has been entered into the proposed amendments in the LML. The municipal safayi notebooks described above are not being awarded this status. It is not clear that ARAZI is aware of their existence.*<sup>282</sup>

### **Amount of property taxes collected**

As not all property holders are registered, tax collection faces many challenges. Taking into account the scale of urban informality affecting an estimated 70 percent of Afghan cities,<sup>283</sup> not all due taxes are paid in reality. Based on the survey conducted by MAIL in 2011, from 2 million *jeribs* of taxable land, 120 million Afs in taxes should have been collected. Yet the actual tax collected by MoF in 2014 was only 20 million Afs, significantly lower than the projected total. The exact amount collected for land transaction tax is not clear.

In terms of the *safayi* tax, no accurate data is available in terms of the amount of tax collected annually through this system. Additionally, the *safayi* system faces its own challenges:

- The tax collection rate is low, because citizens fail to see the benefits of tax expenditure.
- Poor surveying and deliberate mis-surveying to reduce the tax calculation have been reported.<sup>284</sup>
- As the *safayi* system changed the tax calculation method in 2009, some *nahyias* (districts) use the old manual system and some the new system. Given that the old method uses different tax rates for similar properties, this can be confusing for citizens and makes tax collection and enforcement difficult for municipal staff.

### **Cost of collecting taxes**

The cost of collecting transaction taxes is relatively low, because the only necessary activity is the establishment of the pricing committee. People go to the bank to make the payment themselves based on the land price given on the legal title deed.

The cost of collecting land tax, particularly in rural areas, is high because the system is manual, thus leaving space for administrative duplication. Data registry is done manually, while the high number of departments and institutions such as ARAZI and MoF with its Small-Owned Enterprises Department, Properties Department, and Directorate General for Revenues (which also has four different departments for small, medium and large tax payers and a non-tax revenue office) make the process time-consuming and inefficient.<sup>285</sup>

There are two tax collectors in each district (finance and revenue collection clerks).<sup>286</sup> Their salary is approximately 15,000 Afs per month. As the money derived from tax collection is usually transported from the districts to the provincial centre by car, there are certain minimal expenses for fuel along with the per diem of tax collectors transporting the money. When calculating the expenses for all 366 districts in Afghanistan, tax collection in rural areas costs approximately 66 million Afs. Given that the amount of taxes collected in 2014 amounted to only 20 million Afs, it is not advantageous for the Afghan government to collect land taxes.

Tax collection in residential areas and, generally, in urban areas is rather easy. The *safayi* system has proven to be a cost-effective and relatively straightforward intervention with multiple benefits.<sup>287</sup> According to the UN Habitat report, the average cost for the survey and registration of a property is US\$8, while the average annual *safayi* tax is US\$25.<sup>288</sup>

282 Alden Wily, "Land, People, and the State," 61.

283 "Managing Land, Mobilizing Revenue," 2.

284 "Managing Land, Mobilizing Revenue," 3.

285 Interview with ARAZI employees, Kabul, 27 March 2015.

286 Note that they are not solely responsible for taxation; their remuneration corresponds to the completion of several tasks.

287 "Managing Land, Mobilizing Revenue," 1.

288 This figure includes the average from all properties (residential, commercial, governmental, and indus-



## 6.8 Dispute resolution

PANEL 8: Dispute resolution					
<i>LGI 1: Assignment of responsibility</i>					
8	1	1	There is a clear assignment of responsibility for conflict resolution.		
8	1	2	Conflict resolution mechanisms are accessible to the public.		
8	1	3	Mutually accepted agreements reached through informal dispute resolution systems are encouraged.		
8	1	4	There is an accessible, affordable, and timely process for appealing disputed rulings.		
<i>LGI 2: Share of land affected by pending conflicts is low and decreasing</i>					
8	2	1	Land disputes constitute a small proportion of cases in the formal legal system.		
8	2	2	Conflicts in the formal system are resolved in a timely manner.		
8	2	3	There are few long-standing (>5 years) land conflicts.		

### 6.8.1 Introduction

Although land disputes are the most common cause for conflict in Afghanistan in terms of all types of conflicts (42 percent),<sup>289</sup> they seem to proceed infrequently to the formal justice system.<sup>290</sup> Some court personnel also appear to feel that they are less capacitated to adjudicate land claims than non-state dispute resolution providers are, as the latter possess superior local knowledge and evidence-gathering capacity. As a result, the low percentage of land cases in government forums does not constitute evidence of a low number of land cases.

#### *Formal justice system in Afghanistan*

The Afghan judiciary is an independent organ of the Islamic Republic of Afghanistan comprised of Islamic, statutory, and common law. No law should contravene the tenets and provisions of Islam.<sup>291</sup> The courts are the primary formal organs for addressing disputes. The court system consists of approximately 540<sup>292</sup> primary courts located in each district or municipality, 34 provincial courts of appeal in each province, and the National Supreme Court, including courts with specialised jurisdiction whose organisation and authority are regulated by the law.<sup>293</sup> Additionally, there are other dispute resolution forums to address land issues within the formal justice system. These include well-established bodies such as MoJ's Department of Huqooq and Department of Government Cases. Finally, the informal dispute resolution mechanisms such as *shuras*, *jirgas*, CDCs, and other ad hoc and permanent bodies, including the justice system of armed opposition groups, exist to deal with land disputes in Afghanistan.

The key role of the Supreme Court is dispute resolution, as it is the highest judicial organ of the state. However, it carries out certain administrative roles such as land registration, land transfer, and issuing title deeds, which certain experts consider to create a conflict of interest in terms of the Supreme Court's judicial role. In the latest rounds of donor meetings in the summer of 2014, discussions were held on the possibility of transferring the authority for land registration from the Supreme Court to ARAZI. Recently, concrete steps were taken by the NUG in the form of Cabinet Resolution No. 5, dated 5 February 2015, to acknowledge land registration and the issuance of the title deeds as an administrative rather than a judicial process. ARAZI is currently working closely with the second vice

trial). See "Managing Land, Mobilizing Revenue," 3.

289 Warren, "Afghanistan in 2014," 11.

290 See the statistics in the Introduction.

291 *Constitution of Afghanistan*, Article 3, 2004 (SY 1382).

292 According to the provisions of the Law on the Organisation and Jurisdiction of Judiciary, the Supreme Court may establish district primary courts in each district (there are approximately 400 districts in Afghanistan) as well as family, commercial, juvenile, and military primary courts in each province (four times 34 provinces); additionally, there are four municipal primary courts in Kabul. Due to the remoteness of certain areas, some of the primary courts have not yet been established, although there are no statistics on the precise number of not yet established primary courts.

293 *Constitution of Afghanistan*, Article 116, 2004 (SY 1382).

president and MoF on how this role and function can be taken out of the court system and absorbed into ARAZI with corresponding budgetary implications. The presidential decree necessary for the transfer of responsibilities was already drafted by ARAZI and awaits the president's approval. ARAZI is preparing to launch a pilot project in Herat to trial the functioning of the new mechanism in 2016.

The appeal courts located in provincial centre are responsible for general criminal, security, civil and family, public rights, commercial, and juvenile cases. They have jurisdiction over primary courts such as the Central Provincial Primary Court, Juveniles Primary Court, Commercial Primary Court, District Primary Court, and Family Issues Primary Court, which adjudicate general criminal, civil, public rights, security, and traffic criminal cases.

### **Formal justice system: Other dispute resolution forums**

Other dispute resolution forums address land issues within the formal justice system. These include well-established bodies such as MoJ's Department of Huqooq and Department of Government Cases. Since ARAZI is the land authority that addresses the property claims of refugees and returnees, expedites property disputes resolution, and identifies and verifies forged documents, the dispute resolution function constitutes a vital part of its portfolio. The Department of Huqooq (Rights) was established to adjudicate and settle land disputes arising from debts, properties, and commercial or family issues between citizens and legal persons. It aims to do so through the engagement of tribal elders and other community leaders, similarly to the informal justice system mechanism by referring cases to court in the case of a lack of evidence or willingness to settle the dispute. Similar to the Department of Huqooq, the Department of Government Cases serves as a bridge between the public and the courts, while protecting and safeguarding the movable and immovable properties of the government. However, these institutions do not significantly affect the primacy of the courts and the informal justice mechanisms, and they serve more as channels through which some cases are referred to the formal system.

### **Afghan informal justice system**

Before discussing the informal justice system, it is important to clarify certain terminology. The informal justice system is sometimes called the informal dispute resolution mechanism without denying the courts the final decision power as the only organ that can legally resolve disputes and give a final decision on a case. However, since the informal justice system occasionally resolves disputes as opposed to only addressing them, it cannot be called a mechanism for addressing land disputes.

Although notable improvements have been made in Afghanistan's formal justice system since 2001, the informal non-state justice sector still handles what appears to be the majority of disputes. According to the Survey of the Afghan People conducted by the Asia Foundation in 2015, 47 percent of people approached elders of local *shura* in the case of a land dispute, although the total number of land-related court cases in the formal system varies between 10 and 50 percent per province. People taking the dispute to the informal dispute resolution body are mostly from rural areas, while nearly half of all disputes are land disputes (42.2 percent). When asked which type of justice system—formal (courts and Huqooq) or informal—is fair and delivers the best results, the majority of Afghans preferred *jirgas/shuras*, followed by the Department of Huqooq; the courts were the least preferred venue.<sup>294</sup>

A great profusion of actors mediate land disputes within the non-state informal justice sector. Even though this briefing paper treats the non-state justice sector in a fairly unitary fashion, in reality, it should be better understood as an institution of multiple actors (e.g., registered and non-registered *shuras/jirgas*, CDCs, commissions on conflict mediation<sup>295</sup>) that sometimes cooperate with one another in order to resolve the dispute through the informal justice mechanism. Due to a dearth of reliable information on their operations, this paper will not consider forums of dispute resolution provided by armed opposition groups.<sup>296</sup>

294 Warren and Hopkins, "Afghanistan in 2015," 104.

295 Commissions on conflict mediation constitute a joint initiative in south-eastern provinces, comprising tribal elders, local commanders, and other influential individuals.

296 For more information, see Antonio Giustozzi, Claudio Franco and Adam Baczo, "Shadow Justice: How

## 6.8.2 Assignment of responsibility

Afghanistan's court system enjoys competence to address land disputes, and *de facto* principles of territorial jurisdiction generally determine which court will address the dispute at the primary and first appellate levels.<sup>297</sup> As designated by the Constitution of Afghanistan, the Supreme Court is the country's chief judicial organ<sup>298</sup> with provincial courts of appeal,<sup>299</sup> and primary courts located in each provincial centre and district.<sup>300</sup> District primary courts, particularly the civil *dewan* of the central primary court (when both parties are natural persons) and the public rights *dewan* (when at least one party is a legal person) are responsible for addressing land disputes.<sup>301</sup> The public security *dewan* could also conceivably handle particularly aggressive instances of land grabbing.<sup>302</sup> While district primary courts are capacitated to address only land disputes within their district,<sup>303</sup> central primary courts are able to address disputes both inside and outside their particular geographical area.<sup>304</sup> Nevertheless, despite the abovementioned provisions of the LOJJ, there exist other governmental and non-state entities engaged in dispute resolution efforts in Afghanistan.

In both Pashtun and non-Pashtun areas, many parties pursue their claims through an ad hoc dispute resolution body known as a *jirga* or *maraka*. All adult men are in theory able to participate in the *jirga/maraka*. However, most commonly, tribal elders compose these bodies, although religious leaders are also involved in some instances. Certain individuals have developed a reputation as particularly effective mediators, and participate in more *jirgas* than do others of a similar status. These individuals are known as *jirgamaran*. Government officials, most commonly the district governor or chief of police, also mediate disputes in some instances, as do some commanders or other non-state armed actors.<sup>305</sup> Outside of the core Pashtun areas of eastern and southern Afghanistan, mediation by individual non-state leaders such as commanders, *maliks/arbabs*, and religious leaders is very common using the forums known as *jalasas* (meetings) or *marakas*.

*Shuras* also mediate disputes in many areas, whether Pashtun or non-Pashtun. Unlike *jirgas*, these are permanent bodies with a fixed membership. *Shuras* are most often organised around a common identity (e.g., tribal *shura*, *ulema shura* [*shura of Islamic clerics*]) or a common activity (e.g., *shura* to promote development). The latter includes a significant number of *shuras* with donors or other external support, such as District Coordination Councils established after the since-ended Afghan Social Outreach Programme. Dispute resolution is part of the mandate of District Coordination Councils,<sup>306</sup> as it is for other donor-supported *shuras*.

Furthermore, there were (and still are) various initiatives from the NGO community such as the NRC's project of Information and Legal Assistance Centres, Afghanistan PEACE's project focussed on Kuchi communities, USIP and ARAZI's pilot project to support ARAZI's mechanism of addressing land disputes, and the World Bank's Land Conflict Resolution Project using various mediation mechanisms to support conflict resolution within local communities.

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the Taliban Run their Judiciary?" (Kabul: Integrity Watch Afghanistan, 2012).

297 *Law on the Organisation and Jurisdiction of Judiciary* (LOJJ), (*Official Gazette* no. 851) 2005 (SY 1384). The LOJJ does not specify the principles of territorial and subject-matter jurisdiction, except in the division of *dewans* in the central primary court. One could nevertheless read Art. 81-82 of the Civil Procedure Code as establishing the principles of territorial jurisdiction. In any event, territorial jurisdiction appears to predominate in practice, and disputes over jurisdiction between the various courts based on territory seem quite rare.

298 Art. 116, 120.

299 LOJJ, Art. 52; *Constitution of Afghanistan*, Art. 116, 2004 (SY 1382).

300 LOJJ, Art. 62.

301 LOJJ, Art. 63.

302 LOJJ, Art. 63.

303 LOJJ, Art. 68.

304 LOJJ, Art. 63.

305 For example, "The Customary Laws of Afghanistan" (New York: International Legal Foundation, 2004), 53-54, on the role of commanders in dispute resolution in northern Afghanistan.

306 AECOM, "Afghanistan Social Outreach Program (ASOP) Annual Report: July 2010-July 2011" (Washington, DC: United States Agency for International Development, 2011).

### ***Accessibility of conflict resolution mechanisms to the public***

The majority of Afghans lack access to the conflict resolution mechanisms for solving land disputes.<sup>307</sup> However, the level of access varies dramatically between demographic groups.

Adult men of majority populations<sup>308</sup> enjoy the greatest degree of access, whether to the formal or informal justice system. They face the least social stigma in accessing state dispute resolution services (see below for the contrast with women's situation) and have the greatest opportunity for travel if the dispute requires so. Additionally, most sources indicate that costs associated with the use of such services are low enough so as to not constitute a general barrier to access. Nevertheless, technical issues impede access to the justice system such as the absence of state judicial presence in remote and insecure areas<sup>309</sup> and the lack of financial means for private legal counselling.<sup>310</sup> Finally, young people experience limitations in accessing conflict resolution forums, claiming that elders or other non-state leaders do not consider the youths' arguments or evidence.

Men from marginalised population groups face additional barriers to accessing conflict resolution services. As court access requires the possession of the ID document or *tazkera* (Civil Procedure Code, Art. 13(1)), minority groups are thus excluded from state conflict resolution mechanisms. This is notably the case for the Jogi and Chori Frush populations; none of the former and only a few of the latter possess any form of identification from the Afghan state.<sup>311</sup> Additionally, access to non-state forums depends on the disputants' social integration in the area. New migrants, refugees, and IDPs thus have significantly greater difficulty in accessing non-state forums than long-term residents do.

By contrast, women have extremely limited access to both state and non-state dispute resolution forums.<sup>312</sup> In both instances, strictly enforced social norms discourage women from approaching any dispute resolution forum. As such, the only way to access a conflict resolution forum is through their male relatives or when accompanied by a *mahram* (intermediary or "chaperone"; in all cases, a male relative). A woman's ability to access dispute resolution forums thus strongly depends on the support of her family members. Given the fact that Afghan women often become the owners of property only through inheritance, the possibility for women to use the dispute resolution mechanism to claim property is virtually non-existent.<sup>313</sup>

### ***Effectiveness and equitability of the informal justice system: Recognition of informal justice mechanisms***

Even though the informal justice system is widely used in Afghanistan, it does not enjoy full legal recognition. Evidence and rulings are shared between state formal mechanisms such as the Department of Huqooq and courts, while non-state dispute resolution venues only function on an ad hoc basis. Often it happens that the court decides the case differently from the *shura* or *jirga*, thus creating obstacles for the implementation of any decision.

307 See Tim Luccaro and Erica Gaston, "Women's Access to Justice in Afghanistan: Individual versus Community Barriers to Justice" (Washington, DC: United States Institute of Peace, 2014). The authors detail how most women lack access to any dispute resolution forum.

308 Given that Afghanistan's demographics vary in each province and that reliable statistics do not generally exist, we use "majority" to designate the population locally perceived to be the majority.

309 For example, until a recent deployment of judges from the provincial centre, most districts of Khost Province lacked a sitting judge.

310 Some NGOs and civil society organisations offer legal aid for land issues; among them, the NRC's Information, Counselling, and Legal Awareness programme is certainly the most well-known.

311 See, for instance, "Jogi and Chori Frush Communities."

312 Refer to Luccaro and Gaston, "Women's Access to Justice in Afghanistan."

313 There are some exceptions such as widows and elderly women who are well accepted in the community, as they can approach non-state leaders without an intermediary. Additionally, a small number of women in urban areas who have become community leaders due to individual circumstances or efforts have the ability to move about with a significantly greater degree of freedom. They can mediate disputes to which a woman is a party or, at least, directly lobby male leaders on behalf of a female disputant.

One in five people prefer avoiding the formal justice system and solving their disputes (not only land disputes) using the non-state system.<sup>314</sup> Based on the Civil Code and Civil Procedure Code's provisions, the decision of the informal justice system can assume a legal status, provided that it is registered with a court from the beginning of the case, and the court refers it to the informal justice system. Since Afghans do not approach the formal justice in a high number of cases, when the decision is made in the informal justice system, under Afghan legal provisions, it is not eligible to be registered by courts.<sup>315</sup> Additionally, there is a massive difference in the opinions of judicial practitioners on this issue. Some judges claim that as long as the case is settled in a non-state system before the start of the court proceeding, it can be registered with the court; others believe that it is not their legal obligation, but that they can register it, depending on their workload. Finally, some judges say that registering cases concluded by the informal justice system is not legal.<sup>316</sup>

Nevertheless, linkages and ad hoc cooperation between the formal and informal justice systems do exist. The Civil Code and Civil Procedure Code contain specific rules that give legal recognition to non-state dispute resolution. Both prescribe the basic rules that all Afghans should follow in their relations with each other to encourage people with personal disputes, including land disputes, to use reconciliation in order to find a compromise. On this basis, the decisions of the informal justice system can be perceived as an agreement (contract) between two people that can be enforced by a court. According to both laws, the non-state system of dispute resolution has the same status as court decisions, as long as the dispute is registered with the courts from the beginning and the court recommends it to be referred to an informal or traditional justice body such as a *shura* or *jirga*. Taking this into account, the decisions of the non-state system can gain a legal status as valid contracts recognised by court. However, certain preconditions apply: for example, all parties must voluntarily agree to the non-state system's decision.<sup>317</sup> Also, the courts will not accept a non-state system decision for certain types of cases, such as criminal cases.

Additionally, a new wave of interest in the possible linkages of the formal and informal justice systems has recently arisen among Afghan political circles and the international community. The debate started around the possibility of reviving the draft Law on Dispute Resolution, *shuras* and *jirgas* that was initiated in 2010 and is still pending at the MoJ. The main purpose of this draft law is to regulate the operation of *shuras/jirgas*. Moreover, the draft law aims to create linkages between the formal and informal justice systems. A number of international actors, including the United Nations Development Programme,<sup>318</sup> UNAMA,<sup>319</sup> USIP,<sup>320</sup> and others, reflected on this debate by producing reports and policy papers on the topic. Currently, two versions of the draft law (for criminal and civil cases, respectively) submitted to the MoJ are awaiting the final decision.

Second, the first draft of Land Dispute Resolution Regulation for ARAZI, supported by USIP, is currently being drafted. The aim of this regulation is to address land disputes that are outside the court system via community councils (*shuras*), district and provincial ARAZI offices, and local governance structures, which will operate under common district and provincial commissions. Additionally, the regulation aims to maintain the social order and justice via dispute resolution, strengthen the relations between *shuras*, district and provincial ARAZI offices, and local governance structures, engage the *shuras* and reinforce their role in land dispute resolution, cooperate with judicial bodies to prevent the accumulation of cases, and register the outcomes of land disputes in ARAZI's Principal Books and database. Yet the outcome of the current debate on the possibilities of linking the formal and informal justice systems still remains to be seen.

314 Warren, "Afghanistan in 2014," 11.

315 However, there are some indications in the Civil Code that give the possibility of registering the dispute as a contract. See the next paragraph for more details.

316 Ali Wardak, "Civil Dispute Resolution in Afghanistan" (Kabul: United Nations Development Programme, 2015).

317 If the settlement is in the form of the claimant's property, he/she becomes its owner. However, if the other party refuses to pay the claim, he/she is deemed to illegally hold the claimant's property, as if it were stolen from the claimant.

318 See Wardak, "Civil Dispute Resolution in Afghanistan."

319 "The Stolen Lands of Afghanistan and its People: The Legal Framework."

320 The Policy Note is in the process of finalisation. The expert consulted for the purposes of this report in his capacity as a consultant of USIP has access to the draft of the policy note.



On the practical level, there is ambiguity in terms of the legal recognition and use of the informal justice system based on how various government officials regard informal dispute resolution. Some government entities encourage its use, while others discourage it; at the provincial level, officials are generally more supportive. This ambiguity is only exacerbated by certain provisions of the Civil Code and Civil Procedure Code, which, according to some jurists, imply that the decision of the informal justice system can acquire legal value as long as it was registered in the court from the very beginning of the case. However, in practice, most Afghans resolve their disputes outside of the formal legal system and treat the state as a kind of appeals mechanism when the informal system fails. Only after multiple failed attempts at informal resolution do these parties bring their dispute to state authorities, which might bring it to the court system or, in a likely larger number of cases, supervise the conduct of further informal processes.

Currently, in Kabul, stakeholders such as the Ministry of Border and Tribal Affairs are willing to work with non-state dispute resolution forums, while others such as the Ministry of Women's Affairs severely criticise their continued proliferation and seek their curtailment. Possibly due to the lack of a law or policy sanctioning the use of non-state forums, only one of the people interviewed for this report mentioned the state registering informal decisions;<sup>321</sup> the remainder were explicit that this practice does not occur, while being equally explicit that non-state authorities resolve the majority of land conflicts in their area.<sup>322</sup>

At the provincial and district levels, and especially regarding executive branch officials, responses to non-state forums appear more diverse. In some cases, provincial and district governors and chiefs of police regularly refer land disputes to non-state forums and encourage their use. Some judges also engage in this practice, at both the first instance and appellate levels, although the practice appears less widespread among judges. Finally, in some instances, state officials may participate as members of non-state dispute resolution forums, or even mediate disputes on an individual basis. In all instances, state officials are more likely to cooperate with non-state dispute resolution forums for land and other civil disputes than they are for criminal cases.<sup>323</sup>

In most rural areas, the district governor and chief of police are the best-resourced officials, with other government persons typically facing a significant deficit of resources. For this reason and others (e.g., persistent insecurity that aggregates authority to the executive), these officials often take the lead, even in areas outside of their technical legal mandate. For dispute resolution, this means that executive branch officials often spearhead working with elders and/or other non-state leaders, broadly taking one of two forms. In some cases, executive branch officials will route cases to non-state leaders, supervising their work to a degree. In other cases, the official will himself participate in a non-state dispute resolution forum, working alongside non-state leaders. However, such involvement is not systematic and depends on the individual initiative and temperament of both the officials and non-state leaders in question.

Finally, some judges, at either the first instance or appellate level, encourage parties to resolve their disputes through non-state instances. Indeed, courts appear to particularly seek non-state

321 Interview with a non-state community leader, Kabul, 25 June 2014.

322 For example, interview with a non-state community leader, Kabul, 25 June 2014, who estimated that 80 percent of land disputes in his area were resolved through non-state processes; interview with a non-state community leader, Guzara District, Herat, 21 June 2014, who estimated that only 2 percent of land disputes in his area were resolved through the courts; interview with a non-state community leader, Arghandab, Kandahar, June 8, 2014, who likewise estimated that 80 percent of disputes in his area were resolved through non-state authorities.

323 Deborah Smith, "Community-Based Dispute Resolution in Nangarhar Province" (Kabul: Afghanistan Research and Evaluation Unit, 2009), 2; Smith notes the cooperation between state and non-state dispute resolution providers for both civil and criminal issues. However, Barfield states that "While actors in the formal sector claim a monopoly over criminal cases, they saw this monopoly as restricted to the "Rights of God" (Huquq Allah), that is in criminal matters those general overarching offenses against the state (as God's agent). But local communities have jurisdiction over the "Rights of God's servants" (Huquq al-'Ibad), the ability of individuals to seek personal redress in criminal matters." See Thomas Barfield, "Informal Dispute Resolution and the Contemporary Legal System in Contemporary Northern Afghanistan" (Washington, DC: United States Institute of Peace, 2006), 2.

assistance for land disputes, as local non-state leaders often know the parties and the history of the area far better. They therefore possess a greater capacity for the investigation of claims.

Provincial or district Huqooq officials enjoy an official mandate for linking state and non-state dispute resolution capacities through the referral of disputes (Art. 17 of the Civil Procedure Code<sup>324</sup>). When the Department of Huqooq recognises the decision of the *shura* or *jirga*, it is only an administrative recognition, because only the courts can provide legal recognition. In some areas, Huqooq actively plays this role (under the supervision of the district governor); while elsewhere it is unwilling or lacks the resources, including human resources, to play this role adequately.

### ***Accessibility of the process of appeal***

After primary courts, two layers of appellate courts exist. Each province has one appellate court,<sup>325</sup> and the Supreme Court serves as the country's highest appellate authority.<sup>326</sup> In many areas, appeals against primary court decisions appear near-universal, including for land disputes. This pattern indicates that appellate procedures are accessible to a similar degree as primary courts, although this high rate of appeal itself creates systemic difficulties.

An appellate court is located in each of Afghanistan's 34 provinces.<sup>327</sup> These courts receive cases from all first-instance courts across the province, including all *dewans* of the central primary court. They also receive cases from the commercial, juvenile, and family courts.<sup>328</sup> Provincial appellate courts may review both the factual and legal aspects of the disputes brought to them.

In turn, the Supreme Court is Afghanistan's highest judicial authority.<sup>329</sup> The ability of the Supreme Court to revise lower court judgments appears more or less limited to the legal aspects of the case.

In practice, parties appeal almost all primary and appellate court decisions. This pattern has two potential implications on costliness. First, it might indicate that parties do not find the access to court procedures too costly. However, this conclusion would contradict most other evidence, which suggests that many parties find court procedures to be unreasonably costly. Thus, the more plausible interpretation is the second: given the near-universal rate of appeal, parties factor the cost of appellate procedures into their initial calculations, before embarking on the primary court litigation. Conversely, if parties believed appellate procedures to be too costly, they would avoid court proceedings altogether, instead of "dropping out" after the primary court litigation has finished.

Closely related to cost, dispute parties also consistently report state proceedings as too costly.<sup>330</sup> However, parties seem to weigh this factor more into their decision to pursue a primary court verdict than into their decision to pursue an appeal.

Additionally, the process of appeal for ruling is lengthy (sometimes lasting three to four years) if it is done without informal payments and/or a good network. The legal process for appealing as stipulated in the law is two months,<sup>331</sup> although judges and other employees of the court often increase the duration in order to be able to collect informal payments for the speedy resolution of the case.

324 More specifically, the referenced article seems to empower the Department of Huqooq with transferring cases to the court when an out-of-court resolution has failed. However, Afghan law does not elaborate on the powers of the Huqooq, which is nevertheless along-standing office.

325 *LOJJ*, Art. 52; *Constitution of Afghanistan*, Art. 116, 2004 (SY 1382).

326 *Constitution of Afghanistan*, Art. 116, 120, 2004 (SY 1382); *LOJJ*, Art. 23.

327 *LOJJ*, Art. 52.

328 *LOJJ*, Art. 61.

329 *Constitution of Afghanistan*, Art. 116, 2004 (SY 1382); *LOJJ*, Art. 23.

330 For example, interview with a non-state community leader, Arghandab, Kandahar, 8 June 2014, who said that the court would take up a dispute should non-state processes fail.

331 *Civil Procedure Code*, Art. 437.

Within non-state systems, appellate procedures appear substantially less common than in the state system, where most land disputes are resolved by village elders (who may be understood as the forum of first instance). However, if village elders do not succeed in resolving a dispute or if the disputants are not satisfied with the outcome, various informal appeals-like procedures exist. It has been observed that once village-level dispute resolution processes have not been successful, parties often have recourse to non-state leaders well-known for dispute resolution prowess at the district, provincial, or even regional level. In one notable example, the tribes of southeastern Afghanistan have over the years developed an intertribal regional *jirga* (*tokhm jirga*), employing specialised procedures to address disputes where multiple previous attempts at resolution have failed.

Most sources report that pursuing these informal appeals is less costly than the formal system. Yet they are not costless, especially given that informal processes might take place over the course of several decades, albeit with long lulls in the conflict. In some instances, parties seem to abandon a dispute, less because of satisfaction with the dispute resolution outcome than because the costs of pursuing the dispute outweigh the positive outcome.

### 6.8.3 Share of land affected by pending conflicts

Due to the lack of comprehensive or systematic data, it is impossible to estimate with any certainty the amount of land that is subject to dispute in Afghanistan. However, the available data from 2014 show that land-related disputes constitute over 42 percent of all conflicts, but they are on the decline, as almost 53 percent of cases were related to land disputes in 2009.<sup>332</sup> Given that 43.2 percent of all disputes in 2015 were resolved through the informal justice system,<sup>333</sup> the latter carries a significant responsibility for the resolution of land disputes.

It is important to note that the frequency of land disputes is somewhat dependent on migration patterns. During the Soviet invasion of Afghanistan in 1979 and the civil war of 1992-94, millions of Afghans migrated to Pakistan, Iran, and other neighbouring countries. After the military operation by the international armed forces in 2001, people started returning to their homeland only to find out that their land had been grabbed, was occupied by other ethnic groups, or its boundaries had been altered. This created social tensions in communities, thus providing the incentives for land conflicts. However, since 2001, some sources report a lessening of land conflicts linked to patterns of migration. In provinces like Khost, Afghanistan experienced a surge in land disputes as displaced persons returned to their home areas and sought to reclaim property occupied during the years of their absence. However, as the repatriation of refugees is now slowing down, the amount of land subject to disputes is slowly reducing.<sup>334</sup>

Despite the best efforts of our team, we were not able to acquire nationwide statistics on the nature of disputants and the types and reasons for land conflicts in Afghan courts. We were informed that the Supreme Court in partnership with USAID had implemented a computerised case management system designed to collect information on the type of disputes that came before it. However, when we attempted to access this information, we were informed that a condition of the agreement made between the judiciary and the donor was that the data would not be released to the public. We also approached the Afghan partner working on the project and were informed that the system is not yet in place. However, based on personal communication with NRC's Information, Counselling, and Legal Assistance project,<sup>335</sup> GIZ's Rule of Law project in Kunduz, and land titling studies conducted by the Peace Training and Research Organisation and TLO in Khost and Kunduz in 2014, we were able to acquire anecdotal data.

332 Warren and Hopkins, "Afghanistan in 2014," 97.

333 Warren and Hopkins, "Afghanistan in 2015," 103.

334 Note that there are certainly other factors contributing to the occurrence of land conflicts. Therefore, this report does not claim in any way that land conflicts will decrease dramatically with the slowing down of migration patterns. However, a certain decrease can be expected.

335 NRC's project includes seven Information and Legal Assistance Centres in Kabul, Herat, Kunduz, Nangarhar, Balkh, Faryab, and Kunar provinces, while an additional ten provinces are covered through outreach activities from these bases.

In terms of the typology of disputant parties, most land disputes brought before the court are between the families, communities, and tribes, although the cases between individuals tend to be resolved through traditional mechanisms, especially those within tribes and families.<sup>336</sup> Cases between individuals and the government are rare and tend to occur in urban or semi-urban areas, where the government enjoys a minimum presence. The types of conflict range from disputes over inheritance rights, ownership and possession rights, and money recovery to conflicts over forest and constructible land.<sup>337</sup>

Despite the decrease in land disputes, several factors point toward the fact that the share of land disputes in relation to other types of conflicts continues to be high (42 percent). In rural areas, land such as mountains, forests, and pastures tend to be communally held. Frequent migration and displacement in recent decades accompanied by a dramatic population increase have created pressure over resources, particularly constructible land. This, combined with the lack of documentation for both communal and private land and the unclear demarcation of boundaries, has created situations particularly susceptible to land disputes. Land in peri-urban areas also appears particularly prone to frequent disputes involving large tracts of land. In these rapidly urbanising areas, land records are likewise scanty, while the last ten years has witnessed a rapid increase in land values due to their proximity to major cities. For these reasons, peri-urban areas appear particularly prone to land-grabbing<sup>338</sup> by significant powerholders. In some instances, communities have reported the seizure of hundreds of hectares of land. If another powerholder contests the control of the land, land disputes over very large tracts can thus emerge. In addition, while communities themselves rarely confront powerholders over land seizure, research has uncovered instances of the original owners raising land disputes when the land is resold to less powerful third parties.<sup>339</sup>

Although land disputes most likely constitute the majority of disputes, they seem to proceed to the formal justice system infrequently. Research from various parts of the country has indicated that land disputes in any given court range from less than 10 percent to around 50 percent of disputes.<sup>340</sup> The history of land administration in a given area contributes to explaining this variation. For example, some dispute parties seek out the court to undo communist-era land distributions when these have remained in place. Other parties seek out the court because they possess land documentation issued by the Karzai government. In other words, in instances where the state has been active in land administration, parties appear relatively more likely to turn toward the formal state system for land dispute resolution. Field research for this study thus indicated a significantly greater percentage of land cases going to court for Herat city,<sup>341</sup>

336 Note, however, that regional differences may occur due to various factors such as the presence of the state (or lack thereof), availability of informal dispute mechanisms, cultural practices, etc.

337 “Major Land Disputes and Land Titling Systems of Khost Province”; NRC representative, pers. comm., 16 March 2015; Afghan civil society actor, pers. comm., 18 March 2015.

338 The term is defined as “use, control, occupation or ownership of land by one without bona fide right” in “The Stolen Lands of Afghanistan and its People: The Legal Framework,” 12. The definition includes different ways in which land grabbing is performed, such as the “use of physical force, intimidation or violence by powerful people to remove others from land, occupation of empty lands; obtaining the title through a land allocation scheme that fails to meet the legal requirements [and] obtaining the title through fraud” (in “Addressing Land Grabbing through the Criminal Justice System,” 3). According to the statistics compiled by ARAZI, more than 1.2 million *jeribs* of land have been grabbed in the past decade by over 15,000 individuals; see “Public Inquiry into Land Usurpation,” 9; and “The Stolen Lands of Afghanistan and its People: The State Land Distribution System,” 5.

339 “Major Land Disputes and Land Titling Systems of Khost Province”; representative of NRC, pers. comm., 16 March 2015; Afghan civil society actor, pers. comm., 18 March 2015.

340 “Formal and Informal Justice in Paktia and Nangarhar: A TLO Working Paper” (Kabul and Washington, DC: The Liaison Office and the United States Institute of Peace, 2011), 30; the paper notes especially the high number of land conflicts in the court of Mohmand Dara District. See also “Formal and Informal Justice in Helmand and Uruzgan: A TLO Working Paper” (Kabul: The Liaison Office, 2011), iv; which notes that the court of Grishk District appears to hear exclusively criminal matters.

341 Interview with a non-state community leader, Herat, 14 June 2014, who estimates that 50 percent of land disputes in his area are addressed to the court; interview with a non-state community leader, Herat, PD 5, 15 June 2014, who estimates that 40 percent of disputes in his area are addressed to the court.

a traditional government stronghold, as compared to the rural areas examined.<sup>342</sup> By contrast, parties across the country bring criminal issues to courts with far greater regularity, and in most courts, these comprise a much more substantial percentage of formal system cases.

Some courts appear to route land disputes away from state forums, because they feel that they have less capacity to adjudicate land claims than non-state dispute resolution providers, as the latter possess superior local knowledge and evidence-gathering capacity. More specifically, many judges appear reluctant to rely on the sort of oral evidence on which land cases, particularly in rural areas, tend to rest; they prefer therefore to leave the decisions up to non-state actors.

### ***Timelines of the dispute resolution system***

The Civil Procedure Code of 1990 prescribes a time period of approximately eight months from the filing of a lawsuit until its final resolution at the Supreme Court level; two months from the initiation of the lawsuit to its resolution in the court of first instance;<sup>343</sup> one month in which to file an appeal;<sup>344</sup> “final appeal” not more than two months after the primary court judgment;<sup>345</sup> and the Supreme Court may take up to three months to issue a judgment after it has received the objection from one of the parties.<sup>346</sup> However, the reality differs from the legal prescriptions.<sup>347</sup>

The time to file a first appeal and the time for the court to consider that appeal seem to run concurrently: thus, a party who waits two weeks to file an appeal will leave the court with two fewer weeks to consider his objection (Art. 200, Civil Procedure Code). In turn, Art. 437 of the Civil Procedure Code refers to the consideration of courts of appeal as the “final appeal,” despite later prescribing Supreme Court processes. Finally, Art. 437 of the Civil Procedure Code does not appear to specify any time limit for filing an appeal before the Supreme Court, after receiving judgment from an appellate court. When combined with the provisions that explicitly confer discretion on the courts to lengthen the time for certain filings (e.g., Art. 201 gives the court of first instance the ability to extend the time to file an objection to be considered on appeal), significant ambiguity might exist in terms of the duration of primary and appellate court procedures.

Nevertheless, the most straightforward reading of these provisions would suggest that primary and appellate judicial processes (except perhaps a ruling from the Supreme Court) should take place within around one year after the initiation of a claim. In reality, judicial proceedings seem rarely to conclude within this amount of time. Both state officials and dispute parties describe typical resolution processes taking three to five years, with the resolution in the first instance court taking place approximately within 12 to 18 months, but varying from province to province and district to district. In Kabul, the time to reach the decision in the court of first instance seems to be approximately one year for most cases, whereas in other provinces the closing of a case might take longer. According to information from the NRC’s Information, Counselling, and Legal Assistance Project, land disputes take up to three years to resolve in the formal sector. Generally, it takes less time in the informal system, while the average number of days necessary for the NRC to help resolve a case is currently about 390 days.<sup>348</sup> Indeed, respondents in a great range of studies have identified the length of court proceedings as a primary reason to avoid them.<sup>349</sup>

342 For example, interview with a non-state community leader, Guzara District, Herat, 21 June 2014, who estimates that only 2 percent of land disputes in his area are resolved through the court; interview with a non-state community leader, Balkh, Shor Tapa District, 15 June 2014 who estimates that a “very small” percentage of disputes in his area are addressed to the court; interview with a non-state community leader, Arghandab, Kandahar, June 8, 2014, who likewise considers that 80 percent of disputes in his area were resolved via non-state authorities.

343 *Civil Procedure Code*, Article 200 (*Official Gazette* no. 722), 1990 (SY 1369).

344 *Civil Procedure Code*, Art. 365.

345 *Civil Procedure Code*, Art. 437.

346 *Civil Procedure Code*, Art. 489.

347 For example, in 2012, 3,992 land cases were referred to the Department of Huqooq, but only 5 percent were resolved in the same year (see “Public Inquiry into Land Usurpation,” 44).

348 Representative of NRC, pers. comm., 16 March 2015.

349 See, for instance, “Major Land Disputes and Land Titling Systems of Khost Province,” 11; “Justice and Security,” 57, 96; interview with a non-state community leader, Daman District, Kandahar, 3 July 2014; inter-



Several factors appear to increase the duration of court proceedings. First, the adversarial court proceedings disrupt community relations as well as relations between the plaintiff and defendant, thus triggering a sort of (non-violent) cycle of revenge. This phenomenon obviously increases the duration of the proceedings, although it would not necessarily account for each level of adjudication exceeding the maximum statutory periods. Second, courts often mention a large workload and report an inability to adjudicate in a timely manner. Many sources also report courts delaying proceedings in lieu of bribes, although, as with information on corruption more generally, this is very difficult to substantiate and cannot be taken at face value, as parties unfamiliar with the legal system might conflate the full procedural due process with a bribe-seeking delay. At the least, the perception that courts delay processes in an attempt to extract bribes is quite widespread and probably influences how parties interact with the court system.

There appear to be a relatively small number of long-standing conflicts lasting more than five years in Afghanistan. Although nationwide data on this indicator does not exist, case studies from Kunduz and Khost as well as personal communication with NRC and GIZ representatives can serve as anecdotal evidence.

Our research has uncovered few land disputes remaining in government instances for this length of time.<sup>350</sup> As mentioned above, most land disputes take approximately three years to be resolved in the formal system, while it is generally less in the informal system.<sup>351</sup> However, this should not be taken as evidence of an absence of long-term land disputes in Afghanistan.<sup>352</sup> Rather, Afghanistan has witnessed a profusion of long-term land disputes, some lasting decades or even over a century, while usual disputes typically cycle through a series of government and non-government forums, not remaining with any one forum for the length of time implicated by this indicator. However, one should not take the absence of long-term disputes in government forums as evidence of their efficiency. If a government (or other) forum does not prove to be efficient, parties usually remove their cases from that particular forum.

In urban areas, disputes lasting more than five years tend to relate to land distribution, settlements, or acquisitions that local parties allege to have been fraudulent. First, the local residents alleging displacement might seek to confront the powerholder<sup>353</sup> and re-acquire their land. Because of the extreme power differential between the powerholder and displaced persons, this sort of dispute tends to remain *sub rosa*, with displaced persons waiting for more favourable circumstances before confronting the powerholder directly, thus lengthening the dispute. Second, especially in crowded peri-urban areas, the interests of powerholders might overlap. In these instances, powerholders will dispute the ownership of the land among themselves. Because each party has substantial resources, they do not necessarily have strong incentives to resolve the dispute quickly. Third, displaced residents might have a land dispute with the people who acquired the land from the powerholder. Here, current residents have in some cases followed the proper procedures to acquire their land and possess a legally valid land title (even if the originally displaced persons also have a legally valid title). In other cases, current residents will continue to enjoy the protection or patronage of the powerholder from whom they acquired their land. All of these circumstances might account for the lengthening of the dispute.

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view with a non-state community leader, Kabul, 25 June 2014.

350 See, for example, “Major Land Disputes and Land Titling Systems of Khost Province,” which details land disputes cycling through a variety of dispute resolution forums over time; “USAID Country Profile: Property Rights and Resource Governance: Afghanistan” (Washington, DC: United States Agency for International Development), which notes a high incidence of land disputes, a profusion of forums addressing them, and the limited role played by government institutions.

351 Representative of NRC, pers. comm., 16 March 2015.

352 We use the word “disputes” rather than “cases” in this report, because the word “case” refers to a dispute presented to one instance (e.g., court) and the period between the opening and closure of the case. In Afghanistan, “dispute” is a more accurate word due to the fact that disputes move from one instance to another without being resolved for long periods of time.

353 An influential person from a political, social, or military point of view in a particular area, such as warlords, strongmen, etc.

Long-term disputes in rural areas usually present a different set of circumstances. These disputes often take place between groups of persons such as tribes or villages. They often implicate off-farm resources, such as pastures or forests. In these cases, the disputants will often both be located adjacent to the disputed land or have habitually used it in the past (e.g., for gathering firewood). Periodic clashes over such land, with attendant short-term resolutions, might take place over many years, if not decades, with the dispute going through hot and cold phases. As such, outside observers might more accurately characterise the dispute in question as a rivalry between groups, i.e., one of several ways in which these groups compete. If each party has enough resources, they may prefer not to risk losing their standing in the community by giving up the dispute. In some of these long-term land disputes, third parties will intervene as mediators. Yet such intervention tends only to occur if the dispute manifests in a way that destabilises the broader area.

Recent TLO research in the south-eastern province of Khost, for instance, indicates that some of the major intertribal land conflicts have been ongoing for decades, with tensions periodically reigniting over the extension of traditional boundaries, the use of natural resources, or constructions on the contested land. These conflicts, however, are only occasionally introduced into the formal system—notably as most take place over land legally owned by the government. Rising land prices, the value of available resources, tribal rivalries, and a history of violence complicate the resolution of the conflict.<sup>354</sup> Similar trends have been observed in other areas in the southeast, notably in Paktika and Paktia. There are strong indications that the existence of protracted intercommunal conflicts, fuelled by historical rivalries, is a likely phenomenon across rural Afghanistan. Another notorious example is the decades-long conflict between Hazaras and Kuchi tribes in the Hazarajat.<sup>355</sup>

## 6.9 Review of institutional arrangements and policies

PANEL 9: Institutional arrangements and policies						
<i>LGI 1: Clarity of mandates and practice</i>						
9	1	1	Land policy formulation, implementation, and arbitration are separated to avoid conflict of interest.			
9	1	2	Responsibilities of the ministries and agencies dealing with land do not overlap (horizontal overlap).			
9	1	3	Administrative (vertical) overlap is avoided.			
9	1	4	Information about land rights and use is shared by public bodies; key parts are regularly reported on and publicly accessible.			
9	1	5	Overlaps of rights (based on tenure typology) are minimal and do not cause friction or dispute.			
9	1	6	Ambiguity in institutional mandates (based on the institutional map) does not cause problems.			
<i>LGI 2: Equity and non-discrimination in the decision-making process</i>						
9	2	1	Land policies and regulations are developed in a participatory manner involving all relevant stakeholders.			
9	2	2	Land policies address equity and poverty reduction goals; progress toward these is publicly monitored.			
9	2	3	Land policies address ecological and environmental goals; progress toward these is publicly monitored.			
9	2	4	The implementation of land policy is costed, matched with benefits and adequately resourced.			
9	2	5	There is regular and public reporting to indicate progress in policy implementation.			
9	2	6	Land policies help to improve land use among low-income groups and those who experience injustice.			
9	2	7	Land policies proactively and effectively reduce future disaster risk.			

354 See “Major Land Disputes and Land Titling Systems of Khost Province: Implications for Collaboration between Traditional Dispute Resolution Mechanisms and ARAZI” (Kabul: The Liaison Office/United States Institute of Peace, October 2014).

355 See, among others, Foschini, “The Social Wandering of the Afghan Kuchis.”

## 6.9.1 Clarity of mandates and practice

### *Separation of policy formulation, implementation, and arbitration: Possible overlaps*

Despite the uncertain status of the LML 2008,<sup>356</sup> it remains the primary legal reference for issues related to the division of land policy formulation, implementation, and arbitration. Policy formulation rests with the ministries and ARAZI for the development of proposals, and then the President, Council of Ministers, High Council on Water and Land, and Parliament for approval and amendments. Implementation differs according to the legislation, but it is most commonly the responsibility of the ministries, ARAZI, and/or local municipalities. Art. 13-28 of the LML further detail in the arbitration system for land conflicts. The responsibility remained with MAIL<sup>357</sup> until a 2013 cabinet decision to shift the responsibility to ARAZI as the government representative. “Practical work” (not further defined) relating to the arbitration of land issues rests with the “Settlement Commission,” which has not yet been established. Furthermore, the courts also adjudicate land disputes.

First, ARAZI figures in policy formulation, implementation, and arbitration. Following Decisions 23 of 2009 and 11 May 2013 of the Council of Ministers, ARAZI aims to become an independent “one-stop-shop” for land issues in Afghanistan. However, the concentration of all land-related responsibilities in ARAZI, despite making the administrative procedures more effective and the management of land issues more coordinated, risks blurring the lines between land policy formulation, implementation, and arbitration. Additionally, ARAZI makes the decisions about the leasing of state land and is also responsible for its monitoring. This significantly compromises the impartiality of the monitoring.

Furthermore, greater clarity over the roles of ARAZI, the courts, the Department of Huqooq, and other dispute resolution bodies is needed in terms of dispute resolution. ARAZI’s Department of Addressing Land Disputes provides necessary documentation when a case comes before a court. Additionally, it can informally resolve the dispute, which is then recorded by ARAZI. This adds to the myriad of conflict resolution bodies existing in Afghanistan, thus creating further complexity to the arbitration mechanisms.

Second, the president enjoys great decision-making powers over land issues. Decisions on the distribution and donation of state land to disadvantaged people, the transfer of arid and virgin land, the realisation of land surveys, the publication of information (national or on demand), and in exceptional cases, the acquisition of public land are contingent on his approval.

Third, policy formulation and its implementation is very much fluid in terms of the responsibilities of municipalities. The “control and supervision of implementation of master plans is the responsibility of master plan designer (MUDA) and municipalities”<sup>358</sup> as a joint task, while the implementation of the plan is fully under the responsibility of the municipality. The obvious legal issue existing here is that the implementing body—municipalities—is also responsible for their own control and supervision. This becomes further muddled when looking more carefully at the Municipality Law, which notes that “[m]unicipalities can formulate their own master plan and submit them for government approval.”<sup>359</sup>

Finally, a perceived conflict of interest exists with the courts with their administrative function of registering land and providing formal title deeds and their judicial function of resolving land-related disputes. Currently, ARAZI is working together with the president, vice president, and MoF on a mechanism to transfer the administrative responsibilities to ARAZI.

356 Alden Wily, “Land Governance at the Crossroads,” 4.

357 Art. 13.

358 Alden Wily, “Land Governance at the Crossroads,” 19.

359 Alden Wily, “Land Governance at the Crossroads,” 8.

Horizontal overlaps also exist between authorities dealing with land governance. As “[t]here is no ‘Ministry of Lands’ to lead, coordinate or monitor...[administrative responsibilities] are dispersed among ministries and municipalities.”<sup>360</sup> The High Council on Land and Water, chaired by the president and comprising 16 members from all institutions dealing with land governance was established to this end. Since its establishment only dates back several months, the results of this coordination body remain to be seen.

In the urban setting, significant horizontal overlap exists between MUDA and the local municipalities; processes are thus applied by the institutions without integration. The process of urban expansion and infrastructure development is shared between local urban municipalities (Kabul, Jalalabad, Kandahar, etc.) as well as MUDA, formally tasked with developing urban policy throughout the country. Collaboration has developed informally and depends heavily on the individual municipal and ministerial objectives and ideologies. When shared ideology and objective are weak, urban expansion and infrastructure development remain primarily outside of the formal realm. Planning objectives differ in the municipalities and MUDA, with no specific planning objective existing across the board. Objectives remain overly individualised and often in conflict with one another, resulting in numerous stalemates in policy planning. However, certain efforts are being made to rectify this. In 2011, for instance, MUDA signed a memorandum of understanding with the Independent Directorate of Local Governance accompanied by a second technical memorandum in 2012. The parties of the memorandum agreed to cooperate on a number of important land issues, including meeting the basic needs of the urban sector, improving policy enforcement, and updating the master plans of the largest cities in the country (Kunduz, Kandahar, Herat, Jalalabad, and Mazar-e Sharif) with the notable exception of Kabul. Both the clarification of the roles of the different actors and their commitment to improve cooperation on specific actions represent a positive step toward reduced horizontal overlap.

In rural areas, the main actors—MRRD and MAIL—have a track record of impressive cooperation and little horizontal overlap. While programming may occasionally diverge, cooperation exists (i.e., MAIL relies heavily on the MRRD-initiated NSP to implement some of its local agricultural and irrigation projects). MRRD and MAIL not only rely on each other for technical assistance and on-the-ground support, but also cooperate on projects in agricultural development in rural areas (with grants offered by the National Area-Based Development programme through MAIL for livestock projects) without significant issue. Nevertheless, the level of cooperation between government departments in rural areas is heavily reliant on their individual capacity and technical knowledge. Cooperation exists in some areas between ministries, whereas competition and a lack of cooperation exist between agencies in other areas.

Despite the current overlap, promising strides have been made through the establishment of ARAZI and the High Council on Land and Water. ARAZI’s current main purpose is to address the very overlaps listed here on land issues. The gradual evolution of ARAZI from an inter-ministerial institution in 2007 to an independent institution in 2013 marks a promising achievement in enabling the authority to tackle all relevant land issues in rural and urban areas. ARAZI currently reports directly to the Presidential Office in order to streamline decisions and efforts.

The High Council on Land and Water is chaired by the president and has the following members: Afghan CEO, Special Senior Advisor to the president on Reform and Good Governance, ARAZI’s CEO, President’s Advisor on Agriculture, as well as representatives from MoF, MoJ, MUDA, Ministry of Foreign Affairs, MAIL, Ministry of Women Affairs, MRRD, Ministry of Economy and Industry, IDLG, NEPA, Ministry of Mines and Petroleum, Afghanistan Chamber of Commerce and Industries, Administrative Office of the President, Central Statistics Organisation, and civil society organisations. Its main aim is to coordinate the various land administration agencies and approve and monitor the implementation of their policies.

In summary, the high degree of autonomy among the municipalities, the tensions between and within ministries, and the overly centralised legal framework results in significant conflicts in the public institutions working on land issues. The blurred lines between their responsibilities open up a window for the relevant public institutions to blame each other and defer the responsibility of

<sup>360</sup> Alden Wily, “Land and the Constitution,” 3.

real issues. The autonomy also gives way to conflicts of interest, corruption, nepotism, and bribery. Given the unclear roles of public institutions, it further becomes easier to sidestep responsibility in front of the public eye, with intra-government bodies deferring blame or responsibility for action (i.e., upgrading infrastructure in communities) to one another.

In terms of vertical overlap, Afghan government offices are highly hierarchical. While overlap exists horizontally between departments and agencies, administrative—or vertical—overlap is avoided. Clear organisational hierarchies exist with a well-defined division of labour. Some duplication of responsibilities and a lack of information sharing exist due to the excessive bureaucracy, but roles are generally well separated. Organisational structures are top-down pyramids with headquarter offices, regional coordination offices, and provincial management units. The field staff report to provincial staff, who report to regional staff, who then report to headquarters. The management and implementation structure thus generally lacks an overlap of responsibilities and focuses on clear role delineation between bodies.

### ***Public accessibility and reporting on land right and use information***

Section 6.6 discussed the public accessibility of land information that is scattered across various land administration institutions. Although available to individuals, the complicated, costly, and time-consuming processes (especially in courts) render the access to information difficult for private individuals. Due to better social networks and leverage, government officials can access information much easier, even when the information is for their personal use. The lack of adequate data collection and linkages between various land governance institutions makes the process of information sharing difficult. As such, the various land registries are not, for the most part, interconnected, creating major overlaps in certain types of information and gaps in others. Land information is not widely available to the public, mostly limited to the owners of the land in question; third persons are mostly not given access to the information. Information on state land is particularly well protected and not publicly available. Finally, there is no reporting on land rights and use by public institutions.

### ***Overlaps on right based on tenure typology***

Private ownership of land was introduced under the reign of King Amanullah Khan (1919-29) as part of a greater effort toward tax regularisation.<sup>361</sup> Since then, the legal framework on rights to land and property has been severely disrupted with overlapping regulations, the existence of long-standing informal settlements in urban centres, and mass internal and external migration, which has led to multiple (equally legitimate) owners of a single piece of land or property. Three primary types of ownership can be identified: private, state, and public. These types of ownership are well differentiated, with the exception of public land, as already mentioned in this report.

Duplicate ownership issues can arise in various situations such as when former refugees return to Afghanistan only to find that someone else is using their land. Both sides have a legal document of some sort proving ownership and leaving them with seemingly equal rights to the land. In other instances, different courts perhaps issue title deeds to two different families due to the unavailability of records or simply due to corruption. While many accounts exist in the realm of duplicate ownership, what remains is that the issue has not been resolved in a comprehensive manner, with the government often opting to handle the issue on a case-by-case basis within the formal or informal justice sector.

## **6.9.2 Equity and non-discrimination in the decision-making process**

### ***Development of land policies: Stakeholders involvement***

Following the establishment of the goal to develop a national land policy in the Afghanistan National Development Strategy (Volume 1, Item 14), the NLP was adopted in 2007 after extensive, but informal consultations with public institutions over a two-year period.<sup>362</sup> No formal public consultations took place during the development of the NLP. Nevertheless, the contents of the

<sup>361</sup> Peikar, "Historic and Current Institutional Developments," 7.

<sup>362</sup> Alden Wily, "Land Governance at the Crossroads," 9.



policy are largely considered to uphold international best practices.<sup>363</sup> The inter-ministerial working group tasked with the policy development was chaired by a representative from MAIL with the participation of MoJ and MUDA,<sup>364</sup> and the draft policy was signed jointly by the three respective ministers.<sup>365</sup> Following the initial signing of the draft land policy, six working groups consisting of representatives from the abovementioned ministries were established for Land Law, Land Registration, Land Dispute and Adjudication, Land Grabbing, Informal Settlements, and Rangeland and Forests with the aim to review the elements of land policy and prioritise its activities.<sup>366</sup> The NLP required changes in the legal framework, noting in the policy document that “land management in Afghanistan is governed by an ineffectual and inadequate legal framework.”<sup>367</sup>

Most pledges of the NLP in 2007 have not yet been “absorbed”<sup>368</sup> into the legal framework of the country. The “current legal framework still has remnants of past land rights reforms” and “customary law...remains poorly integrated with formal law and policy.”<sup>369</sup> The NLP, while developed in a semi-participatory manner (only among public institutions), has been left without a corresponding legal framework to support it, and it thus remains as an aspirational reference document.

The regulations related to urban and rural land were developed in a top-down manner, with little to no input from the general public (public institutions are not required by law to consult the public. The lack of this requirement translates into a lack of action, and the most relevant actors—the affected public—are often left out of the consultation and drafting process. The public may be involved in small-scale rural projects (i.e., through the NSP), but they are not widely included in the process of drafting regulations related to the programmes. This is particularly visible in the case of urban planning, where the on-the-ground realities of cities like Kabul are not considered in drafting plans.

### ***Equity and poverty reduction in land policies: Public monitoring***

Some sections of the NLP pay homage to international sources (i.e., Art. 17 of the Universal Declaration of Human Rights, which notes that “Everyone has the right to own property alone as well as in association with others” and “No one shall be arbitrarily deprived of his property”), as well as to the Constitution of Afghanistan, which is not only explicitly evoked in land policy, but is also visible in the language borrowed from Art. 40 and 41.

Art. 40 of the Constitution of Afghanistan states:

*Property shall be safe from violation. No one shall be forbidden from owning property and acquiring it, unless limited by the provisions of law. No one's property shall be confiscated without the order of the law and decision of an authoritative court. Acquisition of private property shall be legally permitted only for the sake of public interests, and in exchange for prior and just compensation. Search and disclosure of private property shall be carried out in accordance with provisions of the law.*

Similarly, the NLP defines itself as a “flexible, equitable and transparent policy that serves the diverse interests of the Afghan society.” It stipulates that all Afghans should have the opportunity to legally access land resources and the right to maximise their social welfare. No individual or group should be barred from ownership. Additionally, it stipulates:

*Transparency, accountability and community participation are critical for effective land administration and must be applied at all levels, from communities to the highest levels of government. Local communities must take responsibility and the government must acknowledge its role to serve the people.*

363 Alden Wily, “Land Governance at the Crossroads,” 9.

364 “Islamic Republic of Afghanistan: Capacity Building in Land Policy and Administrative Reform” (Kabul: Scanagri Denmark A/S, Asian Development Bank, 2007), 7.

365 “Islamic Republic of Afghanistan: Capacity Building,” 39.

366 “Islamic Republic of Afghanistan: Capacity Building,” 39-42.

367 *Rationale for a Land Policy*, Draft Land Policy, 2007 (SY 1386), 1.1.

368 Alden Wily, “Land Governance at the Crossroads,” 1.

369 Alden Wily, “Land Governance at the Crossroads,” 1.

Finally, the policy also aims to address part of citizen's most pressing concerns by allowing for the formalisation of land rights in informal settlements. The NLP notes the following objective in Art. 1.3: "Ensure that land markets are efficient, equitable, environmentally sound and sustainable to improve productivity and alleviate poverty."

The land policy also aims to support the poor and marginalised in Afghanistan. It makes special mention of landless farm workers, recognising that "poor farmers have mortgaged their land in such a manner that their livelihood and land ownership is at risk."<sup>370</sup> It further notes that the land market does not operate to the benefit of all citizens, explaining that "people with limited financial resources find themselves excluded from acquiring land through purchases" and that the "poor must be able to access land markets."<sup>371</sup> It upholds the overall principle to "protect the poor"<sup>372</sup> and allow for greater inclusion and equitably targeting the poor and marginalised in land affairs.

While the NLP, is generally intended to alleviate poverty and increase equity among citizens, its goals have not been sufficiently incorporated into the legal framework, and a monitoring mechanism has not been put in place to measure them.

The LML 2008, for instance, is not pro-poor, apart from an indirect mention in its objectives to the poor and marginalised, stating in Art. 2 that it aims to provide the "opportunity for people to access land." However, neither the LML's section on restitution, Chapter 4, nor Art. 2 on the state's commitment to the poor, is noticeably pro-poor. The section on restitution with a government obligation to allocate land to the poor was removed from the LML, while the definition of eligible persons to include large landowners was expanded and remained "silent on the need to include urban dwellers in need of housing in its purview."<sup>373</sup> The LML 2008 also provides no support for informal dispute resolution (an important avenue for resolution among the poor who may not be able to afford to resolve disputes in court), and the poor and marginalised are never directly mentioned in the law. Other laws, including Presidential Decree 104, which legalised the distribution of land to IDPs and returnees, have simply not been successfully implemented.

Additionally, existing land laws have been inconsistent on the issue of discrimination against women and girls. Women and girls, often deprived of their inheritance rights to land and property (despite Art. 40 of the Constitution of Afghanistan confirming their right to inheritance), are left without sufficient protection. They are also vulnerable to domestic violence within the context of greater conflicts overland. However, some notable attempts of the NLP to incorporate and rectify women's equity have been made. The Elimination of Violence against Women Law was decreed in 2009, aiming to protect the property rights of women. Additionally, ARAZI conducted a review of the LML in light of the NLP and developed a series of proposed amendments.<sup>374</sup> The draft amendments are expected to go to Parliament for review in 2016.

### ***Ecological and environmental goals of land policies: Public monitoring***

Art. 1.3 of the NLP notes the objective to develop "land markets [that] are efficient, equitable, *environmentally sound* and sustainable to improve productivity and alleviate poverty." It further recognises the dangers to the environment in informal and unplanned developments, noting that the "relevant municipality in consultation with the Ministry of Urban Development shall determine the habitability of an area taking into account clearly defined environmental and planning criteria..."<sup>375</sup> It prioritises environmental protection,<sup>376</sup> noting it to be a primary issue.<sup>377</sup>

A whole section in the NLP is dedicated to environmental sustainability. It stipulates thus:

370 NLP, Art. 2.3.2.

371 NLP, Art. 3.1.3.

372 NLP, Art. 1.4.14.

373 Alden Wily, "Land Governance at the Crossroads," 29.

374 Peikar, "Historic and Current Institutional Developments," 15.

375 Art. 2.2.4.

376 Art. 2.2.6.

377 Art. 3.1.9.

*Land management systems have not traditionally assigned priority to environmental issues with regard to the sustainability of natural resources including forest conservation and prevention of desertification. Degradation of land, from overgrazing, lack of flood controls, poor mining techniques, deforestation, to name only a few has negatively impacted Afghanistan's greatest natural resource. Environmental protection campaigns are most successful when supported and implemented by the general public, however public awareness of environmental issues is negligible (Art. 3.1.9, NLP).*

The policy further explains that:

*It is national policy that land is a natural resource and fundamental to the livelihoods of our people which shall be protected for present and future generations. Land management issues shall consider the environmental impact in all aspects related to land use, regulation, allocation, resource use and management.<sup>378</sup>*

*It is national policy that a campaign of public awareness be initiated to ensure that all citizens develop a level of environmental awareness in order to support and implement environmental protection measures, individually, at the community and national level.<sup>379</sup>*

In practice, however, a similar issue occurs as with the equity and poverty reduction goals. While the land policy addresses ecological and environmental goals and concerns, it lacks corresponding laws to ensure its proper implementation and contains no provisions for public monitoring. In practice, environmental and ecological concerns are typically overlooked by government agencies and private individuals in the interest of other objectives (such as construction and expansion).

### ***Budgeting and adequate resources for land policies***

Adequate budgeting and financial resources for the implementation of the NLP have been limited or non-existent in the drafting of policies, resulting in the absence of a cost-benefit analysis or when accompanying the review of resources and institutional capacity for implementation. Additionally, donor priorities lie in other sectors like security and health, not providing adequate resourcing opportunities for Afghan land administration. Therefore, land policies in Afghanistan are not properly costed and lack adequate financial resources for their implementation.

### ***Public reporting on progress in policy implementation***

The NLP was drafted to “serve as a general guidance to inform the revision and modification of the legal framework for land,” aiming to encourage MAIL and MUDA to “formulate or adjust their strategies and plans of action to tackle challenges.”<sup>380</sup> While ARAZI has used the NLP (among other documents and information from consultations) to develop draft amendments to the LML 2008, the amendments have not yet been reviewed by Parliament.<sup>381</sup> Neither the LML 2008 nor the NLP 2007 contains a requirement for public reporting to indicate the process of implementation.

Public reporting has thus far occurred at the initiative of the relevant government agencies. Furthermore, challenges related to the high rates of administrative corruption and an overly centralised bureaucracy further limit the public’s access to information.

### ***Disaster risk reduction in land policies***

The NLP makes significant strides in laying the foundation for disaster risk reduction in its text. Of utmost risk in Afghanistan is the threat of natural disasters such as floods, droughts, and landslides. While the NLP does not mention disasters directly, Art. 2.2.4 states that land must be assessed to determine its habitability according to environmental criteria. It further indicates that “access to land resources [must] be clarified and secured as part of an integrated natural resource management”<sup>382</sup> to ensure environmental sustainability.<sup>383</sup>

<sup>378</sup> NLP, Art. 3.1.9.

<sup>379</sup> NLP, Art. 3.1.9.

<sup>380</sup> *National Land Policy (Official Gazette no. 958), 2007 (SY 1386).*

<sup>381</sup> Peikar, “Historic and Current Intuition Developments,” 15.

<sup>382</sup> Art. 2.2.6.

<sup>383</sup> Art. 3.1.9.

While the section focuses on environmental protection, clear linkages to disaster risk exist (i.e., reference to floor controls and mining techniques). However, the laws aiming to improve disaster risk management have not been developed following the adoption of the NLP.

NGOs and ANDMA have implemented the most recent efforts related to disaster risk reduction. Their efforts are of particular importance given that an estimated 250,000 Afghans suffer from natural disasters every year, with more than 23,000 displaced annually on average between 2008 and 2014.<sup>384</sup> Between 2000 and 2010, the principal disasters that affected Afghanistan were droughts (2000, 2006, and 2008, affecting more than 4 million people) and a storm in 2008 that affected approximately 170,000 people.<sup>385</sup> Large disaster risk projects aim to mitigate the risks of disasters while building the capacity of ANDMA to undertake such work in the future. ANDMA has developed several guidelines, including:

- Disaster Management Plan for Herat Province;
- Natural Disaster Mitigation Policy;
- Disaster Response Procedures;
- Policy and Coordination Guidelines on Formulation of National Disaster Management Plan.

ANDMA's resources, however, remain severely limited. Additionally, given that the NLP 2007 was not reflected in the LML 2008, the policies that would reduce the risk of future disasters are virtually non-existent in Afghanistan.

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<sup>384</sup> "Major New Disaster Risk Management Program for Afghanistan," International Organisation for Migration, <http://afghanistan.iom.int/press-releases/major-new-disaster-risk-management-programme-afghanistan>, 10 March 2015 (accessed 12 September 2015).

<sup>385</sup> Takeshi Komino, "Disaster Risk Reduction National Platform and Strategic National Action Plan in Afghanistan," in *Civil Society Organisation and Disaster Risk Reduction: The Asian Dilemma*, ed. Rajib Shaw and Takako Izumi (Tokyo: Springer, 2014), 30.

## 7. Policy Issues and Recommendations

### 7.1 Land rights recognition

#### 7.1.1 Recognition of continuum of rights

The main issue in the recognition of rights in Afghanistan is the discrepancy between the existing legal framework and the reality of land tenure in the country, which is overwhelmingly informal. The tendency of the current Afghan legal framework to prioritise landowners with formal documentation excludes the majority of Afghan population from ownership rights. Additionally, the lack of awareness of the general public as well as the Afghan National Police and Army on land issues and land rights contributes, in certain cases, to the limited land rights recognition.

Art. 5 of the LML 2008 recognises the validity of customary deeds under the condition that they were prepared and submitted before August 1975 and that the land seller possesses valid title deed. Additionally, for customary deeds to be formally recognised, they have to contain all relevant details such as the seller and owner's names and signatures (or fingerprints), witnesses' signatures (or fingerprints), description of boundaries of the land, price, and date. Although no comprehensive research of customary deeds was conducted for this study, based on the accounts of various technical experts involved in this project, the format of customary deeds is not unified across the country, and people have limited information as to what details the customary deed should include. Thus, the customary deed often lacks all of the necessary information.

In terms of undocumented rights, long-term unchallenged possession is ensured in Art. 8 of the LML 2008. Art. 5 establishes certain requirements for the legal formalisation of ownership, thus limiting the claims to land acquired after 1973. Considering the occurrence of wars after 1973, this article is of limited usage for those not possessing any (formal or customary) documentation.

Lastly, Afghan land laws do not protect collective ownership, very commonly used in Afghanistan.

Through the enactment of the LML 2008 and Presidential Decree 83 in 2003, which are both strongly pro-formal ownership documentation and supersede all previous laws relevant to establishing ownership property rights including through customary documents, the majority of land in Afghanistan falls under the category of state land, thus depriving most Afghans of their rights to land tenure.

In the urban setting, the tendency to prioritise formal ownership documentation has similar effects as in rural areas, although with some specificities. Due to the lack of tenure security combined with the large influx of returnees and IDPs, the phenomena of extensive land grabbing and irregular building of informal settlements have become very common in cities.

For the purposes of this report, we defined indigenous tenure rights as the rights of Kuchi nomadic and Jat communities to own and use land, because, due to the overly informal tenure in Afghanistan and the specific lifestyle and social organisation of the country's tribes, the vast majority of the Afghan population could be considered as indigenous. Although some regulations exist in the legal framework to provide ownership and user rights to nomadic communities,<sup>386</sup> in practice, when translated into state policies of settlement of nomadic tribes and land distribution plans, these efforts are often met with resistance from the local populations who use the land and claim ownership over it. Consequently, Kuchi communities are not able to secure their tenure and user rights because of the contradicting claims over pastures.

<sup>386</sup> Art. 14 of the 2004 Constitution of Afghanistan provides for "improving...the settlement and living conditions of nomads," while the Environment Law (2007) requires the demarcation of "areas appropriate for use of pastoralists" (rangeland), including migration corridors, and consultation with nomadic communities in terms of land use and resource management plans (Ch. 1).



The situation of Jat communities is distinct from that of the Kuchis.<sup>387</sup> Considered stateless, most are refused citizenship by the Afghan authorities. As such, studies indicate approximately 80 percent of households are not registered and do not hold any form of identification document, thus inhibiting, among other things, their legal access to land ownership.

## **Recommendations**

### **Short-term**

- The minimal duration of continued ownership and land cultivation required in order for the long-term unchallenged possession to be formally recognised should be decreased through an amendment to the current LML.
- Customary deeds prepared after August 1975, but otherwise meeting all the other requirements as per Art. 5 of the LML 2008 should be formally recognised through an amendment to the current LML.
- The provisions clarifying the status, legal recognition, and ways to register collective rights should be amended in the current LML.
- The awareness of the public as well as the Afghan National Police and Army on land issues and land rights should be increased. Land governance should be included in the teaching and training curricula for these target groups.
- ARAZI's plans to create a telephone line that would allow people to contact the authority, record their complaints, and ask questions on different land issues such as how to record land should be promptly materialised and adequately financed.
- The efforts of various NGOs such as TLO and Checci to inform Afghan citizens about the information necessary on a customary deed for it to be formally recognised should be further enhanced by involving the government in these efforts.
- As an interim measure, a community-based land recording system should be developed, which will be later connected to the ARAZI registering system (when transferred from the courts to ARAZI) and its Principal Books.
- A centralised (gradually computerised) system at ARAZI should be created as a one-stop-shop for land registration.
- The relevant authorities should work together to operationalise the existing efforts to incorporate a provision on land usurpation into the Criminal Code. Where appropriate, donors and civil society stakeholders should provide technical assistance to the drafting process.
- The draft Restitution Policy on Land Grabbing should be approved and supported.
- The prosecution of land grabbers should be made a priority within the Attorney General's Office. Similarly, the investigational and technical capacity of the Afghan National Police should be enhanced with the possibility to establish a special police force tasked with the protection of land against land grabbing.
- Presidential Decree 104 enacted in 2005, which puts provisions in place regarding the distribution of land for housing to eligible returnees and IDPs, and the National Policy on Internal Displacement, approved in November 2013, which addresses the right to adequate housing and access to land,<sup>388</sup> should be adequately implemented.
- The policy on upgrading informal settlements, currently awaiting cabinet approval, should be promptly enacted.

<sup>387</sup> The categorisation of Jats (also known as Jogi and Chori Frush) as an ethnic category is also contested, and the denominations "Jat," "Jogi," and "Chori Frush" are exogenous to the communities themselves. Cf. "Jogi and Chori Frush Communities."

<sup>388</sup> Art. 7.1.3.

- The implementers of various upgrading projects (including the NGO community) should create an adequate coordination mechanism to share information and lessons learned. With technical support of the international community, municipalities should develop a database including all information about upgrading in each area, which will be publicly available on the municipalities' websites.
- The provisions of the Constitution of Afghanistan and the Environment Law 2007 to give land user rights to nomadic communities should be promptly implemented, coupled with capacity building in local communities about the issues of settlement and usage of land by nomadic tribes. Community-based conflict resolution mechanisms should be used to solve the disputes between nomadic tribes and local communities, unless involving criminal justice elements. The latter cases should immediately be brought before the courts for adequate dispute resolution.
- The draft Rangeland Law, which provides the framework for the management of private, community, and public rangeland, should be promptly approved. In particular, it states that nomadic or semi-nomadic people may acquire pastureland for grazing their livestock after applying to the local authorities to state their need for the land and identifying the vacant land (*mawat*).
- ARAZI's request to establish a technical working group comprised of MAIL, MRRD, Ministry of Energy and Water, Independent Directorate of Kuchi Affairs, Commission for Dispute Resolution for Kuchi and Nomad Affairs, Parliament, and ARAZI to provide technical inputs on adequate solutions regarding the issues of Kuchi communities should be promptly approved.

#### Long-term

- Increased incentives for individuals in rural areas to formally record their titles—for example, by reducing the costs associated with their acquisition—should be devised. Possible measures can include discounts for low-income individuals or vulnerable groups.

### 7.1.2 Respect for the enforcement of rights

Although opportunities for tenure individualisation exist (only through regular venues of land registration), they exhibit various challenges. There are two fully valid possibilities and a third “provisional” avenue for land registration in Afghanistan.

First, registration in ARAZI's Principal Books is one of the most valid types of registration. The only way to have land registered with ARAZI is through the *tasfiya* process. However, *tasfiya* is currently conducted only in cases when a major land dispute exists, a large development or mining project is planned, land is located near state land, or powerful people are involved. It is very difficult for ordinary Afghan citizens to have their land cleared by ARAZI and hence it registered in the Principal Books.

Second, registration and the subsequent acquisition of the title deed in courts is considered as a valid proof of ownership. Although the courts are legally bound to accept all seven types of legal documents listed in the LML 2008, in the current situation, judges often refuse to accept the tax and water payment receipts, as well as *Sanad Rasmee Mulkyet* (documents proving ownership from the period of the Democratic Republic of Afghanistan, 1978-79), because of fears of accepting forged documents.

Nevertheless, it is not possible to formalise customary title deed without transacting (selling) the land or clearing it through the *tasfiya* process (which is virtually impossible). In other words, there is no mechanism established whereby a customary deed could be turned into a formal title deed after meeting all the necessary requirements. Only the buyer, when purchasing the land based on the seller's customary deed, can acquire the formal title deed after going through the court registration process. Similarly, land cleared through the *tasfiya* will be registered in ARAZI's Principal Books. The process of formalising long-term possession based on non-documentary evidence does not exist in Afghanistan. Similarly to the formalisation of a customary deed, a transaction must occur for the buyer to acquire the formal title deed or otherwise the land must go through the *tasfiya* process.

The third way of registering land, though only “provisionally,”<sup>389</sup> is through the cadastral survey. The last national cadastral survey was conducted between 1970 and 1978, when only 30 percent of land was surveyed. Records have since not been updated, except for an additional 4 percent of land surveyed in last five years after various presidential decrees. The surveying of Afghan land was suspended completely by Presidential Decree 83 in 2003. However, individuals can have their land surveyed on demand, but the approval of ARAZI’s CEO is needed. In cases of large tracts of land such as whole villages, the approval of the President has to be sought. This is done by submitting a letter of request to the Administrative Office of the President. The outcome of the request usually depends on the amount of informal payments made or the number of personal connections. Due to the high fees payable for the cadastral survey (2 percent of the property value) and the general reluctance to conduct it during the Karzai regime out of fear of misusing land information, land inventory occurs rarely in Afghanistan.

Apart from the procedural problems mentioned above, one of the other reasons mentioned for the low rates of registration and formalisation is reportedly the widespread corruption of government institutions, which require the payment of bribes. According to the agencies involved in addressing land issues, most rural residents prefer to use customary deeds as the process of formalisation and registration requires the payment of informal fees. Customary deeds are thus considered cheaper, do not require travelling to the nearest provincial centre, and include little or no payment of debts.<sup>390</sup> Another reason mentioned was the perceived complexity of the administrative process. According to the World Bank Doing Business in Afghanistan report from 2015, it takes approximately 250-360 working days for the completion of land registration.<sup>391</sup> Paying taxes also deters people from registering their property, in particular when including the informal fees, which often have to be paid in addition to regular land taxes. People try to avoid paying taxes due to a lack of financial resources or because they do not believe that the government will spend the money to their benefit. Some high-ranking officials and wealthy individuals do not pay taxes, knowing very well that they will not be pursued. Finally, there is limited knowledge, particularly among the rural population, about land rights, and the exact steps of the administrative process can discourage them from registering their property; people’s limited knowledge about the consequences of not formalising land rights must be considered as a secondary factor.

Registration, or lack thereof, is of particular importance. Studies have found that almost all land is registered in the name of the male head of household; less than 2 percent of women own land, and most of them are widows.<sup>392</sup> The reasons for this trend are the strong social and customary barriers to property ownership by women, where patriarchal structures remain prevalent.

Due to the largely customary tenure of land with only a minimal portion being recorded or mapped as well as the high levels of corruption in the formal system, the opportunities for illegal land transactions are enormous. Illegal land sales are most commonly known as “land usurpation” or “land grabbing.” A recent report by MEC identified that one of the most common means of land usurpation is document forgery.<sup>393</sup> In particular, the forgeries carried out by court employees have been identified as one of the main forms of land usurpation. Despite the extensive nature of this problem, the current legal framework does not adequately address the crime of land grabbing.<sup>394</sup>

389 The cadastral survey provides only “probable” proof of ownership.

390 Although data on payments in the informal system is difficult to acquire, this information is based on the accounts of various technical experts involved in this study.

391 World Bank, “Doing Business 2016.”

392 “USAID Country Profile: Property Rights and Resource Governance: Afghanistan,” (Washington, DC: United States Agency for International Development), 8.

393 “Public Inquiry into Land Usurpation,” 9.

394 See “The Stolen Lands of Afghanistan and its People: The Legal Framework,” 14.

## Recommendations

### Short-term

- ARAZI's plans to implement the National Demarcation Project to identify the boundaries of villages and *gozars* (administrative units smaller than districts in urban areas) should be materialised. As a follow-up step, the land clearance process on large scale should be restarted. The judge should be included in the *tasfiya* delegation to deal with land disputes, if necessary. In the case of more complex land disputes, the fact that the ownership of land is disputed should be indicated on the *tasfiya* report and forwarded to the courts. Adequate financial resources should be allocated for this purpose from the national budget. Financial support as well as technical expertise should be sought from the international community and civil society.
- The possibility of first-stage land clearance being done by communities to enable nationwide land identification should be explored.
- The regulation proposed by ARAZI that allows for registering urban properties should be approved promptly.
- The draft Customary Deed Registration Law, drafted by the Judicial Reform Commission in 2005, should be reviewed and approved, and the new law stipulating the possibilities for the formalisation of non-documentary land ownership evidence should be enacted.
- The process of a gradual cadastral (or inventory) survey should be restarted, together with the *tasfiya* process on a large scale.
- As an interim step, the option should be explored to establish a community-based identification of the boundaries of land belonging to one community (e.g., village) together with the acceptance of judges to use these boundaries to locate land registered with the courts and ARAZI during the *tasfiya* process.
- More information about the physical characteristics, type of the land, its exact location, and a cadastral map (or sketch) should be included in formal and customary title deeds to decrease the possibility of illegal land transactions.
- ARAZI should take over the administrative responsibilities of establishing the title deeds of courts and become a one-stop-shop for the registration of private land. Simultaneously, the registration system should be replaced by a computerised one, including GPS coordinates, GIS imagery, and the cadastre map. This would also enable the comparison of the names of the sellers and buyers in previous transactions of the same plot of land to prevent the acceptance of forged documents.<sup>395</sup> Extensive public campaigns should be conducted to inform ordinary citizens about the new system and the steps required to register property.
- The expenses for a computerised registration system should be properly budgeted while taking into account registration fees.
- The benefits of collecting taxes for the community should be clearly communicated to citizens, particularly in rural areas. The government must ensure its investment of the collected taxes back into the community. The plans for such a public awareness campaign were already planned by MoF, but they need to materialise.
- Awareness about legal provisions and women rights should be raised, particularly in rural communities.
- ARAZI should take steps to facilitate the increased registration of land by women, for instance, by providing discounts on fees to women.
- Relevant authorities should work together to operationalise the existing efforts to incorporate a provision on land usurpation into the Criminal Code. Where appropriate, donors and civil society stakeholders should provide technical assistance to the drafting process.

<sup>395</sup> Although this technical solution to corruption might alleviate low-level corruption, it might not prevent corruption linked to powerful and well-connected persons.

- The draft Restitution Policy on Land Grabbing should be supported and approved.
- The prosecution of land grabbers should be made a priority within the Attorney General's Office. Similarly, investigations and the associated technical capacity should be enhanced within the Afghan National Police with the possibility of establishing a special police force tasked with the protection of land against the land grabbing.

#### Long-term

- Fighting corruption should become the priority of the NUG. The anti-corruption strategy established by President Karzai in 2008 should be implemented through the stronger engagement of the President himself and the increased results-based support of the international donor community. Additionally, the past and yet unaddressed cases of corruption should be the priority of the Attorney General's Office.
- Courts should develop their technical capacity to detect forged documents and establish proper verification procedures. Unless the document fails to pass this procedure, the judge should recognise its validity, as prescribed by the law. Failing to do so, penalties should be introduced. For this purpose, internal and external audits of the courts should be conducted on a regular basis.
- Penalties should be developed in the Afghan Criminal Code for those holding and/or making forged documents.

## 7.2 Right to forests and common land and rural land use regulations

### 7.2.1 Rights to forests and common land

Although the classification of forests and their usage is clear in the Afghan legal framework, in praxis, the management of forests faces a number of issues. The lack of security and the inability of the government to implement the rule of law throughout the country often lead to the destruction of forests, the felling of trees, timber smuggling, and the conversion of forests to residential areas.

Common land is considered as equal to public land in Afghanistan, although the current body of laws does not provide a clear definition of the latter. This is particularly problematic in terms of the ownership rights of virgin and arid land. As virgin and arid land can be considered as pastureland,<sup>396</sup> it cannot be sold or leased.<sup>397</sup> However, based on the concurrent Art. 46-49 of the LML 2008, the state, providing certain conditions are met, can allocate and distribute arid and virgin land to individuals and other legal persons. In the current body of laws, it is not clear which arid and virgin land can be considered as pastureland<sup>398</sup> and hence public land that cannot be sold or leased, and which can be considered as state land that can be distributed to individuals and other legal persons. Due the ambiguity of the definitions, there are numerous conflicts over the usage of pasture and forestlands, even though the Afghan legal code provides certain clarity in relation to the access to key natural resources.

Furthermore, no process for the legal recognition of "the public" as an owner of public land was established in Afghanistan. This means that despite the general understanding of public land being owned by the public, there is no legal means to prove this during the *tasfiya* process or before the courts. Therefore, such land legally belongs to the state based on Art. 2(8) of the LML 2008, which stipulates that all land for which ownership cannot be legally proven belongs to the state. The weak legal understanding of common property especially undermines the interests of those who own small farms or no farms at all. The rights of this group of people are endangered by influential people, and the legal standards cannot protect their rights. Disputes over outlying land such as rain-fed agricultural land and pastureland are common, putting into conflict the rights of

<sup>396</sup> Based on the definition of pastureland in LML 2008, Art. 3(9).

<sup>397</sup> LML 2008, Art. 82(1): "Pastures shall be kept unoccupied for the sake of public requirements of local villagers (for cattle grazing, graveyard, threshing ground and etc.); and *Pasture Law*, Article 6 (*Official Gazette* no. 795), 2000 (SY 1421): "Buying, selling and leasing a pasture is prohibited."

<sup>398</sup> Hence, the very unclear definition of pastureland in Art. 3(9.2) of LML.



individuals versus those of the local population as well as the interests of different ethnic groups.<sup>399</sup>

Similarly to public land, collective property rights are not provided for in the current body of laws; indeed, no definition of communal land exists. Even though the NLP defines the term “community land,” this term is not embedded in any other existing law related to land management. Only the Pasture Law 2000 mentions communal pastures (not communal land). Since the cadastral survey has been conducted on only 34 percent of the Afghan territory without identifying communal land or pastures, boundaries are not clearly demarcated.

In terms of multiple rights over common and private land, this is a regular occurrence, and such rights can legally coexist. Multiple venues (formal and informal) exist in the case of disputes; however, there are numerous examples of lengthy and complicated unresolved disputes, raising questions about the efficiency of dispute resolution venues. Multiple rights over land and mining resources can also legally coexist, and the rights and obligations of the licence holder and the state (owner of the land) are stipulated clearly in the ML 2015, including the dispute resolution mechanisms. Whether or not the government is able to implement the ML 2015 remains to be seen, although past experience illustrates the government’s inability to monitor the application of mining contracts.

## **Recommendations**

### **Short-term**

- Mechanisms should be identified to promote forest management in areas that are currently out of government reach such as developing and empowering community-based adjudication groups (comprising elders and influential figures in the community) in order to address violations of rural land use restrictions. One possible option would be channelling rural land management through CDCs.
- The awareness of the local population should be raised about the importance of forests and other natural resources and the negative impacts of deforestation in order to encourage communities to take part in maintaining forests, particularly in areas where the presence of central government is limited.
- Communities should be capacitated on the provisions of the Water Law of 2009 that stipulates their rights and obligations. District MAIL offices should ensure the adequate implementation of the law.
- Contradictory legal codes in terms of the definition of public land, including a clear distinction between arid and virgin land and pastureland, should be addressed by approving the existing revised draft of the LML developed by ARAZI as well as the Pastureland Law by MAIL.
- The process for the recognition and, most importantly, the registration of public land has to be established to protect the rights of the public through an amendment of the current LML.
- The clarification of the status, recognition, and ways to register collective rights should be embedded in the legal framework by amending the current LML.
- The draft Rangeland Law, which provides the framework for the management of private, community, and public rangeland, should be promptly approved. In particular, it states that nomadic or semi-nomadic people may acquire pastureland for grazing their livestock after applying to the local authorities to state their need for the land and identifying the vacant land (*mawat*).
- ARAZI’s request to establish a technical working group comprised of MAIL, MRRD, Ministry of Energy and Water, Independent Directorate of Kuchi Affairs, Commission for Dispute Resolution for Kuchi and Nomad Affairs, Parliament, and ARAZI to provide technical inputs on adequate solutions regarding the issues of Kuchi communities should be promptly approved.

<sup>399</sup> Alden Wily, “Looking for Peace on the Pastures.”

- The possibility of community-based pastureland administration (for example, as used by the Rural Land Administration Project or Sustainable Agricultural Livelihoods in Eastern Hazarajat project) should be considered, as should the Land Administration Management Project prepared in cooperation with MAIL in 2007.
- The cadastral survey of disputed land should be prioritised where the interests of local communities are at stake. In the absence of a comprehensive survey, combining satellite images with GPS coordinates is a cost-effective method in the short term to demarcate the boundaries of communal pastures.
- The cadastral (or inventory) survey should be restarted gradually, together with the *tasfiya* process on a large scale.
- A clear monitoring system of the application of mining contracts should be established with the participation of local communities and under the auspices of the Ministry of Mines and Petroleum.

#### Long-term

- Community discussions and dialogue regarding conflicts over access to natural resources should be encouraged. Traditional structures such as the various tribal bodies and new structures like the community, district, and provincial development councils can play an important role in this regard.

### 7.2.2 Effectiveness and equity of rural land use regulations

Although restrictions on rural land use are clearly stipulated in the Afghan legal code, in practice, rural land is often used for purposes not specified by the law. Residential buildings, for instance, are not allowed to be built in disaster prone areas. However, the monitoring of the compliance to these restrictions does not occur. Due to the unclear definitions of pastureland (and public land in general), as well as the often illegal usage of rural land, including forests, the transferability restrictions are not always enforced or followed.

In terms of rural land use change, the restrictions over such changes for certain rural land like pastures, forests, agricultural land, protected areas, and other public land<sup>400</sup> exist. In fact, changes are not allowed in most cases according to Afghan law. Only the use of arid and virgin land can be changed, although no clear mechanism exists for this purpose. Finally, there are no rural land use plans to regulate the usage of rural land.

Despite the various efforts made by MAIL such as the National Resource Management Strategy launched in 2006, natural resources, including forests, pastures, and protected areas, are affected by the lack of a comprehensive mechanism for their effective and sustainable use. For this purpose, programmes were developed in 2014 to manage and protect natural resources in cooperation with the public so as to build community capacity in the area of sustainable utilisation, promote a sense of ownership among the people, and motivate people to contribute to the survival of these resources. Communities and local governments, however, need further knowledge and skills through practical training in order to develop their ability and capacity for the management of natural resources.

Afghanistan's protected areas require special attention here. The country only has two national parks, and suggestions for the creation of more protected areas such as in Nuristan Province, Badghis Forest, and the Buddha monuments in Bamiyan were put forth to NEPA in 2002, but these are still awaiting approval. Furthermore, the lack of enforcement of protective regulations leads to the degradation of protected rural areas, and although the mechanism of converting land to protected area exists, it is cumbersome and lengthy.

<sup>400</sup> Note the unclear definition of public land.

## **Recommendations**

### **Short-term**

- Mechanisms should be identified to promote forest management in areas that are currently out of government reach such as developing and empowering community-based adjudication groups (comprising elders and influential figures in the community) in order to address violations of rural land use restrictions. One possible option would be channelling rural land management through CDCs.
- The awareness of the local population should be raised about the importance of forests and other natural resources and the negative impacts of deforestation in order to encourage communities to take part in maintaining forests, particularly in areas where the presence of central government is limited.
- The draft Rangeland Law, which provides the framework for the management of private, community, and public rangeland, should be promptly approved.
- Contradictory legal codes in terms of the definition of public land, including a clear distinction between arid and virgin land and pastureland, should be addressed by approving the existing revised draft of the LML developed by ARAZI as well as the Pastureland Law by MAIL.
- A clear mechanism for changing the use of arid and virgin land should be established. A database should be developed within ARAZI to collect data about arid and virgin land use changes.
- Adequate monitoring mechanisms should be established to monitor the compliance with land use restrictions in disaster prone areas.
- The process of land change to protected areas should be expedited by mainstreaming the steps and organisations responsible.
- The surveying of natural resources identified to be at a high risk of degradation should be prioritised.

### **Long-term**

- The possibilities of allowing for a clear, transparent, and publicly accessible process of rural land use change should be explored for other types of rural land.
- Rural land use plans should be developed by MRRD through a participatory and transparent process in which public voices can be heard and burdens shared.
- Increased human and financial resources are needed for NEPA in order to be able to implement its policies regarding national parks and protected areas.

## **7.3 Urban land use, planning, and development**

### **7.3.1 Restrictions on rights**

Restrictions on land use as prescribed by the Kabul Master Plan are often not enforced. It is illegal to convert a residential area to an industrial area or construct buildings on arable land. However, the rampant corruption in the ranks of government and land management authorities allows for the uncontrolled usage of the land. Examples of informal settlements built on mountain slopes within and on the outskirts of cities is another example of the friction with urban use restrictions. Mountains and hills are considered as pastureland and, as such, for public usage. The appropriation of technically public land to private interests thus deprives people from using the land for grazing.

Although regulations on disaster risk management are developed on a national level, these regulations are not specific to each municipality. Additionally, MUDA, the municipalities, and MAIL make limited efforts to implement disaster risk policies. Although Kabul Municipality stated that efforts are currently underway to develop a policy on land use for disaster risks, they provided no further information.

Due to the thriving black market for looted historical and cultural artefacts coupled with the generally poor enforcement of protection measures, much of Afghanistan's physical cultural heritage can be considered at risk. Such legal measures are central to providing a legal foundation for heritage protection. While natural heritage regulations exist in urban areas, little focus has been given by the main urban actors—namely, municipalities and representatives of MUDA and MAIL—to the actual implementation of disaster risk regulations due to a presumed lack of resources, high rates of corruption, focus on other issues (e.g., a lack of sufficient urban infrastructure), and so on.

Finally, urban planning, particularly in Kabul, is irregular, because the most current third master plan for Kabul was abandoned on the request of MUDA by the Karzai administration; hence, no master plan regulates urban development in the city. President Ghani's decree forbidding construction on arable land also complicates urban expansion in major cities. Since some arable land is included in the master plans, sometimes dating back 50 years, the decree limits their implementation.

## ***Recommendations***

### **Short-term**

- Clear mechanisms for changing the usage of each type of urban land should be devised, including the requirement of permits to do so. Municipalities should establish a monitoring mechanism for this purpose, as well as a database of land use changes, which would be updated regularly and include new spatial information.
- Zoning laws for both national and municipal purposes should be enacted.
- Resources must be allocated toward restrictions on urban land use related to disaster risk. Government personnel should be trained not only in managing disasters but also in taking preventive measures in light of the available laws and regulations. Long-term systematic training is also required along with the future recruitment of employees and their training.
- A feasibility study for different cities should be undertaken by MUDA to identify the enforcement mechanisms of the National Disaster Risk Strategy.
- A feasibility study for different cities should be undertaken by MUDA to identify possible enforcement mechanisms for the protection of Afghan cultural heritage and the prevention of looting.
- The long-awaited National Urban Policy and new Municipality Law should be enacted.
- New master plans have to be developed for the largest cities as per MUDA's commitments within "Big Cities Master Plan" initiative with the support of international community.
- By devising new master plans for the largest cities, the ban on constructions on arable land should be taken into account, and the provisions of the master plan should be written in line with the presidential decree.

### **Long-term**

- The public should be capacitated on community-based disaster risk preparedness.

### **7.3.2 Transparency of land use restrictions**

The process of urban expansion and infrastructure development is shared between local urban municipalities (Kabul, Jalalabad, Kandahar, etc.) as well as MUDA, formally tasked with developing urban policy for the country. However, due to the unclear delineation of responsibilities of these two main actors, actual collaboration has developed informally and depends heavily on the individual municipal and the ministerial objectives and ideologies. When shared ideology and objectives are weak, urban expansion and infrastructure development remain primarily outside of the formal realm. Planning objectives differ according to each municipality and MUDA, with no specific planning objective existing across the board. Objectives remain overly individualised and

often in conflict with one another, thus resulting in numerous stalemates in policy planning. In Kabul city, for instance, the responsibility is shared with the municipality's Plan Implementation Office and MUDA.<sup>401</sup> Due to a fundamental disagreement in the implementation of the third and final master plan of Kabul between the office and the ministry, partially upheld by the formal suspension of the master plan in 2005 through a presidential decree, urban expansion in Kabul is littered with irregularities. Despite efforts to develop a fourth plan, no plan for the urban space within Kabul's city limits has been established.<sup>402</sup> Focus has instead been placed on developing legal mechanisms to change the urban landscape of Kabul, with a 2009 plan for urban expansion *outside* of the city ("Kabul Jadid," New Kabul City), attempting to incentivise Kabul residents to move outside of the city in the hopes of reducing the population of the city to a more manageable amount. The lack of a legal framework has resulted in a process that lacks transparency and can be dismissive of the facts on the ground.

The formal planning mechanisms of MUDA are to be shared with the public through official announcements and local authorities such as the municipality, while respecting all citizen rights outlined in the LML 2008, the Constitution of Afghanistan, and relevant articles in the Civil Code. However, information is not always shared with the public in a consistent manner. While occasional announcements about urban expansion exist, these are limited to major urban changes (i.e., the release of plans for New Kabul City) and are generally not detailed. The public is generally unable to obtain more information about planned urban expansion without previously established social networks with individuals working in the relevant municipal or ministerial departments. Most discussions on expansion and development thus remain inaccessible to the public. When people are not informed about planned urban expansion, landless people, returnees, IDPs, and rural migrants are considerably more tempted to build informal settlements outside of the master plan, than if the information was available. Additionally, with the absence of the publicly available information on planned urban expansion, oversight in the form of public scrutiny is missing when planning and implementing urban expansion projects.

The decisions about changes in urban land use do not involve the public. Construction projects are developed based on the legal documents giving permission to the particular organ for changing urban land use. The lack of public involvement in the decisions about land use changes often renders the implementation of the project impossible due to the lack of ownership among the original landowners to allow the implementation.

The uncertain status of the LML 2008 coupled with disputes over the implementation of the third master plan and relatively weak authority of the government has rendered the legal framework for changes in urban land use convoluted, underdeveloped, and disregarded by enforcement authorities. While exact figures on land use changes and requests are not accessible,<sup>403</sup> requests for changes in land use do not have a specific process to be followed; likewise, a mechanism or database for proper land use changes has not been developed. Disputes between MUDA and the local municipalities make it difficult to distinguish the appropriate authority for such requests. Urban land use changes are most commonly visible through informal processes, with formal requests being very rare. Requests for changes in urban land use rarely come from the public and are typically put forth by powerbrokers who are able to manipulate or better navigate the request process. Such changes thus provide little benefit to society in general. Land with restrictions on land use change is in reality converted to a different use by illegal means.

401 Calogero, "Planning Kabul," 79.

402 Calogero, "Planning Kabul," 80.

403 See the explanation for the lack of data in the Introduction.



## Recommendations

### Short-term

- An interagency commission between MUDA and the municipalities should be established to clearly delineate the responsibilities between these two institutions in relation to the formulation, implementation, and monitoring of the master plans. In the future, this commission can serve as a forum for the discussion of various pressing issues such as the status of informal settlements in Afghan cities.
- The focus of urban land authorities should shift from the “outsourcing” of urban space development outside the city to finding affordable and effective housing opportunities inside the city. These efforts should be supported by the development of new master plans for the largest Afghan cities.

### Long-term

- Efforts need to be put in place to streamline public input into all major initiatives, including providing platforms through which the public can get the information about projects, propose new projects, make complaints, and so on.

### 7.3.3 Efficiency in the urban land use planning process

Currently, no clear commitment to low-cost housing and services for the poor exists, apart from broad declarations about land rights. The provisions do not specify low-cost housing offers to the poor, but instead rely on instalment schemes that typically amount to the normal (not low) cost of the land. A lack of payment can result in evictions. Focus has instead been placed on providing incentives for families living in informal urban settlements to move outside of urban centres to semi-urban areas, rural areas, or “new towns” (like New Kabul City) or “small towns” near urban centres (locally known as *sharaks*).

Although state land distribution schemes were developed by the government through Presidential Decrees 104 and 1091 during President Karzai’s regime, these are rather an exception from the general policy of not distributing state land. Additionally, the implementation of the distribution policies, mirrored by rampant corruption and conflicts caused by unclear ownership claims of distributed land, does not serve the interests of the poor Afghan population.

In Kabul, issues relating to rapid urban expansion persist. Given the reality of Afghanistan’s largest city population (hovering between 5 and 5.5 million inhabitants), it is reasonable to note that there is no effective urban spatial expansion in Kabul. Kabul Municipality currently employs a 2011 master plan developed by the Japan International Cooperation Agency in partnership with the Afghan government related to the New City Development Area (in Deh Sabz) as well as the current boundaries of Kabul city. The status of this plan, however, remains tenuous and has not been implemented by MUDA. Due to the absence of the updated master plan, rampant corruption, extensive land grabbing, and a great influx of refugees, IDPs, and rural-to-urban migrants, building in Kabul throughout the 1990s and, more recently, the 2000s remains largely outside of the third master plan and is thus considered as “informal” in nature. Indeed, with the suspension of the third master plan by then-President Karzai at the request of MUDA, the city has no clear functioning reference for planning purposes.

Other large cities such as Herat, Jalalabad, and Mazar-e Sharif suffer from outdated urban plans as well. Additionally, the carrying capacity of infrastructure has been long overloaded in Afghan cities. While proposals for piecemeal infrastructure development have been proposed to the government internally and by international NGOs, no comprehensive strategy for the provision of new infrastructure and services has been adopted or considered by the government, primarily due to the unresolved issue of informal settlements.

Most new residential building construction in Kabul (and other cities) is today considered as informal (constructed outside of the third master plan’s framework). A range of settlement types and deeds reveals a complicated landscape with squatters on public land, informal homes on private land, grabbed land, and more. Unregulated urban expansion, where people build their

houses without an official building permit, results in the decrease of available green spaces and agricultural land in Afghan cities, a myriad of informal land ownership claims, and, consequently, a high number of land disputes.

## **Recommendations**

### **Short-term**

- A policy on low-cost housing for the poor should be adopted. The policy should be developed in a consultative manner, with input from all stakeholders including civil society representatives, the government, and the public in question. Additionally, anti-eviction laws should be designed (based on Forced Eviction Guidelines already existing within the National IDP Policy) with constitutional protections in mind and, in the case of eviction, a legal commitment to fair compensation should be established.
- The proposed new LML stipulating the creation of a Distribution Delegation (with representatives from ARAZI, Afghan Geodesy and Cartography Head Office, and MAIL) with the aim to provide housing opportunities to the poor should be promptly approved.
- Presidential Decree 104 should be amended (or annulled and new laws adopted) to tackle its shortcomings such as the allocation of non-viable land and cumbersome eligibility criteria. The National IDP Policy (including Forced Eviction Guidelines) should be adequately implemented.
- Initiatives like Maslakh where IDPs are given land titles should be supported and, if possible, reproduced.
- The electoral promises of the NUG and especially the current statements made by the minister of MUDA, stating that the focus of his term in office will be to provide adequate low-cost housing, have to materialise, for instance, in the form of a broader national housing programme that provides lower income populations with access to water wells, land, and affordable financing strategies.
- Consideration should be given to the most appropriate planning and whether such a process is the best possible planning option for cities. In the case of Kabul, for instance, more flexible planning and the formalisation of informal settlements may be more suitable. A feasibility study should be conducted to this end.
- New master plans should be developed for the largest cities in Afghanistan as per MUDA's commitments within "Big Cities Master Plan" initiative with the support of the international community.
- With the development of new master plans for the largest cities, the infrastructural needs of the population and the current state of the cities (considerably changed in comparison to the 1990s) need to be taken into account, and adequate mechanisms to provide the necessary infrastructure should be developed.
- The policy on the upgrading of informal settlements should be approved and implemented.
- A general directorate of informal settlements should be established within each municipality to mainstream the issues of upgrading informal settlements.
- The implementers of various upgrading projects (including the NGO community) should create an adequate coordination mechanism to share information and lessons learned. Municipalities, with the technical support of the international community, should develop a database with information about the upgrading in each area, which would then be publicly available on municipality website.

**Long-term**

- Corruption in state land distribution efforts should be curbed by increased efforts to implement the anti-corruption strategy established by President Karzai in 2008 and increased results-based support from the international donor community. Additionally, past and yet unaddressed cases of corruption should be the priority of the Attorney General's Office.
- A community savings and loan system should be introduced to mobilise the community and make upgrading sustainable.

**7.3.4 Speed and predictability of enforcement of restricted land uses**

The current legal framework for building permits remains convoluted, and no national-level policy has been identified for residential building permits that are technically justified, affordable, and complied with. Compliance to land-related regulations has thus far remained tenuous at best, primarily due to a lack of incentive, high government bureaucracy, corruption (thus resulting in relatively high financial and temporal investment by local populations), and a lack of awareness of the procedures and requirements related to building. The convoluted legal framework related to building permits—legal texts often being littered with holes and opportunities for bribery—renders it rare for building permits to be obtained in strict compliance with the regulations in place.

Building permits are generally granted in three months in corruption-free environments, but the on-the-ground realities in Afghanistan result in the process being filtered with corruption and typically extending the required time.

***Recommendations*****Short-term**

- A review of the effectiveness of the process for obtaining a building permit should be conducted.
- A mechanism for monitoring the existence of building permits should be established, and non-compliance should be sanctioned by law. This, however, should be implemented only after the status of informal settlements is resolved.

**Long-term**

- The long-standing issue of pervasive corruption in administrative procedures in Afghanistan must be addressed in order to ensure that building permits are reviewed and fairly judged within a reasonable period of three months.

**7.3.5 Tenure regularisation schemes in urban areas**

Residential dwellings in Afghan cities are mostly informal, as owners do not have any legal documentation proving their ownership. As the policy on upgrading informal settlements has not yet been approved by the cabinet, the formalisation of informal residential dwellings is at best difficult, if not impossible. While strategies and, to an extent, regulations exist to reduce incentives for new informal occupations (including leaving those in informal settlements in a state of tenure insecurity and threatening informal settlers with forced eviction), the high demand for urban housing and a lack of understanding about the regulations among the public have counteracted some efforts toward regularisation. The imbalance between formal and informal residential dwellings in Afghan cities has led to most informal homes lacking basic infrastructure.

Finally, apart from the limited references in the LML, no regulations for the specific classification, recordkeeping, development, or management of condominiums were identified. Legal regulations fall short of the detailed management guidelines and are limited to the recognition of common property.

## Recommendations

### Short-term

- The draft NLP of 2007 aiming to offset the “ongoing failure of the formal land allocation, adjudication and registration systems” that have “caused uncontrolled informal developments in urban and rural areas”<sup>404</sup> should be operationalised by the enactment of new laws that grasp the realities in Afghanistan.
- The policy on upgrading informal settlements has to be approved and implemented.
- With the development of new master plans for the largest cities, the infrastructural needs of the population and the current state of the cities (considerably changed in comparison to the 1990s) need to be taken into account, and adequate mechanisms to provide the necessary infrastructure should be developed.
- A specific policy on common property for condominiums should be developed and enforced through a consultative process. Such a policy should encourage citizens to partake in the maintenance of common property through positive measures (i.e., incentives) instead of penalties.

### Long-term

- Community saving and loan systems should be considered as an effective way to mobilise the community and make upgrading activities sustainable.

## 7.4 Public land management

### 7.4.1 Identification of public land and clear management

Although no clear definition of public land exists in the Afghan legal framework, based on the accounts of various technical experts consulted for this study, public land is the land that has been allocated for public use and is the property of neither the state nor the individual. The problem arises with Art. 3(8) of the LML 2008, which stipulates that any land that is deemed public but is not registered in the books of government lands should be considered as state land. Additionally, Presidential Decree 83 further blurs the boundaries between state and public land by putting the emphasis on formal documentary proofs of ownership. Given that the legal framework does not define public land or provide any provisions on how to register it, public land can be easily interchanged with state land. In other words, unregistered land that is under public use can easily be claimed by the state as its property and be subsequently reassigned.

This is particularly problematic when it comes to the ownership rights over virgin and arid land. As mentioned, virgin and arid land can be pastureland,<sup>405</sup> and hence it cannot be sold or leased.<sup>406</sup> However, based on the concurrent Art. 46-49 of the LML 2008, the state, providing certain conditions are met, can allocate and distribute arid and virgin land to individuals and other legal persons. In the current body of laws, it is not clear which arid and virgin land is considered as pastureland,<sup>407</sup> and visual characteristics are often used to distinguish pastureland from arid and virgin land. However, in extremely wet or dry seasons, for instance, arid and virgin land can resemble pastureland.<sup>408</sup> In this case, the testimonies of witnesses are used to distinguish between these two types of land. However, as the distinguishing factors are visual characteristics and witness testimonies, there is considerable room for corruption, thus creating a situation in which, although public land cannot be sold or leased, it can indeed be distributed to individuals and other legal persons.

<sup>404</sup> See draft *NLP*, Art. 2.1.1.

<sup>405</sup> Based on the definition of pastureland in Art. 3(9) of the LML 2008.

<sup>406</sup> *LML*, Art. 82(1): “Pastures shall be kept unoccupied for the sake of public requirements of local villagers (for cattle grazing, graveyard, threshing ground and etc.)”; and, “Buying, selling and leasing a pasture is prohibited.”

<sup>407</sup> Hence the very unclear definition of pastureland in *LML*, Art. 3(9.2).

<sup>408</sup> Arid and virgin land can grow plants in the wet season, while pastureland can dry out significantly during the dry season.

Another important feature of the definition of public land is that it is allocated only for public use to serve the common interests and welfare of residents of a particular area. Using public land for purposes not set out by law is not permitted. For example, pastures that have been allocated for the grazing of animals and graveyards must not be used for a different purpose. However, the current body of laws (LML 2008 and LAL 2000 with its amendments) does not clearly define the terms “public interest,” “public need,” “public purpose,” “public reasons,” or “public welfare.” The law uses these terms interchangeably, which creates space for numerous interpretations. The unclear definitions of public land and the restrictions placed on their ownership and consequently on their transferability and use result in various illegal sales, leases, and transfers of public land to private interests, sometimes with an illegal use.

Even though the level of government responsible for public land seems to be appropriate, public land management faces a number of problems. In general, land management is a low priority for the government. A major issue across all ministries and ARAZI is the lack of skilled human and financial resources to manage public land.<sup>409</sup> Furthermore, widespread corruption in the government hampers transparency and accountability in land management in general.<sup>410</sup> To mention but one example, powerful individuals, often state actors themselves, acquire public land for lucrative housing projects through “land grabbing.”<sup>411</sup>

In terms of recording and mapping public land, between 1966 and 1977, a national cadastral survey was conducted on 30 percent of all land in Afghanistan. Since then, another 4 percent of land has been surveyed, while the remaining 66 percent of land has not been surveyed at all. Additionally, the classification of the different types of public land in the LML is not clear, making identification impossible on the ground. Furthermore, the determination of the boundaries of pastureland and its classification based on the audibility of the human voice are not compatible with present-day conditions.

Information on public land is not made public. First, the unclear definition of public land along with the fact that it cannot be registered as such based on the current legal framework renders access to information impossible. Second, Presidential Decree 99 in 2002 halted the surveying and mapping of land previously conducted by the Cadastral Survey Department. President Karzai allowed the Cadastral Survey Department to conduct surveys only on his request and/or after his approval for the surveys conducted on demand (Art. 15(1)), while the Cadastre could not make any survey information public (Art. 15(2)). This, however, led to complaints that the survey offices were making records available to elite persons who then used the information to change the ownership in their favour. This practice has not necessarily stopped, adding to the extreme gathering of power over land matters in the hands of the president.<sup>412</sup>

While the responsibility over the management of the different types of public land is more or less unambiguously assigned (taking into consideration the unclear definition of public land and its different types), the lack of professional land experts and financial resources in Afghan land administration for the implementation of day-to-day activities represents a major challenge that makes it difficult to put into practice strategic and action plans. In ARAZI, for instance, although the merging of the Cadastral Survey Department of the Directorate of Geodesy and Cartography with ARAZI strengthened the latter’s professional capacity, ARAZI continues to lack a sufficient technical structure that can address countrywide land affairs. In specific terms, ARAZI’s provincial capacity is limited in terms of human resources and integrated cadastral maps.<sup>413</sup> Other problems facing ARAZI include a lack of modern technical equipment for conducting cadastral surveys, insecurity in some provinces, and the lack of provincial cadastral departments. For these reasons, the establishment of some new departments has been proposed in ARAZI’s *tashkil* (organisational structure) for the coming year; in the opinion of current ARAZI employees, these departments are needed to effectively address land affairs.<sup>414</sup>

409 Interview with ARAZI employees, Kabul, 11 March 2015.

410 In this regard, the opinions of low-ranking government officials, particularly ARAZI officials working on forests and pasturelands and defending public property, were considered.

411 Alden Wily, “Land Governance at the Crossroads,” 20.

412 Alden Wily, “Land, People, and the State,” 33.

413 “ARAZI: An Operational Strategy,” 6.

414 Interview with ARAZI employees, Kabul, 11 March 2015.



Only state land can be allocated (leased) to private and public interests in Afghanistan: private land can be acquired by the state (through acquisition) for public interest. Public land cannot be allocated (sold, leased, transferred, or exchanged) to private interests under any circumstances. However, the ambiguity of the definition of virgin and arid land in particular gives room for its illegal allocation to private hands. According to Art. 46-49 of the LML 2008, the state can allocate and distribute arid and virgin land to individuals, while pastureland can simultaneously be arid and virgin land without any clear distinction between the two types of land.

## **Recommendations**

### **Short-term**

- The newly proposed and amended LML that addresses the shortcomings of the public land definition, classifies four types of land including “land specific to village(s),” contains a clear definition of “public interest,” classifies the types of public land, and delineates responsibilities between the institutions responsible for different types of public land should be enacted.
- Public land management should be prioritised on the government’s agenda.
- ARAZI’s plans to restart the cadastral survey of the remaining 66 percent of land (including public land) should be implemented promptly and adequately financed. The survey, as planned by ARAZI, should start in Bamiyan Province as soon as possible.
- A community-based management of public land should be put in place (potentially through *shuras*, *jirgas*, and CDCs) once the definition of public land is clarified. It should aim to raise public awareness about public land, laws, and regulations associated with its use.
- The criminalisation of land grabbing and other illegal uses of public land should be put on the government’s agenda and operationalised.
- The capacities of public institutions dealing with public land such as ARAZI, MAIL, and the municipalities should be built on the national, provincial, and district levels.
- The activities of public land institutions dealing with public land should be adequately financed.
- ARAZI should take over the administrative responsibility of establishing title deeds from the courts and become a one-stop-shop for the registration of private land, thus creating a central land registry. Later on, this system should be computerised and made publicly available to provide all land-related information.

### **7.4.2 Justification and time-efficiency of acquisition processes**

The current LEL 2005 has numerous deficiencies that limit the justification and time-efficiency of land acquisition processes. First, the LEL does not require the expropriating authorities to estimate the least amount of land required for their projects. Second, the state organisation is required to announce the implementation of the project only three months before the project start date. Third, the current law is not transparent as to which departments have the powers of expropriation, and it does not limit the powers of the implementing officials, which encourages corrupt practices.<sup>415</sup> Finally, no third-party monitoring exists for verifying the compliance of the implementing organisation with the destined usage of the land.

There is no accurate statistical information on acquired land and whether or not it has been transferred to its destined use in a timely manner. Various projects are underway in various parts of the country, and the acquired land is recorded per project, but there is no specific institution to gather and keep these records nationwide. Although ARAZI is in theory the institution responsible for monitoring the transfers of state land every six months to ensure that the acquired land is used for its intended purpose, no regular monitoring takes place due to the lack of financial and human resources and the poor security situation in certain areas. Furthermore, this creates a conflict of interest, since ARAZI is both the transferring and monitoring authority.<sup>416</sup>

415 Alden Wily, “Land, People, and the State,” 49.

416 Interview with ARAZI employees, Kabul, 11 March 2015.

In some cases, land acquisition faces resistance from landowners, thus prolonging the three-month period and delaying the implementation of public welfare projects. There are numerous reasons why such resistance occurs. First, the LEL 2005 does not make any provisions for public consultation regarding public welfare projects. This undermines the principle of transparency and accountability, as the local communities who are most affected by the project have no say in the process. Second, “the owners cannot appeal against the expropriation, to receive payments in front of a judge, to buy the property back if the land was not used in the manner intended and to choose whether to be paid in cash or in kind.”<sup>417</sup> If the owners are not willing to give up their land, the acquisition process starts, and based on the transparency of the acquisition process and people’s satisfaction with the compensation and resettlement measures, the actions of private owners are determined. Third, when the owners are not satisfied with the compensation, the acquisition process can be lengthy and complicated and can create many conflicts with the evicted owners. In such cases, people try to obstruct the implementation of development projects, and sometimes residents even refuse to vacate their houses to put pressure on the government to reach an agreement on a better compensation price.

### **Recommendations**

#### **Short-term**

- The proposed LAL, currently under review by MoJ, should be promptly ratified. It should include a list of 19 different categories of public projects that can be implemented through the acquisition process, a requirement for the organisation to estimate the least amount of land required for the implementation of the project, a minimum announcement period of nine months before the start of the project to all people directly or indirectly affected by the acquisition, a provision of third-party monitoring to assess whether the leased and transferred land is used for its intended purpose, and finally, a proposition of public consultations before acquisition process.
- A computerised database with the recording of all acquired land together with cadastral maps and other related-land documents should be developed, kept with ARAZI, and shared with other land institutions.

#### **7.4.3 Transparency and fairness of acquisition procedures**

Although compensation for land, residential buildings, fruit-bearing trees, and other saplings is legally prescribed, in the majority of cases, the paid compensation is not sufficient for individuals to be able to maintain their previous living standard.<sup>418</sup> Cases in which the acquired land is located in a central part of the city, but the exchanged land is situated on the outskirts can serve as an example of this. Another problem in the applicable law is that there is no deadline for the payment of compensation, and sometimes it may be made three or four years after the acquisition. When land prices increase during this period, the landowner might not be able to afford the same standard of living as before. In light of Art. 40 of the Constitution of Afghanistan, which states that private land can only be expropriated in exchange for a prior and just compensation, it can be argued that most of the acquisition processes in Afghanistan are unconstitutional.

Furthermore, if grazing land is (mistakenly or illegally) used for the construction of a public project (i.e., an airport), people who formerly used the grazing land can no longer use it, yet there are no provisions in the current legislation stipulating the provision of compensation for the loss of grazing rights. Similarly, the LEL does not provide any provisions for fair resettlement options for people whose land has been appropriated.

Finally, the acquisition process is lengthy in itself. It can take up to 120 weeks until completion. Since the actual payment of compensation requires landowners to have their land titles verified by the court,<sup>419</sup> it takes a few weeks to even convene all members of the land valuation committee for a meeting. Since the price is rarely set during one meeting, and no clear method

417 Alden Wily, “Land, People, and the State,” 49.

418 Interview with ARAZI employees, Kabul, 11 March 2015.

419 Peikar, Olsen and Upadhyay, “Proposed Law on Land Acquisition,” 15.

is prescribed for how the committee sets prices,<sup>420</sup> the actual payment can turn out to be inadequate and delayed.

In terms of rights to compensation in the case of land use changes outside of the acquisition process, none of the land-related laws include any provisions that would stipulate compensation rights. For example, issues such as the conversion of rural land to urban land and how this would affect secondary rights like access to grazing are not considered in the laws. Little is known about how land use changes influence the livelihood of citizens.

What is of particular importance is also the fact that there is no particular authority to whom individuals can lodge their complaints against the acquisition process and the compensation paid. Although those affected can ultimately approach the court system, resorting to the courts to launch a lawsuit should be the last instance, as opposed to only presenting a common complaint. Furthermore, rampant corruption and lengthy processes in the judiciary leave lawsuits filed by such individuals unaddressed for a long time. At the same time, individuals whose land has been acquired cannot easily defend their rights against powerful figures and/or state institutions.

## **Recommendations**

### **Short-term**

- The amended LAL containing a clear provision on fair and just compensation processes, including compensation paid prior to the project start date, compensation for grazing and other rights, identification of suitable exchanges for acquired land, and provisions on the resettlement of individuals who face losses as a result of land acquisition should be promptly enacted.
- The proposed LAL stipulating the creation of a complaints hearing committee comprised of land experts, an expert engineer, a representative from the appropriating organisation, a representative of the pricing committee, and the individual whose land/property has been appropriated and/or his/her representative should be adopted. Public awareness campaigns informing people about complaint hearing policies and regulations should be conducted.
- A comprehensive dataset containing the records of complaints regarding land acquisitions and their outcomes should be established.
- Research and data collection should be conducted on unrecorded secondary rights (e.g., grazing, right of passage, collecting forest products) to determine how land acquisition can influence these rights. Policies addressing the issues related to unrecorded rights should be devised while taking into account the recommendations of this research.

## **7.5 Transfer of large tracks of land to investors**

### **7.5.1 Transfer of state land to private use**

There are various challenges when transferring state land. The ambiguity of the legal framework as to the sale of state land creates a situation in which state land sales occur in an unregulated manner with various state agencies like AISA or with powerful figures and warlords selling previously acquired state land<sup>421</sup> despite its prohibition by presidential decree.

Nevertheless, state land leases are a major venue for providing large tracks of land to investors. Yet these do not always occur in an open and transparent manner through public auctions.

The valuation of state land intended for lease also encounters various problems. Although provisions in the Afghan legal framework set clear procedures for land valuation, the inherent delays in assessing the land and setting a price pose a problem, as the members of the valuation delegation often take time to present themselves at the land valuation committee meetings. Sometimes, it takes more than one year to have the lease contract signed off on by both parties. Additionally, due

<sup>420</sup> See the issues associated with the setting up of land prices in Section 6.7.

<sup>421</sup> In the case of warlords, state land is often acquired illegally.

to the high level of corruption, powerful strongmen and public officials sometimes put pressure on the valuation committee to decrease the value of the land, thus compromising the setting of the land price based on market values. Finally, the results of the valuation are not publicly accessible, which creates transparency issues within the process.

Finally, the implementation of relevant policies to enable the public capture of benefits arising from changes in permitted land use has largely been ignored, thereby resulting in some members of society unduly benefiting from these. The benefits are not captured in real time, mainly because the land value assessment is not done systematically and regularly.

## **Recommendations**

### **Short-term**

- The possibility for state land sales should be clarified through the cabinet regulation to clarify the current legal provisions on this matter. Clear categorisation should be developed based on which the restrictions on transferability will be applied.
- The status of AISA and its activities should be clarified by clear rules of engagement interlinked with ARAZI's investment policy.
- Increased financial resources coupled with on-the-job long-term training should be provided to HOOAC to allow it to better perform its duties such as verifying the usage of public auction for every land lease procedure.
- A mechanism to assess the performance of members of the valuation commission should be devised, with poor performance being addressed immediately.
- Corruption in the land valuation process should be addressed.
- The results of land valuation for land lease purposes and the information about land leases for various projects, particularly where it concerns the public, should be made publicly available.
- A clear monitoring system of the application of lease contracts and benefit-sharing mechanisms should be established, with the participation of local communities.

### **7.5.2 Private investment strategies**

Public consultations with the local communities regarding the land leases and private investment do not have any strong legal backing and do not take place. Hence, secondary right holders can potentially be left out of the process.

Additionally, ARAZI has built some safeguards into the bidder requirements to prevent negative effects from large-scale investments. However, due to the minimal monitoring, the compliance with these safeguards is not possible to verify.

Based on Art. 61 of the LML 2008 and Art. 31 of ARAZI's Land Lease Procedure, the lease contractor is obliged to consider and apply environmental protection principles. It is also one of ARAZI's monitoring obligations to assess environmental impacts and ensure that the project is not a threat to the environment (Art. 13(5), Land Lease Procedure). However, although environmental considerations are taken into account when selecting the investment, rules for the compensation of environmental damages have been changed to apply only to landowners and not lessees, thus compromising ARAZI's leverage with regard to the lessee.

Although ARAZI is the main organisation responsible for the lease of state land, various other state organisations continue to lease state land on an ad hoc basis without following proper procedures.

Furthermore, no regular monitoring by ARAZI takes place due to a lack of financial and human resources and the limited security in certain areas of Afghanistan. This means that there is little information about whether leased land is used for its intended purpose and if the terms of the agreement are followed. Remedial action is almost never taken.

Finally, the Afghan legal framework does not provide for the resettlement and rehabilitation of people affected by state land leases, despite the fact that many large-scale development projects, such as in the mining sector, can lead to the mass displacement of local communities.

### **Recommendations**

#### **Short-term**

- Practical mechanisms on how to involve local communities in the process of leasing state land for investment projects should be identified.
- A study to devise environmental and social impact assessment tools to identify best practices applicable in Afghanistan should be conducted. Based on these results, mechanisms should be established and incorporated into ARAZI's Land Lease Procedure.
- ARAZI should be established as the only organisation responsible for leasing state land.
- ARAZI should conduct an in-house assessment to find out what factors have prevented the organisation from monitoring land lease contracts, including the identification of alternative monitoring mechanisms available in places with limited access due to the poor security situation.
- Based on the outcomes of the aforementioned assessment, a clear monitoring system of the application of lease contracts and benefit-sharing mechanisms should be conducted at least every six months and with the participation of local communities.
- The newly proposed LAL, including the provisions for resettlement and rehabilitation, should be adopted.

#### **Long-term**

- Based on the aforementioned assessment, training policies for ARAZI staff for the effective monitoring of lease contracts should be devised. Additionally, people's awareness regarding land lease procedures should be increased.

### **7.5.3 Policy implementation is effective, consistent, and transparent**

Although ARAZI's new Land Lease Procedure has made the leasing process less time-consuming, these steps cannot always be completed in the time required. In practice, it takes more than the specified time due to corruption, the limited technical capacities of ARAZI personnel, and incomplete, incorrect, or missing information. One explanation for the missing or incomplete information is that not all the information required for land leases is found on the ARAZI website, thus rendering the access to information difficult.

Finally, there is a gap between the legal framework relating to the benefit sharing of state land leases and its real application on account of numerous reasons: weak local governance at the provincial and district levels, the absence of rule of law in many parts of the country, corruption, the lack of public knowledge regarding the land lease procedure, and the inaccessibility of the contracts to the public.

### **Recommendations**

#### **Short-term**

- The newly proposed LML, which includes various provisions for the lease procedure such as determined prices for all types of land based on land size, type, category, grade, proximity to the road, market value, and province, should be adopted.
- Guidelines regarding bidding requirements should be made accessible to investors (preferably online) so that they are able to provide complete project proposals, thus decreasing the duration of the land lease procedure.
- On-the-job training should be provided to increase the capacity of district and provincial ARAZI officials in order to process applications in a faster and more efficient manner and identify missing information before sending it to the higher levels.



- All investment contracts, including benefit-sharing modalities, should be made publicly available. This should be done through different venues, such as online, public meetings, and the provision of hard copies on request.
- A clear monitoring system of the application of lease contracts and benefit-sharing mechanisms should be conducted at least every six months and with participation of local communities.

#### Long-term

- Public awareness about state land lease procedures and investments strategies should be increased.

### 7.5.4 Contracts involving state land are public and accessible

Information about the geographical situation of leased land and the duration of contracts is not publicly available. Spatial information is sometimes not at all available for the contracts, because the leased land has not been surveyed. ARAZI's GPS Department should at least take the GPS coordinates of each parcel of land before the transaction, although this does not happen in a consistent manner.

No third-party monitoring of land lease contracts currently exists, and it is therefore difficult to objectively verify the compliance with contractual obligations and environmental and socio-economic safeguards. Furthermore, due to ARAZI's infrequent monitoring of the compliance with contractual obligations, the avenues to deal with non-compliance are very limited.

#### *Recommendations*

##### Short-term

- All investment contracts, including spatial information and duration, should be made publicly available. This should be done through different venues, such as online, public meetings, and provision of hard copies on request.
- A clear monitoring system of the application of lease contracts and benefit-sharing mechanisms should be conducted at least every six months and with the participation of local communities. Venues for dealing with non-compliance should be clearly established.
- Comprehensive policies should be devised to allow for third-party monitoring by communities and civil society, for example.

##### Long-term

- Public awareness about state land lease procedures and investment strategies should be increased.

## 7.6 Public provision of land information: Registry and cadastre

### 7.6.1 Mechanisms for recognition of rights

Formal registration seems to be the privilege of wealthy and well-connected individuals in Afghanistan, as it is difficult for the poor to formalise land possession, mainly due to the largely informal nature of land tenure<sup>422</sup> and the lack of opportunities to formalise land possession.

One of the most common and valid ways to formalise land ownership (only for the new owner) is through the courts when transacting land. However, court registration when acquiring the title deed during land transactions is a complicated process. When registering the property, the existing circular form has to go through at least three different offices. This lengthy and time-consuming process can be expedited by informal payments; however, people who cannot afford or who refuse to engage in corrupt practices have to follow the proper procedure, which can take over a year to finalise. Additionally, there are no effective and proper safeguards for recording rights to prevent costs and abuse.

<sup>422</sup> Different levels of formalisation exist between the provinces.

Each step of the circular form verification process is often difficult to pass for ordinary Afghan citizens.

1. The circular form first goes to the court archive (*makhzan*), where it is verified against court records (*konda*). When the seller's title deed does not exist in the *kondas*, the registration process cannot continue. Given that the majority of the Afghan population does not possess formal title deeds, they cannot go through the courts to proceed with the land transaction. Additionally, based on the numerous accounts of the land experts interviewed for this report, in recent praxis, the courts do not accept tax and water payments as valid ownership documents, although prescribed by the law, due to fears of accepting forged documents.
2. The circular form is then taken to ARAZI and certified based on its Principal Books. However, since ownership changes via court registration are not consistently communicated to ARAZI (either by the courts or voluntarily by the owners), ARAZI often cannot certify the ownership, because only the previous owner figures in their records. When all or part of a plot of land is sold several times using the court registration system, ARAZI often does not have the information about the current owner or size of land. However, based on the accounts of ARAZI officials, as long as the seller has the tax or water payment receipts, the presidential decree, or the valid customary deed, they can proceed with the verification of the circular form.
3. After the circular form is certified by ARAZI, it is taken to the Revenue Office of MoF (*mustofiat*) to verify if all taxes have been paid. However, since MoF tax records have not been updated since 1978 after Daud Khan's assassination, and the communication with the courts when issuing title deeds to new landowners occurs only sporadically (either by sending an official letter or voluntarily by the owners), most tax payers are not registered in MoF's taxation books. If the tax payments are not registered, no certification can be accorded.
4. It is important to note that the certification of the Survey and Cadastre Directorate of ARAZI is not necessary in terms of obtaining land spatial information. In the past, the certification of the Cadastral and Survey Department was required (old circular form), but this requirement has since been abolished. Sometimes, however, when the person is not willing to pay a bribe or does not have good social connections or when the land is situated next to state land, the judges decide to use the old circular form. The person thus needs to obtain the cadastral certification. Similarly, the certification of the Ministry of Energy and Water was previously required to verify the existence of water rights. At present, this verification is not required.

This process is very time-consuming and costly (mainly due to the informal payments), thus rendering it unaffordable for a considerable part of the Afghan population. Furthermore, while the formal registration of rights has been compulsory in previous versions of the LML, this is not explicitly the case in the 2008 version or in current proposed amendments of the law.<sup>423</sup> In the absence of an explicit legal obligation, people prefer other venues of land registration (customary) or do not register their land at all.

The main issues associated with the formalisation of customary deeds and ownership based on non-documentary evidence such as long-term unchallenged possession was already explained in Section 6.1 In theory, customary deeds and long-term possession, when meeting all the requirements stipulated by law, can facilitate the formalisation of ownership. This process, however, requires the testimonies of at least two witnesses. Due to the extensive migration of the population caused by the decades of war, this is not an effective way to secure the ownership. There are many cases of witnesses moving from their place of origin and the claimants for land ownership not having any means to contact them.

<sup>423</sup> Alden Wily, "Land Governance at the Crossroads," 15.

## Recommendations

### Short-term

- The information required to be included on the title deed should be increased (e.g., cadastral map or sketch, GPS coordinates, exact location with the indication of the village, district, and province, type of land), and information on land transfers should provide the adequate specification of the land so to prevent corruption. The format should be unified across all provinces and districts.
- The different registries in Afghanistan should be mainstreamed and interlinked to prevent overlaps as well as outdated and missing information. ARAZI should be established as a “one-stop-shop” for registering land (both within and outside the Master Plans). The *tasfiya* process should be done on a large scale and should always include members of the Survey and Cadastre Directorate to conduct the survey. The land should then be recorded in ARAZI’s Principal Books, and the formal title deed given to the owner. Technical and financial support of ARAZI’s pilot project in Herat, which, if successful, will be extended to all 34 provinces, should be accorded. This process should be subsequently computerised to allow for the interlinkages with other registries, such as those of the courts and MoF’s tax books.
- An independent monitoring body should be created to monitor the process of land formalisation in order to ensure an effective and transparent process.
- ARAZI’s in-house procedures and anti-corruption policies should be reviewed to prevent the lengthy and costly process of land registration.
- Until ARAZI is established as a one-stop-shop for land registration, as an interim measure, the circular form should include a column for cadastral verification.
- The registration of land should be made obligatory in the newly amended LML.

### 7.6.2 Completeness of the land registry

Although the official cost of recording property is low, the necessity of informal payments increases the costs considerably.

Furthermore, the information held in registries is, for the most part, not linked to updated maps. The only office that records the location of land with spatial information and maps is the Survey and Cadastre Directorate. Given that 66 percent of the country remains to be surveyed and that much of the already recorded and mapped land has drastically changed in recent years (to date, 75 percent of arable land has been changed<sup>424</sup> to residential areas), the records available in Cadastre cannot be considered as reliable or complete. Additionally, when registering land with the courts, there are two types of circular forms: the latest version approved by the Supreme Court and the old circular form. The decision as to the choice of form lies with the court. Unlike the old form, the new circular form does not include cadastral certification, which consequently provides room for corruption for potential land grabbers and illegal usurpants. The old form is more often used when the land transaction occurs adjacent to state land, as the courts pay more attention to prevent the corruption in such cases.

Private encumbrances such as land conflicts and mortgages are recorded during the surveying process in the cadastral ownership lists. The surveyors mark the forms as “not finalised.” Also, ARAZI and the municipalities record all the information about land or houses, including encumbrances such as the existence of a mortgage over the land. If someone wants to buy a property, they must verify the encumbrances with ARAZI and the municipality. The buyer can also verify with MoF if the property is free of any charges or taxes. However, the obligation to verify the existence of any encumbrances is not legally binding for the offices that certify the circular form during the land registration process. Therefore, unless the individual proactively seeks this information, the possibilities of buying the land with encumbrances are very high. Finally, public restrictions and charges are not recorded in Afghan land registries.

<sup>424</sup> Interview with an ARAZI official, Kabul, 1 September 2015.

To access records on land ownership, people have to go to the different public institutions to obtain each type of information or a copy of a document. The information is accessible to individuals, albeit often only after making an informal payment; however, third persons are rarely granted the information (e.g., information about somebody else's private land or state land), unless, of course, the person acquiring the information is powerful.

The process, particularly in the courts (two to three months), is time-consuming and cumbersome due to the high informal payments that have to be made to keep the process going. Additionally, records are only available through a manual search, thus prolonging the access to information even further. To facilitate the easy access to land records, the USAID LTERA project initiated the digitalisation of some court archives. However, the land tenure records in the Survey and Cadastre Directorate and rest of ARAZI are yet to be computerised.

## ***Recommendations***

### **Short-term**

- Increased financial resources coupled with on-the-job long-term training should be provided to HOOAC to allow it to better perform its duties, in particular to provide an external audit of the courts' land registration procedures.
- ARAZI's plans based on its Operational Strategy to establish national comprehensive cadastral registration programmes should be technically and financially supported.
  - Cadastral records should be connected to both ARAZI's Principal Books and the courts' title deed registration system in a consistent manner. Furthermore, the uniform and standard format of a circular form, including the verification of the cadastre, should be developed and include all of the personal information of the buyer and seller, photos, signatures (or fingerprints), physical specification of land, etc.
  - As an interim measure, all cadastral maps should be scanned to expedite the manual searching that presently occurs in the Survey and Cadastre Directorate, with the subsequent aim of later including them in the computerised system.
  - When ARAZI certifies the circular form, the absence of encumbrances should be simultaneously verified.
  - The newly amended LML with provisions to record violations and charges should be adopted.
  - As an interim measure, while awaiting the fully computerised system, the process of acquiring information from the courts should be mainstreamed. A clear step-by-step process should be developed, and a monitoring mechanism should be established to enforce compliance and curb corruption.

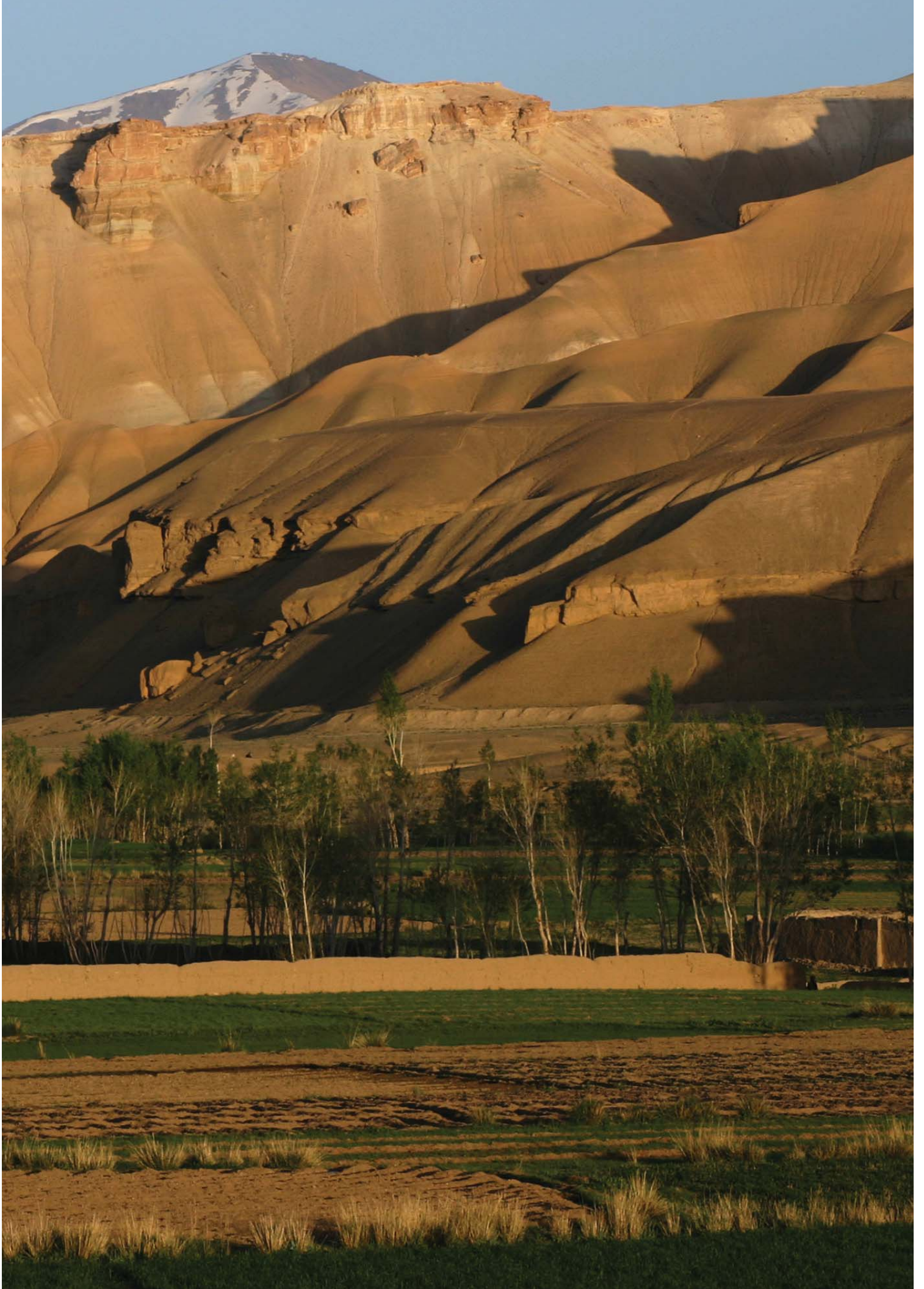
### **Long-term**

- The creation of a centralised computerised system at ARAZI should mainstream the access to land information. People would then be able to access information through the website (without the possibility of changing information).
- The computerisation process that started in the courts should be completed and then continued to the Survey and Cadastre Directorate and the rest of ARAZI.









### 7.6.3 Reliability of registry information

Afghanistan does not have one single registry, and land information is scattered across various registries with different ministries and agencies. Although there are at least six different registries collecting various kinds of information, in reality, only two serve as uncontested proof of ownership: ARAZI's Principal Books and the courts' Title Deed Registry (*konda*). Most of the registry books are not interlinked in any way, thus causing overlaps and outdated or missing recordings:

1. Even though the ARAZI's Principal Books are partially connected with the court's Land Title Registration Book (*konda*) through the circular form, courts do not consistently inform ARAZI (or the Survey and Cadastre Directorate) about new owners when issuing a new title deed. Likewise, the new owners do not voluntarily inform ARAZI about ownership changes. ARAZI's certification is therefore mere verification if the land is private (not state land) due to the often missing information about the new owner and size of the land, which can also be sold partially. Hence, ARAZI cannot always certify the circular form.
2. The Land Statistics Registration Book (cadastral registration) is only connected to ARAZI's registry as the former Cadastral Survey Department was merged with ARAZI.
3. The MoF land taxation books are only sporadically interlinked with other land registries; further, they are often outdated and do not have an effective mechanism for updating the records. MoF's provincial and district finance offices (*mustofiat*) collect land tax based on their taxation books, which contain information about eligible tax payers based on land declaration forms (*izharnamas*) dating back to Daud Khan regime (1973-78), the sporadic exchange of official letters between the courts and MoF informing about new landowners, and, even more rarely, voluntary reporting by new owners. As a result, the tax records are often not accurate. Additionally, many Afghans do not go through the official land registration channels, thus completely circumscribing the updating mechanism of the courts and ARAZI. No effective enforcement mechanism exists to search for unregistered tax-eligible persons, as they are responsible for going to the *mustofiat* offices and paying the taxes themselves. Therefore, when the land is transacted outside of close family,<sup>425</sup> when the record is not written in MoF's taxation books, or when the new owner does not register with the *mustofiat* office, MoF cannot trace the eligible tax payers; hence, land taxes are not paid in full.
4. When the *tasfiya* process is conducted by ARAZI, the members from the MoF and Survey and Cadastre Directorate are present. Certain information sharing therefore exists, although the actual process is unclear.
5. The municipal *safayi* taxation books are not interlinked with MoF's taxation books, mainly because the municipalities are allowed to spend their own revenues. The payment of *safayi* tax thus remains outside of the MoF's tax collection process.

Furthermore, the registries are unreliable with outdated information, as the cadastral survey records and maps have not been updated since 1978 and the MoF's tax records and ARAZI's Principal Books lack an adequate mechanism for updating data. The fact that approximately 66 percent of land has not yet been surveyed and that customary land tenure is often not formally registered only aggravates the situation. Finally, the destruction of documents during the years of wars and the prevalence of forgeries are a recurrent issue that renders the updating of registries difficult and compromises the reliability of registry information.

It is important to note that even though the changes in land records sometimes occur in the provinces, they are not necessarily forwarded to the centre. Hence, there is no centralised database of land records.

<sup>425</sup> When land stays in the family, the tax payments can be traced back based on the father's or grandfather's name. When the transaction occurs outside of the family, this is not possible.



## **Recommendations**

### **Short-term**

- Until ARAZI is established as one-stop-shop for land registration, as an interim measure, the various registration books should be compared and proper linkages developed, including at the central level. This will also help to establish a complete database of land information when ARAZI takes over as the one-stop-shop.
  - A formal mechanism should be developed for the courts to inform ARAZI and MoF about new title deeds issued to new landowners.
  - A formal mechanism has to be developed to connect MoF's taxation books to ARAZI's Principal Books.

### **7.6.4 Cost-effectiveness and sustainability of land administration services**

The fees collected by land administration authorities are very limited (excluding informal payments). The only organ that can receive registry fees is the courts. Yet these fees cannot be kept in the court accounts and must be sent to MoF's central treasury account where they are redistributed back to the various state institutions (including the courts). Although the courts are able to receive registry fees (4 percent of the property's total value), it is not enough to cover all their expenses.

The service fee collected by the Survey and Cadastre Directorate of ARAZI is not part of the land registration fees, but is rather a payment for different services such as the provision of information, copies of the documents, etc. These payments, however, do not cover the operation costs of the Survey and Cadastre Directorate.<sup>426</sup>

Finally, despite numerous efforts by the international community to support this sector, the capital investment in land administration is not sufficient.

## **Recommendations**

### **Short-term**

- ARAZI should devise a comprehensive financial strategy aiming to secure stable, short-term financial solutions. While it has already partially done so, its plans were mainly aimed at securing funding from donors. Strategies such as the introduction of service fees (similar to the cadastral service fees) and negotiating with the MoF to keep a portion of the revenues could be an option.
- An increase in a portion of the national budget accorded to land administration, in particular for ARAZI, should be negotiated, and further financial support should be ensured from the international community.

### **7.6.5 Fees are determined transparently**

The Cadastral Survey Department was the first state organisation in the country to introduce cadastral service charges. These set fees are nevertheless not publicly accessible. The Bill of Cadastral Survey Service Fees is only available in cadastral survey offices. In courts, no list of fees is available to the public.

Receipts are issued for all transactions when individuals go to the bank to process the payments for the court registration fee and MoF's transaction tax. The receipt issued in the bank then serves as proof of payment, thus allowing the registration process to continue. In terms of receipts for service fees, the issuance is not very consistent.

Informal payments are widespread within government institutions. Some measures and policies are in place for monitoring civil servants and dealing with corruption issues. For instance, MEC and HOOAC are the most prominent organisations dealing with these issues. Nonetheless, due to

<sup>426</sup> Based on discussions with ARAZI officials, Kabul, 25 August 2015.

the limited capacities of both institutions, they are not able to reduce the rampant corruption in the country. Additionally, the operational strategy of ARAZI, as the main organ responsible for land in Afghanistan, does not address the issue of corruption, and it contains no measures to ensure transparency and accountability.<sup>427</sup> While ARAZI claims “client orientation” to be one of its main organisational values, there are no procedures in place to gain feedback from clients based on which the organisation can then assess service delivery.

In terms of the existence and public availability of service standards, ARAZI is the only organ among public institutions dealing with land issues that has certain service standards included in its strategic plan and published on its website. Other land administration organisations do not possess any service standards.

## **Recommendations**

### **Short-term**

- The Bill of Cadastral Service Fees should be made public and available online.
- All other land-related organs that charge fees for their services (or forms) should have a publicly available list of fees. ARAZI can provide the use of its website if the other institutions do not have the technical capacities to do so.
- ARAZI’s operational strategy should be amended to contain anti-corruption provisions.
- A system should be established to receive customer feedback on land services within public land institutions.
- Service standards should be set for all institutions dealing with land governance and be made public to ensure the transparency and accountability of the services provided.

## **7.7 Land valuation and taxation**

### **7.7.1 Transparency of valuations**

There are four instances when the valuation of land is conducted through different commissions (of different members and sizes): land acquisition, transfer of state land to another governmental entity, leasing of state land to investors, and land and property transaction tax. However, the valuation processes have various shortcomings. The valuation commission for the acquisition and transfer of state land, for instance, takes more than one month to set the price, as it is not easy to convene all of the members. The process only occurs on time if there is pressure from the leadership or those with an economic interest. Sometimes, the commission members refuse to cooperate or share information. For example, the courts often refuse to cooperate and send an assessment of the price. Additionally, when real estate dealers provide information about land prices (also in the case of leasing state land and property transactions), they do not always provide an accurate assessment of the price. Corruption can lead to valuations that are not necessarily based on market values, as strongmen and powerful individuals whose economic interests are at stake put pressure on the commissions to set a price that benefits them. For the abovementioned reasons, the land/property valuation does not necessarily reflect the market value.

An additional problem with valuations for acquisition purposes is the fact that the process is announced and the budgets approved one year in advance. Once the community has been informed about the acquisition process, people take various pre-emptive measures (e.g., selling land, land grabbing) to achieve higher prices. Consequently, the budgets are not sufficient to pay compensation.

The valuation when transacting land or property is sporadic and sometimes corrupted, often leading to discrepancies between the prices written on the title deed and the actual value of the land. Many cases have been brought to the Supreme Court when the actual price of the land is not written on the legal title deed with aim to decrease the amount of taxes to be paid.

<sup>427</sup> ARAZI, “Operational Strategy.”

The calculation for land taxation is based on the land records (*izharnamas*) and sporadic information obtained from the courts and ARAZI. This is mainly applicable to the registered land. Since the procedure for tax calculation is fixed (based on the size and grade of the land, and not on the valuation commission or market value), there is no proper updating of tax values based on market prices.

The valuation process of *safayi* tax seems to work well when the implementing agencies are still present in the area. When the implementing agencies finish the surveying, the majority<sup>428</sup> of municipalities do not have the capacity to update the GIS maps themselves. They use printed maps, while putting red dots on the properties that already have paid taxes.<sup>429</sup> Often this information is not brought to the centre to be updated in the central GIS system.

Finally, there are no legal provisions that would require making the valuation rolls public. State organisations can provide information regarding the value of land or property on request as long as the individual has a legal basis for making such a request such as a land dispute case in which he/she is involved. Based on the accounts of various government officials interviewed for this report, the prevalence of corruption in the country, and the fact that powerful individuals can easily use information to promote their economic interests, the lack of public availability of valuation rolls is rather a protective measure. This assumption, however, can be challenged (by the same argument used in relation to the cadastral survey) by the fact that although the information on valuation rolls is not made public, the prevalence of corruption is still high.

## **Recommendations**

### **Short-term**

- Land valuation as conducted for the four different purposes outlined above should be mainstreamed through a cabinet resolution to bring all valuation practices under one regulation. The land valuation process should also take place regularly with each transaction.
- Increased financial resources coupled with on-the-job long-term training should be provided to HOOAC to allow it to better perform its duties, in particular to provide external audits of land valuation procedures.
- A clear mechanism should be developed for the activities of the various valuation commissions to expedite the valuation process. Additionally, performance-based evaluations should be introduced for members, and a corresponding monitoring mechanism should be established to verify compliance.
- Land valuation for acquisition should be done before the acquisition process is announced to prevent a rapid increase in land prices and possible land grabbing by powerful individuals.
- The collection of *safayi* taxes should be made more sustainable by providing adequate resources and capacity building for district and provincial municipal officers.
- Valuation rolls should be compiled in one national database and made public only after adequate actions against land grabbing are implemented to prevent land usurpers from benefiting from this action.

### **Long-term**

- The procedure for land valuation for taxation purposes should include the assessment of the market value of the land.

<sup>428</sup> UN Habitat is working in five large cities of Afghanistan (Kandahar, Mazar-e Sharif, Herat, Jalalabad, and Lashkar Gah). Based on the interview with a UN Habitat employee, only in Kandahar does the municipality use the GIS maps.

<sup>429</sup> Interview with UN Habitat employee, Kabul, 6 August 2015.



## 7.7.2 Efficiency of tax collection

The prevalence of corruption in the civil service can prevent the transparent implementation of policies of tax exemption. For example, land that does not meet the criteria for tax exemption can be recorded as exempted from tax if the landowner makes a deal with the civil servants or simply writes a lower amount of land on the title deed. A farmer exempted from the tax due to a natural disaster can extend the exemption period by paying off state officials. Furthermore, farmers who genuinely qualify for tax exemption might be asked for bribes so that their land is exempted from tax. Corrupt practices continue and even increase in rate, particularly in the absence of the public's awareness of tax exemption policies.<sup>430</sup>

MoF's tax rolls are often outdated and do not include all property/land owners, either because land is transacted outside of the formal process (MoF's last reference point is thus the *izharnamas* from 1978) or because limited information is shared between the courts and district MoF or ARAZI offices. In some areas, there are no ARAZI or MoF offices due to the poor security situation. Since not all property holders are registered, and no enforcement mechanism exists to make new landowners to pay taxes, not all taxes are collected. Furthermore, tax evasion in land and property transactions is frequent, which is a major cause of revenue loss.<sup>431</sup>

In terms of *safayi* tax, there is a relatively low rate of tax collection (although it is higher than that of land tax collection), because citizens do not see the benefits of tax expenditure. Additionally, poor surveying or deliberate mis-surveying has been reported with the aim to reduce tax calculation.<sup>432</sup> Although the methods of tax calculation in the *safayi* system were changed in 2009, some *nahias* (districts) within cities still use the old manual system, while others use the new system. The old method was based on the price noted on the land title document, while the new system calculates the tax amount based on the physical characteristics of the land. As a result, there can be different tax rates for similar properties. This can be confusing for citizens and makes tax collection and enforcement difficult for municipal staff.

In addition to the relatively low rate of tax collection, the cost of collecting land tax, particularly in rural and remote areas, is high. Tax collection is done manually, and the high number of departments and institutions involved in the process make it time-consuming and inefficient.<sup>433</sup> Additionally, long transportation routes from remote areas increase the costs considerably. For these reasons, land taxes in rural areas are often not collected.

### Recommendations

#### Short-term

- Responsible authorities should be capacitated on tax exemption procedures and legal provisions in different parts of the country to ensure consistency.
- Raising the awareness of the local population about tax exemptions to increase accountability and transparency on the part of officials should be a priority.
- A study should be conducted on the current state of tax collection and its deficiencies. Clear policy recommendations and guidelines should be devised to establish a well-functioning system that is suitable for the Afghan context. Lessons learned from other countries should be used as a guideline.
- The Land Taxation Law of 1988 should be reviewed, and then drafted and approved by MoJ after taking into account the findings of the aforementioned study.
- A formal mechanism should be developed for the courts and ARAZI to inform MoF about changes in ownership and land sizes, and an adequate enforcement mechanism should be devised to pursue possible tax evaders.

430 Interview with ARAZI employees, Kabul, 24 April 2015.

431 Interview with ARAZI employees, Kabul, 11 March 2015.

432 "Managing Land, Mobilizing Revenue," 3.

433 Interview with ARAZI employees, Kabul, 27 March 2015.

- A clear national framework or guidelines for *safayi* taxation, including proper monitoring to prevent deliberate mis-surveying, should be established to increase transparency and accountability.

#### Long-term

- Formalisation of largely informal land tenure in Afghanistan is a prerequisite for successful tax collection efforts.
- The improvement of the security situation is essential for the functioning of tax collection.
- The public’s awareness should be increased regarding the taxation system, its benefits, and its functioning.
- The tax system should be computerised to expedite the process and make tax collection cost-effective.

## 7.8 Dispute resolution

### 7.8.1 Assignment of responsibility

There are multiple venues for conflict resolution that can exist in parallel in Afghanistan. The courts are given the primary responsibility for conflict resolution. However, other formal dispute resolution forums exist such as MoJ’s Departments of Huqooq and Government Cases, while *tasfiya* delegations from ARAZI can also resolve disputes between land claimants. Yet these institutions have not significantly affected the primacy of the courts and serve more as channels through which some cases are referred to the courts. For a variety of reasons—corruption, absence or lack of access to courts, costliness, and perceived distance from the community—the majority of Afghans prefer solving their disputes in informal dispute resolution forums like *shuras* and *jirgas*. The sharing of evidence and rulings between formal and informal justice systems occurs rarely and only on an ad hoc basis.

The majority of Afghans lack access to conflict resolution mechanisms for land disputes.<sup>434</sup> However, the level of access varies dramatically between demographic groups. Adult men of majority populations<sup>435</sup> enjoy the greatest degree of access, whether it is to formal or informal justice systems, while men from marginalised population groups and women face additional barriers to accessing conflict resolution services. Strong and strictly enforced social norms discourage women from approaching any dispute resolution forum.

Even though the informal justice system is widely used in Afghanistan, it does not enjoy full legal recognition. Various state justice providers such as judges and Huqooq officials differ in their opinions about accepting the decisions made by non-state justice mechanisms, and consequently, the situation differs considerably from district to district.

Finally, the process of appeal is lengthy (sometimes three to four years) if it is done without informal payments and/or a good social network. The legal process for appealing as stipulated in the law is two months.<sup>436</sup> Nevertheless, judges and other employees of the court often make it longer in order to be able to collect informal payments for the speedy resolution of the case.

434 See Luccaro and Gaston, “Women’s Access to Justice in Afghanistan,”

435 Given that Afghanistan’s demographics vary by region, and reliable statistics to establish them do not generally exist, here we use “majority” to mean the population locally perceived to be the majority.

436 *Criminal Procedure Code*, Article 437 (*Official Gazette* no. 1132), 2014 (SY 1393).

## Recommendations

### Short-term

- The computerised case management system implemented by USAID is already being rolled out. However, this system requires the internet, and it does not connect all of the conflict resolution bodies such as the police. Adequate solutions should be developed to enable remote areas to benefit from this system. Additionally, the access to this system should be granted to all conflict resolution institutions such as the Department of Huqooq and ARAZI.
- Computer databases like Oracles, which are cheaper and take less time to implement, should be considered as an interim measure before the fully operational computerised system is in place with a database of all land disputes held within the central office of each formal conflict resolution body.
- Fighting corruption, particularly in the courts, should become the priority of the NUG. The anti-corruption strategy established by President Karzai in 2008 should be implemented through the stronger engagement of the president himself and increased results-based support from the international donor community. Additionally, previous and yet unaddressed cases of corruption should be the priority of the Attorney General's Office.
- The auditing capacities of the HOOAC should be increased by the provision of technical and financial support, and internal audits should be conducted to prevent corruption within the formal justice system.
- Internal audits of all land administration institutions should be conducted on a regular basis.
- Mechanisms to encourage women to approach the formal justice system should be devised, while sensitising the rest of the community to women's right to equal access to justice.
- Laws devising more effective linkages between formal and informal conflict resolution mechanisms (taking into account lessons learned from projects like the NRC's Information and Legal Assistance Centres, Afghanistan PEACE's project, the World Bank's Land Conflict Resolution Project, and USIP/ARAZI's sponsored pilot) should be broadly and inclusively consulted with the public and approved.<sup>437</sup>
- Capacity building of ARAZI employees and community *shura* and *jirga* members on land dispute resolution mechanisms, women's rights, and laws and regulations including the Land Dispute Resolution Regulation needs to be conducted.
- To prevent the accumulation of cases before the courts and provide an accessible, affordable and timely appeals process, the responsibility of the Supreme Court to issue title deeds should be promptly given to ARAZI.
- The draft Land Dispute Resolution Regulation prepared by ARAZI, which includes provisions on appellate procedures by establishing district-level commissions as the first instance and provincial-level commission as the appellate stage, should be promulgated and effectively implemented by taking into account the new draft law on *shuras* and *jirgas*.

### Long-term

- Measures should be taken by the NUG to improve the security situation in remote and insecure areas so as to facilitate the presence of the state justice system.
- The focus should be put on the establishment of well-capacitated special courts on land dispute resolution, while taking into account the past lessons of similar courts, with an accessible, affordable, and timely appeals process.
- If necessary, mobile courts should be established consisting of *tasfiya* teams and judges in order to deal with land disputes on the spot and in timely manner.

<sup>437</sup> As mentioned in this report, there are currently two draft laws with this objective awaiting decision at MoJ.

## 7.8.2 Share of land affected by pending conflicts

The most common reason for disputes in Afghanistan is land. Despite the decrease in land disputes, several causes indicate that the share of land disputes in relation to other types of conflicts continues to be high (42 percent). In rural areas, land such as mountains, forests, and pastures tend to be communally held. Frequent migration and displacement in recent decades accompanied by a dramatic population increase have created pressure over resources, particularly constructible land. This, combined with the lack of documentation on both communal and private land and the unclear demarcation of boundaries, has created situations particularly susceptible to land disputes. Land in peri-urban areas also appears prone to frequent disputes involving large tracts of land. In these rapidly urbanising areas, land records are likewise scanty, while land values have rapidly increased during the last ten years due to the proximity to major cities. For these reasons, peri-urban areas appear particularly prone to land-grabbing by significant powerholders. In some instances, communities report the seizure of hundreds of hectares of land. If another powerholder contests control of the land, land disputes over very large tracts can thus emerge. In addition, while communities themselves rarely confront powerholders over land seizure, research has uncovered instances of the original owners raising land disputes when the land is resold to less powerful third parties.

Although land disputes constitute the bulk of disputes in the country, they seem to proceed to the formal justice system infrequently. Research from various parts of the country has indicated that land disputes in any given court comprise from less than 10 percent to about 50 percent of all disputes.

Based on the legal provisions of Afghan Civil Procedure Law, primary and appellate judicial processes (except perhaps for Supreme Court rulings) should take place within more or less one year after the initiation of a claim. In reality, judicial proceedings seem to rarely conclude within this timeframe. Both state officials and dispute parties describe resolutions within three to five years as more typical, with the resolution in the first instance court taking approximately one year, but varying from province to province and district to district.

Several factors appear to increase the length of court proceedings. First, adversarial court proceedings disrupt community relations as well as relations between the plaintiff and defendant, triggering a sort of (non-violent) cycle of revenge. Second, courts report to be overburdened and lack the capacity to adjudicate in a timely manner. Many sources, however, also report courts delaying proceedings in lieu of bribes to influence how parties interact with the court system.

Finally, there are few long-standing land disputes in the Afghan formal justice system. However, long-term land disputes can drag on for decades or even over a century in length, while the disputes typically cycle through a series of government and non-government forums, not remaining in any one forum for the prolonged length of time. However, the absence of long-term disputes in government forums is not evidence of the efficiency of these forums. If a government (or other) forum does not prove efficient, parties usually remove their cases from that forum and proceed with another one.

### **Recommendations**

#### **Short-term**

- Relevant authorities should work together to operationalise the existing efforts to incorporate a provision on land usurpation into the Criminal Code. Where appropriate, donors and civil society stakeholders should provide technical assistance to the drafting process.
- The draft Restitution Policy on Land Grabbing should be approved and supported.
- To prevent the accumulation of cases before the courts and provide an accessible, affordable and timely appeals process, the responsibility of the Supreme Court to issue title deeds should be promptly given to ARAZI. Additionally, the capacity of ARAZI should be increased if administrative tasks are transferred to it from the Supreme Court.
- The NUG should initiate a national land survey and registration in the country in order to determine state, private, and public land and establish clear boundaries.

## Long-term

- Well-capacitated, transparent, and accountable special courts on land dispute resolution should be established with the aim to address only land and property disputes in an effective and timely manner.
- If necessary, mobile courts should be established, comprising *tasfiya* teams and judges in order to deal with land disputes on the spot and in a timely manner.

## 7.9 Institutional arrangement and policies

### 7.9.1 Clarity of mandates and practice

There is reportedly quite a good division of responsibilities between policy formulation, implementation, and arbitration. However, one issue arises in terms of the supervision and monitoring of policy implementation. ARAZI, for instance, makes decisions about the lease of the state land, but it is also responsible for its monitoring. The “control and supervision of implementation of master plans is the responsibility of master plan designer (MUDA) and municipalities”<sup>438</sup> as a joint task, while the implementation of the plan is fully under the responsibility of the municipality. An obvious conflict of interest exists here, when the implementing body—municipalities—is also responsible for its own control and supervision. This significantly compromises the impartiality of monitoring, which becomes further muddled when looking more carefully at the Municipality Law, which notes, that “[m]unicipalities can formulate their own master plan and submit them for government approval.”<sup>439</sup> Finally, a perceived conflict of interest exists between the courts’ administrative function of registering land and issuing formal title deeds and their judicial function of resolving land-related disputes.

Greater clarity over the dispute resolution roles of ARAZI, the courts, Department of Huqooq, and other dispute resolution bodies is needed. ARAZI’s Department of Addressing Land Disputes provides the necessary documentation when a case comes before a court. It can also informally resolve the dispute, which is then recorded at ARAZI. This adds to the myriad of conflict resolution bodies existing in Afghanistan, thus adding further complexity to the conflict resolution mechanisms.

In an urban setting, significant horizontal overlap exists between MUDA and the local municipalities. The process of urban expansion and infrastructure development is shared between the municipalities and MUDA. However, actual collaboration develops on an informal basis and depends heavily on the individual municipal and ministerial objectives and ideologies. If shared ideology and objective is weak, numerous stalemates in policy planning occur. This is particularly true for MUDA and Kabul Municipality, where strong disagreement exists about the implementation of the third Kabul master plan, resulting in a lack of regularised urban expansion in Afghanistan’s largest city.

In terms of the public availability of land information, although information on land rights and use is available to individuals, the complicated, costly, and time-consuming processes (especially in the courts) render the access to information difficult for private individuals. Due to their better social networks and leverage, government officials and prominent individuals can access information much easier, even in the case of government officials seeking information as private, not public persons, for their personal use. The lack of adequate data collection and established linkages between various land governance institutions makes the process of information sharing difficult. As such, various land registries are, for the most part, not interconnected, creating major overlaps in certain types of information and gaps in others. Land information is not widely available to the public, being mostly limited to the owners of the land in question; third parties are mostly not given access to information. Information on state land is well protected and certainly not publicly available. Finally, no reporting on land rights and use by public institutions exists in Afghanistan.

438 Alden Wily, “Land Governance at the Crossroads,” 19.

439 Alden Wily, “Land Governance at the Crossroads,” 8.



The types of ownership are well differentiated, with the exception of public land. Land allocated for public use that is the property of neither the state nor an individual is considered as public land based on the accounts of various technical Afghan experts involved in this report. The issue arises with Art. 3(8) of the LML 2008, which stipulates that any land that is deemed public but is not registered in the book of government lands is considered as state land. Additionally, Presidential Decree 83 further blurs the boundaries between state and public land by emphasising formal documentary proofs of ownership. As the Afghan legal framework does not define public land and or provide provisions on how to register it, public land can be easily interchanged with state land. In other words, land that is under public use and not registered as such can easily be claimed by the state as its property and be subsequently reassigned.<sup>440</sup> This can lead to numerous land claims over one plot of land, leading to long-lasting and protracted conflicts.

Additionally, land tenure is rarely based on formal ownership documents. A majority of people claim rights over land based on customary land tenure, which often contributes to overlapping ownership claims. However, no comprehensive solution has been developed for duplicate ownership (i.e., two individuals having valid ownership claims for a single piece of land), which is an important issue given the history of wars in Afghanistan and the culture of land grabbing throughout the country. Based on the account of some experts, this is because the legal framework has been unable to find a way to address the discrepancies between the tenure typology of previous regimes and the current one, as with collective/communal ownership based on the decrees of past regimes (i.e., Kuchis and various Afghan tribes that were given land, collective tenure particularly in rural areas with customary land claims).

## **Recommendations**

### **Short-term**

- An interagency commission between MUDA and the municipalities should be established to clearly delineate the responsibilities between these two institutions in relation to the formulation, implementation, and monitoring of the master plans. In the future, this commission can serve as a forum for the discussion of various pressing issues such as the status of informal settlements in Afghan cities.
- The newly proposed LML, including a clear delineation of responsibilities between land governance institutions (not mentioned in the current LML), should be promptly ratified.
- The role of ARAZI as a dispute resolution body has to be decided, while making sure not to replicate the same conflict of interest as currently affects the courts (being the issuer of title deeds as well as the adjudicator of land conflicts).
- Contradictory legal codes in terms of the definition of public land, including a clear distinction between arid and virgin land and pastureland, should be addressed by approving the existing revised draft of the LML developed by ARAZI as well as the Pastureland Law by MAIL.

### **Long-term**

- The creation of a centralised computerised system at ARAZI should mainstream the access to land information. People would then be able to access information through the website (without the possibility of changing information).
- A comprehensive solution must be found to develop the current tenure typology in such a way that addresses the realities of Afghanistan (e.g., collective ownership).

<sup>440</sup> Note that the conversion of public land into private land (not only state land), especially in the peri-urban areas, also occurs.

## 7.9.2 Equity and non-discrimination in the decision-making process

The contents of the NLP 2007 are largely considered to hold up to international best practices.<sup>441</sup> Although various inter-ministerial and technical working groups were established for the development of the NLP, no formal public consultations took place. Additionally, most of the pledges of the NLP have not yet been “absorbed”<sup>442</sup> into the legal framework of the country. The “current legal framework still has remnants of past land rights reforms,” and “customary law... remains poorly integrated with formal law and policy.”<sup>443</sup> The NLP, while developed in a semi-participatory manner (only among public institutions), has been left without a corresponding legal framework to support it, and thus it remains an aspirational reference document.

Public institutions are not required by law to consult the public. This lack of a requirement translates into a situation in which the most relevant actors—the affected public—are often left out of the consultation and drafting process. The affected public may be involved in small-scale rural projects (i.e., through the NSP), but they are not widely included in the process of drafting regulations related to the programmes themselves. This is particularly visible in the case of urban planning where the on-the-ground realities of cities like Kabul are not considered in drafting plans.

While the NLP is generally intended to alleviate poverty and increase equity among citizens, the objectives of the policy have not been sufficiently incorporated into the legal framework, and monitoring mechanisms have not been put in place to measure them. The LML 2008, for instance, is not pro-poor, apart from an indirect mention of the poor and marginalised in its objectives. The section on restitution with a government obligation to allocate land to the poor was removed from the 2008 version, the definition of eligible persons was expanded to include large landowners, and the housing needs of urban citizens were overlooked. It also provides limited support for informal dispute resolution, an important avenue for resolution especially among the poor who may not be able to afford to resolve problems in court. Other laws and policies, including Presidential Decree 104 and the National IDP Policy, which legalised the distribution of land to IDPs and returnees, have simply not been successfully implemented.

Existing land laws have been inconsistent on the issue of discrimination against women and girls. Women and girls, often deprived of their inheritance rights to land and property (despite Art. 40 of Afghan Constitution stating their right to inheritance and the Elimination of Violence against Women Law stipulating their right to property), are left without sufficient protection. They are also vulnerable to domestic violence within greater conflicts overland.

While the land policy addresses ecological and environmental goals and concerns, it lacks corresponding laws to ensure their proper implementation and contains no provisions for public monitoring. In practice, the environmental and ecological concerns are typically overlooked by government agencies and private individuals in the interest of other objectives (such as construction and expansion).

Adequate budgeting and financial resources for the implementation of the NLP have been limited or non-existent in the drafting of policies, resulting in the absence of a cost-benefit analysis or when accompanying the review of resources and institutional capacity for implementation. As a result, Afghan land policies often remain under-resourced with limited capacities to implement the policies and regulations.

Neither the LML 2008 nor the NLP 2007 contains a requirement for public reporting to indicate the process of implementation. Public reporting has thus far been at the initiative of the relevant government agencies (e.g., ARAZI reports their achievements on their website).

441 Alden Wily, “Land Governance at the Crossroads,” 9.

442 Alden Wily, “Land Governance at the Crossroads,” 1.

443 Alden Wily, “Land Governance at the Crossroads,” 1.

The NLP makes significant strides in laying the foundation for disaster risk reduction in its text. While the section's focus is on environmental protection, clear linkages to disaster risk exist (i.e., the reference to floor controls and mining techniques). However, the actual laws that aim to improve disaster risk management have not followed after the adoption of the NLP. Additionally, ANDMA's resources remain severely limited.

### ***Recommendations***

#### **Short-term**

- The current draft of the LML 2014 should be promptly ratified by the Afghan Parliament and enforced by the Afghan National Unity Government, because it builds on the NLP 2007. If necessary, the law should be adopted through presidential decree.
- The new LAL should be ratified promptly to address undue evictions and loss of moveable and immoveable property of the poor.
- The criminalisation of land grabbing in the Afghan Penal Code should be promptly put in place, and perpetrators should be brought to justice.
- The NLP 2007 that includes the provisions for ecological and environmental objectives should be promptly enforced by implementing existing laws and, if necessary, enacting new ones to mirror its objectives.
- The Environment Law should be enforced.
- The expenses for the implementation of the NLP should be fully and properly budgeted in the national budget through extensive consultations with MoF.
- It is of utmost importance that NLP be enforced and associated with mechanisms for monitoring the adherence to the policy by government and non-governmental actors.
- The obligation of public reporting on land policy implementation should be amended in the new draft of the LML.
- The ratification of the LML 2014 should include disaster risk reduction in its purview.
- ARAZI's plans to hold a conference on the NLP 2007 and its possible amendments should be supported.

#### **Long-term**

- Any future land-related policy and law should be developed after extensive formal and informal consultations with land governance stakeholders, including the public.
- A greater prioritisation of ecological and environmental issues must be established across the board by the Afghan government, accompanied by monitoring and enforcement measures.
- The continuous support of the international development community in the field of land governance should be ensured.











## 8. Policy Matrix

The list of issues and indicators detailed in this section is not exhaustive. The issues and corresponding policy recommendations were selected based on the priorities identified during the Technical Validation Workshop and Policy Dialogue.

	Policy issue	Proposed action	Responsible agency	Monitoring indicator
<b>Recommendations on Panel 1</b>				
<b>LGI 1: Recognition of continuum of rights</b>				
1	<p>Customary and undocumented rights recognised only to a certain extent, hence the majority of people do not possess valid ownership documents.</p>	<p>The minimal duration of continued ownership and land cultivation required in order for the long-term unchallenged possession to be formally recognised should be decreased through an amendment to the current LML. Customary deeds prepared after August 1975, but otherwise meeting all the other requirements as per Art. 5 of the LML 2008 should be formally recognised through an amendment to the current LML.</p> <p>The efforts of various NGOs such as TLO and Checchi to inform Afghan citizens about the information necessary on a customary deed for it to be formally recognised should be further enhanced by involving the government in these efforts.</p> <p>The awareness of the public as well as the Afghan National Police and Army on land issues and land rights should be increased. Land governance should be included in the teaching and training curricula for these target groups.</p> <p>A centralised (gradually computerised) system at ARAZI should be created as a one-stop-shop for land registration.</p> <p>As an interim measure, a community-based land recording system should be developed, which will be later connected to the ARAZI registering system (when transferred from the courts to ARAZI) and its Principal Books.</p>	<p>ARAZI, MoJ, and parliament (if not possible through presidential decree), as well as CDCs, <i>shuras</i>, <i>jirgas</i>, religious figures, civil society, the media.</p>	<p>Increased % of land recognised and registered.</p>
	<p>Extensive land grabbing and the lack of measures to prevent and/or punish it compromises land tenure security, particularly in urban areas.</p>	<p>The relevant authorities should work together to operationalise the existing efforts to incorporate a provision on land usurpation into the Criminal Code. Where appropriate, donors and civil society stakeholders should provide technical assistance to the drafting process.</p> <p>The draft Restitution Policy on Land Grabbing should be approved and supported.</p> <p>The prosecution of land grabbers should be made a priority within the Attorney General's Office. Similarly, the investigational and technical capacity of the Afghan National Police should be enhanced with the possibility to establish a special police force tasked with the protection of land against land grabbing.</p>	<p>MoJ, ARAZI, Ministry of interior, courts, international donor community, civil society, Attorney General's Office, Afghan National Police.</p>	<p>Increased number of cases of land grabbing resolved in courts.</p>
<b>LGI 2: Respect for and enforcement of rights</b>				

4	<p>Land clearance (<i>tasfiya</i>) process allowing for land registration in ARAZI's Principal Books is conducted rarely.</p>	<p>ARAZI's plans to implement the National Demarcation Project to identify the boundaries of villages and <i>gozars</i> (administrative units smaller than districts in urban areas) should be materialised. As a follow-up step, the land clearance process on large scale should be restarted. The judge should be included in the tasfiya delegation to deal with land disputes, if necessary. In the case of more complex land disputes, the fact that the ownership of land is disputed should be indicated on the tasfiya report and forwarded to the courts. Adequate financial resources should be allocated for this purpose from the national budget. Financial support as well as technical expertise should be sought from the international community and civil society. The possibility of first-stage land clearance being done by communities to enable nationwide land identification should be explored. The regulation proposed by ARAZI that allows for registering of urban properties should be approved promptly.</p>	<p>ARAZI, MoF (for budget allocation), courts; IDLG, MUDA, MRRD, CDCs, Ministry of Border and Tribal Affairs, UN Habitat, UNHCR.</p>	<p>Increased % of land cleared.</p>
<p><b>Recommendations on Panel 2</b></p>				
<p><b>LGI 1: Rights to forests and common land</b></p>				
<p>Management of forests in Afghanistan faces a number of issues.</p>		<p>Mechanisms should be identified to promote forest management in areas that are currently out of government reach such as developing and empowering community-based adjudication groups (comprising elders and influential figures in the community) in order to address violations of rural land use restrictions. One possible option would be channelling rural land management through CDCs. The awareness of the local population should be raised about the importance of forests and other natural resources and the negative impacts of deforestation in order to encourage communities to take part in maintaining forests, particularly in areas where the presence of central government is limited.</p>	<p>MAIL, ARAZI, IDLG, NEPA, Ministry of Border and Tribal Affairs, MRRD, CDCs, <i>shuras</i>.</p>	<p>Mechanisms for the promotion of forest management in areas out of government control including the establishment of community-based adjudication groups.</p>
<p><b>LGI 2: Effectiveness and equity of rural land use regulations</b></p>				
<p>There are no rural land use plans in Afghanistan.</p>		<p>Rural land use plans should be developed by MRRD through a participatory and transparent process in which public voices can be heard and burdens shared.</p>	<p>MAIL, IDLG, MoF, NEPA, MRRD.</p>	<p>% of rural land covered by rural land use plans.</p>

	<p>The lack of enforcement of protective regulations leads to the degradation of protected rural land.</p>	<p>Mechanisms should be identified to promote forest management in areas that are currently out of government reach such as developing and empowering community-based adjudication groups (comprising elders and influential figures in the community) in order to address violations of rural land use restrictions. The surveying of natural resources identified to be at a high risk of degradation should be prioritised. The process of land change to protected areas should be expedited by mainstreaming the steps and organisations responsible.</p>	<p>NEPA, MAIL, IDLG, Survey and Cadastre Directorate of ARAZI.</p>	<p>% of rural land brought under NEPA's protection regime.</p>
<p style="text-align: center;"><b>Recommendations on Panel 3</b></p>				
<p style="text-align: center;"><b>LGI 1: Restrictions on rights</b></p>				
<p>Restrictions on land use prescribed by the master plans of large cities are not often enforced.</p>	<p>Clear mechanisms for changing the usage of each type of urban land should be devised, including the requirement of permits to do so. Municipalities should establish a monitoring mechanism for this purpose, as well as a database of land use changes, which would be updated regularly and include new spatial information. The Municipality Law should be amended, and unified practices across municipalities should be anchored in the law. Zoning laws for both national and municipal purposes should be enacted.</p>	<p>MUDA, Kabul Municipality, ARAZI, IDLG, MoJ, NEPA, UNHCR.</p>	<p>% of land used in line with the new Master Plans for the largest cities.</p>	
<p>Urban planning in the largest cities does not follow a clear reference for urban planning.</p>	<p>New master plans have to be developed for the largest cities as per MUDA's commitments within "Big Cities Master Plan" initiative with the support of international community. The long-awaited National Urban Policy should be enacted.</p>	<p>MUDA, municipalities, UN Habitat, World Bank</p>	<p>% of land used in line with the new master plans for the largest cities.</p>	
<p style="text-align: center;"><b>LGI 2: Transparency of land use restrictions</b></p>				
<p>The delineation of responsibilities between the municipalities and MUDA is unclear.</p>	<p>An interagency commission between MUDA and the municipalities should be established to clearly delineate the responsibilities between these two institutions in relation to the formulation, implementation, and monitoring of the master plans. In the future, this commission can serve as a forum for the discussion of various pressing issues such as the status of informal settlements in Afghan cities.</p>	<p>MUDA, municipalities (especially Kabul Municipality).</p>	<p>% of land used in line with Kabul's master plan.</p>	
<p style="text-align: center;"><b>LGI 3: Efficiency in the urban land use planning process</b></p>				
<p>Currently, no clear commitment to low-cost housing and services exists for the poor.</p>	<p>A policy on low-cost housing for the poor should be adopted. The policy should be developed in a consultative manner, with input from all stakeholders including civil society representatives, the government, and the public in question. Additionally, anti-eviction laws should be designed (based on forced eviction guidelines already existing within the National IDP Policy) with constitutional protections in mind and, in the case of eviction, a legal commitment to fair compensation should be established.</p>	<p>ARAZI, MoJ, MUDA.</p>	<p>Increased number of low-cost housing units.</p>	

	<p>The policy on the upgrading of informal settlements should be approved and implemented.</p> <p>Presidential Decree 104 should be amended (or annulled and new laws adopted) to tackle its shortcomings such as the allocation of non-viable land and cumbersome eligibility criteria. The National IDP Policy (including forced eviction guidelines) should be adequately implemented.</p> <p>Initiatives like Maslakh where IDPs are given land titles should be supported and, if possible, reproduced.</p>	<p>MUDA, Kabul Municipality, Ministry of Refugees and Repatriation, ANDMA, UNHCR.</p>	<p>% of land used in line with Kabul's master plan.</p>
<p>The carrying capacity of infrastructure has been long overloaded.</p>	<p>With the development of new master plans for the largest cities, the infrastructural needs of the population and the current state of the cities (considerably changed in comparison to the 1990s) need to be taken into account, and adequate mechanisms to provide the necessary infrastructure should be developed.</p>	<p>MUDA, municipalities.</p>	<p>% of land used in line with Kabul's master plan (including necessary infrastructure).</p>
<p><b>Recommendations Panel 4</b></p>			
<p><b>LGI 1: Identification of public land and clear management</b></p>			
<p>The unclear definition of public land results in illegal transactions and uses.</p>	<p>The newly proposed and amended LML that addresses the shortcomings of the public land definition, classifies four types of land including "land specific to village(s)," contains a clear definition of "public interest," classifies the types of public land, and delineates responsibilities between the institutions responsible for different types of public land should be enacted.</p> <p>ARAZI's plans to restart the cadastral survey of the remaining 66 percent of land (including public land) should be implemented promptly and adequately financed. The survey, as planned by ARAZI, should start in Bamiyan Province as soon as possible.</p> <p>A community-based management of public land should be put in place (potentially thorough <i>shuras</i>, <i>jirgas</i>, and CDCs) once the definition of public land is clarified. It should aim to raise public awareness about public land, laws, and regulations associated with its use.</p>	<p>High Council on Land and Water, ARAZI's Survey and Cadastre Directorate, MAIL, MoJ, MoF, IDLG, Ministry of Interior, Afghan National Police, international community.</p>	<p>% of public land surveyed. % of public land used according to the regulations.</p>
<p><b>LGI 2: Justification and time-efficiency of acquisition processes</b></p>			
<p>There is no accurate statistical information on acquired land.</p>	<p>A computerised database with the recording of all acquired land together with cadastral maps and other related-land documents should be developed, kept with ARAZI, and shared with other land institutions.</p>	<p>ARAZI, municipalities, MUDA.</p>	<p>% of acquired land entered into the database.</p>
<p><b>LGI 3: Transparency and fairness of acquisition procedures</b></p>			



<p>In most cases, compensation is not sufficient for individuals to maintain their previous living standard.</p>	<p>The amended LAL containing a clear provision on fair and just compensation processes should be promptly enacted.</p>	<p>ARAZI, MoJ.</p>	<p>% of land acquisition cases where adequate and timely compensation was provided.</p>
<p>There is no deadline for the payment of compensation for land acquisition.</p>	<p>The amended LAL stipulating for compensation to be paid prior to the project start date should be promptly enacted.</p>	<p>ARAZI, MoJ.</p>	<p>% of land acquisition cases where adequate and timely compensation was provided.</p>
<p>There is no provision on compensation for the loss of grazing rights.</p>	<p>The proposed LAL providing for the compensation of grazing and other rights that incur losses due to acquisition processes should be adopted.</p>	<p>ARAZI, MoJ, MAIL.</p>	<p>% of land acquisition cases where adequate and timely compensation was provided.</p>
<p><b>Recommendations on Panel 5</b></p>			
<p><b>LGI 1: Transfer of state land to private use</b></p>			
<p>State land sales occur in an unregulated manner.</p>	<p>The possibility for state land sales should be clarified through the cabinet regulation to clarify the current legal provisions on this matter. Clear categorisation should be developed based on which the restrictions on transferability will be applied. The status of AISA and its activities should be clarified by clear rules of engagement interlinked with ARAZI's Investment Policy.</p>	<p>ARAZI, Ministry of Commerce and Industries, AISA, municipalities.</p>	<p>% of state land sold.</p>
<p>State land leases do not always occur through public auction.</p>	<p>Increased financial resources coupled with on-the-job long-term training should be provided to HOOAC to allow it to better perform its duties such as verifying the usage of public auction for every land lease procedure.</p>	<p>ARAZI, Council of Ministers, HOOAC.</p>	<p>% of state land leases occurring through public auction.</p>
<p>Land valuations encounter delays, and the results are not made public.</p>	<p>A mechanism to assess the performance of members of the valuation commission should be devised, with poor performance being addressed immediately. Corruption in the land valuation process should be addressed. The results of land valuation for land lease purposes and the information about land leases for various projects, particularly where it concerns the public, should be made publicly available.</p>	<p>ARAZI, president, NUG, municipalities.</p>	<p>% of land valuations occurring in a timely and transparent manner.</p>
<p><b>LGI 4: Contracts involving state land are public and accessible</b></p>			

<p>Neither ARAZI nor third parties currently monitor land lease contracts.</p>	<p>A clear monitoring system of the application of lease contracts and benefit-sharing mechanisms should be conducted at least every six months and with the participation of local communities. Venues for dealing with non-compliance should be clearly established.</p>	<p>Third-party monitoring conducted at least once a year per lease contract.</p>
<p style="text-align: center;"><b>Recommendations on Panel 6</b></p>		
<p style="text-align: center;"><b>LGI 1: Mechanisms for recognition of rights</b></p>		
<p>Court registration when acquiring the title deed during land transactions is a lengthy and complex process.</p>	<p>The different registries in Afghanistan should be mainstreamed and interlinked to prevent overlaps as well as outdated and missing information. ARAZI should be established as a “one-stop-shop” for registering land (both within and outside the master plans). The <i>tasfiya</i> process should be done on a large scale and should always include members of the Survey and Cadastre Directorate to conduct the survey. The land should then be recorded in ARAZI’s Principal Books, and the formal title deed given to the owner. Technical and financial support of ARAZI’s pilot project in Herat, which, if successful, will be extended to all 34 provinces, should be accorded. This process should be subsequently computerised to allow for the interlinkages with other registries, such as those of the courts and MoF’s tax books.</p> <p>An independent monitoring body should be created to monitor the process of land formalisation in order to ensure an effective and transparent process. ARAZI’s in-house procedures and anti-corruption policies should be reviewed to prevent the lengthy and costly process of land registration.</p>	<p>ARAZI, courts, MoF, MoJ, international community, High Council on Land and Water</p> <p>Increased % of registered land.</p>
<p style="text-align: center;"><b>LGI 2: Completeness of registry</b></p>		
<p>Cadastral surveying information has not been updated since 1978 and concerns only on 34% of Afghan land.</p>	<p>ARAZI’s plans based on its Operational Strategy to establish national comprehensive cadastral registration programmes should be technically and financially supported.</p> <p>Cadastral records should be connected to both ARAZI’s Principal Books and the courts’ title deed registration system in a consistent manner. Furthermore, the uniform and standard format of a circular form, including the verification of the cadastre, should be developed and include all of the personal information of the buyer and seller, photos, signatures (or fingerprints), physical specification of land, etc.</p> <p>As an interim measure, all cadastral maps should be scanned to expedite the manual searching that presently occurs in the Survey and Cadastre Directorate, with the subsequent aim of later including them in the computerised system.</p>	<p>ARAZI’s Survey and Cadastre Directorate, MoF, NUG, courts, international community</p> <p>% of surveyed land.</p>
<p style="text-align: center;"><b>LGI 3: Reliability of registry information</b></p>		

<p>Afghanistan does not have one single land registry. Changes in land records are not necessarily forwarded from the provinces to the centre. Hence, no centralised database of land records exists.</p>	<p>Until ARAZI is established as one-stop-shop for land registration, as an interim measure, the various registration books should be compared and proper linkages developed, including at the central level. This will also help to establish a complete database of land information when ARAZI takes over as the one-stop-shop.</p>	<p>High council on land and water, ARAZI</p>	<p>Increased % of registered land.</p>
<p>The synchronisation of data from the various registries is not consistent, and thus the registries contain outdated information.</p>	<p>A formal mechanism should be developed for the courts to inform ARAZI and MoF about new title deeds issued to new land owners. A formal mechanism has to be developed to connect MoF's taxation books to ARAZI's Principal Books.</p>	<p>ARAZI, courts, MoF.</p>	<p>Increased % of registered land.</p>
<p>Informal payments are widespread within government institutions.</p>	<p>A mainstreamed process of land registration as well as a computerised land registry with ARAZI will decrease the opportunities for corruption. Increased financial resources coupled with on-the-job long-term training should be provided to HOOAC to allow it to better perform its duties, in particular to provide an external audit of the courts' land registration procedures.</p>	<p>ARAZI, HOOAC.</p>	<p>Increased % of registered land.</p>
<p><b>Recommendations on Panel 7</b> <b>LGI 1: Transparency of valuations</b></p>			
<p>Land valuation for different purposes does not occur systematically with each transaction.</p>	<p>Land valuation as conducted for the four different purposes outlined above should be mainstreamed through a Cabinet Resolution to bring all valuation practices under one regulation. The land valuation process should also take place regularly with each transaction.</p>	<p>MOF, ARAZI, municipalities, MAIL, IDLG, MUDA.</p>	<p>% of land valuations occurring with each transaction. % of land valuations occurring in a timely and transparent manner.</p>
<p>The process of land valuation for various purposes has many shortcomings.</p>	<p>A clear mechanism should be developed for the activities of the various valuation commissions to expedite the valuation process. Additionally, performance-based evaluations should be introduced for members, and a corresponding monitoring mechanism should be established to verify compliance.</p>	<p>High council on land and water, ARAZI.</p>	<p>% of land valuations occurring in a timely and transparent manner.</p>
<p>People take pre-emptive measures after the process of acquisition is announced.</p>	<p>Land valuation for acquisition should be done before the acquisition process is announced to prevent a rapid increase in land prices and possible land grabbing by powerful individuals.</p>	<p>High council on land and water, ARAZI.</p>	<p>% of valuation rolls made public.</p>
<p>Valuation rolls are not made public.</p>	<p>Valuation rolls should be compiled in one national database and made public only after adequate actions against land grabbing are implemented to prevent land usurpers from benefiting from this action.</p>	<p>High council on land and water, ARAZI.</p>	<p>% of valuation rolls made public.</p>

LGI 2: Efficiency of tax collection			
	<p>MoF's tax rolls are often outdated, and not all property/landholders are on the tax rolls.</p>	<p>A study should be conducted on the current state of tax collection and its deficiencies. Clear policy recommendations and guidelines should be devised to establish a well-functioning system that is suitable for the Afghan context. Lessons learned from other countries should be used as a guideline. As an interim measure, a formal mechanism should be developed for the courts and ARAZI to inform MoF about changes in ownership and land sizes, and an adequate enforcement mechanism should be devised to pursue possible tax evaders.</p>	<p>MoF, ARAZI, courts.</p> <p>% of all eligible tax payers on the tax rolls.</p>
	<p>Not all taxes are collected.</p>	<p>Formalisation of largely informal land tenure in Afghanistan is a prerequisite for successful tax collection efforts. The Land Taxation Law of 1988 should be reviewed, and then drafted and approved by MoJ after taking into account the findings of the aforementioned study. The improvement of the security situation is essential for the functioning of tax collection.</p>	<p>NUG, High council on land and water, ARAZI, courts, MoF, MoJ, Ministry of Interior, MUDA, municipalities, international community.</p> <p>% of land and property taxes collected.</p>
Recommendations on Panel 8			
LGI 1: Assignment of responsibility			
	<p>Although land disputes constitute the majority of disputes in the country, they proceed to the formal justice system infrequently.</p>	<p>The computerised case management system implemented by USAID is already being rolled out. However, this system requires the internet, and it does not connect all of the conflict resolution bodies such as the police. Adequate solutions should be developed to enable remote areas to benefit from this system. Additionally, the access to this system should be granted to all conflict resolution institutions such as the Department of Huqooq and ARAZ. Computer databases like Oracles, which are cheaper and take less time to implement, should be considered as an interim measure before the fully operational computerised system is in place with a database of all land disputes held within the central office of each formal conflict resolution body.</p>	<p>ARAZI, MoJ, MoF, international community.</p> <p>% of land disputes in the formal justice system.</p>
	<p>Alleged corruption in the courts and the consequent costliness are the most commonly cited reasons that prevent the Afghan population from using the formal justice system.</p>	<p>Fighting corruption, particularly in the courts, should become the priority of the NUG. The anti-corruption strategy established by President Karzai in 2008 should be implemented through the stronger engagement of the president himself and increased results-based support from the international donor community. Additionally, previous and yet unaddressed cases of corruption should be the priority of the Attorney General's Office. The auditing capacities of the HOOAC should be increased by the provision of technical and financial support, and internal audits should be conducted to prevent corruption within the formal justice system. Internal audits of all land administration institutions should be conducted on a regular basis.</p>	<p>NUG, president, HOOAC, MEC, international community, Attorney General's Office.</p> <p>% of land disputes in the formal justice system.</p>



<p>Men from marginalised population groups and women face barriers to accessing conflict resolution services.</p>	<p>Mechanisms to encourage women to approach the formal justice system should be devised, while sensitising the rest of the community to women's right to equal access to justice.</p>	<p>MoJ, Ministry of Women's Affairs</p>	<p>% of land disputes involving women in the formal justice system.</p>
<p>The informal justice system does not enjoy full legal recognition.</p>	<p>Laws devising more effective linkages between formal and informal conflict resolution mechanisms (taking into account lessons learned from projects like the NRC's Information and Legal Assistance Centres, Afghanistan PEACE's project, the World Bank's Land Conflict Resolution Project, and USIP/ARAZI's sponsored pilot) should be broadly and inclusively consulted with the public and approved.</p>	<p>MoJ, ARAZI.</p>	<p>% of land disputes resolved by the informal justice system and registered in the formal justice system.</p>
<p style="text-align: center;"><b>Recommendations on Panel 9</b></p>			
<p style="text-align: center;"><b>LGI 1: Clarity of mandates and practice</b></p>			
<p>Greater clarity over the different roles of ARAZI and other dispute resolution bodies is needed in terms of dispute resolution.</p>	<p>The role of ARAZI as a dispute resolution body has to be decided, while making sure not to replicate the same conflict of interest as currently affects the courts (being the issuer of title deeds as well as the adjudicator of land conflicts).</p>	<p>ARAZI, MoJ, courts, IDLG, MAIL, <i>shuras</i>, Department of Huqooq.</p>	<p>Clearly defined roles of ARAZI and the courts.</p>
<p>Complicated, costly, and time-consuming processes render the access to information difficult for private persons.</p>	<p>The creation of a centralised and (gradually) computerised system at ARAZI should mainstream the access to land information.</p>	<p>President, ARAZI, courts, MoF, international community.</p>	<p>Increased % of land registered.</p>
<p style="text-align: center;"><b>LGI 2: Equity and non-discrimination in the decision-making process</b></p>			
<p>Most of the pledges of the NLP 2007 have not yet been "absorbed" into the legal framework.</p>	<p>The current draft of the LML 2014 should be promptly ratified by the Afghan Parliament and enforced by the Afghan National Unity Government, because it builds on the NLP 2007. ARAZI's plans to hold a conference on the NLP 2007 and its possible amendments should be supported.</p>	<p>ARAZI, MoJ, international community.</p>	<p>% of NLP pledges turned into laws.</p>

## 9. Conclusion and next steps

Afghanistan has gone through a number of changes related to land governance in the course of its modern history. With each administration change, different sets of rules applied to land issues. The three decades of war resulting in the destruction of a considerable number of documents have also contributed to the myriad of land-related issues. Although various legal texts and drafts were produced in recent years to rectify the shortcomings of the current land administration, the legal framework falls short of the corresponding Afghan realities.

There are numerous factors that affect the recognition of tenure rights:

- The impact of conflict over the past three decades on land administration and management remain to be acknowledged and addressed. The return of exiled populations, the internal displacement of populations,<sup>444</sup> rapid urbanisation, and the ongoing conflict over rights to pasturelands between nomadic and settled communities have drastically impacted the tenure situation.
- Widespread land grabbing by powerholders was reported to be one of the greatest challenges faced by land authorities according to the ARAZI and municipal employees interviewed for this study. Current estimates suggest that over 1.5 million *jeribs* of land, including nearly 15 percent of all arable land, has been illegally usurped. The land was usurped by a range of actors, including local armed commanders, ethnic leaders, village leaders, wealthy individuals, the Afghan National Police, and government officials. This occurred through the use of force, forged documents, and corrupt practices with the involvement of government officials.<sup>445</sup> ARAZI has proposed legislative reforms to prohibit land grabbing as part of the amendments to the LML. These aim to define land grabbers and specify punishments; however, the relevant provisions were removed by MoJ's Taqin Department. Additionally, ARAZI has developed a draft five-year strategy for the prevention of land grabbing as well as a restitution policy, both of which were sent to cabinet for approval.
- Rampant corruption is present at all levels of government, including the institutions dealing with land management. Afghanistan was ranked 172 (out of 175 countries) in the Transparency International Corruption Perception Index 2014,<sup>446</sup> thus being perceived as the fourth most corrupt country in the world. The perceptions of the Afghan population have deteriorated in the past few years. According to the 2014 Integrity Watch Afghanistan National Corruption Survey, respondents reported an increase in their experience of corruption in 2014 and regarded it to be the second greatest problem in the country after security.<sup>447</sup> The justice sector and police are viewed as the most corrupt public institutions.<sup>448</sup>

Unless Afghan land administration recognises the importance of these (some relatively new) factors and takes them into account in its land policies, land tenure security in Afghanistan will remain tenuous at best.

444 It is estimated that 5.7 million former refugees are in need of reintegration in Afghanistan, and 630,000 Afghans were estimated to be internally displaced in 2014; see Howard and Madzarevic, "Security of Tenure," 5.

445 "The Stolen Lands of Afghanistan and its People: The Legal Framework," 10. There is currently no data available on how many people are affected by the issue of illegally usurped land.

446 "Corruption Perception Index 2014: Results," (Berlin: Transparency International, 2014) <http://www.transparency.org/cpi2014/results> (accessed 3 September 2015).

447 Corruption was considered as the third greatest problem in 2012. See Mohammad Razaq Isaqzadeh, "National Corruption Survey 2014" (Kabul: Integrity Watch Afghanistan, 2014), 2.

448 Isaqzadeh, "National Corruption Survey 2014," 4.

The goal of this report was to establish a consensus and priority actions for each of the nine land governance areas in terms of gaps in the existing evidence about the strength of Afghan land governance; areas for regulatory or institutional change; new approaches to be piloted and interventions to improve land governance on a broader scale (e.g., by strengthening land rights and improving their enforcement); and criteria to assess the effectiveness of these measures. Below is the summary of these main points, as established through the national technical validation workshop.

## 9.1 Gaps in the existing evidence about the strength of Afghan land governance

There are a number of areas that lack evidence and sufficient data, which prevents policymakers and other stakeholders such as practitioners and the NGO community from adequately devising, planning, and implementing policies and actions. One of these areas is rural land use change. There is no data available on the amount of rural land that has undergone a change in usage, the duration of this process, and if the land is changed to its intended use. Similarly, there is limited information on rural land identified for rehabilitation and the swiftness of the transfer to its destined use. Finally, little is known about whether the approved requests for changes in urban land use are swiftly followed by development on these parcels of land.

Second, the opacity of Afghan land acquisition procedures coupled with a lack of data seriously undermines the transparency of state acquisition processes. Although the acquired land cannot be transferred to private interests according to the LEL, the development of these parcels of land remains murky due to the lack of appropriate monitoring and rampant corruption in land administration institutions. Given the illegal character of these transfers, no data is available on the transfer of acquired land to private interests. Additionally, due to the absence of a single centralised database of acquired land, limited information exists about the timeliness of land transfers to their destined use. People who lose their user and ownership rights through the acquisition process are not consulted about future development projects, and there is no specific complaint-response mechanism to challenge the acquisition process. Thus, little is known about the impact of these arbitrary decisions on the actual population.

Finally, a need for studies was identified in the course of this project in order to provide evidence-based information to inform policy decisions:

- A feasibility study on the different cities should be undertaken by MUDA to identify the enforcement mechanisms of the National Disaster Risk Strategy and to protect Afghan cultural heritage and prevent looting.
- Consideration should be given to the most appropriate urban planning approaches, and whether the master plans are the best possible planning option for Afghan cities. In the case of Kabul, more flexible planning and the formalisation of informal settlements may be more suitable. A feasibility study to this end should be conducted.
- Research and data collection on unrecorded secondary rights (e.g., grazing, right of passage, collecting forest products) should be conducted to determine how land acquisition can influence these rights. Policies addressing issues related to unrecorded rights should be devised while taking into account the recommendations of the proposed study.
- A study to devise environmental and social impact assessment tools to identify best practices applicable in Afghanistan should be conducted. Based on the results, mechanisms should be established and incorporated into ARAZI's land lease procedure.
- An in-house assessment should be conducted by ARAZI to identify the factors that have prevented the organisation from monitoring land lease contracts. A study should examine alternative monitoring possibilities available in places with limited access due to the poor security situation.
- A study should be conducted on the current state of tax collection and its deficiencies. Clear policy recommendations and guidelines should be devised to establish a well-functioning system that is suitable for the Afghan context. Lessons learned from other countries should be used as a guideline.

## 9.2 Areas for regulatory or institutional change

Numerous land-related laws have been enacted in last few years (e.g., LML 2008), but the provisions do not always mirror the Afghan reality. As a reaction to this, various laws and policies (e.g., amended LML, LAL) were drafted, but never properly promulgated and put into practice. In 2007, the NLP was developed to meet international best practices, but it lacked corresponding laws and regulations for its operationalisation. Based on the accounts of various land experts consulted in the course of this study, the current draft of the LML 2014 should be promptly ratified by the Afghan Parliament and enforced by the NUG, because it builds on the NLP 2007. If necessary, the law should be adopted through a presidential decree. The expenses for the implementation of the NLP should be fully and properly budgeted through extensive consultations with MoF.

The enactment of this important piece of legislation will, however, not be sufficient. Customary land tenure is recognised only to a certain extent, and the requirements to formalise it are difficult to meet. Due to the inability of the Afghan government to deal with the rapid urban expansion and provide adequate housing for the poor, most urban land tenure rights remain unrecognised, and as a result, the citizens living in informal settlements are at risk of eviction. Numerous conflicts over the ownership and use of land also exist between Kuchi nomad tribes and local communities, as indigenous populations lack the opportunities to secure their rights. Furthermore, collectively held land is very common in Afghanistan, but the legal framework does not provide for collective rights. Public land is not clearly defined in Afghan land laws, thus resulting in a lack of clarity over ownership, transferability, and usage restrictions.

Widening of the scope of customary land tenure recognition (while preventing extensive land grabbing) and clarifying the status, legal recognition, and means of registering collective rights are necessary steps in order to increase the land tenure security of the majority of the Afghan population. Additionally, the draft Customary Deed Registration Law, drafted by the Judicial Reform Commission in 2005, should be reviewed and approved, while a new law stipulating the possibilities for the formalisation of non-documentary land ownership evidence should be enacted. Furthermore, Presidential Decree 104, enacted in 2005, which puts provisions in place on the distribution of land for housing to eligible returnees and IDPs, and the National Policy on Internal Displacement approved in November 2013, which addresses the right to adequate housing and access to land (Art. 7.1.3), should be adequately implemented, and a policy on upgrading informal settlements, currently awaiting cabinet approval, should be promptly enacted.

The ambiguous definitions of state and public land in the Afghan body of law and the absence of a mechanism to register public land put the land user rights of a considerable part of the population, mainly landless, at risk. The draft Rangeland Law, which provides the framework for the management of private, community, and public rangeland, should be promptly adopted. Additionally, contradictory legal codes in terms of the definition of public land, including a clear distinction between arid and virgin land and pastureland should be addressed by approving the new draft of the LML currently blocked at MoJ. The process for the recognition and, most importantly, registration of public land should be established to protect the rights of the public over public land.

Finally, the enactment of the long-awaited National Urban Policy and new Municipality Law as well as the development of new master plans for Kabul and other cities should be prioritised by MUDA in cooperation with Kabul Municipality, while the responsibilities over the formulation and implementation of the master plans should be clarified. By devising new master plans for the largest cities, the ban of constructions on arable land should be taken into account, and the provisions of the master plan should be written in line with the presidential decree.

The opportunities for formal tenure regularisation are limited. There are only two possibilities for individual land registration through the *tasfiya* process or the courts when transacting (selling, buying, or mortgaging) the land. Given that customary land tenure rights are recognised in the formal justice system only to a limited extent and that the *tasfiya* process is mostly conducted in cases of major transfers of land (e.g., state land leases), the opportunities for ordinary Afghan citizens to record their land are very limited. The cadastral survey can currently be conducted only on the approval of the president, and it only provides proof of “probable” ownership.



Furthermore, no single mechanism for the recognition of formal and customary land rights exists without transacting the land in the courts. This, combined with the tendency of Afghan land laws to prioritise formal land tenure documentation, leads to a large proportion of land falling into the hands of the state (including public land) as well as numerous illegal sales (land grabbing) and leases. Women's property rights are not recognised as fully as those of men, despite the existence of clear laws providing for the fair and equal rights of women. The reliability of registry information is also compromised by outdated and missing information, mainly because of the limited information sharing between the different land registries, the lack of a formalised updating mechanism, and the prevalence of informal land transactions.

To mainstream the formalisation of land tenure, ARAZI should take over the administrative responsibility of issuing title deeds from the courts and become a one-stop-shop for the registration of private land. Simultaneously, the registration system should be gradually replaced by a computerised one, including GPS coordinates, GIS imagery, and the cadastre map. This would also enable the comparison of the names of the sellers and buyers in previous transactions of the same plot of land to prevent the acceptance of forged documents. The expenses for the computerised registration system have to properly budgeted, while taking registration fees into account. Extensive public awareness campaigns should be conducted to inform ordinary citizens about the new system and the steps required to register property. Additionally, ARAZI's plans to restart the *tasfiya* process and cadastral (or inventory) survey on a large scale should be gradually put in place. Support in form of financial means as well as technical expertise should be sought from the national budget, international community, and civil society.

Finally, the relevant authorities should work together to operationalise the existing efforts to incorporate a provision on land usurpation into the Criminal Code. Where appropriate, donors and civil society stakeholders should provide technical assistance during the drafting process. The draft Restitution Policy on Land Grabbing should be promptly approved, and the prosecution of land grabbers should be made a priority within the Attorney General's Office. Similarly, the investigational and technical capacity of the Afghan National Police should be enhanced to this end. By doing so, the land tenure security of the most vulnerable part of the population will be increased, and land usurpers will be adequately sanctioned, thus increasing the trust of the population toward the government.

Another main area of regulatory change is acquisition. Acquisition procedures have many shortcomings, such as the lack of transparent land valuations, late compensation payments, few opportunities for appeal, and no compensation for the loss of rights resulting from a land use change (e.g., grazing rights). Nevertheless, the lease of state land to investors is one area that has made good progress in identifying clear and transparent procedures, although not always implemented as the provisions for adequate and fair resettlement and rehabilitation are lacking. The proposed LAL, currently under review by MoJ, should be promptly ratified to rectify the abovementioned shortcomings. It should include the following: a list of 19 different categories of public projects that can be implemented through the acquisition process; a requirement for ARAZI to estimate the least amount of land required for the implementation of the project; a minimum announcement period of nine months before the start of the project to all people affected directly or indirectly by the acquisition; a provision of third-party monitoring to assess whether the leased and transferred land is used for its destined purpose; a suggestion of public consultations before acquisition processes; compensation paid prior to the project start date; compensation for the loss of grazing and other rights; and the creation of a complaints hearing committee.

Land is the most cited reason for disputes in Afghanistan. Although there is a myriad of (formal and informal) dispute resolution mechanisms existing in parallel, information is shared in an ad hoc manner, and informal dispute resolution forums do not enjoy full legal recognition, despite their use by the majority of Afghan citizens. The formal justice system is considered as costly (often due to the need of informal payments), time-consuming, and cumbersome; hence, few cases make it to the courts. The law aiming to create more effective linkages between the formal and informal justice systems should be broadly and inclusively open to public discussion, and approved and implemented by all relevant institutions to create practical and more effective linkages between formal and informal conflict resolution mechanisms.

Finally, land taxation constitutes one of the main problems in revenue collection, as clear procedures for updating the tax rolls and enforcement mechanisms to prevent tax evasion are lacking. This, combined with the relatively low investment in land administration and low prioritisation of land issues with the NUG, results in the limited financial and human capacities of land administration institutions. Furthermore, more clarity is needed in terms of the division of responsibilities between certain land administration institutions, mainly ARAZI and the courts in terms of land registration and dispute resolution, and MUDA and the municipalities in terms of the formulation and implementation of the master plans. One way to address these issues would be a clear communication strategy to explain to the community the benefits of tax collection, particularly in rural areas. The government should in turn ensure the proper spending of the collected taxes in the community. Plans for such a public campaign were already planned by MoF, but they need to materialise.

During this LGAF exercise, the following recommendations were identified:

- An increase in the proportion of the national budget accorded to land administration, especially for ARAZI, should be negotiated. The international development community should ensure their continuous support in the field of land governance.
- Fighting corruption should become the priority of the NUG. The anti-corruption strategy established by President Karzai in 2008 should be implemented through the stronger engagement of the president himself and increased results-based support of the international donor community. Additionally, past and yet unaddressed cases of corruption should be the priority of the Attorney General's Office. Furthermore, the auditing capacities of the HOOAC should be increased, and internal audits should be conducted to prevent corruption within the formal justice system.
- Measures should be taken by the NUG to improve the security situation in remote and insecure areas so as to facilitate the presence of the state.
- The capacity building of land administration personnel, particularly on the district and provincial levels, should be increased in the field of legal provisions related to land, including dispute resolution, land valuation and taxation, public land management, land leasing, and acquisition procedures.
- The capacity building of the Afghan population should be increased in terms of their obligations and rights in relation to land, including the ways to register land and the benefits of taxation.

### 9.3 New approaches to be piloted and interventions to improve land governance on a broader scale

The abovementioned regulatory and institutional actions to rectify the shortcomings of the current land administration are not to be finalised in the short term, although their implementation has to start urgently. To accelerate the implementation of these various complex processes and fill in the gap before their nationwide implementation, the possibility of innovative and community-based mechanisms should be considered. For example, the possibility of a pastureland administration as used by the Rural Land Administration Project or the Sustainable Agricultural Livelihoods in Eastern Hazarajat project should be studied, and the Land Administration Management Project prepared in cooperation with MAIL in 2007 should be reconsidered to prevent numerous conflicts over pastureland.

As an interim measure, a community-based land recording and boundary demarcation system, which will be later connected to ARAZI's registering system and Principal Books, should be established. Efforts should be undertaken to ensure that judges accept to use the boundaries established by the community to locate land registered with the courts and during the *tasfiya* process. Additionally, the possibility of first-stage land clearance done by communities to enable nationwide land identification should be explored.

## 9.4 Criteria to assess the effectiveness of these measures

Based on the specific methodology, the aim of this report was to broadly assess the state of land governance in Afghanistan without going into great detail or considering district variations, although these would certainly reveal new realities and a different set of issues. With input from Afghan land experts, a collection of policy recommendations was established to provide guidance to land governance stakeholders on possible ways forward. Clear indicators for each recommendation and suggested actions are included in the Policy Matrix in Section 8.

## 9.5 Next steps

The various stages of the LGAF implementation have identified a number of issues that require immediate attention. Clear policy recommendations along with the responsible institutions for implementing these recommendations were also identified to provide the ways forward on each of the pressing issues. Monitoring indicators for the success or failure of the different approaches were also devised. All of this information was compiled in the policy matrix in Section 8, which will serve as a roadmap for Afghan policymakers and the international community in order to improve land governance in Afghanistan

Based on the discussions during the policy dialogue, the participants suggested the following steps for the future implementation of the LGAF recommendations:

1. Follow-up meetings with ARAZI to internalise the policy matrix document.
2. Presentation of the document to the High Council on Land and Water chaired by the President of Afghanistan.
3. Review of the measuring indicators and the capacities of the institutions to perform monitoring. If needed, a new measuring system should be devised (led by ARAZI with the participation of all land administration institutions).
4. Review conference on the progress of the policy matrix conducted by ARAZI every six months.

## Appendices

### Appendix I: Revised LGAF definitions regarding concepts and terminology

Dimension/Indicator	Modifications/Definitions
<p><i>LGI 2.1: Rights to forests and common land</i> 2.1.9. Boundary demarcation of communal land</p>	<p>The Afghan legal framework does not provide a definition of communal land, even though the concept existed in the past, with communal land sometimes being allocated to different tribes or clans. Currently, despite the absence of communal land in the Afghan land terminology, the Pasture Law 2000 mentions communal pastures.<sup>1</sup> Art. 2(2) provides a definition of communal pastures: “Arid land which, in accordance with section (9) of the land management law does not fall within bounds of villages or towns.” According to Art. 3 of the same law, “the communal pasture can be used for grazing cattle belonging to the communities”; it cannot be brought, sold, or leased (Art. 6). For the purpose of this report, communal land is equivalent to communal pastures. Common land, however, is equivalent to public land to prevent limiting it to communal pastures alone.</p>
<p><i>LGI 4.1: Identification of public land and clear management. Public land ownership is clearly defined, effectively serves the public purpose, is inventoried, and has clear management responsibilities, while relevant information is publicly accessible.</i></p>	<p>All indicators falling under this dimension suffer from the absence of a clear definition of public land in the Afghan body of land laws. Given that Art. 3(8) of the LML 2008 stipulates that any land which is deemed public and not registered in the book of government lands is considered state land and that land registration rarely occurs in rural areas, public land can be easily interchanged with state land. Therefore, the management, surveying, and public access to information about public land cannot be objectively assessed. Most analysis of public land is derived from the analysis of all Afghan land (private, public, and state).</p>
<p>4.1.1. Criteria for public land ownership are clearly defined and assigned to the right level of government.</p>	<p>This indicator in particular suffers from the unclear definition of “public interest,” “public good,” “public welfare,” etc. There is no clear definition of public land provided in the Afghan legal framework or how it should be used for the provision of “public goods.”</p>
<p>4.1.6. All essential information on public land allocations to private interests is publicly accessible.</p>	<p>Albeit the absence of a clear definition of public land, a general understanding of public land is the land that has been allocated for public use and is the property of neither the state nor an individual; hence, it cannot be sold or leased to private interests.<sup>2</sup> However, since public land can be easily interchanged with state land, which can indeed be allocated to private interests, the analysis of this indicator is based on the analysis of state land allocations to private interests (particularly, arid and virgin land).</p>
<p><i>LGI 4.2: Justification and time-efficiency of acquisition processes. Only the state acquires land for public interest, and this is done efficiently.</i> 4.2.1. There is minimal transfer of acquired land to private interests.</p>	<p>The state can acquire land from individuals only for public purposes. Therefore, from a legal point of view, the acquired land cannot be transferred to private interests. This indicator is analysed based on the realities on the ground, where the transfer of acquired land to private interests might occur.</p>



<p><i>LGI 5.1: Transfer of public land to private use follows a clear, transparent, and competitive process, and payments are collected and audited (with the exception of transfers to improve equity such as land distribution and land for social housing).</i></p> <p><i>LGI 5.4: Contracts involving public land are public, easily accessible, with agreements monitored and enforced.</i></p>	<p>All indicators under this dimension had to be adapted to the realities of Afghanistan due to the fact that public land, although not clearly defined, cannot be sold or leased because it is the property of the public. Therefore, the analysis of state land in relation to these indicators was used in cases where the legal provisions clearly provide limitations on public land transactions.</p>
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1. Certain experts advocate that the communal land is equivalent to *mara'a* land. However, in Art. 82 of the LML (Dari version), the translation used for all types of pasturelands is *mara'a* (grazing land, graveyard, hills, etc.). Since the term *mara'a* encompasses all types of pastureland, communal land can certainly be considered as part of *mara'a*, but not equal to it. Alden Wily considers *mara'a* land as equivalent to public land ("Land, People, and the State in Afghanistan 2002-2012," 2), but due to the absence of a clear definition of public land in Afghanistan, this does not have legal support.
2. This understanding is also currently being proposed in the new draft of the LML (Art. 6.3). The article stipulates that public land is not the property of the government or individuals.

## Appendix II: List of experts and qualifications

Panel 1: Land tenure recognition	
Expert Investigator	Khalid Bahrami
Qualifications	Mr Bahrami earned a Bachelor of Laws from Kabul University and a Master of Laws from Kateb University. Recently, he has worked with ARAZI as a legal specialist in the development of land polices. His areas of work include land dispute resolution and land reform.
Panel 2: Rights to forests and common land and rural land use regulations	
Expert Investigator	Ghulam Dastageer Sarwaree
Qualifications	Mr Sarwaree is currently head of the Rangeland Department in MAIL. He graduated from the Horticulture and Natural Resources Department of the Faculty of Agriculture in Kabul. He was previously general manager of Analysis and Planning for the Environment, as well as a manager of the Artificial Forest Programme with MAIL.
Panel 3: Urban land use, planning, and development	
Expert Investigator	Jamshid Habib
Qualifications	Mr Habib studied architecture at Kabul University and subsequently at Kansas State University where he received a Master's Degree in Environmental Behaviour Studies. Currently, he divides his time between teaching at Kabul University and working as CEO of a design and consultancy firm.
Panel 4: Public land management	
Expert Investigator	Ghulam Hussain Rahmani
Qualifications	Mr Rahmani is the director of planning and policy at ARAZI, Kabul. He is a graduate of the Social Science Institute of Kabul. He has been working with ARAZI for over 30 years in various positions.
Panel 5: Transfer of large tracks of land to investors	
Expert Investigator	Arifullah Arif
Qualifications	Mr Arif earned a Bachelor of Laws (Jurisprudence and Law) and a Master of Laws (Sharia and Law) from Kabul University. His areas of work include legal advice, rule of law, legal reform/legislation drafting/amending, land reform, anti-corruption, informal justice system, community-based dispute resolution, capacity building, and project management.
Panel 6: Public provision of land information: Registry and cadastre	
Expert Investigator	Yasin Safar
Qualifications	Mr Safar is a topographical/cadastral surveyor and land tenure specialist as well as a member of Terra Institute. He has more than 40 years of professional experience in land surveying, classification, clarification, registration, and administration. He was previously deputy of the Afghan Geodesy and Cartography Head Office and director of the Cadastral Survey Department.
Panel 7: Land valuation and taxation	
Expert Investigator	Abdul Salam Kohistani
Qualifications	Mr Kohistani is a graduate from the Animal Science Section of the Agriculture Faculty at Kabul University. He is currently working as a manager of land transfer and exchange at ARAZI, Kabul. His areas of work include land management, land distribution, and management of land document records.
Panel 8: Dispute resolution	
Expert Investigator	Gul Rahman Totakhail

Qualifications	Mr Totakhail has ten years of experience with national and international organisations, mainly in the areas of legal advice, planning and policy, drafting rules and regulations, legislative capacity building, legal research, technical and legal consultancy, parliamentary culture and practice, as well as administration and management. Currently, he is working as a consultant, senior legal advisor, and rule of law officer at USIP.
<b>Panel 9: Review of institutional arrangements and policies</b>	
Expert Investigator	Fahim Hakim
Qualifications	Mr Hakim is a graduate of the Engineering Faculty at Kabul University, and he earned a Master's in Post-War Recovery Studies from the University of York, UK. Currently, he is working as a freelance consultant with various national and international organisations. His past professional experiences include commissioner and deputy chair at AIHRC and programme coordinator at UN Habitat.

## Appendix III: Lists of participants (panel workshops)

Panel 1: Land Tenure Recognition	
Name	Position and organisation
Eng. Yousuf Pashtoon	Technical Advisor, Presidential Office, Kabul
Attaullah	Head of Department of Mosahee District, ARAZI, Kabul
Ghulam Ehsan Sultani	Director of Survey and Cadastre Directorate, ARAZI, Kabul
Ahmad Zia Langari	Commissioner, AIHRC, Kabul
Qudrat	Project Manager, Women and Children Legal Research Foundation, Kabul
Eng. Noor Agha	Representative, Nangarhar Municipality
Khalid Bahrami	Formerly with ARAZI's legal team, Kabul
Eng. Abdul Latif	Head of Construction Department, Kandahar Municipality
Panel 2: Rights to forests and common land and rural land use regulations	
Arif Rahimi	Representative, Wildlife Conservation Society, Kabul
Zohurullah Yaqeen	Advisor of Survey and Cadastre Directorate, ARAZI, Kabul
Ghulam Dastageer Sarwaree	Head of Rangeland Management Department, MAIL, Kabul
Mohammad Arif	Director of Rangeland Management Department, MAIL, Kabul
Ahmad Shah	Head of Forestation and Natural Resources Management, MAIL, Kabul
Panel 3: Urban land use, planning, and development	
Eng. Seyar	Civil Engineer, Herat Municipality
Abdul Satar	Architecture, Nangarhar Municipality
Eng. Ramat	Representative of Khaliq Nemat, MUDA, Kabul
Panel 4: Public Land management	
Ghulam Hussain Rahmani	Director of Planning and Policy, ARAZI, Kabul
Abdurrah Samadi	Head of Land Clarification, ARAZI, Kabul
Mohammad Yousuf	Chief of Policy and Planning, Survey and Cadastre Directorate, ARAZI, Kabul
Panel 5: Transfer of large tracks of land to investors	
Habibullah Rahmani	Former Administration and Finance Director, ARAZI, Kabul
Wahid Rahman Rahmani	Land Lease Director, ARAZI, Kabul
Saida Faqirzada	Pro-active Land Lease Manager, ARAZI, Kabul
Panel 6: Public provision of land information: Registry and cadastre	
Yasin Safar	Former Head of Cadastral and Survey Department; currently, Afghan Topographical/Cadastral Surveyor, Land Tenure Specialist, and Member of Terra Institute, Kabul
Ghulam Ehsan Sultani	Director of Survey and Cadastre Directorate, ARAZI, Kabul
Noor Agha	Instructor, Cadastral Institute, Kabul
Motiullah Nazari	Provincial Representative, ARAZI, Herat Province

Ghulam Hussian Rahmani	Director of Planning and Policy, ARAZI, Kabul
<b>Panel 7: Land valuation and taxation</b>	
Hamidullah	Director of Provincial Office, ARAZI, Parwan Province
Rohullah Haqdost	Director of Registration and Land Clarification, MoF, Kabul
Abdul Salam Kohistani	Head of Land Distribution, ARAZI, Kabul
Ahmad Khalid Ekrami	Representative, Directorate of Revenue Recognition Department, MoF, Kabul
Ghulam Hussain Bayat	Representative, Kabul Municipal District
Abdullah Murad	Representative, Revenue Recognition Department, MoF, Kabul
<b>Panel 8: Dispute resolution</b>	
Ghulam Rahman Totakhail	Legal Advisor, ARAZI, Kabul
Ahmad Sayed Ahmadi	Head of Dispute Resolution Department, ARAZI, Kabul
Sayed Yahya Sultani	Dispute Resolution Manager, ARAZI, Kabul
Yusuf Stanikzai	Justice Section, TLO, Kabul
Noor Afzal Muslih	Leader of Nomad Tribe Council, Nangarhar Province
<b>Panel 9: Review of institutional arrangements and policies</b>	
Kabir Ranjbar	Senior Legal Advisor, AISA, Kabul
Gul Rahman Totakhail	Legal Advisor, ARAZI, Kabul
Yasin Safar	Former Head of Cadastral Survey Department; currently, Afghan Topographical/Cadastral Surveyor, Land Tenure Specialist, and Member of Terra Institute, Kabul
Ghulam Hussain Rahmani	Director of Planning and Policy, ARAZI, Kabul
Abdul Salam Kohistani	Head of Land Distribution, ARAZI, Kabul
Mohammad Asif Seyar	Technical Deputy, Survey and Cadastre Directorate, ARAZI, Kabul
Nafisa Kabuli	Member of Appeal Court, Kabul
Khalid Bahrami	Formerly with the legal team, ARAZI, Kabul



**Appendix IV: List of participants (technical validation workshop)**

No.	Name	Position and organisation
1	Yousuf Pashtoon	Technical Advisor, President's Office, Kabul
2	Najia Zareef	Law Department, MoJ, Kabul
3	Ghayer Ahmad Ahmadyar	Director of Protected Areas Management, MAIL, Kabul
4	Habibullah Habib	Head of Kabul Office, ARAZI, Kabul
5	Motte-ullah Nazari	Provincial Representative, ARAZI, Herat Province
6	Haji Sher Ahmad	Provincial Representative, ARAZI, Herat Province
7	Abdurrab Samadi	Head of Land Clearance Department, ARAZI, Kabul
8	Arifullah Arif	Legal Specialist, ARAZI, Kabul
9	M. Asif Sayar	Former Technical Chief, Cadastral Survey Department, ARAZI, Kabul
10	Eng. Ghulam Rasoul Nawabi	Director of Development Programme, Kabul Municipality
11	Ghulam Hussain Bayat	Municipal Representative, Kabul Municipality
12	Zia-ur Rahman	Representative, AISA, Kabul
13	Bilal Waqad	Legal Advisor, UNAMA, Kabul
14	Abdul Kabir Salehi	Project Coordinator, Information, Counselling And Legal Assistance, NRC, Kabul
15	Suraya Subhrang	Women's Department Commissioner, AIHRC, Kabul
16	Eng. Jaweed	Representative, Humanitarian Assistance and Facilitating Organisation, Kabul
17	Peyton Cook	Rule of Law Officer, USIP, Kabul
18	Haji Ghulam Hussain Rahmani	Land Conflict Resolution Director, ARAZI, Kabul
19	Najibullah Atiqi	Representative, International Rescue Committee, Aynak site, Kabul
20	Shobha Rao	Liaison Officer, UNHCR, Kabul
21	Abdul Latif	Property Manager, Kandahar Municipality
22	Claire Van Loveren	Judicial Officer, UNAMA, Kabul
23	Tamana Sharifi	Representative, Women & Children Legal Research Foundation, Kabul
24	Suraya Ebrahimi	Representative, Women & Children Legal Research Foundation, Kabul
25	Reza Amiri	Head of Knowledge Management Unit, United Nations Environment Programme, Kabul
26	Alec Knuerr	Project Coordinator, United Nations Environment Programme, Kabul
27	Farah Diba Karimi	Urban Planning Advisor, General Directorate of Municipal Affairs, IDLG, Kabul
28	Mohammad Aqa	Assistant Representative, UN Food and Agriculture Organisation, MAIL, Kabul
29	Depika Sherchan	Housing Land and Property Task Force Coordinator, UN Habitat, Kabul
30	Bernardo Almeida	Representative, UN Habitat, Kabul
31	Abdul Qadir Shakiri	Training Officer, UN Habitat, Kabul

32	Zabiullah Habib Afroz	Director of Policy And Legislation, NEPA, Kabul
33	Dr Jalaludin Naseri	Acting Director, NEPA, Kabul
34	Maiwand Rahimi	Researcher, Peace Training and Research Organisation, Kabul
35	Mirwais Asr	Social Development Specialist, Ministry of Mines and Petroleum, Kabul
36	Noor Katawazi	Director of Human Resources, Ministry of Border and Tribal Affairs, Kabul
37	Maseehullah Farahmand	Senior Programme Officer, Equality for Peace and Democracy, Kabul
38	Ruhullahm Haqdost	Director of Registration and Land Clarification, MoF, Kabul
39	Abdul Salam Kohi	Legal Policy Advisor, Afghanistan Chamber of Commerce and Industries, Kabul
40	Sayed Mahmood	Social and Environmental Specialist, Development Programme, Kabul Municipality
41	Saleh Mohammad	Manager, Agha Khan Foundation, Kabul
42	Kabir Zazai	Law Department, MoJ, Kabul

**Appendix V: List of participants (policy dialogue)**

No.	Name	Position and organisation
1	Rahim-Ulla Hedayat	Senior Legal Advisor, Office of the Second Vice President
2	Zabihullah Habib Afrooz	Director of Policy and Legislation, NEPA
3	Jawad Peikar	CEO, ARAZI
4	Alim Erada	Deputy CEO, ARAZI
5	Abdul Hamid Arya	Chief of Staff, ARAZI
6	Ghulam Hussain Rahmani	Director of Policy and Planning, ARAZI
7	Abdurab Samandi	Director, Land Clearance, ARAZI
8	Ghulam Eshan Sultan	Director, Survey and Cadastre Directorate, ARAZI
9	Gul Rahman Totakhil	Legal Advisor, ARAZI
10	Hashmat Ghafoori	Senior Advisor and Executive Director of Regional Programme, MRRD
11	Najib Fahim	Head, International Agreements Directorate, Ministry of Foreign Affairs
12	Yosuf Pashtun	Technical Advisor, President's Office
13	Mir. M. Anwar Sadat	Head, Department of Legal Cases, MoJ
15	Shobha Rao	Representative, UNHCR
16	Ghafoor Laiwal	Deputy Minister, Ministry of Border and Tribal Affairs
18	Zia Ul-haq Zahid	Afghanistan Independent Bar Association
19	Mohammad Akbar	Representative, United Nations Development Programme

**Appendix VI: Institutional map**

National government		Type of land <sup>1</sup>	Land policy	Responsibility and mandate	Overlapping mandates and other issues <sup>2</sup>
President	State and private	Formulation	<p>Formulation of overall land policy, strategies, and short- and long-term goals;</p> <p>Formulation of decrees and promulgation of laws;</p> <p>Decisions on the distribution and donations of state land to disadvantaged people;</p> <p>Decisions on the transfer of arid and virgin land;</p> <p>Decision on conducting land surveys and making the information public (national or on demand);</p> <p>Exceptional cases of acquisition of public land;</p> <p>Decisions on establishing protected areas.</p>	<p>Parliament should approve laws promulgated by the president, but in practice this requirement is often overlooked. Thus, the president and Parliament have a large overlap in their mandates: for example, the LML 2008 has never received parliamentary approval.</p>	
Council of Ministers (including CEO)	State and private	Formulation	<p>Approval of strategic decisions based on policies developed by respective ministries and other governmental agencies;</p> <p>Decisions on leasing state land over 1,500 <i>jeribs</i>;</p> <p>Decisions on compensation for land acquisition;</p> <p>Approval of welfare projects through the acquisition of large tracts of land.</p>	N/A	
Parliament	State and private	Formulation	<p>Enactment of land laws;</p> <p>Supervision of the implementation of laws.</p>	<p>Overlap with the executive in supervising the implementation of laws;</p> <p>Lack of capacity in law drafting;</p> <p>Allegations that many parliamentarians are involved in land grabbing.</p>	
High Council on Water and Land	State and private	Formulation	<p>Coordination among various land administration authorities;</p> <p>Approval of strategic policies on land and water reform;</p> <p>Monitoring and support of the proper implementation of these policies;</p> <p>Addressing urgent land grabbing cases;</p> <p>Providing technical support for land and water affairs;</p> <p>Issuing the required orders on land and water affairs;</p> <p>Monitoring of ARAZI's activities;</p> <p>Rural development from the perspective of land and water;</p> <p>Coordination of land water projects.</p>	N/A	

<p>ARAZI</p>	<p>State and private</p>	<p>Formulation, implementation (including monitoring), and arbitration</p>	<p>Land management and administration of land tenure: Enforcement of land laws, policies, and procedures; Implementation of presidential decrees; Transfer of state land for distribution purposes to public land (after the transfer, the corresponding ministries are responsible for the actual distribution depending on the beneficiaries); State land leases along with the collection and monitoring of revenues from land leases; Transfer and exchange of government and private land; Identification of government or private land; Returning illegally occupied land; Contributing to land survey activities; Organisation and deployment of refinement teams to clear disputed land (<i>tasfiya</i>); Providing information to the courts about land ownership; Protection of state land and prevention of illegal occupation of land; Participation in land dispute resolution; Allocation of compensatory land in a methodical and transparent manner.</p>	<p>Requires greater clarity over its dispute resolution, because possible overlaps exist between the Department of Addressing Land Disputes and the jurisdiction of courts; Makes decisions about the leasing of the state land and is responsible for its monitoring; Relatively new organisation with limited professional capacity, especially at the provincial level; Poor coordination among main and regional offices; Concerns about the centralisation of authority, especially at the office of ARAZI's CEO.</p>
<p>Survey and Cadastre Directorate(part of ARAZI since 2013)</p>	<p>State and private</p>	<p>Implementation</p>	<p>Conducts geodetic, cartographic, and cadastral survey and mapping activities throughout the country.</p>	<p>Lack of up-to-date cadastral information with only 34% of the country surveyed and many records destroyed; Lack of clarity and gaps in the Cadastral Survey Law; Questioning about the effective functioning of the regional Cadastral Directorates, especially after their integration into ARAZI.</p>
<p>MoF</p>	<p>Private</p>	<p>Formulation and implementation</p>	<p>Land and property taxation; Participation in land valuations for acquisition purposes; Recordkeeping in the <i>mustofiat</i>.</p>	<p>Limited capacity to collect taxes in rural areas.</p>



MAIL	State	Formulation and implementation	Sustainable management of forests, pastures (including deserts, hills, mountains and slopes, marshlands, and riverbanks), and natural resources; Taking part in land valuations for acquisition purposes.	Unclear ownership of pastures; Poor relations with community councils in rural areas; Water Right Law and policies not implemented in practice; Limited capacity to resolve water conflicts; Inequity in water distribution; Inadequate monitoring and evaluation system; Weak legal framework; Gap between community and provincial authorities; Conflicts between community-based approaches and formal state mechanisms.
NEPA	State	Formulation and implementation	Improvement of livelihoods and protection of the health of humans, fauna, and flora.	Poor law enforcement and implementation capacity; Inadequate funding.
MRRD	Private (rural areas)	Formulation and implementation	Development and implementation of programmes promoting responsible social and financial growth in rural areas, primarily in the non-farm sector; Implementing a made-in-Afghanistan “pro-poor” growth strategy.	Poor law enforcement and implementation capacity.
MUDA	Private and state (urban areas)	Formulation and implementation	Development, approval, and implementation of the national urban policy; Preparation of development strategies for all zones; Preparation of urban and regional plans for all major urban areas; Strengthening the capacity of municipalities; Development of revenue building programmes for all municipalities; Participation in land valuations for acquisition purposes.	Lack of a clear legislative framework for urban planning and its implementation; Yet to produce a national urban policy; Overlap with the responsibilities of the municipalities in terms of the control and supervision of the implementation of master plans.

Municipality	Private and state (urban areas)	Formulation and implementation <i>(Conflict of interest: responsible for formulation, and implementation, and supervision)</i>	Responsible for urban planning in large cities; Adoption of measures for the allotment of land plots for the construction of residential houses and commercial sites in accordance with the relevant legal provisions; Expropriation of land in accordance with the provisions of the LEL; Adoption of measures for roads, playgrounds, hammams, market constructions, creation of urban green spaces, and public health and upgrading works in cities; Taking part in land valuations for acquisition purposes; Management of public land within master plans.	Overlap with MUDA in relation to the formulation, implementation, control, and supervision of master plans (especially with Kabul Municipality).
Ministry of Mines and Petroleum	State	Formulation and implementation	Development of natural resources.	Sensitivity in terms of contracting investors to develop natural resources.
IDLG	Private and state	Formulation and implementation	Development of subnational governance policy; Increasing people's participation in subnational governance; Empowerment of provincial councils; Introduction of laws on district councils, municipal councils, mayors, and village councils; Reform of public administration and build capacity of the public work force at the subnational level; Institutionalisation of provincial planning and budgeting.	Unclear division of responsibilities between MUDA and IDLG for developing national urban policy; Interference from provincial authorities in the decision making of municipalities.
AISA	State	Implementation	Sale of state land to investors; Support to private investment.	Ambiguity about legality of state land sales; Ambiguity in terms of AISA's status as an independent entity.
Courts	State and private	Arbitration	Maintaining land-related records; Issuing title deeds; Dispute resolution.	Lack of transparency and accessibility of land records; Corruption; Time consuming and costly process; Perceived conflict of interest between their administrative function and judicial function of resolving land-related disputes.
MoJ	Private and state	Formulation and arbitration	Development of legal texts; Conflict resolution (Huqooq).	Overlap with the Parliament for law drafting.

AIHRC	Private and state	Implementation and monitoring	Monitoring, fostering, and protecting human rights; Acceptance of individual complaints about the violation of personal human rights; Referral of human rights violations of individuals to legal authorities; Assistance in the defence of citizens' rights.	N/A
Independent Directorate of Kuchi Affairs	State	Formulation and implementation	Protection and advocacy for the rights of Kuchi tribes and other minorities.	Ambiguity between state and publicly owned pastures.
HOOAC		Monitoring and prevention of corruption.		
Provincial government				
Department of Huqooq (MoJ)	State and private	Arbitration	Resolution of conflicts and civil disputes between government and individuals or between individuals; Playing a mediation role on conflict resolution.	Time-consuming; Heavy paper work and bureaucracy; Increases community awareness.
Private sector service providers				
Property Dealers	Private	Implementation	Property transactions; Contribution to the land valuation process; Land recordkeeping.	Credibility questioned; Informal charges higher than their formal obligation; Sometimes acting as an illegal bridge between government authorities and customers.
Cooperation for Rehabilitation of Afghanistan	Private	Implementation	Facilitating the mobilisation and empowerment of local communities to ensure sustainable peace, human rights, development, and overall improvement in quality of life.	Linking communities with municipal authorities; Increasing community awareness both socially and economically.
Afghanistan Land Consulting Organisation	Private	Implementation	Non-profit, non-political, and non-governmental organisation providing legal and technical counsel to vulnerable citizens in defending their property claims before Afghan courts. It also works closely with government organisations including courts, ARAZI, Survey and Cadastre Directorate, municipalities, Department of Huqooq, MUDA, and many others in solving land issues faced by the poor.	Increasing community awareness.
Non-governmental entities				

MEC	Private and state	Implementation and monitoring	Making anti-corruption recommendations; Monitoring and evaluation of the anti-corruption efforts of the government and international community; Regular reporting to the president, Parliament, and people of Afghanistan, as well as the international community, about the state of the fight against corruption.	Possible overlaps with HOOAC.
Provincial Commissions on Conflict Mediation	Private	Mediation	Conflict mediation.	Various informal justice system mechanisms create a myriad of venues for conflict resolution/ mediation.
<i>Shuras and jirgas</i>	Private	Arbitration and mediation	Addressing land disputes often with aim to bring peace to the community as opposed to justice.	Linkages between formal and informal justice systems unclear; Informal justice system often not recognised by the formal justice system; Draft law on <i>shuras</i> and <i>jirgas</i> currently being developed.

1. Due to the unclear definition and contested nature of public land, this institutional map considers public land with state land.
2. Issues such as a lack of human resources and financial capacity are not mentioned here, because this is similarly applicable to all institutions dealing with land issues in Afghanistan.
3. Abdul Baqi Popal, "Municipalities in Afghanistan" (Kabul: General Directorate of Municipal Affairs, 2014), 18.

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