

Issues Paper Series

# Land Rights in Crisis: Restoring Tenure Security in Afghanistan



**Afghanistan Research  
and Evaluation Unit**

#### AFGHANISTAN

Prime Minister's Compound (next to AACA), Kabul  
Phone: + 93 (0)702-76637

#### PAKISTAN

House No. 21-B, Street 55, F-7/4, Islamabad  
Phone: + 92 (0)51 227-7260 Fax: + 92 (0)51 282-5099

areu@areu.org.pk www.areu.org.pk

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Liz Alden Wily

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Liz Alden Wily

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and the governments of Sweden and Switzerland.

March 2003

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This issues paper was prepared by an independent consultant with no previous involvement in the activities evaluated. The views and opinions expressed in this report do not necessarily reflect the views of the AREU.

## About the Author

Liz Alden Wily is an independent political economist and rural development strategist specialising in land tenure. She gained her Ph.D. in the political economy of land tenure from the University of East Anglia, UK in 1988. She has worked in Africa since 1972 with a number of governments on matters of tenure, particularly in the structuring of tenure reforms. She has also worked in Indonesia, Nepal and Pakistan. Her main field of expertise is in communal property development. Through this she has also been closely involved in forestry sector developments over the last decade. She has published extensively. Liz Alden Wily may be contacted at [lizaldenwily@clara.co.uk](mailto:lizaldenwily@clara.co.uk).

## About the Afghanistan Research and Evaluation Unit (AREU)

The Afghanistan Research and Evaluation Unit (AREU) is an independent research institution that conducts and facilitates quality, action-oriented research and analysis to inform policy, improve practice and increase the impact of humanitarian and development programmes in Afghanistan. It was established by the assistance community working in Afghanistan and has a management board with representation from donors, UN agencies and NGOs.

Fundamental to the AREU's purpose is the belief that its work should make a difference in the lives of Afghans. The AREU is the only humanitarian and development research centre headquartered in Afghanistan. This unique vantage point allows the unit to produce valuable research, and ensure that its findings become integrated into the process of change taking place on the ground.

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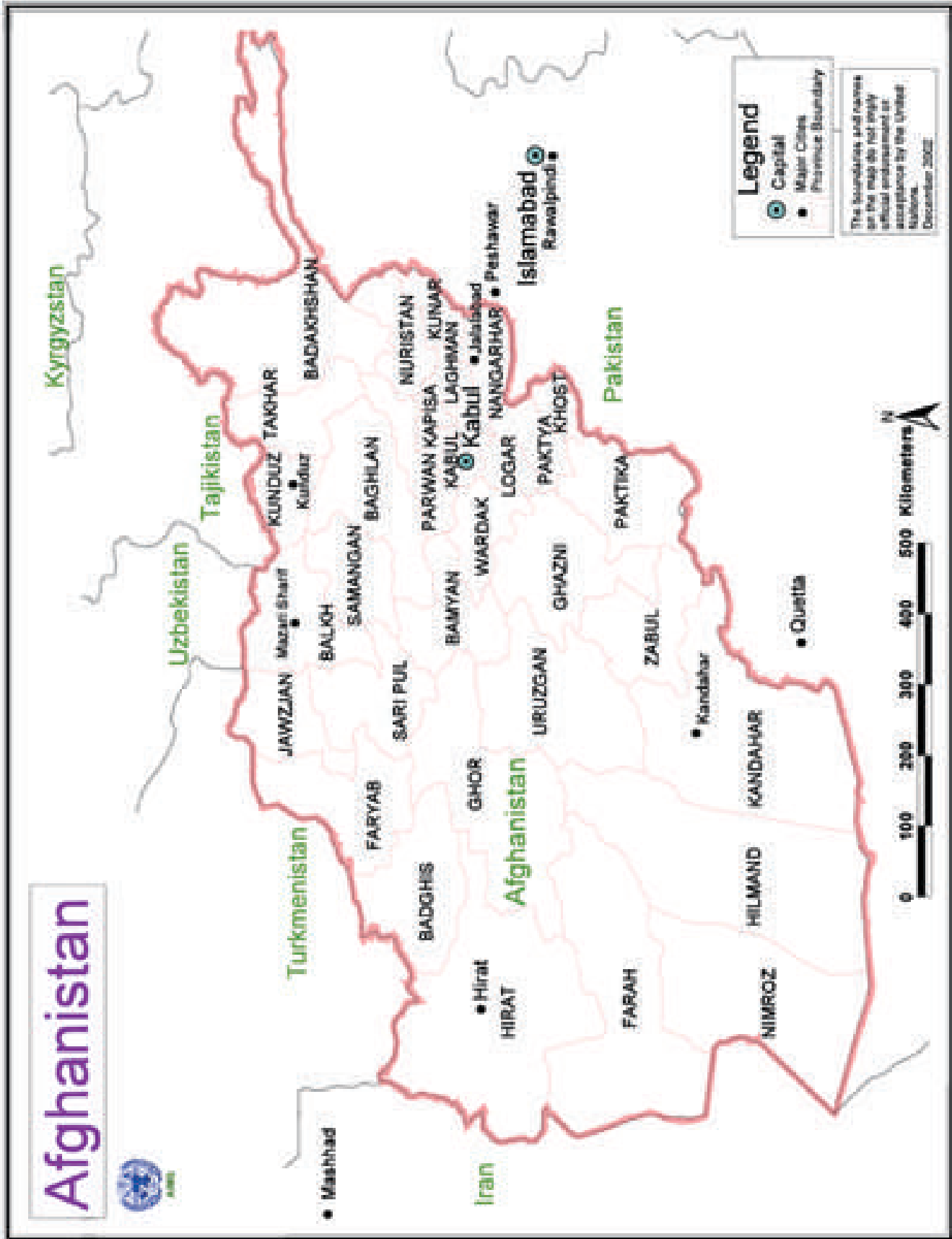
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# Afghanistan



# Glossary

## Land Ownership Terms

Cadastre	a listing of properties based on surveys and mapping; includes the coordinates of each property which are therefore able to be identified on associated maps;
Common property	land that is owned jointly by all members of a specific community; usually used with respect to pasture, swamps and forests;
Customary land law	rules relating to how land is owned and transacted that have been established through practice and by adherence by members of the group; these rules are rarely codified and may change with time;
Eligible applicant	a term used in Afghanistan to define those persons who are eligible to receive land from the state; this has generally included landless farmers, those with very little land, landless nomads and sometimes, retired civil servants;
Entitlement	state law recognition of specific land ownership, usually through the registration of the owner and the land owned, and the issue of a certificate of some kind;
Excess land	a term used in Afghanistan to describe areas of land above the land ceiling;
Foreclosure	the process whereby the lender becomes the owner of the mortgaged property when the borrower defaults on repayment of the loan; many countries have banned foreclosure because the value of the property is often greater than the value of the debt. Alternative remedies are provided to help the creditor get his money back including the forced sale of the land by an appointed third party and repayment of the amount due to the lender;
Land ceiling	the maximum area of land that may legally be owned by a single owner;
Land document	title deeds, a bill of sale or other documents that the law permits to be used as evidence of ownership of the land;
Land holding	covers both the owning of land itself or the rights associated with the land (such as a usufruct - the right to use the land);
Land tenure	the arrangements through which land (or rights in land) is owned and transacted (gifted, sold, inherited, lent, etc.). These systems may be based upon state law (statutory tenure), customary law (customary land tenure) or religious law ( <i>Shariat</i> );
Lease	a right to use a property for a specified time; a lease may be arranged customarily or under the terms of state laws. The Civil Code (which is based mainly on <i>Shariat</i> ) provides for leases;

Mortgage	an interest over a property that is created as security against a loan or a debt, and which ceases once the loan or debt has been paid;
Mortgagee	the lender who provides the loan and who thereby gains an interest in the property that may only be activated under certain conditions;
Mortgagor	the borrower who uses his property as security for a loan;
Public interest	the grounds upon which a national government is permitted to take private property for national benefit (such as for building dams, schools or roads);
Public land	land that is either owned by all citizens together or that is held to be un-owned and/or un-ownable;
Private land	land that may be owned by individuals or other legal bodies or persons;
Registration	a formal process of recording land rights or land ownership in a land register that then becomes the primary legal source of determining who is the owner of a certain plot of land;
Sharecropper	usually a landless farmer who pays for the use of a plot by giving the landowner a share of the crop as agreed between them. Sometimes a sharecropper owns the land but shares the crop with the person providing inputs to enable him to farm it. Or a farmer may mortgage his farm and pay back the debt through giving the creditor a share of the crop;
Statutory land law	state laws, laws made by national governments. A law that is an "act" is a law passed by an elected body like a parliament. "Edicts" or "decrees" are laws issued by leaders on their own authority, usually with the endorsement of advisory bodies like cabinets;
Tenant	although used often to mean a person who is renting in land, "tenant" may also refer to any land occupant, including a landowner or sharecropper;
Title deed	a certificate that indicates the owner of a described and mapped plot of land according to official registers.

## Dari/Pashto Land Tenure Terms

Adat	custom, customary law
Alaqadar	sub-district (local) administrator
Alem ( <i>see also mujtabid</i> )	a (Sunni) legal expert, able to exercise and interpret <i>Shariat</i>
Amlaki shakhsi	private land
Amlaki dawlati	government land
Aryat ( <i>see also jaizi, rahn</i> )	pledge, mortgage
Baayer	virgin land, wasteland
Badar ( <i>see also mazdoor, noker</i> )	landlord
Bazgar	farmer, sharecropper
Chaduri ( <i>see also pardah, hijab</i> )	a head-to toe veil worn by women
Charagha ( <i>see also malchar</i> )	pasture land
Firman	decree
Gayrawi	mortgage, temporary selling
Hakem ( <i>see also woluswal</i> )	district governor
Hamsaya	neighbour
Hanafi	one of four legal interpretations of the Sunni sect of Islam. The others are Maliki, Hanabali and Shafi'i
Haq-oba	water right
Hijab ( <i>see also pardah, chaduri</i> )	women's dress code in Islam
Hoquq	law, rights
Hudood	summer grazing territory
Hukm	order, appointment to act
Ijarah	rented land
Imlak	registry office
Izafa	excess land
Jaizi ( <i>see also aryat, rahn</i> )	mortgage
Jirga	tribal council
Joi	water channel
Karez	traditional underground water tunnel
Khairat	alms, given by wealthier households to poor
Khan	prominent family
Khawanin-i-mulk ( <i>see also malekeen</i> )	feudal lord, landed gentry
Lalmi	un-irrigated land; can produce crops in a wet year
Malekeen ( <i>see also khawanin-i-mulk</i> )	land owner
Mulchar ( <i>see also charagha</i> )	pasture land
Malik ( <i>see also qaryadar</i> )	representative of a village or local community to the government, appointed by the village
Manteqa	local domain, area, territory
Maraa	variously public land, common land, local public land
Mawaat	barren land or wasteland
Mazdoor ( <i>see also bazgar</i> )	day labourer
Mir-ob	water manager
Meeras	inheritance
Maoqofa ( <i>see also waqf</i> )	common land often used for religious purposes (e.g. mosques, shrines)
Maqarara	regulations
Mullah	traditional prayer leaders

Mujtahid	a legal expert, one qualified to exercise <i>ijtihad</i> , which is to render interpretations of the <i>Sunna</i> ( <i>Islamic sources of Shariat</i> )
Mulk-i-Khalisa	Customarily joint or shared ownership
Mushtarak	common land
Mufti	legal expert, one qualified to issue <i>fetwa</i> , official rulings based on <i>Shariat</i>
Nizamnama ( <i>see also ossulnama</i> )	royal ordinance
Noker ( <i>see also bazgar</i> )	serf, servant
Ossulnama ( <i>see also nizamnama</i> )	royal ordinance
Pulghu	shared oxen system
Pardah ( <i>see also hijab, chadri</i> )	curtain, seclusion
Pashtunwali	Pashtun customary law
Qabala-i-urfi	customary title deed
Qabala-i-sharayee	official title deed
Qanoon	law, code of regulations
Qanoon madani	Civil Code
Qanoon jauza	Penal Code
Qaryadar ( <i>see also malik</i> )	village leader
Qazi	judge
Raees-i-makamah	chief judge
Rahn ( <i>see also jaizi, aryat</i> )	pledge, mortgage
Raiot	dependent, client serf
Rewaj	customary law, customs, tradition
Sadar	chief
Sarkulfi	key money
Sanad	document (generic)
Shar'ia, or Shariat	the sacred law of Islam
Shura, majlis	council, committee
Urfee	traditional agreement/sale
Waqf ( <i>see also moquofa</i> )	common land, usually used for religious purposes (e.g. mosques, shrines)
Wakaalat	acting on another's behalf, acting by proxy
Wakil	attorney, representative
Wikalatnama	power of attorney
Woluswal ( <i>see also hakem</i> )	district head
Zamin	land
Zoliad	rights of possession

#### NOTES

**Afghani:** The Afghan currency, also known as "afs"; The Afghani figures quoted in this report use the "old Afghani," the currency in circulation prior to October 2002 for which one Afghani= US \$0.00002. On October 6, 2002, the government introduced the "new Afghani," which trades at one Afghani=US \$0.0222.

**Jerib:** The common measure of land; five jeribs comprise one hectare (2000 sq. metres).

**Dates:** Laws are indicated by their Afghan date. Excepting the Taliban regime, which used the Arabic lunar calendar, Afghanistan follows a solar calendar beginning in 622 AD, the year of the *Hijrat*. The first day of the year coincides with the first day of spring. The approximate corresponding western date is derived by adding 621 years, two months and 21 days to the Afghan date.

# Executive Summary\*

## I. INTRODUCTION

Land tenure insecurity has many faces – from the returning refugee widow who is unable to wrest her husband’s land from his family, to the community evicted by a land-hungry warlord, to the drought-defeated smallholder who has sold his last plot for food and cannot find a landlord willing to enter a sharecrop arrangement. It may also be a case of clan heads carving up local pasture for new cultivation, land that poorer villagers thought was theirs to share, that the government thought was its own to distribute, that visiting nomads thought was theirs to graze – and often have documents to “prove” it – documents that may conflict with others issued at different times, with the law, or with human rights and justice norms. At this point in time, multiple claims, each with its own historical legitimacy, may exist over the same land. The law, and the documents or testimony it generates, is plural, complex, uncertain, incomplete and currently unenforceable. At every turn, there is a need to rethink norms for a sustainable future while reconciling with the past.

Until recently, land tenure - the holding and transacting of land – has not been more than peripherally on Afghanistan’s planning agenda. This is not surprising. The Afghanistan Transitional Administration (ATA) is new, is only just beginning to function as a government and has limited authority over the country. Though it is a marvel that any substantive land planning has taken place at all, what has been thought through is driven by the limited objective of helping foreign investors secure land. A more poverty-focused approach to reconstruction, within which land tenure conflicts are most visible, has been slow to emerge, which has meant that issues of land access and the concerns of the majority remain a low priority.

The new administration has also not been particularly well served by the assistance community in this area. Though a range of policy advisories have been issued and agrarian surveys

conducted over the last year, they have failed to focus on basic land access, rights as a factor of production, recovery or conflict resolution. Structural analysis about the drivers of conflict and poverty has been limited. By failing to recognise the centrality of land rights to the peace and reconstruction process and by failing to provide the ATA with valuable lessons learned from experience in other contexts, the aid community has tended to reinforce the perception that land ownership problems are too complex, bewildering or sensitive to address at this time.

Unfortunately, such a risk-avoidance strategy is a – historical and imprudent, and may temporarily suppress chronic grievances. It fails to consider the role that conflict over space – and particularly rural space – has played in driving and sustaining the internal conflict in Afghanistan over the last quarter century. As a result, current approaches to land tenure matters tend to be superficial and *ad hoc*. The concern of the ATA is, however, very real. While caution is indisputably in order, it makes sense that the assistance community facilitate the ATA’s efforts to understand and deal with the land rights crises that currently beset the nation. It is hoped that, sooner rather than later, this will be expressed in a comprehensive strategy, implemented with its own set of workable legal instruments and local level arrangements.

Four basic strategies will be helpful in shaping this strategy:

- Adopting an incremental and learning by doing approach to the issues, to be able to move forward. Invoke support where it is needed (at the local level) to make practical progress and to establish workable new norms;
- Recognising that land rights management is a cornerstone of social management in agrarian states. Dealing with land ownership issues will not only aid productive development, but will also open avenues

\* Editor’s note: Because of the breadth and quantity of information contained in this paper, we felt the executive summary should be as inclusive and comprehensive as possible. This summary, therefore, is longer than most.

through which wider concerns of governance, particularly inclusive, local-level governance, may be practically addressed;

- Making sustainability a primary objective of restitution policies and action. This means that classical approaches to restoring order in land ownership should go beyond simply returning land to pre-war owners, as many aspects of that pattern of ownership remain contested;
- Ensuring that the law upon which decisions of tenure are based is comprehensive and straightforward in its prescriptions, and transparent and consistent in its use. These are attributes that do not currently exist; and
- Recognising that no top-down dictate, in the form of laws, reforms or enforcement will be lasting without local ownership/popular support. If there is a single, principle suggestion arising from this short review, it is that treatment of land ownership issues requires rigorous adherence to sound development process in general and the adoption of localised and participatory community-based approaches in particular.

Before discussing how such strategies might be achieved, some general background findings to the land tenure sector should be considered.

## I. LAND OWNERSHIP

### Characteristics

Data on rural land ownership is scanty, incomplete, out of date or structured in ways that are hard to compare. With such limitations in mind, the following observations on land ownership can be made:

While most of the rural population depends on arable agriculture, the amount of useable farmland is limited, comprising only 12 percent of the land area. Irrigated agriculture is extremely important to the rural economy, in the form of vineyards, and orchards and cereal farms. The greater productive area in the country is pastureland, which covers 45 percent of the total land area. This supports an immense livestock population owned by

both settled farmers and semi-nomadic and nomadic populations. However, land tenure arrangements are least well developed in these areas and most subject to contention and even armed conflict.

Outright landlessness is a very real feature in Afghanistan. A significant body of people do not own farmland (the landless), or they own farms too small for survival (near-landless), yet together they provide a highly significant part of production, as sharecroppers, workers or tenants. While it cannot be confirmed that landlessness or near landlessness is rising, the signs are that this is the case.

Though the range of holding sizes is narrower than many other states in the region, ownership is highly skewed. Minorities at the upper end have traditionally owned disproportionate areas of total land. One recent survey finds that 2.2 percent own 19 percent of the total land area in 2002.

Regional differences of land distribution are so strong that national farm size averages are meaningless. For example, while “most” own their land in the mountainous east and northeast, landlords, sharecroppers and labourers are most common in the southern fertile plains around Kandahar.

Land holding in Afghanistan is not a simple question of owning or not owning. The most striking aspect of rural Afghan tenure is the high degree of uncertainty in land ownership, primarily in the sharecropping sector and the closely intertwined element of land mortgaging. This involves a web of relationships in which it is difficult to distinguish creditors/debtors from owners/sharecroppers, or to know precisely who is the legal or accepted right-holder over the property.

### Land Tenure Administration

An unusually strong history of land ownership recordation exists in Afghanistan, dating back to land grants issued in the 1880s with documents relating to land transfer in the customary, religious/civil and state law land management sectors. The form of

documentation is relatively consistent. In addition, a national land registration programme conducted between 1965-1978, mapped and recorded 45 percent of arable farms into 5,502 registers. However, maintenance of these records has been limited.

No clear regime for managing land rights exists and by default many management functions have fallen to the courts, which also handle the bulk of land disputes. With instability and coercion by warlords over the last decade, land rights management and dispute resolution has lost credibility in many areas. Most rural Afghans regulate their land ownership relations customarily, without using officials or courts. Customary sector management offers a strong foundation, but is rife with practices that favour wealthier elites, men and dominant ethnic groups.

#### The Legal Framework for Landholding

Land rights in Afghanistan are governed by more than one legal regime, including customary law, civil law, Islamic law and state law. While important differences exist, there is also an unusual degree of commonality among these in their treatment of land rights.

**Customary law (*rawaj*)** This relates to how land is owned and transacted as established through community practice and adherence by members to group norms. Customary rules are rarely codified and appropriately change with time. Pashtunwali (Pashtun customary law) is one of the more elaborated operating laws, and dominates the norms in many areas. *Shariat* and custom often conjoin on land matters, except with respect to usury, women's land rights and common property rights. The former is more liberal – and generally less adhered to because of this.

**Civil law (*qanoon madani*)** The Civil Code is a written expression of mainly Islamic law principles and includes more than 1,000 directives relating to property. The Code was compiled in the 1970s building in large part on historical treatments of the *Hanafi* school of Islamic jurisprudence.

**Religious law (*Shariat* or *Shar'ia*)** in its original rules as laid down in the Koran and expressed in many scholarly treatises, may

be directly applied when the issue is not covered in the Civil Code. Similarly, the Civil Code is only applied if the issue is not covered in state law. Land cases are officially dealt with in civil courts, which rule on the basis of state, civil and religious law, in uncertain mix and measure.

**State law (*statutory law* or *national law*)** This comprises both supreme law (see below) and sector law (i.e. agriculture, taxation, housing). It has been executed through statutes (*qanoon*), passed by Afghan kings and presidents in the form of decrees or edicts, and published in pamphlets and, since 1963, in an official gazette. Frequent regime changes have had a confusing effect on formal state law. Rather than sustaining existing laws, new regimes have tended to repeal previous laws and institute new ones, but in a very uneven manner. In practice, there is considerable continuity in the land sector from the statutes of 1965 to those of 2000. No single body of land tenure law exists, but land is significantly addressed by a number of Taliban edicts of 1999 and 2000. These are the law in force at this time, as they do not contradict the (broad) terms of the 1964 Constitution.

**Constitutional law** The supreme law, which has consistently included a limited set of declamations on the right of the state to appropriate property, the protection of private rights, the right to travel and settle freely, the definition of government land and the rights of foreigners to own land. The modern Afghan state has seen constitutional law promulgated in 1923, 1931, 1964, 1977, 1979, 1980, 1987 and 1990 (and a draft in 1992). The current constitution in force is that of 1964, which offers insufficient guidance on land rights. However, it is notable for its support against random foreclosure by creditors, a prominent concern of poorer rural Afghans, and a principle that does not seem to be widely applied.

#### Land Classes

In terms of tenure, the land area of Afghanistan falls within one or other of these classes:

**Government land (*amlaki dawlati*)** The definition of government land has been altered



by each regime and still lacks clarity. First defined in the 1965 Land Survey and Statistics Law as “land registered as belonging to the government,” this government land expanded to include wasteland, forests and then pastures through constitutional articles. These definitions were subsequently abandoned and the definition of government land is currently uncertain beyond those properties already registered and/or held as belonging to the state.

Public land (*maraa*) Land, under the control (not ownership) of the state, but held to be either owned by the nation as a whole, or by nature un-ownable (such as wasteland). However, the government has always acted as landlord and has, at times, made public land available for lease or sale. *Maraa* also includes land reserved for local community use. The lack of a clear boundary between national public land and local public land reflects weak tenure development and unresolved conflicts between state and customary notions of tenure.

Private land (*amlaki shakhsi*) Conceptually, private ownership is defined as individual ownership of discrete estates and therefore limited to farms, house plots, rather than group-owned property. In practice, a documented “individual” landholder often conceals shared ownership by a larger number of individuals – a family, clan or village. Conversely, rights to land owned by a family may be exercised by a single (male) head of household.

Communal land (*mushtarak*) Commons are non-farm properties including local open spaces, dry uplands, pasture and swamps, conventionally understood as owned by the community members jointly. In practice, khan families have superior rights. They are able to use these lands in ways that those without draught power for dry-land cultivation or livestock to pasture cannot. Disputes over commons are legion and growing, especially between seasonal pastoral and settled cultivator interests, both of which have different historical and customary claim.

Religious land (*waqf*) Held originally by religious institutions, much of this land is now

under the control of the state as government land or public land, with the remainder held by local mosques for the common good. This land may not be bought or sold.

Distinctions among classes are uncertain, with overlapping interests between public and communal lands, private and communal lands, and government and public property. A main structural problem is the uneven acknowledgement of common rights in land as private property rights, a problem that encompasses competing interests over pasture.

## II. LAND POLICY AND LAW

Formal land policy has only sporadically been declaimed over the years, and is still not in place today. Policy is discernible however both through the terms of state law and, more generally, in tenure-related strategies that have been adopted over the last century.

### Tenure Strategies: 1880-2001

Four dominant strategies have been the following:

Pashtunisation policies that saw leader after leader empower loyal Pashtuns to colonise the territories of minority and potentially rebellious ethnic groups. This began with the efforts of King Abdur Rahman in the 1880s to secure the borders of the new state, using this means with brutal efficacy. This laid the foundation for ethnic land contestation in Hazarajat and in the north, conflict that has intensified over the last decade.

Settlement policies associated with large dam and irrigation developments during the reign of Zahir Shah (1933-1973), which routinely replaced local occupancy with selected settlers; often these “eligible applicants” were Pashtun nomads (Kuchi), who were to prove less than dedicated to the settled farming lifestyle, but who have retained substantial interests in many areas, often as creditors of heavily indebted tenants.

Recordation policies designed to clarify and order land ownership and to bring land relations under state control. This was undertaken by Zahir Shah in the 1960s and 1970s as a mass survey and registration

programme, funded by USAID. Less than half of all farmers and farms were registered and not a single title deed was issued but a basis for ownership documentation was widely entrenched. The process also saw a massive expansion of government land, including the bringing of some 2.6 million hectares of pasture under state control.

Distributive reform designed to bring more equity to grossly inequitable land ownership. This began with President Daoud's moderate reforms during the 1970s that placed a ceiling on private landowning, required the compulsory sale of the excess to the state, and instituted progressive taxation on the basis of holdings' size. This was followed by a more extreme, well-meaning but brutally implemented reform by the People's Democratic Party of Afghanistan (PDPA) led by Presidents Taraki and Amin (1978-1979). This dramatically reduced the land ceiling, redistributed the excess without payment of compensation and cancelled standing debts of more than five years relating to mortgaging. The rebellion that ensued from these and concurrent radical educational reforms, led to Soviet invasion and occupation (1979-1989).

All four strategies were implemented in the service of state building and modernisation. All four failed in their objectives. Untangling the conflicts that resulted is a main task facing the current administration.

#### Key Drivers of Tenure Insecurity

The current situation of widespread insecurity of tenure appears to be driven by these main conditions:

A history of rural production that builds on deeply inequitable relations within the community with regard to access to and rights over land and water. Symptoms include crushing indebtedness, landlessness and, more recently, destitution, all of which carry abundant seeds for sustaining conflict. This is decreasingly being relieved by traditional social reciprocity, which shows signs of being in demise. The majority poor may decreasingly rely on the rich to keep them housed, fed or landed. Plans to increase agricultural productivity ignore the fact that most farmers

are landless and without the resources to restart farming.

Multiple and unresolved interests over the same land. This stems mainly from the inglorious history of translocation outlined above, which has generated increasingly violent ethnic land disputes. The appropriation of lands by warlords is a more recent (1990s) but equally unsettling phenomenon.

Failure to develop land ownership norms beyond the farm. This is a problem that is shared by many governments around the world and is only now beginning to see creative resolution. It refers to the fact that while most of Afghanistan is land suitable for pastoral rather than arable development, tenure norms are least well developed in the pastureland sector. A related shortfall has been the tendency of state builders to co-opt as much land as possible to state coffers, or at least to its control, which has directly affected customary forest and pastureland rights.

Continuing disorder that helps to sustain tenure insecurity in many rural areas. While this is most visible in the existence of an enormous number of displaced persons, well-settled communities are also affected. Uncontrolled poppy production, warlordism, land invasions and ethnic and intra-community disputes are all generating insecurity at a time when stability of occupancy is essential. The outstanding question is whether matters of land security may be tackled before peace and stability are restored. While in theory the answer may be no, in practice, sustained order is unlikely to be achieved without addressing land conflicts.

### III. CHALLENGES

This study concludes that long years of misdirected policy have entrenched, rather than improved, deeply inequitable and often unjust land ownership relations among tribes, between agricultural and pastoral systems and among feudally-arranged classes of society. Attempts to remedy these have been poorly executed. Violence, insecurity, anarchy and land grabbing compound these problems. The question facing the new administration is whether to ignore disturbed land

relations and hope that they will resolve themselves, or to deal with the issues directly. And if the latter, then how?

1. Putting land relations on the agenda. There are signs that both the ATA and the international community are recognising that disorder in land relations cannot be ignored if peace and stability – let alone socio-economic transformation – are to come about. It is both timely and necessary to formulate a more explicit and comprehensive strategic commitment to tackle land ownership matters in a manner that goes beyond *ad hoc* fire fighting of occasional or prominent land disputes.
2. Focusing on sound development processes. Commitment and action to develop a comprehensive land policy will be critical. The current constitution-making process offers a broad and inclusive environment through which this could be pursued. Production of a substantial chapter on land rights and administration would represent a major achievement contributing to nation building and reconciliation. This will require careful facilitation. At the same time, it will be helpful to promptly launch support for local-level land dispute resolution initiatives out of which important guiding new norms may be offered to national-level planning.
3. Identifying institutional responsibility. The building blocks of such decision-making are still to be put in place. No single ministry has taken on land tenure issues or offered a concrete institutional framework through which multi-sectoral tenure concerns may be addressed. What currently exists as different agendas between the executive and judiciary branches of government need integration into a single and consistent strategic vision as to how land rights should be ordered, governed and sustained.
4. Taking community-based approaches seriously. It is important that land policy development not be confined to the corridors of central government. Rather, it should be informed by practical efforts of land conflict resolution in strategically selected rural areas. This will allow the ATA to focus on priority disputes locally in situations where it cannot

deal with such issues nationally, to enable the evolution of an inclusive and practical approach and to lay the foundation for local-level land governance systems. What is required at this stage is a process that avoids top-down approaches and instead promotes efforts that can be sustained at the periphery in the hands of ordinary Afghans, operating within local and community-level contexts.

5. Developing a sound legal basis for land rights management. The legal issues facing Afghanistan are immense and go beyond the difficulties the administration currently has in enforcing the (state) law that exists. What constitutes the law is itself a matter of debate. A main problem is the uncertainty of boundaries and roles among religious, civil, custom and state law. Clarification and coordination, if not total integration, are urgent. Even within religious law, there must be questions raised and addressed as to the legitimacy of limiting guidance to sources, such as Hanafi, not observed by all Afghans. While an initiative to improve state land law is underway, land law remains a loose compilation of provisions with vast gaps and loopholes. The scope of legal instruction upon which judges will, for example, rule on restitution disputes is insufficient to meet the demands of current circumstances. The development of a national land policy will guide the development of new legal provisions. Ideally, these will include a comprehensive and integrated basic new land law, which takes account of majority customary and religious directives that are consistent with constitutional principles. An absence of court reporting also poses problems. This has prevented the evolution of legal precedent on the one hand, and limits consistency among rulings, or the accountability and transparency of the courts, on the other. This is going to be particularly important in the upcoming work on the Special Land Court, mandated with hearing what will be thousands of land disputes relating mainly to land claim cases. Interest within the Ministry of Justice to adopt a fresh and more comprehensive approach to developing new law deserves immediate encouragement and practical support. Acting towards this specifically in the land tenure sector will be a manageable and concrete way forward.

6. Learning from international experience. Land tenure problems plague many other agrarian states and there is much to be learned from the growing body of land tenure reform underway in more than fifty countries. Many of these reforms directly address issues of similar concern to Afghanistan, such as how customary and statutory land tenure regimes may be integrated, how cheap, decentralised and sustainable tenure administration may be established at the community level, the proper role of the state in land administration and land ownership and the kind of norms that may be developed to support stable common property systems. Novel approaches to land dispute resolution, with a particular emphasis on non-court based dispute resolution, are also being developed and tested. Making such experience available to the ATA is an obvious responsibility of the assistance community. Lessons from Kosovo, Bosnia and East Timor may be particularly instructive for Afghanistan with respect to post-conflict restitution management. These experiences illustrate that the unravelling of what is an often ethnically discriminatory history is a messy but ultimately essential element of effective restitution. In the process, new administrations are forced to make fundamental decisions as to what constitutes “equity” and whose rights or interests are to be “more equal” than others.
7. Locating restitution within reconciliation. Matters of land restitution cannot be satisfactorily separated from the demands of reconstruction. This is a realisation that many post-conflict administrations arrive at belatedly and at a cost. Optimism that land interests may quickly be restored in accordance with a chosen dateline avoids the reality that many of these properties are subject to multiple claims, each with an historical or social legitimacy that cannot be dismissed by invoking the law. Unpacking rights, identifying “owners” as defined by a certain time period and declaring this the legal norm, may not be enough and may exacerbate contestation. There is both need and opportunity in Afghanistan to adopt a reconciliation approach. Practically, this needs to be implemented at the local level and on a case-by-case basis.
8. Clarifying tenure norms. A related issue is the need to clarify the distinction between local-public and national-public properties, particularly as they affect the interface of land rights of settled and mobile peoples. As in Afghanistan, many countries have seen local commons appropriated by national governments because they are perceived as un-owned or too broadly owned to be viewed as private property. Today, however, there is a declining emphasis in other countries on individualisation as the only route through which private property may be expressed. Two main results have been the provision of new tenure norms to allow for group-owned private property, and clearer and more formal arrangements to allow different (e.g. seasonal) interests in the same land to co-exist.
9. Keeping equity on the rural land agenda. How people order their land relations and the manner in which local and national governments provide regulatory guidance, is central to the governance of agrarian society. Failure to attend to the sound ordering of land relations and the fair distribution of arable land will impact adversely on rural livelihoods as a whole. The fact that drought has tied landlessness more tightly to destitution adds to the urgency for governance systems to address, rather than avoid, the situation.
10. Learning from the past. History does matter, not only in terms of the changing land relations inherent in modernisation and conflict, but also in terms of the crucial history of state intervention. The Afghan experience tells us that one critical lesson of this history needs to be learned: that the forced redistribution of land is unlikely to be a lasting solution and could contribute to war and instability, even where the beneficiaries are the majority. At the same time, matters of distribution and associated practices through which land is voluntarily or involuntarily transferred from the poor – such as through unfair land mortgaging and sharecropping regimes – are pressing concerns that need to be addressed. Adopting exploratory and more participatory and local decision-making on such matters will be necessary; law or top-down reform on its own, will be ineffective.

11. Equity for growth, not instead of growth. Within the civil administration, what is driving current planning is the determination to make land more easily and securely available to investors. While this is an important objective, it presents too narrow a basis on which land tenure planning and management systems need to be developed.
12. Keeping an eye on the land security needs of women. It is too early to suggest direct reforms in rural gender land relations. Nonetheless, the new administration should be aware that improvement in the land security of women will be an important route towards improved land relations overall within the local rural community. The ATA should support this area as needs arise.
13. Putting registration in perspective. Registration and entitlement have been the most concrete tenure development strategies yet offered by the ATA, as expressed within the Draft National Development Framework (NDF), including the establishment of a “nationwide registry” to “allow for the use of land as collateral for entrepreneurial activities” recommended by the Asian Development Bank. The feasibility of using peasant farmland as collateral should be reconsidered and safer (for both creditor and debtor) means for accessing credit explored. The ATA should also question the utility and cost-effectiveness of registration as a route to tenure security. The strategic lessons to be learned here seem to be that recordation procedures need to be kept simple, cheap and above all, locally controlled and administered. Accessibility and accountability to owners themselves is paramount and arguably a sure way to ensure integrity in land records. Community-based tenure management and administration deserves early exploration.
14. Investing in Research. There is still far too much about land tenure in Afghanistan that is not known. A deeper examination of land relations, particularly of sharecropping and land mortgaging in strategically selected

communities, would add to an understanding of these shifting power dynamics. The problems being faced by returning refugees deserves close examination, as do those being experienced specifically in the north and Hazarajat where land relations are particularly tense. The territorial history and character of pastoral hudood (summer grazing zones) also deserves closer examination towards resolving pasture disputes. A better understanding of the land rights, interests and needs of rural women also needs attention. There is also a range of simpler and more concrete tasks, such as computerising the information contained in the 5,502 registers as quickly as possible. Even if the existing registers are discarded altogether, the information these and the background files contain on landholding in 1965-1978 represent a very important historical record against which current day tenure changes may be assessed. Two principles of process should guide all research conducted: first, that each task is undertaken in conjunction with the ATA and other appropriate operational agencies; and second, that participatory processes be adopted as much as possible, in frameworks which work with Afghans at the local level to help them explore and act upon tenure problems.

#### IV. CONCLUSION

Taking steps along the path to improved land relations will not be easy. The temptation to address problems only through new law, new policy or periodic coercion cannot have much success in the often lawless and disturbed conditions that operate beyond the reach of the current administration. Such strategies would also be a replay of the top-down approaches of the past, approaches that have only helped to provoke conflict. Adopting localised and participatory approaches is urgent, relevant and desirable in Afghanistan. The main conclusion of this short review is that land relations and security can only be improved with genuine and practical efforts that arrive at change with and through ordinary Afghans at the local level.

## SUMMARY OF PRINCIPLE FINDINGS

- Stark inequities in land ownership, ethnic conflict over land access, and mismanaged land reform efforts by the state have all played a role in generating and sustaining conflict, including Soviet occupation, over the last quarter century.
- Conflict has seriously disturbed land relations, de-securing farm and pasture rights in some areas, jeopardising the ability of administrators or courts to manage or uphold rights fairly, and threatening confidence in the capacity of the constitution or other state law to protect existing land rights.
- Landlessness and indebtedness in the farming sector have always been features of Afghan agriculture and are likely to involve a greater proportion of farmers than 25 years ago. Population growth and land shortage, opium poppy production, ethnic tension, insecurity, and more recently, drought, remain potent drivers to land grabbing, landlessness and destitution.
- Knowledge about how rural land is distributed and under what conditions is incomplete and characterised by strong regional differences. Disturbed settlement and tenure insecurity render information unreliable beyond the short-term. High rates of sharecropping by both landowners and landless and the ambivalent status of mortgaged plots make precise definition of owners difficult.
- Today, the poor constitute the majority of rural populations. However, customary, religious and state law regimes share starkly inadequate provisions supporting the land rights or interests of the poor. Many current land practices result in homelessness and rural landlessness, yet there exist insufficient means – beyond charity – to impede or remedy these effects.
- Pasture land is a principle source of conflict. Competition over this valuable resource engenders conflict among settled and nomadic land users and ethnic and territorial concerns. It also brings to light conceptual differences about if, how, and in what situations, people may own land in common and have those rights upheld as private property. It also highlights the conflicting positions as to rightful reach of government land and government powers over property.
- A plural legal basis to land rights exists, in the form of customary, religious and state law, and with a great deal of overlap, some inconsistency and much uncertainty as to norms in each body of law. Landowners variously use custom, Shariat or evidence from the land register to demonstrate their rights. The documentation of transactions is widely practised in all three regimes.
- A clear system for land tenure administration does not exist. Administration (such as the formalisation of routine transfer of rights) falls, by default, to judges.
- There is currently no institutional focus for dealing with tenure. Attention to tenure problems has so far been ad hoc. The administration's main effort to date has been to create a special court to hear land claims. However, the legal basis on which this court will rule seems inadequate for the challenges involved, as do the systems for ensuring decisions are consistent, publicly recorded and accountable.
- The main discernible land policy of the ATA is to restore land to those who owned the land in 1978, including those lands that belonged to government at that time. Adoption of this strategy without addressing underlying grievances associated with how land was acquired, will not provide a lasting resolution.
- A second main policy of the ATA is to pursue registration and entitlement, mainly to encourage investment. This deserves more thought in light of the failures of classical registration to deliver tenure security.

## MAIN RECOMMENDATIONS

- Establish order in land relations to help end civil strife. However, order cannot be easily achieved without peace. To avoid being paralysed by this conundrum, the ATA needs to develop a comprehensive set of principles and intentions with respect to land rights and land policy, and through participatory means to ensure as much support as possible.
- Inform policy and law through practical lessons of localised progress. At the same time action on the ground is essential in order to build a tangible basis of progress and experience. An incremental approach is necessary. Action at the periphery may begin in only a limited number of areas. A gradual body of improved practice may accrue and prove important in guiding evolving policies and law.
- Focus on the Land Claims Court as a first venue for developing clear policies, law and procedure. This court urgently needs support with clear and detailed procedures, process and especially principles upon which rulings will be made. Many wider concerns of legal process could be helpfully explored through the tangible issues presented by land ownership matters.
- Adopt a reconciliation approach to restoring order to land relations. Pursuit of the traditional restitution approach of reverting land to owners of a certain date needs to be retained as an objective in principle, but couched within a reconciliation context that seeks to explore and resolve conflicting claims as well. To be effective, reconciliation and related restitution will need to operate in a localised manner and involve local level leaders and representatives of the concerned parties.
- Pilot district or community-based land administration in stable areas. This is likely to be the only practical and cost-effective means for administering land tenure in the short or longer term. Adopting decentralised and participatory approaches from the outset will be sound.
- Minimise land loss by improving the operations and impact of land mortgaging and sharecropping on land security. Finding workable ways forward will be best achieved through involving sharecroppers and those mortgaging their land in discussions.
- Support the ATA's efforts to restore land tenure stability with international assistance. The reach, manpower, technical and financial capacity of the ATA to deal with land ownership problems is limited. Help is needed and deserved.
- Establish an institutional focal point for taking action and responsibility. Given that a number of ministries have interests, it may be necessary to establish a special inter-ministerial commission for this purpose. To be effective, this commission should be charged with devising practical pilot developments, as well as guiding new national land policy and law development. The Ministry of Justice (MoJ) and Ministry for Rural Reconstruction and Development (MRRD) should be key actors; either could host the commission.
- Support ATA decision making with accurate information and analysis to inform decisions is also pressing. Organisations should be encouraged and assisted to research key issues. Priority areas for research include:
  1. investigating the operations and impact of land mortgaging and sharecropping on land security in order to devise protective measures;
  2. gaining a thorough understanding of the nature of land conflicts in the north;
  3. exploring with pastoral and settled peoples the way to workable norms to limit and control conflict over pasture;
  4. identifying current distribution of rural land ownership and land access in different farming zones; and
  5. examining the difficulties being faced by returnees in accessing past or new rural land.

These and other investigations should be carried out in conjunction with the ATA and agencies with special responsibilities in these areas.

## Introduction



Photo courtesy of Marc Petzoldt

### Tenure Insecurity

In agrarian societies, production and livelihood, economic growth and social stability depend heavily upon orderly and accepted land access and ownership systems. When the way in which land rights are ordered is contested, peace and security are difficult to attain or sustain. Disorder in land relations reigns in Afghanistan at this time. Tenure insecurity is rife. Many Afghan farmers own no land or too little to live on. Many access land under unstable or unjust conditions. Many owners hold land that is claimed by others. Many have lost their land to others. Different claims present different versions of what is legitimate. Customary, religious and state laws governing land ownership are under challenge, difficult to enforce and in any event, insufficiently developed to meet the demands of the present situation. At every turn, there is a need to rethink norms for a sustainable future while reconciling with the past.

How far the past can provide a workable foundation is just one of the challenges facing

the administration. As this paper will attest, there is little doubt that conflict over land rights and its treatment by successive administrations is one of the causes of turmoil during the last 25 years. Where struggles over land and water have not been a primary driver to conflict, they have served as a tipping point to conflict. Dissatisfaction with state policies or longstanding inequities in land access has been a frequent driver to conflict. It is evident that lasting recovery cannot be found without restoring stability in land relations. Perhaps the most important question that needs exploration - and which this short review hopes to help prompt - is whether the resolution of tenure issues can help provide a path to stability. The tentative conclusion drawn is that it can, and it must.

### A Scoping Study

This paper summarises the findings of a short exercise to identify land issues in present-day Afghanistan, carried out for the Afghanistan Research and Evaluation Unit (AREU) in accordance with terms of reference provided as Appendix A.



The review was conducted in October 2002 and this paper drafted in November 2002.

AREU's desire to learn more about land tenure issues stemmed from its interest in tracking shifts in the ownership of assets within especially poor populations. "Land" was to prove a large subject, so this short study should be viewed as only a first step in what will almost certainly need to be a series of explorations of increasing range and depth and involving a widening set of actors. These will need to be conducted in partnership with the ATA itself; concerns surrounding land ownership are of such importance that they are necessarily first and foremost the business of state.

This review is not about land in general but about land tenure, the way in which rights in land are distributed, secured, transacted and governed and the problems that surround these processes. Though water and land rights go together in Afghanistan, the former is not directly addressed here. In addition, the paper focuses upon the rural, rather than the urban, economy. Urban tenure problems are no less acute, certainly more visible to planners and present challenges that are similar to those confronting rural communities. However, while urbanisation is clearly accelerating and private sector investment could eventually reorient parts of the economy, there is no expectation that Afghanistan will move from an agrarian to an industrial state. As in the past, the majority of Afghans will need to survive through agriculture (arable and pastoral) and/or the processing and marketing of agricultural products. The recovery and development of agriculture and achievement of a healthy and stable rural society remain key reconstruction challenges.

Just how land relations are ordered (or not ordered) among members of the rural population and between state and people are generically critical concerns for such objectives. Security of tenure is, in the best of times, a top consideration for rural planning and for social management. In situations of conflict, stability in land rights is characteristically a first casualty. This is demonstrably the case in Afghanistan where all levels of land tenure - territorial, ethnic/tribal, community, class and domestic land relations - have been affected. Land relations between state

Land tenure: the way in which rights in land are distributed, secured transacted and governed.

and people, and among farming systems have been recurrent points of conflict. Even where order exists, the intervention of un-elected, un-appointed and usually unwanted warlords in many parts of the country disturb land relations. Coerced or semi-coerced land theft in response to still-lucrative opium poppy production exacerbates insecurity of tenure.

The need to attend to issues of land rights becomes clearer as public planning commits to a poverty-focused approach to social change, such as is beginning to emerge in Afghanistan. Landlessness and near-landlessness (not owning enough land on which to live on) plagues rural society in Afghanistan today in much the same way it did in the past. As demonstrated over the last several years, drought may tip thousands into irreparable forms of destitution. Encouraging development programming to be more thoroughly underwritten with attention to the structural drivers of poverty, inequity and unsustainable livelihoods, is an objective of this short review. The fact that possibly most rural dwellers can be categorised as poor and very poor makes such objectives more pressing.

#### Methodology

This exercise has been carried out through consultations with more than 50 individuals in 20 or so government, non-government and international institutions; and through the examination of more than 70 publications and 18 laws in English translation (and the frustrated pondering of the contents of more than 60 other un-translated ones). Only four provinces were visited, all in the central part of the country (Logar, Parwan, Wardak and Ghazni). Visits were made to only two villages and one pastoral camp (respectively, Qalai-Pingrom in Charkh district (Logar province), Bidmoskh in Hujamari district (Ghazni province) and the Niazi Kuchi Camp in Jaghato district (Ghazni)).

Given the extreme brevity of the field research, the findings presented here are at best provisional and imperfect in understanding the immense complexities in the tenure sector. Nonetheless, it is hoped that what is presented will serve as a platform for identifying where to focus more rigorous study, prompt discussion among policy makers and supporting agencies and help focus attention on land ownership concerns.

## Sources

As writers have remarked before, the retrieval of crucial historical records and information is difficult in this early "post-conflict" period in Afghanistan. Critical sources have been lost, destroyed or removed, or jealously guarded after years of feared (or real) misuse.<sup>1</sup> Still others are only available in Dari or Pashto (and sometimes Russian), a chastening reminder for English-speakers of the limits of their linguistic hegemony. Figures on land use and distribution do exist, ranging from the important Afghanistan Agriculture in Figures (1978) and the Agricultural Survey of Afghanistan (1988-1990), to more recent attempts to capture the state of rural production nationwide.<sup>2</sup> Most have grave shortcomings as will become apparent in this paper. The growing number of village studies, frequently conducted by NGOs to guide their interventions,<sup>3</sup> helps to fill in the gaps but can often not be used to extrapolate to such a diverse country. Rising interest in the coping strategies of millions of returning refugees, displaced persons and the rural poor, now doubly afflicted by drought, is also producing a range of interesting commentaries.<sup>4</sup> Still, as Pain and Goodhand plaintively observe, the rural economy in 2002 remains statistically unknown.

Examination of land law has also been important, though practice has been severely handicapped by difficulties in accessing these laws (and translating them) and in understanding the serial repeal, reissue and amendment of them. As noted under the Acknowledgements, the author was greatly assisted in the first stage of this task by

the legal adviser of the Ministry of Interior. Regrettably, time did not allow comprehensive examination of these sources, especially of the abundant civil law provisions relating to land tenure regulation.

It is also the case that Afghan institutional and personal memories are substantial, demonstrating the importance of bridging the knowledge and operational gap between the assistance community and the government. The last two decades of conflict are also recorded in a growing body of reportage, both popular and academic. Understanding the changing social and political environment is essential for pinpointing land relations, and in order to do so, this author has drawn on a host of excellent, topical and lively writings, some simple first-hand accounts.<sup>5</sup>

Meanwhile, new and more carefully structured studies are underway.<sup>6</sup> Ensuring that these include land relations is one of the intended outcomes of this review. For example, one cannot help but read with concern a detailed study of feed, livestock and rangeland requirements in 183 villages undertaken for the International Centre for Agricultural Research in the Dry Areas (ICARDA) in 2002 that fails to address the fact that massive contestation over pasture rights contributes to a significant portion of the problems being faced – or likely to be faced – in the sector once stocks recover. It is also troubling to find a yet more promising crop and food supply assessment undertaken for FAO/WFP in 2002 based on interviews with 5,000 farmers in 540 villages that seems to assume that the farmer owns both land and product. By failing to consider the reality of

<sup>1</sup> For example, most of the copies of maps and land registers held by provincial cadastre offices have been destroyed, and the law library of the University of Kabul was allegedly burned for heating fuel by Taliban guards. It would seem that some important development records and data that is no longer available locally has found its way to Moscow (see Emadi 2001). Having endured being forcibly required in 1978-1979 to provide information as to who owned large farms, and having seen copies of its maps and registers destroyed, the government Cadastral Department maintains a fiercely protected archive of information on land ownership, information that in many first world states is considered a matter of public record and accessible on the internet.

<sup>2</sup> See UNDP 1993, Maletta 2002, FAO 2002. WFP studies focusing on food security have been helpful; e.g. Clarke & Seaman 1998, de Weijer 2002. Results of a vulnerability assessment of 1,884 households in which tenure issues are directly covered, are expected shortly.

<sup>3</sup> The author has found survey work conducted under the Danish NGO DACAAR particularly helpful; see Klinnert 1997a, 1997b, Allen 2000 and Klijn 2002.

<sup>4</sup> Although published documents still have a noticeably narrow authorship at this point: Pain 2001, Lautze et al. 2002, Pain & Goodhand 2002, Pain & Lautze 2002, Bhatia & Goodhand et al. forthcoming.

<sup>5</sup> Including both personal and more academic accounts. Main sources have been Olesen 1995, Rubin passim, Nojumi 2002, Farr & Merriam (eds). 1988, Anwar 1988, Majrooh & Elmi 1986, Gohari 2000, Marsden 2002, Rashid 2000 and Magnus & Naby 2002.

<sup>6</sup> For example, AREU is conducting a substantial study into the rural livelihoods of some 600 households, and UNIFEM is planning a gender-focused study of the same subject. UNCHS (Habitat) is investigating urban tenure matters. These should add to the limited information presented in this report.

how farm products are distributed among tenants, sharecroppers, landless workers and clients, the study's predictions of food supply hold little value.

It is equally clear that "development" is proceeding with inadvertent inattention to land relations. Some NGOs and bilateral aid programmes, for example, limit the distribution of building materials and agricultural inputs to those who are able to demonstrate that they own the land they use. This excludes the poorer farmers who live on and farm land that is not their own. In the immediate past, there have been good excuses for overlooking such details in the drive to get the aid out and bring the information in. However, as post-drought, post-conflict recovery begins to allow for an extended time horizon, it will be necessary to adopt a more analytical approach to social change and development aid – one that will certainly come face-to-face with the seriousness of current tenure insecurity.

### Presentation

This paper is presented in three chapters. Chapter One provides background information on how rural land rights have been distributed in the past and present. The lack of useable, comparable and up-to-date data is declaimed, but nonetheless provides enough evidence to suggest that landlessness and near-landlessness are significant and possibly increasing phenomena. Customary, religious/civil and state law tenure regimes are examined and found to have important commonalities in how they indicate and govern land relations. This chapter also notes and describes the unusual and well-entrenched role of the courts in tenure administration as well as in land dispute resolution.

Chapter Two traces the history of land tenure policy in Afghanistan in order to better understand the present. Because national land policy was not often explicitly articulated in the past, the paper resorts to examining state law as a way of understanding past and present "policy." This has proved rewarding. Several key land decrees are provided in translation in Appendices J & K.

Chapter Three attempts to bring together the findings and suggests concrete ways forward. The overall suggestion made by the author is that real progress in improving land relations and tenure security will almost certainly be achievable only through adopting of decentralised, participatory and localised processes. Top-down directives, or law and regulation on its own is unlikely to be useful, and will in any event, be poorly structured without an evolutionary and participatory basis.

Finally, several important comments of the peer reviewers of the first draft of this paper deserve recording. One of the issues raised concerns presentation. Land tenure matters are complex and often difficult to understand. This, combined with language difficulties, means that this paper may not

It is clear that "development" is currently proceeding in Afghanistan with dangerous inattention to land relations, reinforcing unsatisfactory norms.

be widely read by those for whom it holds most relevance: Afghan administrators and decision-makers. To this end, the author and AREU will in due course prepare a short policy brief in both English and Dari for widespread circulation. A second set of comments requested that the author and readers appreciate the very real difficulties being faced by the government in its limited capacity to plan, act and enforce policies and laws in a country where "security" is sustained in only a small part of the country and at the hands of a largely international force. "Remember," one reviewer writes, "that all civil service employees (janitors and ministers) are currently paid US \$30 per calendar month plus food aid provided by WFP." A third set of comments emphasises the importance of international support and the need for modest and practical interventions. These comments reinforce the arguments made in Chapter Three on behalf of incremental approaches on the one hand, and promotion of community-based and sustained tenure decision making and management on the other. There seems little reason for nationwide land programmes (titling or reforms) that have been attempted in the past, or which are fairly routinely being financed in many other parts of the world. Any attempt by an over-anxious international community to coerce reforms may also jeopardise the need for local ownership of decision-making in this difficult sphere.

Several reviewers also urged caution in over-attributing the historical importance of land in conflict in Afghanistan, particularly in light of the role played by international foreign policy in contributing to the failed Afghan state. The latter is a thoroughly documented thesis that dominates the literature and is not reiterated here, though it is referred to as appropriate. In seeking to redress the continued neglect of land as an important driver and sustaining force of underdevelopment and conflict, a degree of over-emphasis as to the functionality of land rights in rural security may have resulted.

At this point I would like to close with reiterated thanks to all those many people who provided information and documents, from ministers to villagers. It must be emphasised that AREU publishes this report in the spirit of its mandate to promote attention to difficult or troubling policy areas, to share what is known and to prompt further investigation, action and knowledge sharing. The inevitable lacunae and inaccuracies of this report are solely the responsibility of the author.

## Chapter One: Land Ownership in Afghanistan, Past and Present



Photo courtesy of Marc Pezoldt

This introductory chapter has two main objectives: first, to describe the pattern of land ownership distribution in rural Afghanistan in the past and present, and second, to lay out the legal and structural foundations on which ownership of rights are based.

In practice, neither task is simple. Data on rural land tenure is scanty, structured in ways that are difficult to compare, incomplete (particularly in their inclusion of the landless) or simply out-of-date. The highly unpredictable character of land relations in the current context throws traditional patterns into doubt. Many Afghans are not living in their homes and/or are occupying land that may not legally be theirs. To complicate the picture further, landholding data almost exclusively refers to ownership of arable farmland. Properties held in common and non-arable lands, such as pastures, are generally excluded from consideration as privately owned lands, a clear indication of the biases of current norms toward farmers and individual ownership.

Even within those norms, landholding is not a simple matter of either owning or not owning land. Many people use land – sometimes for generations as tenants, sharecroppers and mortgagors – that does not belong to them. Or many farm both their own land and land belonging to others. Still others farm land that belongs to their family but that they do not own themselves. This is frequently the case with sons, wives and daughters.

Written recording of land ownership and other land interests or rights (e.g. the rights of family members, seasonal access rights) generally provides clarity. Afghanistan enjoys a long history of land rights recordation. These records are rarely in the form of modern title deeds, such as those produced on the basis of precise mapping of properties. Nonetheless, all legal systems at play in Afghanistan – customary, religious/civil and state law systems – have generated documentation for land ownership and transactions (sales, gifts, loans, lease, mortgaging and pledges).

Photo courtesy of Chris Johnson



The body of recorded land interests is surprisingly rich. Helpfully, there is also commonality in the kind of information that is recorded under these systems. The linking factor, in most cases, is the court. Judges in Afghanistan have played a long and unusual role in the governance of land relations, serving as both decision makers in disputes and as officers of land administration.

### The Physical Setting

The physical setting in which land rights exist in Afghanistan needs brief account (see the tables and map in Appendix C for details).

1. While most of the rural population depends on arable agriculture, the amount of useable farmland is limited, comprising only 12 percent of the land area. Most of this is rain-fed in a country where highly localised patterns of rainfall may be as low as 100 mm a year.<sup>7</sup> Irrigated agriculture is therefore extremely important to the rural economy, in the form of vineyards, orchards and cereal farms, and where wheat production is dominant.<sup>8</sup> For many decades, arable land has been classified in accordance with its productivity,

Most of the land area of Afghanistan is only suitable for pasture but pasture tenure forms are least well developed.

mainly for purposes of taxation (see Map of Afghanistan Land Classes and Table 2 in Appendix C).

2. The greater productive area in the country is pastureland, that covers 45 percent of the total land area. This supports an immense livestock population owned by both settled farmers and semi-nomadic and nomadic populations. Nomads ("*Kuchis*") number about 1.5 million people in a rural population estimated to be around 18 million.<sup>9</sup> *Kuchis* traditionally possess the greater share of livestock, especially sheep and goats. They are believed to have lost up to 90 percent of these animals during the drought of 1998-2000, in the form of distress sales (e.g., to purchase food).<sup>10</sup> Livestock assets, overall, run at around 60 percent of pre-drought levels, but show signs of recovery.<sup>11</sup> Even post-drought, around 70 percent of settled farmers possess cattle.<sup>12</sup>

Nomads adopt varying degrees of mobility to maximise productivity.<sup>13</sup> The resulting norms are different from those adopted by settled livestock farmers. Issues of control over pastureland and shifting official positions as to what constitutes pasture and how it should be owned or used will emerge as critical issues in this paper, particularly as they intersect with inter-ethnic land concerns. At present, conflict most visibly (and sometimes violently) erupts on summer pastures in the central Hazarajat zone of the country between the Pashtun *Kuchi* and settled farmers. This is a dispute steeped in history and freshly reactivated through Taliban manipulation.

<sup>7</sup> GoA 1978.

<sup>8</sup> In 1978 wheat was by far and away the dominant crop grown [GoA 1978] and remains so today. This last season it absorbed 80 percent of the farmed area, followed by maize (8 percent), barley (6 percent) and rice (4 percent). These crops covered 2.2 million ha., bringing this year's crop almost back to pre-drought levels of 1998 [Maletta 2002].

<sup>9</sup> FAO/WFP 2002.

<sup>10</sup> Maletta op. cit., de Weijer op. cit.

<sup>11</sup> FAO/WFP op. cit.

<sup>12</sup> And 64 percent possess poultry, 40 percent own sheep and 32 percent own goats [Maletta op. cit.].

<sup>13</sup> De Weijer 2002 groups pastoralists as nomadic, semi-nomadic, semi-sedentary and sedentary. Glatzer 1981 demonstrated that (re-) nomadisation in times of need may be as important as sedentisation.

3. Owning farmland is not on its own a sufficient basis for arable production in acutely dry Afghanistan. Corollary water rights are critical. Although not explored in this paper, water tenure is consistent with patterns of land ownership. In addition, access to improved seed, fertilizer, manure, draught power and labour is critically uneven, driven both by competition over scarce resources and longstanding inequities in Afghan society.<sup>14</sup> Together, these drive high rates of tenancy and sharecropping, land mortgaging and indebtedness.

## LAND RIGHTS DISTRIBUTION

### Many Surveys, Little Useful Data

Information as to how land ownership is distributed in the rural community may be gleaned from a rather large number of surveys that have been conducted in Afghanistan over the last forty or so years. Appendix D brings together the main findings of these surveys. As noted above, much of the data is not reliable or is difficult to compare. Inconsistencies are exacerbated by diverse sample sizes, strong regional differences, differing extents to which rain-fed as well as irrigated land were included in the sample, frequent omission of information on the landless and frequent failure to distinguish between tenants and sharecroppers who own land and those who do not. The notion of “near-landlessness,” where households own some land but not enough on which to survive, is not well developed. In some surveys, ownership of a house plot includes farmers as landowners. In others, it appears to be the case that anyone who borrows, rents or sharecrops land is considered landless, even though they may own a garden and house plot. Proportions of landless accordingly diverge widely.

Up-to-date data is scarce and questionable in its conclusions. A recent study of food crop farming,

for example, seemed to assume all farmers own their land and documented an extraordinarily high mean holding size of 6.7 ha.<sup>15</sup> Very substantial older data is available from the 1960s land mapping and registration process described later, but the information has never been fully analysed, and is now 40 years out of date. Another reliable source was the Agricultural Survey of Afghanistan conducted by the Swedish Committee of Afghanistan (SCA) in 1988/92. This presents an excellent picture of production at the time, but is internally inconsistent in its categorisation of landholding (see Appendix D). The end results are starkly diverse pictures of distribution in which landless may encompass anywhere from zero to 88 percent of farmers.

With such limitations in mind, the following general conclusions on the current pattern of arable land ownership may be drawn (see Appendix D for sources).

- Outright landlessness is a very real feature of Afghan rural livelihoods, though it cannot be stated whether the proportion is rising or falling. Ballpark conclusions from different clusters of surveys suggest that the landless may have numbered around 43 percent in the 1960s, around 35 percent in the 1970s, around 18-30 percent in the 1980s and around 30 percent in the 1990s. No data for the present is available. However exact or inexact in figures, it is clear that a significant body of people do not own farmland and yet provide an important part of overall production. Most are in the farming sector as workers, tenants or sharecroppers, with variable levels of remuneration or crop shares. While data on cash or in-kind remuneration is not available, the historical value of compensation to landless farmers shows that crop share payments have been often worth less than

Though a large number of surveys on land holding have been conducted since the 1960s, the results do not easily compare because of the different ways ownership has been assessed.

<sup>14</sup> It would be churlish not to note Dupree’s much quoted simple analysis, that basically, agricultural production in Afghanistan “involves five elements: land, water, seed, animal or mechanical power, and human labour. Theoretically whoever contributes one of the elements receives one-fifth of the resulting crop” [1979].

<sup>15</sup> Maletta op. cit. This figure, it is noted, was not used in the final report for the study (FAO/WFP 2002). Remedy may be forthcoming with the 1,885 sample of the WFP Vulnerability and Analysis Mapping (VAM) study, data that was not available for this study.

the value of their labour. The proportion of persons living by sharecropping is particularly significant. Many sharecroppers are among the landless farmers described above, or can be categorised as they near-landless. Across large surveys, sharecroppers represented 22 percent of farmers in 1970, 19 percent in 1978 and 17 percent in 1988 (see Appendix D for sources). Findings from the 1988/89 Survey of Agriculture suggested a rise in the number of people sharecropping.<sup>16</sup> This is a trend that researchers, such as Clarke & Seaman (1998), conclude is continuing, particularly with respect to the north and northeast. At the same time, both anecdotal and survey findings suggest that in some areas landowners are decreasingly willing to invest in sharecropping arrangements, preferring cash rent.<sup>17</sup> Historically, outright land renting has been less common than sharecropping (see Appendix D for figures).

- Although the range of holding sizes is much narrower than in many states (e.g. Iran before the White Revolution of the 1960s or present-day India), ownership is highly skewed. Minorities at the upper end have traditionally owned disproportionate areas of total land. As the record of survey findings in Appendix D shows, this has ranged from 2.2 percent of farmers owning 42 percent of the land in 1967, to 6 percent owning 10 percent of the land in 1978, to 16 percent owning 60 percent of the land in 1997 and 2.2 percent owning nearly 19 percent of the total area in 2002.
- Provincial and even district differences are so strong that national averages such as above may be meaningless. Within Badakhshan province, for example, the proportion of landless range from 2 percent of households in Shar-i-Buzurg to 59 percent of households in neighbouring Keshem.<sup>18</sup> In

1971, landlords renting out their land constituted only one percent of farmers in Parwan but 23 percent in Nangarhar.<sup>19</sup> Using mainly French sources, Rubin identifies the strongest differences in ownership patterns between the mountainous east and northeast and the fertile plains around Kandahar. While "most" own their own land in the former areas, large landlords, landless, sharecroppers and labourers are "most" common in the latter.<sup>20</sup> The findings of larger scale studies confirm this trend.<sup>21</sup> The extent to which sharecroppers are clients or serfs also varies by region. In the north, for example, landlordism is frequently described as a form of ethnic rule over conquered non-Pashtun populations, whereas around Kandahar client groups tend to be people who have sought refuge in the area and are generally of the same tribe.

- The determination of mean farm size at a national level also has limited meaning, illustrated by the fact that three large national sample studies have found quite different results. In 1978, the government estimated an overall average holding was 3.5 ha, based on a mapped survey of more than 500,000 holdings. In 1988, a survey conducted by the Swedish Committee for Afghanistan of 30,000 families produced a national average of 5 ha. The UN's Food and Agriculture Organisation (FAO) survey of 5,000 farms in 2002, (the least reliable on matters of ownership), gives a national average arable holding of 6.8 ha. Smaller surveys generally offer much smaller averages, most commonly around 1.4 ha. (see Appendix D for details). In these uncertain times in which many people have not yet returned to their homes, are not farming to previous levels, or are borrowing land of others, it would be premature to conclude that landholdings are increasing in size.<sup>22</sup>

<sup>16</sup> SCA passim.

<sup>17</sup> This is partly because of less certainty in a harvest or share being delivered, partly because they are themselves less able to provide loans for inputs and in need of cash themselves, partly because of insecurity and partly because of changing relations generally in the community. Wardak is said to be such a case [pers. comm. Provincial Agricultural Department].

<sup>18</sup> SMU 2001.

<sup>19</sup> GoA 1971.

<sup>20</sup> Rubin 1996.

<sup>21</sup> For example, GoA 1978, SCA passim.

<sup>22</sup> It should be noted for example that even in 1988, the Swedish survey found that cultivation of rain-fed areas in particular had steeply declined by some 29 percent as a result of abandonment or inadequacy of farm power [SCA 1988]. A reduction in irrigated area was also apparent mainly due to destruction of irrigation systems. Even more destruction of assets and irrigation occurred in the 1990s. The effect is seen in the FAO's finding that only one third of farmland was cropped in 2001-2002 [Maletta op cit.].



- What is clear, however, is the correlation of farm size with overall wealth of the household. This may be demonstrated in a uniformly high correlation of water rights with land rights, and with land area owned with livestock units owned and farm tools owned.<sup>23</sup> Allen describes the inequities thus for a village in Wardak:

"In general ... the more land there is available, the more water there is available, the higher the per-hectare yield and the larger the herd of animals, the higher the agricultural income; the higher the agricultural income, the wider the range of other income sources, the more that is earned from these, the more that is spent on everything, the more families there are in the house, the more literate the householder and the greater their educational expectations."<sup>24</sup>

Much earlier, Whiting and Hughes had confirmed the equally predictable correlation of land size with power in the community:

"Landlords tended to be more advantaged on all variables both economic and non-economic... they were two and half times more influential in decision making than owner-operators and nearly five times more influential than sharecroppers."<sup>25</sup>

## LAND HOLDING NORMS

### Few Owners, Many Tenants

The meaning of land ownership varies from country to country. In Afghanistan, private land ownership



Photo courtesy of FAO

implies full ownership of the soil (but not the minerals found in or under the soil) and all that lies upon it. This is a form of tenure that writers have compared to the English concept of "fee simple" or "freehold."<sup>26</sup> As elaborated in Chapter Two, while policies have sometimes restricted the amount of farmland that may be owned by an individual farmer, no conditions to ownership appear to apply, save erratically imposed conditions requiring new landowners to build on the plot or start farming within a specified period.<sup>27</sup> Part-ownership or shared ownership also exists at household, clan and community levels, with respect to both arable and non-arable pastureland. The civil code provides for land leases, but formal leases seem rare (and apart from a mention of "leasing" in land laws, there does not appear to be any statutory framework for this).<sup>28</sup> Although no land ownership is implied, tenancy, in the form of renting, crop-sharing and/or mortgaging, is such an important aspect of rural land access in Afghanistan that "tenancy" is often described as a dominant "landholding" norm. The distinction between owning land and holding land (occupying and using it) will be made clear here.

<sup>23</sup> See for example, SCA passim.

<sup>24</sup> Allen 1999.

<sup>25</sup> Whiting & Hughes 1971.

<sup>26</sup> Strictly speaking, this is not the case, especially given that English freehold does not include ownership of the soil, but tenants conventionally behave as if this is so, especially as they possess all the rights to use the estate.

<sup>27</sup> Development conditions are a fairly routine imposition in agrarian societies to help limit land hoarding and speculation in conditions of land shortage.

<sup>28</sup> A legal adviser to the Ministry of Justice observed that the very notion of European law leasehold is alien in Afghanistan. Shopkeepers paying rent to building landlords for example, refuse to leave the premises on the grounds that they have been paying rent; i.e. they treat rent payment as more or less part-payment toward property ownership instead of a right to use the premises only. The shop keepers, in turn, have difficulty evicting sub-tenants who make payments to them.

## Acquisition and Transfer

Land is acquired predominately through inheritance. Land is also frequently gifted (mainly to heirs prior to the owner's death). Land purchase is fully permissible, provided for in customary, religious/civil and state law, and is widely practised. The urban market in land, such as in Kabul, is highly active, particularly at present with an influx of foreigners looking for properties to rent. Increases in property prices are steep, to the extent that officials have complained that ordinary urban dwellers are now unable to afford housing [see Appendix I]. There is also anecdotal evidence that peri-urban villagers are being offered incentives to sell for the construction of urban houses. It is unclear how far this activity is mirrored in farmland markets. The suggestion that the market is vibrant may be detected in the routine nature of land sales, complaints of high and still rising prices and corollary complaints of there not being any land to buy in rural areas.<sup>29</sup> The fact that a main task of district and provincial judges is the endorsement of land sales and purchases,<sup>30</sup> and that 56 percent of land disputes relate to sales and purchases, supports this impression (see Appendix E).

## Tenure Uncertainty

The most striking aspect of rural Afghan tenure however is the high degree of "uncertainty" in land ownership. This occurs prominently in the sharecropping sector, which has been noted above as very substantial in terms of proportions of rural families involved. Often, farmers take up sharecropping as a corollary to mortgaging their land to the lender. This produces a complicated picture in which it is often difficult to identify the relationship between the parties involved as being either that of creditor/debtor or

owner/sharecropper. With respect to mortgaging, there is inconsistency in the literature and probably also in practice in identifying the rights of the borrower. Sometimes the borrower (mortgagor) is referred to as the owner and sometimes the lender (mortgagee) is referred to as the owner. Sometimes the lender indeed behaves as the new owner, even though the borrower continues to repay the loan. On giving the loan, the lender may take over the property outright on a temporary basis, rather than reserving this right to be activated only when the borrower defaults in repaying the loan. Despite being discouraged in civil/Shariat law, foreclosure is routinely practised, that is, direct appropriation of the property when a loan is not paid. There is no requirement to force the sale of the property and retrieve only the outstanding debt. Therefore, the creditor

often gains a property of much higher value than the value of the loan originally made to the mortgagor. This injustice is doubled where the debtor has already repaid some of the loan in the form of labour and crops. While under *Shariat* and civil code, creditors may not easily sell the land appropriated on to another buyer, they are in a strong practical position to do so.

Most of those who mortgage their land have very small farms.<sup>31</sup> Often interest on loans is paid in cash, along with providing a share of the crop and various tribute payments or services to the lender.<sup>32</sup> The debtor/mortgagor also provides the labour for production. Both labour and the value of the crop share have been historically undervalued and lead the borrower frequently into deeper and deeper debt in order to sustain farming.

Sharecropping is easier to understand where the sharecropper is already a landless person. There is an assumption in many of the surveys described

Indebtedness, sharecropping and land mortgaging are closely related phenomena in rural Afghanistan.

<sup>29</sup> In the few villages visited during this short review, the high price of land was a voiced complaint. In Pingrom village in Logar province, prices were said to have risen from 300,000 to one million Pakistani Rupees per *jerib* since 1999. The price rise in Bemoskh in Jaghato district in Ghazni was higher.

<sup>30</sup> Pers comm. Judge of Chaharikar Provincial Court.

<sup>31</sup> "Wealthy" farmers may also mortgage part of their land to raise cash. This review encountered one such case in Qalai village of Charkh district, in Logar province, where an elderly large landholder had just mortgaged one-tenth of his land for 500,000 Pakistani Rupees in order to buy a car for his third wife (a condition of marrying him).

<sup>32</sup> Klijn op cit., for example describes the wide range of household and related service tasks (such as carrying water, preparing food, collecting firewood, cleaning ditches, repairing roads) performed by clients and sharecroppers to those whose land they use or to whom they are in debt.

in Appendix D that sharecroppers are automatically landless. This is almost certainly the majority case. However, there are cases where a farmer owns a small plot that is insufficient for his livelihood and sharecrops additional land owned by others. Those who pledge or mortgage what land they have may also be considered as landowners, although oftentimes, creditors consider themselves to be the owner of the mortgaged land until such time as the debt is fully paid.

Most of the literature focuses on the proportion of crop paid to the creditor or to the owner, depending upon the relationship. Historically, and still today, the proportion rises with the number of types of assistance provided; cash, seeds, oxen, plough, fertilizer, etc. Repayment may constitute as much as four-fifths of the output where the owner has supplied equipment, animals and seed grain. In Balkh province, for example landowners in rain-fed areas usually provide all the inputs (seed, fertiliser) and farm power (oxen or tractor). The sharecropper contributes his labour and keeps only one-fifth of the crop. On the other hand, in irrigated areas, if the sharecropper provides one fifth of the fertiliser, he receives one-fifth of the crop. Without fertilizer he receives only one-sixth. When the sharecropper provides oxen and the landowner provides seed and fertilizer, the sharecropper keeps only one-third of the crop. Only if the sharecropper provides the oxen and most of the seed and fertilizer will he be permitted to retain 50 percent of the crop.<sup>33</sup> Again, the value of the crop is generally undervalued and the costs of labour often excluded so that the sharecropper is usually disadvantaged and will rarely be in a position to purchase the land and become independent.

One report claims that not only have people mortgaged their land, sold their jewellery, household goods and even sold their clothes, some have sold their children "to keep themselves out of debtors' prison."

The level of borrowing for farming is very high. In 1963-64, the Ministry of Agriculture reported that 45 percent of farmers were borrowing money and paying an average of 33 percent interest annually.<sup>34</sup> During the 1960s and 1970s, the Agricultural Development Bank of Afghanistan was very active in lending money with land as collateral. But, as with many banks, they found it difficult to collect on land when borrowers defaulted, with sales of land obstructed.<sup>35</sup> Informal borrowing remains dominant. In Faryab in 2001, 50 percent of farmers were borrowing money or inputs to farm.<sup>36</sup> Sometimes most of the rural population is in debt to one degree or another, and often to the same few persons in the community. Shopkeepers are a key source<sup>37</sup> along with landlords. Sample surveys in Paktya and Bagdhis in 2000 showed that, aside from farm-related borrowing, 47 percent and 70 percent of the population, respectively, were borrowing money, mainly for food.<sup>38</sup> While shopkeepers may not charge interest, they raised prices to cover inflation prior to repayment and to earn interest. Poorer households experience more difficulties in securing loans.<sup>39</sup>

A survey in Hilmand found that current borrowing in opium production areas was applied to social needs (food, clothes, marriage and medical treatment) rather than productive activities (fertilizer, seed, hired labour and investment).<sup>40</sup> Nearly 30

percent of producers were landless sharecroppers, receiving a small share of the profits of the crop from landlords and not enough to purchase land themselves.

There are signs that indebtedness is increasing, or is at least widespread at this time. In Zebak district in Badakhshan, the Strategic Monitoring Unit (SMU - now the AREU) reported in 2001 that

<sup>33</sup> SCA 1992.

<sup>34</sup> GoA 1978. Unfortunately, the data does not show whether this is formal bank borrowing or informal sector borrowing, such as farmer to farmer.

<sup>35</sup> Nathan & Berger op cit.

<sup>36</sup> Pain 2001.

<sup>37</sup> Fifty-nine percent of all loans in Badghis, but only 21 percent in Paktya [Allen op. cit.].

<sup>38</sup> Allen op. cit.

<sup>39</sup> Wealthier households in Badghis borrow almost as often from friends (33 percent) as from relatives (25 percent) and shopkeepers (42 percent), while poor households rarely borrow from friends (4 percent) who are probably equally poor [Allen op. cit.]. Loans from relatives may be a form of charity (*khirat*) and interest free. Although not permitted in Islam, loans with fixed interest rates are very common (*qarz-e-soud*).

<sup>40</sup> ACBAR 2000.

Photo courtesy of UNHCR



mortgaged their land, sold their jewellery, household goods and even sold their clothes, some have sold their children "to keep themselves out of debtors' prison."<sup>44</sup>

### The Legal Framework for Landholding

Like most countries, land rights arise from more than one legal regime. In Afghanistan these include customary law [*rawaj*] Islamic law [*Shariat*], civil law, state law and constitutional law.

four percent of households owned 95 percent of the land area, and that the vast majority of farmers are tenants, workers or sharecroppers, often on land that they originally owned. Most had mortgaged their land and were unable to get out of debt.<sup>41</sup> Although less pronounced, the trend is similar throughout the province.

"As there are few opportunities to earn money, even land temporarily mortgaged tends to become a permanent sale. The number of landless is therefore growing. This process has been exacerbated by the drought, which has increased the tendency to sell the land and to use the money for securing food. If forced to sell, landowners prefer to lose their rain-fed lands rather than irrigated ones, both because they are less productive and because strong ownership documents are often not in existence for these lands. Most rain-fed lands were former pastures, and the right to cultivate them has, at times, been disputed, with money collected as fines for cultivating pasture."<sup>42</sup>

As observed, drought increases these disparities.<sup>43</sup> One report claims that not only have people

### Islamic and Civil Law

In practice, *Shariat* (of the *Hanafi* school)<sup>45</sup> is largely embodied in civil law, or specifically, in the Civil Code.<sup>46</sup> This is a volume comprising a series of books and chapters of selected Islamic jurisprudence compiled during the First Republic in the 1970s. It remains the main handbook of all courts (along with a similarly compiled Penal Code). The Civil Code is comprised of 2,416 articles. As many as 1,000 of these articles are directly relevant to land matters. These range from guidance on the handling of contracts and mortgages, to rights of possession, severing of joint rights, inheritance and procedures for purchase and sale. Leasing and renting is also addressed. In content, the provisions are largely common sense. Box 1 provides sample of these articles.

The Civil Code does not completely replace *Shariat*. Reference to original doctrines upon which the code was based is considered necessary from time to time. Much use of this was made by the Taliban, which often built state law directly

<sup>41</sup> SMU 2001 op. cit.

<sup>42</sup> SMU op. cit.

<sup>43</sup> Commented upon by most authors in recent years; see Lautze et al. 2002, Pain & Lautze 2002, WFP 2000, Allen op. cit., Clarke & Seaman 1998, Asian Development Bank 2002, GoA 2002c, Pain & Goodhand (forthcoming).

<sup>44</sup> Lautze et al. 2002.

<sup>45</sup> *Hanafi* jurisprudence (of the *Sunni* sect of Islam) is one of four elaborated doctrines of legal interpretation, each available in a series of historical "books." The other three schools are *Maliki*, *Hanabali* and *Shafi'i*.

<sup>46</sup> The Civil Code of Afghanistan is a compilation of a host of books of Islamic law that have been written over the centuries, which frequently overlapped by subject and were contradictory in some of their directives. The effort it took to harmonise these laws was immense.

## Box 1: Examples of Land Provisions in The Civil Law, 1974

Article 1416: The tenant is bound to be as conscientious in farming and preserving the crops as he would be with regard to his own property. The tenant is responsible for damage to the land during the period of use, except when he proves that he has exerted the effort of a normal person in protection and preservation.

Article 1430: Whenever the tenancy contract is repealed or considered null, the crops shall belong to the person who has provided seeds, and the opposite party shall be entitled to rent in kind except when it is otherwise agreed upon.

Article 2000: The right of inheritance does not exist between Muslim and non-Muslim but non-Muslims may inherit from one another.

Article 2008: One daughter shall be entitled to half of the patrimony; two or more shall be entitled to two thirds.

Article 2198: In case new land comes into being from over-flooding of the river, the new land shall be considered property of the state.

Article 2268: Where a person loses the possession of real estate, he can demand its return in one year after the loss of possession. In cases where lack of possession has happened secretly, the year shall start from the day of discovery of lack of possession.

Source: The Civil Code

from review of *Shariat*.<sup>47</sup> The Civil Code rules, however, that religious jurisprudence may not be applied when the issue in question is covered in the Code. Only where there is no provision in the civil law, then "the court shall issue a verdict in accordance with the fundamental principles of *Hanafi* jurisprudence of Islamic *Shariat* to secure justice in the best possible way."<sup>48</sup>

### Customary Law

How far the Civil Code embraces customary law is moot. In many respects, *Shariat* and custom conjoin. In others, *Shariat* departs. This is the case for example with respect to *Shariat* rejection of usury (receiving interest on loans), with respect to women's land rights and norms relating to commonage – all areas where what is customary strongly dominates. The Civil Code itself provides for custom to be considered. "In regard to rights

of possession and ownership and other objective rights, the law of the locality shall be applicable where the property is located..." [Article 26]. Defining the law of the locality is generally up to those affected, given that customary law as a whole remains unwritten and various in the fixity of its principles. *Pashtunwali*, or Pashtun customary law, tends to be precise and, to an extent, institutionalised.

### State Law

The status of civil law with respect to state law is also clear, though with a less stable history.<sup>49</sup> Civil and *Shariat* law are to be applied only where the subject is not covered by state law. State law (or statutory law, or national law) comprises both supreme law - national constitutions - and sector law, such as pertaining to land, agriculture, environmental management, housing, taxation

<sup>47</sup> Decrees issued by Mullah Omar during the 1998-2001 period were often prefaced with a note about how intensively scholars of religious jurisprudence had been consulted. Rashid (2000) reminds us not to confuse the devoutness of the Taliban with Islamic scholarship of which they allegedly knew little more than what they learned at the primary and secondary school-level madrassa.

<sup>48</sup> Article One.

<sup>49</sup> For example, the 1923 Constitution ambivalently ruled that litigation would be adjudicated "with the principles of *Shariat* and the general Civil and Criminal Courts" [Article 21], and only slightly modified under pressure in 1925. The 1931 Constitution only mentioned *Shariat* [Articles 87-88]. The 1964 Constitution ruled that state law would have precedence where provisions existed [Article 102], sustained in Daoud's Constitution of 1977 [Article 99] and in a modified form in the Constitutions of 1979, 1980, 1987 and 1990 [Article 112]. In contrast, the Taliban ruled that only *Shariat* would apply.

and investment legislation. These statutes ("qanoon" or "canun"), which are also known as acts when passed by elected parliaments, have largely been promulgated by kings and presidents as decrees or edicts.<sup>50</sup>

Afghanistan law has no substantive body of received law from foreign countries, such as the case with ex-colonial states, but Afghan state law has much in common with European law.

The development of statutory law is integral to the making of a state. Given debate as to the origins of the modern Afghanistan state (most commonly fixed as around 1880),<sup>51</sup> it is interesting to note that state laws go as far back as Ahmad Shah's Empire of the 18th century, when the foundation of today's court system was instituted.<sup>52</sup> Abdur Rahman, the founder of the modern state who ruled from 1880-1901, developed the system further and produced a Code of Procedure for the courts. His son, Habibullah, who reigned from 1901-1919, consolidated the system. It was under his regime that the statutes known today in Afghanistan began to appear.<sup>53</sup> Habibullah's successor Amanullah, who was king from 1919-1929 and a prolific lawmaker, produced a Guide Book for Judges. Afghanistan law has no substantive body of received law from foreign countries (such as the case with ex-colonial states), but the form and treatment of Afghan national law has much in common with European law. This stems from the assistance given to King Amanullah by French and Turkish jurists in the drafting of Afghanistan's first constitution in 1923, and the more than 63 statutes promulgated by Amanullah during the 1920s (the first of which typically concerned the collection of taxes).

Passage of these laws was through ratification by a council of ministers and approval by the king followed

Rather than sustaining existing laws, new regimes have tended to annul those of the previous regime and to make new laws, but in a very uneven manner.

by a public announcement of the new law. This procedure is more or less followed today. Prior to 1963, laws were announced publicly and published in pamphlet form. Records of these announcements and pamphlets are,

unfortunately, incomplete. A more orderly official gazette system was established in 1963, which has been maintained; issue 800 is about to be published. Each issue contains a varying number of decrees, amendments to decrees or regulations issued under a decree, though it is often difficult to distinguish between the three.<sup>54</sup>

#### The remaking of state laws

Frequently changing regimes in Afghanistan this last century has had a confusing effect upon formal state law. Rather than sustaining existing laws, new regimes have tended to annul those of the previous regime and to make new laws, but in a very uneven manner. New laws have rarely simply been reissued under the name of the new administration. Usually some changes are made.<sup>55</sup> These may be minor or quite significant, such as in regulating the amount of permitted farmland each owner may hold discussed in the following chapter. In addition, the extent to which the laws of the previous regime are repealed in practice has been uneven.

Appendix F lists 60 or so different land laws and key amendments to laws identified. The content of land laws is, in fact, quite limited; most refer to matters of land survey and registration, land distribution, land based taxation, acquisition and sale of lands, settlement and cooperatives, and in later years, laws relating to the

<sup>50</sup> "Firman," the exception being the parliament of King Zahir Shah from 1964-1973.

<sup>51</sup> See Dupree 1980, Olesen 1995 and Christy 1998 for different views.

<sup>52</sup> See Christy 1998.

<sup>53</sup> Known as "nizamnamah." Subjects included a Statute Relating to Garments, a Statute on Educational Affairs, a Statute Relating to Identity Cards.

<sup>54</sup> It is therefore unclear, for example, how many of the Dari laws listed in Appendix F are original decrees or additions or changes to decrees. This may be determined only by reading their substance, which has not been possible.

<sup>55</sup> For example, Order No. 237 dated 24.2.1367 of the Afghan President Concerning The Cadastral Survey published in Official Gazette Serial No. 674 in 1367 (1988) is a re-issue of the earlier Survey law No. 346 dated 31.6.1355 (1976), issued by Daoud. Daoud's law, in turn, repealed the 1965 law on Survey and Statistics but kept most of its clauses. Gul Ahmad Madadzai, a lawyer with the current government, estimates that the total change to land laws issued since the 1930s may not exceed substantive changes to more than five percent of their articles.

return of properties to refugees. Significant omissions in state laws relate to leasing, mortgaging and regularisation of squatter occupation in towns and systems of land tenure administration.

### Constitutional Law

As supreme law, constitutions have had something to say on land rights.<sup>56</sup> Appendix G lists the relevant clauses. The range of topics on land is limited, prominently addressing the right of the state to appropriate property, the protection of private rights, the right to travel and settle freely in the country and the definition of the rights of foreigners to land in Afghanistan. These are topics common to most modern national constitutions; they exhibit the clear origins of the first constitution as borrowed from European law. A less typical article concerns the control of usury with probable intentions to abolish foreclosure.<sup>57</sup>

The most significant land matter changes across the eight formal constitutions have related to shifts in the meaning of "government land" and the extent to which the state may appropriate private land. From the outset, the 1923 Constitution adopted the European (and indeed, now worldwide) habit of declaring the protection of private property in one breath, then in the next, circumscribing this declaration by reserving the right of the state to compulsorily acquire land in the "public interest." In 1923, the duty of the state to pay for this land was declared. Not surprisingly, alterations in the terms of this clause appeared with the land reform movements



Photo courtesy of Pippa Bradford/WFP

described in the next chapter, which relieved the state of any obligation to compensate owners, an obligation not restored until 1987.<sup>58</sup>

Integral to the above have been significant changes in the meaning of "public interest." This term has been both precisely defined as, "the construction of dams, government offices and military installations," and more loosely defined as, "all developments that benefit the public in general."<sup>59</sup>

The latter has left a characteristic loophole for government to determine what was good for the people. Presidents Daoud (1973-78) and especially Taraki, Amin and Karmal (1979-86) were to make it clear that redistribution of private property, rather than protection of private property, was "in the public interest."

## LAND CLASSES

### Public vs. Private Property

Broadly, landowners in Afghanistan may be divided into four groups: the state, the private person

<sup>56</sup> Arguably, constitution making has an unusually long history in Afghanistan through the declamations made by gatherings of representatives (*loya jirgas*). Certainly the decisions made during these gatherings may be held as core constitutional processes. Olesen (1995) traces *jirgas* back 5,000 years to the Bokhdi Civilisation. The modern constitution-making process (*mashrootiat*), of course, has its origins in Amanullah's reign in his introduction of the first national constitution (1923).

<sup>57</sup> The 1964 Constitution hinted that laws would limit private money lending that dispossessed debtors [Article 26]. This article was elaborated by the subsequent Constitution of 1977 [Article 41] and then abandoned in the revolutionary Constitution of 1980 after informal money lending had been banned (1978) and lending declared the sole prerogative of state [Article 19].

<sup>58</sup> Changes to the classical protection of property clauses began with the First Republican Constitution of President Daoud in 1977, where he reserved the right "to make changes in the interests of the majority" [Article 7], "to eliminate exploitation" [Article 8] and "to place limits on agricultural property" [Article 14]. Babrak Karmal, following close on the heels of Taraki and Amin, in whose 1979 regime the radical land reforms were launched, took this a step further and removed any duty of the state to compensate owners whose land was taken [1980 Article 22]. Najibullah restored a commitment to pay for appropriated land in 1987.

<sup>59</sup> [Article 2.] This was not in the 1923 or 1931 Constitutions, but expressed in the Law for Appropriation of Property for the Public Welfare in Afghanistan, 1935.

## Box 2: The Meeting of Public and Private Lands:

## Upland Pasture/Rain-Fed Lands

"Our land in the valley is divided up among the families. Our upland rain-fed land is not privately owned. Anyone can help himself to as much land as they can plough if the rain comes. Most people take around 10-15 jeribs. These are people who have oxen. Each of the four villages has its own part of the uplands for cultivation. Everyone knows the boundaries. We also use those areas for grazing. Villages go with the animals in June-July. Other times the Kuchi are there. There is much fighting with the Kuchi. It is always about where their animals go and the damage they cause to our crops. They are the same Kuchi coming every year but they come at different times, not all together, just some families together. The agreement in the past was that if they damage the crops, we get some animals. Now the Kuchi have no animals, but they have still come to the area to keep their rights activated. They say this is their pasture. That land is registered as government land; everything above the ridge always belongs to government."

Source: Elders of Pingrom village, Charkh district, Logar province

(including households, partnerships and other legal persons), the public body in general and the local public, or more precisely, communities of persons, such as the members of a clan or village. Public lands have often been defined by their perceived lack of ownership. There is much room for contestation as to how far "un-owned" lands are in reality un-owned, and by whose terms. State capture of such lands during modernisation has been a feature of social transformation all around the world, and is no less the case in Afghanistan, focusing in particular on the status of pastureland. Related is the question as to where national public property extends and where local public property, such as commons, begins. This too has been a source of conflict in Afghanistan, particularly among settled and pastoral peoples. Additional uncertainty surrounds the distinction between land over which the state is an undisputed owner, and land over which it is only trustee and/or administrator on behalf of the real owners, the members of the nation. Many of these complexities are embodied in the concept of government land, a construct that arises out of state-making. Given the chequered history of state formation in Afghanistan this last century, it is not surprising that the definition of what constitutes government land has altered and still lacks clarity. The constitutions of 1923, 1931 and 1964 did not define government land. Legal definition was first provided through the

1965 Land Survey and Statistics Law. The description did not include either forests or pastures as government property. Government land was only to include land registered as belonging to government and wastelands that were not registered as belonging to anyone else. President Daoud's 1977 Constitution was more specific and added forests to the definition, but continued to exclude mention of pastures. These were finally added to the Constitution of 1987.<sup>60</sup> This meant that irrespective of customary or even documented private ownership, these lands entered the state domain. Subsequent abandonment of these claims this last decade (and the Constitution of 1992 in particular),<sup>61</sup> and current discussions about coming up with workable definitions of both government and public land, described later, need to be seen against this backdrop.

In the meantime, there is a great deal of shifting between classes of public and private land. A clear example is Kabul City, where the municipality now has less than 1000 ha. for private housing development. This is out of some 16,830 ha. of land it designated in its master plan for private housing development (see Appendix H). Meanwhile, the municipality retains around 13,000 ha. for roads, services, graveyards, recreation, water, green belts etc. This is known as "public

<sup>60</sup> "Mineral resources, forests, pastures and other natural wealth, basic energy resources, historical relics, banks, insurance institutions, means of communication, radio, television, major dams, ports (sic), main means of production in heavy industry, transport ways and air transport" [Article 20, Constitution 1987].

<sup>61</sup> Article 67 used the term "unclaimed pasture" to describe state land.



### Box 3: Cultivating the Pastures In Altamur, Logar

On a Friday in October 2002, 28 clan heads from the village of Altamur in Logar province met in a tent in the middle of dry lands one mile from the village. Their purpose was to distribute 12,000 jeribs (2,400 ha.) of pasture/rain-fed land. This was land that had been used in the past for pasture and intermittent cultivation. Kuchi pastoralists also routinely used the area. The people of Altamur are semi-nomadic Pashtuns themselves. They were given the area in the 1880s as part of Abdur Rahman's campaign to colonise Hazarajat. The village leader still holds the land grant document. Most people evacuated Altamur around 1980 and went to Pakistan. They began returning five years ago and have set about reclaiming and re-cultivating their lands. They now number 1,500 families.

In 2001, the Altamur farmers received assistance from the Ministry of Agriculture to survey and distribute the rain-fed pasture. Many have returned with the wealth needed to sink deep boreholes in the land and convert it to irrigated agriculture. A team comprised of representatives from Agriculture, Irrigation and Power, the Law Department of Ministry of Justice and the Court Cadastral Survey, visited the area and subdivided the land into 28 plots of between 160 -182 ha. Each plot will, in turn, be subdivided among families. This could yield an average irrigated farm of 1.6 ha., but it is not clear that such parcels will be equal. Several questions remain unanswered; 1) the likelihood of securing water through deep wells and if so, the impact this will have on the local water table; 2) how the pasture rights of Kuchi, also well established in the area, will be disposed of; 3) whether distribution of the land includes families outside of the dominant 28 clans, and in particular, how far the original Hazara occupants of the area have been involved in this government assisted distribution of local resources.

Source: Field visit to Logar province

land," held by itself on behalf of the population, a right given it by the national government.

Customarily-owned rangeland, brought under irrigation and turned into government land for disposal as private properties, is another common example. Such a case is the 30,000 ha. estate of Nada Jalalabad, held today by the parastatal, Nangarhar Agricultural Development Authority. This is on land once owned customarily by pastoralists and appropriated by government. It is now earmarked for return to private ownership, but probably only on a leasehold basis and is therefore unlikely to be granted to those who consider themselves the original owners.<sup>62</sup>

#### Private Rights in Land

Notions of private property in Afghanistan follow the classical route of defining mainly individual owners of discrete estates in land. In practice, as observed earlier, the individual/individual name - such as a clan or family name - usually conceals either shared ownership by a larger number of individuals (e.g. family members), or

layers of interest in the land, each carrying a different weight (e.g. the rights of a brother, son, wife or daughter). It may be more accurate in rural Afghanistan to refer to private land ownership as occurring at individual, joint, family, clan, village and group levels. Recording of ownership may have the same effect experienced elsewhere of endowing the recorded owner with a stronger right than really intended. How far this is the case is not known.

Customarily joint or shared ownership (*mulk-e-khalisa*) is widely acknowledged. Where the co-owners constitute a whole clan or community, their property may be defined as communal land, though this appears not to have been developed in civil law. This may be because while the property may be used communally, the land is considered owned by one leading family or khan, in turn identified by the name of one man. While residents in the community may assume a right of access to those areas in principle, realising that access may require negotiation and/or payment of tribute in one or other form. This need increases as kinship becomes more remote.

<sup>62</sup> Pers. comm. D. Davis, FAO Jalalabad.

Families that are newcomers, unrelated to the core family, workers or client families appear unable to assume commonage rights.<sup>63</sup>

### Common Property Rights

The above may particularly affect non-farm properties, such as pasture, local open spaces, swamps etc. Description of these as "commons" may be a misnomer. In many regions, these seem to carry little notion of shared or equal rights normally assumed in common property. In some areas, this may be because landlord families do own the entire area. In other cases, the common property rights of poor households may dwindle in practice through lack of use. This could be the

case for example where poorer farmers do not use the commons for grazing, possessing no livestock, or do not have the plough power needed to cultivate uplands, held by the community as being land open to all. Common rights are much more visible in the hands of pastoralists who routinely share rights over pastures.

Defining an area as "local common property" is also difficult where the law defines this kind of land as un-owned public property, or where the state has treated this land as its own, converting this into a class of government land.

Disputes over common property and pasture are legion. In some areas, hardly an upland rangeland

#### Box 4: Facing The Agricultural Squeeze:

##### The Case Of The Niazi *Kuchis*

Seven tents of *Kuchis* spent October 2002 on the rain-fed lands of Bidmoskh village in Hujamari district in Ghazni province. This was not their normal summer grazing area, which was in Wardak, but they had been refused entry to Wardak by the Hazara people living there. This was less problematic for them this year because they lost 1,000 sheep in the drought of 1999-2002, and were left with only 40 sheep and a few donkeys. When prohibited by Hazaras to use their traditional summer grazing land, they pleaded with the village elder of Bidmoskh to allow them to stay on this ridge for two weeks before returning early to their winter grazing area in Kandahar. They know the elder of Bidmoskh from long years of transiting through this area on their way to and from the summer grazing in Jaghatu (also in Ghazni). A number of times, the Bidmoskh elder had been helpful in mediating disputes with settled families when their sheep had damaged crops. The Kuchi group expect to leave him several sheep as a gift.

These seven tents, each containing 3-4 families including relatives, generally remain together throughout the year. In winter they join with some 50-60 other families of the same group or *qawm* on the Kandahar sand plains. No one in this *qawm* cultivates. This *qawm* is known as Niazi, led by Khamran, the descendant of Abdullah Khan. The Niazi *qawm* comprises 300 tents in all, or 1,200 family units. Most of these tents are still in the Jaghatu area, begging assistance from mainly Pashtun occupants of the area. Around 170 tents of the Niazi are still scattered in Jaghatu, and it has been agreed that they should depart as soon as possible to avoid conflicts with settled families. Khamran informs us that *Kuchis* joined together in late 2002 to beg President Karzai to force the Hazaras to allow them to use the summer pastures as they have for many decades, but with no result.

*Kuchi* use of Hazarajat pastures probably does not extend further back than 100 years. Their access to summer pastures was formalised in the 1950s through the issue of land documents to leaders of groups. Each group was allocated a discrete and precisely described summer grazing territory (*hudood*). Because Kuchi themselves drew up the boundaries, upon which these allocations are based, each territory is precisely known and its boundaries respected by other *Kuchi*. *Hudood* were divided by *qawm*. The hudood of the Niazi is bounded on the west by the village of Sarkhai, on the east by Surbib Village, on the south by Momand Village and the north by Paienda Khel Village. Winter areas are known as "sand areas" and are not divided by *Qawm*. This hudood of the Niazi is joined on the west by the hudood of the *Marioni qawm* and on the east by the *Daftani qawm*. The Niazi tend to move first to the summer pasture, followed in 10-15 days by the Marioni, then the *Daftani* people. Intermarriage among these three *qawm* is practised. Today there are 130 separate land documents, each protectively held by the respective group leader. Each provides a general description of the territory allocated.

<sup>63</sup> This was indicated in the villages visited. Also see Klijn op. cit.

Summer *hudoos* have rain-fed farming potential and are increasingly claimed by local villagers as their land. "During Zahir Shah and Daoud's time, farmers were not allowed to cultivate above the top water points, dams and so on. The land above was reserved for *Kuchis*. Now, the Hazaras want to cultivate the uplands too" (Khamran). This is the source of contention.

The elder of Bidmoskh says, "These *Kuchis* are just some who have looked to their Pashtun brothers to help them. We are Pashtun, so we help them. Perhaps 300,000 *Kuchis* have been sent away from Hazarajat this year. Many have been in this area since June or July, but most have now moved to Paktya, even though that is not their normal place. They are being punished for the work of their Kuchi brothers, who were loyal to the Taliban. These were mostly *Kuchis* moving from the east from Jalalabad. The Taliban encouraged them to graze in the Shomali Plains and to take the lands of the *Tajiks* there. They promised the *Kuchis* they would be given the land, so the *Kuchis* helped themselves, letting their camels go in the vineyards. They crushed the houses and their animals destroyed the irrigation systems. Their animals died anyway in the drought. God's vengeance."

According to the Hazaras in the area: "Our land was first taken by the settled Pashtun and now the *Kuchis*. We are fighting to get our land back."

Source: Bidmoskh village and Niazi *Kuchi* camp, Hujamari and Jaghato districts

exists that is not under contested ownership. The main contestation is between seasonal pastoral and settled cultivator interests, both of which have different historical and customary claim. There may also be disputes among members of the settled community itself, which usually has an ethnic dimension, especially where rulers of the past have deliberately given their supporters the land of rebellious peoples. Pashtun relations with Uzbek and Tajiks in the north, and Hazaras in the central zone are cases in point (see Chapter Two). Where administrations have defined pastures with rain-fed cultivation potential as their own, or developed state farms, a further level of conflict may result. Or, government may encourage local occupants to develop such commons through private farming, which has the effect of extinguishing seasonal claims to these same lands. Boxes 3 and 4 provide examples.

### Domestic Land Relations

#### The dynamics of land ownership within the family

may be as complicated. As noted above, while the family as a whole may be considered the owner, rights over the farm may be exercised by a single head of household, or by adult sons borrowing some of the land until they receive it formally in inheritance. Or conversely, tracts of land owned by brothers may be farmed, and in effect "owned" as joint property in order to maximise production. Given that most households comprise more than one male adult, entirely discrete ownership by a male household head is not necessarily the norm.<sup>64</sup>

Women, as a whole, have inferior land rights. This is to such an extent that surveys in Afghanistan, unlike in most countries, rarely note the breakdown of landholding by gender (and nearly as rarely address the role of women in farm labour).<sup>65</sup> In legal terms, constitutional and state law may be interpreted as permitting women to own land, and *Shariat* endorses this through its provisions for widows and daughters to inherit at least some share of land.<sup>66</sup> Customary practice

<sup>64</sup> Most farm households included eight to nine persons during the 1960s-1970s [GoA 1978], eight to 12 persons in 1988-1990 [SCA passim] and 10 to 11 persons today [Maletta op cit.]. While these averages do not suggest dominance of large multi-generational units (known to exist), they do suggest more than two adults in the household at once, involving varying arrangements of (not necessarily equitable) land sharing.

<sup>65</sup> An exception is a report on six areas in Hilmand province, where at least the role of women in farm labour was noted (non-existent in that case, dominated by opium poppy production) [ACBAR 2000]. An evident tendency is to under-record the substantial role of women in orchard and garden weeding and harvesting and especially food processing; pers. comm. Carol le Duc UNHCR. Also see Emadi 2002 and Azarbaijani-Moghaddam 2000.

<sup>66</sup> The Koran instructs its followers that "... a son should have a share equivalent to two daughters." Widows are also provided for. "If the women left behind are more than two, then two-thirds of whatever he [the deceased husband] leaves behind, belong to them" (the division among them is not specified). Where there is only one widow, she will receive half of the property that belonged to her husband. The Civil Code 1974 absorbs these principles; refer Civil Code Book Three, Title One, Chapter Two, Part Two.

permits this to be realised mainly as an exception rather than as a rule. While ownership of land by widows does exist, daughters on the whole surrender their rights to their brothers, particularly when they marry. The objective is less to deprive a sister than to prevent land being lost to another family through her – a time-old concern of land-poor peasant farmers.<sup>67</sup> In day-to-day life, one gender specialist argues, a rightful share to the product of labour is a good deal more important to rural Afghan women than owning the means of production itself. Certain provisions for this are allegedly also provided for in religious law.<sup>68</sup> Religious law also disallows sale of houses or farms without the support of all adult members of the family.<sup>69</sup>

Setting aside the evident subordination of even religious law to customary practice in this sphere, it is of note that at no time during the now long history of support for women's rights in Afghanistan, has women's land rights been a rallying point.<sup>70</sup> This has been reserved, generally, for the promotion of female access to education and work opportunities, a development first officially actively pursued by King Amanullah and his wife, Queen Soraya in the 1920s, and variously taken up since by Prime Minister Daoud during the late 1950s and again with a vengeance by the communist government of 1978-1979.<sup>71</sup>

In the interim, women are slowly beginning to more forcefully activate the rights they possess under religious law. Widows, in particular, are most likely to be at the forefront of this effort. They exist in very large numbers following years



Photo courtesy of Alejandro Chicheri/WFP

of conflict.<sup>72</sup> Some have shown they are not content to accept landlessness.<sup>73</sup> How far they will be supported remains to be seen.<sup>74</sup>

While female-headed households are not necessarily landless, this group represents another body of women learning to live independently.<sup>75</sup> How far they will succeed in securing land also remains to be seen. Many such women now live in urban areas and their main concern is shelter, not farms.

<sup>67</sup> For example, see Agarwal 1994 for India and Ovonji-Odida et al. 2000 for Uganda. Grace 2002 provides a case study among 32 women in one state in India. While 21 stated that they had the right to inherit land, all 32 insisted that this does not occur in practice.

<sup>68</sup> Pers comm. N. Zewari, UNIFEM.

<sup>69</sup> This is a principle that women have frequently fought for but not always obtained; see Ovonji-Odida et al. op cit. for the Uganda case where the impact of new legal prevention of sales without spousal consent showed early signs of indeed reducing damaging sales by male household heads. The author was unable to identify the *Shariat* principle referred to, nor find its reflection in the lengthy Civil Code. But it may exist.

<sup>70</sup> For example, see Emadi's review of gender policies (Emadi 2002).

<sup>71</sup> Refer Emadi 2002.

<sup>72</sup> A recent estimate is that there are currently 50,000 widows in Kabul and two million widows in the country overall [Azarbaijani-Moghaddam op. cit.].

<sup>73</sup> See UNHCR District Profiles 2002c. For example, in Mirawara District in Kandahar, it is recorded that "two widows and one other woman complained about their land being occupied by their husband's cousins."

<sup>74</sup> One provincial court judge observed that "Widows have always come looking for their land," and "Through *Shariat* and civil law, I ensure they get the land due to them" [Charikahar].

<sup>75</sup> Their husbands may be absent for purposes of temporary, seasonal or annual work. Husbands who have several wives, may "have separated the family into smaller units in order to receive more aid" [Azarbaijani-Moghaddam op. cit.]. By no means all female-headed households have enough to live on; a WFP report on Hazarajat reported that in Nawur there were at least 25 female-headed households who were landless, had no means to purchase wheat, sugar or meat and who lived on each other's charity, and by collecting weeds and raising small stock, which they have since lost [WFP 2000].

## TENURE MANAGEMENT

Land ownership does not exist in a vacuum, but is governed (variously poorly or well). Each landholding system has its own system for this administration or management. This section looks briefly at the operation of these systems.

### Evidencing Ownership and Transactions

#### *Customary systems*

A primary function of any tenure regime is to enable landholders to know that their tenure is respected and will be sustained by society. The norms for this tend to be activated when rights are either challenged or transacted. Customary practice in Afghanistan, as in most countries, relies heavily upon being able to call upon neighbours, leaders and elders to verbally testify that a certain plot of land does indeed belong to a certain person. Witnesses are also a crucial element of confirmation that the plot in question has been transferred by gift, inheritance, loan or sale to another.

For many decades now, customary transactions have often been recorded. If a villager wants to have his land ownership evidenced, he may request the village leader, or

if need be the village shura (traditional council), to prepare and witness such a statement. This is frequently carried out when land is subdivided among heirs. The land shares allocated are described, and agreement of all parties signed and witnessed. Payment for services is made to those preparing, witnessing or endorsing the statement. Transfers of land by sale, gift or when placing a farm under mortgage, is also frequently agreed and/or recorded in this manner. An example of such a document (in translation) is given in Box 5.

#### *The civil law system*

Civil law provides similar, if more detailed, guidance. This requires the involvement of judges at district or provincial levels to witness and certify a sale. Other government offices are involved. The seller presents himself to the Ministry of Agriculture's land matters department, the Ministry of Justice's law department or the district or provincial judge. He usually brings an

application letter stating his purpose and giving details of the land to be sold. In addition, he brings a signed statement by the village leader, supporting the requested acquisition, transaction or subdivision of the land.

Customary practice in Afghanistan, as in most countries, relies heavily upon being able to call upon neighbours, leaders and elders to verbally testify that a certain plot of land does indeed belong to a certain person.

#### Box 5: A Customary Land Transfer Document [*qabala urfee*]

This is a translation of a recent document prepared in Charkh villages in Logar province. It related to the sale of land for the development of a communal water channel.

"The seller is F. Mohammed who sells around 1,500 sq. metres (less than one *jerib*) to the community shura [names the members] (6). The plot of land under the *Takhat* channel which is bordered on the west by the storage tank of MH Power, on the east is limited by the road from the south, on the west by the vineyard of the seller and on the north by the common road.

"Invoice against 525,000 Pak Rupees (59 Pak Rupees to one dollar: \$8,898).

"The shura represents these four villages [names the villages], and it is here certified that I have received the full amount of the above-mentioned. The land may be used for any purpose which the buyer wishes. My sons and relatives cannot claim or seek to reclaim this land.

"I sign this in the presence of the following persons: (14 persons signed). I am honest in the above declaration: Date 1.5.1381 (10 August 2002)."

Source: Document provided in Charkh district in Logar province.

If a record of the seller's land ownership already exists, it will be used as the basis of sale. If not, a joint team from the above departments will visit the plot, speak with neighbours and confirm that the proposed plot of land to be sold belongs to the seller as he claims. The team will summon the buyer and agree on a price. Finalisation of the sale depends upon the payment of a tax to the Central Bank of Afghanistan. Once the receipt is handed over to the judge, the team will collect the relevant records already in the court or in the land register (see below). They will also prepare a special form certifying the sale (transfer deed).<sup>76</sup> Box 6 lists the information needed for the preparation of this deed; this prominently includes names, signatures and photos of witnesses and statements from the buyer, seller, inspection committee and/or the judge. A copy of the land document (*qabala-i-sharayee*) will remain with

the judge's office. As a consequence, this office effectively runs as a land registry. Information on changes of ownership are (or supposed to be) reported monthly and quarterly to the governor and to the central court administration (chief justice).

Of course the process is not free, a main disincentive for poorer persons to "legalise" customary transactions, which themselves generally need oiling with gifts. In the first instance, the village leader needs to be paid for writing the supporting letter. This can amount, in some areas, to a surprising 30 percent of the value of transaction,<sup>77</sup> and is rarely less than five percent. Then there are official fees for submitting an application and for receiving the document, (currently a token fee of 20,000 (old) Afghanis or approximately US \$0.44). To speed up the process,

Box 6: Information In A *Shariat* Transfer Deed As Handled By Courts

Date of Issue of Deed	Number of Deed (currently 20,000 "old" Afs)	Number of Deed
<ul style="list-style-type: none"> <li>• Seller's statement</li> <li>• Names and photos of two witnesses with signatures and dates</li> <li>• Team statement on validity of sale</li> </ul>	<ul style="list-style-type: none"> <li>• Description of the property including - registration number if the land was registered</li> <li>• Names of adjoining neighbours</li> <li>• Estimated size in jeribs</li> <li>• Type of land</li> <li>• Fixed infrastructure on land</li> <li>• Other points of description</li> </ul>	<ul style="list-style-type: none"> <li>• Seller's name, residence, ethnicity</li> <li>• Name of seller's father</li> <li>• Name of seller's grandfather</li> <li>• Photo of seller and signature with date</li> <li>• Buyer's name, residence, ethnicity</li> <li>• Name of buyer's father</li> <li>• Name of buyer's grandfather</li> <li>• Photo of buyer with signature and date</li> </ul>
	<ul style="list-style-type: none"> <li>• Judge's comment on validity of sale and signature with date</li> </ul>	<ul style="list-style-type: none"> <li>• Names and photos of two witnesses with signatures and dates</li> </ul>

Source: From documents provided by Judges and offices in Parwan and Logar Provinces.

<sup>76</sup> Judges routinely issue 21 different documents, many of which relate to land matters, such as Document of Proof of Family Ownership, Inheritance Document, Resolution of Dispute Certificate, Power of Attorney, Document of Temporary Ownership, Division of Joint Property, Surrender of Property etc.

<sup>77</sup> Pers. comm. G. Jelani, AIMS.

further incentives may be offered/needed. Getting the right result may also require additional payment. Clerks in the courts generally consider the task of digging out relevant old files worthy of payment. Corruption in the process is considered "routine," "rife," "serious" or "limited," depending upon the personal experience of the farmer.<sup>78</sup> There is also plenty of anecdotal evidence to suggest that some warlords directly abuse the system, ordering judges to produce a favourable result.

### *The statutory system*

Under state law, the same process may be implemented to provide proof of ownership or to record a land transaction. Box 7 lists the documents that may be used as legal proof of ownership. These derive from the current land law, the terms of which in this respect are similar to those listed as long ago as 1965 (in the Survey and Statistics Land Law).

#### Box 7: Documents Evidencing Legal Right of Ownership As Defined By State Law

- Document in accordance with *Shariat* as issued by a court for the purchase, ownership, gift, distribution, exchange of land, surrender letter, correction letter and the document of the final decision of a court based on the issue of an ownership document;
- Purchase document, where the document has been issued by an authorised department and where the land is registered with the tax department;
- Tax payment documents, where the land is recorded in the original book of registration and taxation;
- Water rights documents (*haqaba*), where there is no evidence against their legitimacy and where the related land is registered in the book of ownership and taxation;
- Customary documents (*urfee*) prepared before the 15th of Asad 1354 [1975], where the buyer filled out and filed a declaration form, which was witnessed by neighbouring landowners and submitted to the concerned department before the year 1357 [1978];
- A declaration document will be accepted as valid where, 1) the documents have been destroyed; 2) there is no dispute concerning the ownership of the land; and 3) the purchase and occupation of the land is recognised as valid by the neighbours and the local land office;
- Statutory land documents (*qabala Shariat*) will be recognised where they have been prepared by the appropriate court on completion of the legal registration process and where the ownership is reflected in the Book of Ownership and Taxation;
- In order to make a document legal, it must be sent to the concerned authority after completing the process and the document shown to be registered in the Book of Ownership and Taxation;
- There must be no contrary claim of ownership to the land; and
- A farmer who has no legal document for his land, and whose land is not registered in the ownership and taxation book, may have a legitimate claim to the property recognised if, 1) no-one else claims the land; 2) there are signs of buildings and of farm activity by him; 3) neighbours testify that the land is his; and 3) local state authorities approve his occupation.

Source: Law on Land 2000 (Taliban)

<sup>78</sup> Even during the very short period of this study, there was one case where the judge directly requested considerable payment and another case where the judge specifically asked the applicant to report to him if a single attempt was made to extract more than the official fee from him.

*The land register*

Reference is made in both civil and state law to the Government Books of Ownership and Taxation. These books were prepared from 1966-1975 as a main output of a costly USAID-funded programme to survey, map, register and issue certificates of title for all landholding in Afghanistan. Appendix I provides details on this important initiative. Ultimately only 584,816 holdings and owners were registered, leaving at least another 720,000 other landholdings/owners un-registered. Nonetheless, more than 5,000 books of ownership were produced in triplicate, listing such information as is given in Box 8. Provision of information for taxation purposes was a key objective from the outset; more information relating to the taxable status of the land is provided in subsequent books.

More than 30 years later, the number of landholdings/owners may be expected to have risen. This will have occurred through subdivision of land to heirs, and the expansion of cultivation areas through government or private schemes. Changes in ownership of registered parcels will also have occurred, through intra-family and inter-family transfer and through sale. Given the steady workload of witnessing/formalising sales and other transactions that have occurred since 1978 in the district and provincial

courts, it is likely that a quite large number of changes in ownership are indeed recorded. Some court archives hold hundreds of kilos of paper records. Judges and their staff have become expert at retrieving the right information for the right plot of land when a further transaction is made. Copies of these records have only erratically been sent to the two offices that maintain copies of the Registers of Ownership and Taxation Books: the land matters office of the ministry of agriculture in each province and the cadastre, located in 17 offices around the country. Many records in these offices were destroyed over the last decade.

*Formal land ownership certificates*

Although an early objective of the survey and registration was to issue title deeds, not a single certificate was in fact issued. The 1978 "Saur Revolution" intervened. There had been some confusion prior to this time as to which office should issue the planned certificates. A senior official of the government Geodesy and Cartography Department says that the intention to issue certificates was unofficially abandoned in 1971, around the same time that it was decided to abandon cadastral titling. Instead, registration was to follow a simple inventory system recording owners without map references in an attempt to

It is likely that a quite large number of changes in ownership are indeed recorded. Some court archives hold hundreds of kilos of paper records.

**Box 8: Information on Landholdings/Owners in Books of Ownership and Taxation 1975**

No. of Land Parcel	Classes of Land Owned by Area [ <i>jeribs</i> ]:
Map No. [kept blank after 1971]	I Garden
Total Area of Land Owned [ <i>jeribs</i> ]	II Two Crop Irrigated
Owner's Name	III One Crop Irrigated
Owner's ID Number	IV Irrigated Every Second Year
Father's Name	V Rain-fed Lands
Name of Taxpayer	Non-Agricultural Land by Jeribs
Name of Forefather Who Has Paid Tax	Notes (usually relating to land type)

- Additional Information in "Books of Integrated Land Size and Progressive Taxes"
- Amount of Tax Paid Under Previous System
  - Tax Payment Receipt Number
  - Amount of Progressive Taxes
  - Actual Taxes
  - Tax Free Area
  - The Amount To Be Paid



reduce costs and speed up progress [see Appendix I]. Still, documents that are not land titles in the conventional sense, but that are statements of evidence of ownership at the time of land transaction (deeds) are common. Many owners of houses and apartments in urban areas hold these land deeds.

### *Land grant documents*

In addition, there are a large number of traditional documents and land grant deeds issued by kings that may still be used as a basis for preparation of a court-signed land document. Because land-based taxation was levied at least once during the late 1970s, and probably since, tax receipts may also be used as land documents. Just how many people possess tax receipts, a customary document, a royal grant document or court-based document testifying to land ownership (at time of transfer or otherwise) is not known. Even without these, state law provides for owners to ask neighbours to affirm and witness that the plot in question really does belong to them. It is the carryover of this simple mechanism shared by customary and civil land law into state law that speaks to the relatively integrated nature of some of the systems in the different land management regimes.

### Resolving Disputes

Procedures for resolving land disputes follow similar routes described above. At the local and customary level, disputants seek the aid of a neighbour, a local notable (usually a khan or shopkeeper), the village leader, the village shura or the head of the wider community area (*manteqa*), depending upon the nature and seriousness of the dispute - and the means at their disposal to cover the costs.<sup>79</sup> These mediators may involve others; individuals become known for their negotiation skills or their knowledge of certain types of cases, such as those involving water tenure, pasture or mortgaging problems. Each area follows its own norms, but these broadly pursue similar courses.<sup>80</sup> Disputes that are unable to be resolved in the community tend to end up in the office of the district administrator, who may in turn involve the land officer and law officer. Coercively or otherwise, current warlords make use of existing leadership regimes in the areas they control, as did the Taliban and other regimes before them. Box 9 provides an account of such manipulation by one such commander. Agencies like UNHCR as well as NGOs periodically observe that district actors often are unable to resolve the dispute and return the matter to the community to resolve.<sup>81</sup>

#### Box 9: Resolving Disputes in Khuwaja Omari District in Ghazni Province

"Khuwaja Omari is a new district that I carved out so as to protect it. I am the district administrator (*woluswal* or *hakem*) and I am recognised by the provincial governor in this position. I used to fight with an anti-Sunni group and I took over this area because I did not want other people invading and controlling it. I come from this area. Everybody knows me and supports me. My army is not just Pashtun. I also have Tajiks and Hazaras in my militia. We have 30 villages in this district and 30,000 people. Just in the same way as it has always been, each village sends a representative to our district committee (shura). I am the chairman. We meet every Thursday. All the government officers attend. We do all our planning and we are just waiting for the government to instruct us to start collecting taxes again. We have the books and it will be easy to identify just who owns what and how much they should be taxed. We are ready to start taxing again. People don't mind taxation, the Daoud way, when the more land you have the more tax you pay. In our meetings we often hear cases that villagers brought to us that they can't solve. Often these concern land and water. We use *Shariat* to resolve the conflict. Last week, we had a conflict concerning a fight between an owner of a *karez* and the owner of the land above the *karez*. The owner wanted to construct

<sup>79</sup> Known as the *malik* or *qaryadar*, this person is chosen by the local population but given formal recognition by district and provincial authorities as their representative. In the past and still in the present in many areas, the district *shura* comprise such representatives.

<sup>80</sup> Under *Pashtunwali* (Pashtun customary law), two levels of traditional court operate, involving different levels of "experts" and taking different amounts of time.

<sup>81</sup> Pers. comm. R. Al-Salem UNHCR. Also see WFP 2000.

a new house and he enclosed the land over the *karez* and the *karez* owner is against this. He needed to make a tunnel to get to the *karez* and clean it. We got the owner to shift his plans for a house in order to make a place for the tunnel. The problem couldn't be easily solved at the village level because both are powerful men. We had another conflict a few weeks ago. This was about the closure of access by one village to a route to grazing by another community. That one we also helped to solve." [Mr. Zakir, District Administrator]

A view offered by a respected villager: "This man is a warlord. He has a lot of armed men and missile launchers. But this is a son of the area and he keeps the peace. No one is against him."

Source: Field visit to Ghazni province

### *The courts*

The formal court system operates alongside customary routes. While the system seems accessible and official fees are low, it is most likely to be used by those with institutional strength and/or means. The system comprises a well-established hierarchy of courts at district, municipal, provincial and national levels, headed by appointed judges ultimately reporting to the chief justice of the Supreme Court. While smaller districts may only have one judge, there are four different courts dealing distinctly with civil, criminal, commercial and public security disputes at provincial level. There may be three or more judges for each sector. There are additional, special courts or tribunals that mainly operate in cities and deal with traffic, juvenile, labour, civil servant, tax or military cases. Appeals are handled through the high central court of appeals and the Supreme Court.

Land cases are believed to make up around half of all civil cases; the current sharp rise in these cases has led to the establishment of a Special Circuit Land Disputes Court.

Land cases are dealt with in the civil courts. Most judges are trained only in *Shariat*, particularly those operating in rural areas. There appears to be no system for the accused to receive defence counsel, and generally they defend themselves. With the exception of a single issue of a Law Report in 1976, there is no law reporting and therefore no establishment of precedent or evolution of the law through this route. There appears to be no other official form of outcome reporting. Judges thus escape this important source of scrutiny and public accountability. In

addition to ruling in ways different from his fellow judges, a judge has ample room to make different judgements on similar cases.

Reporting from the courts is slow and probably inaccurate. Land cases are believed to make up around half of all civil cases; the current sharp rise in these cases has led to the establishment of a Special Circuit Land Disputes Court. Nonetheless, figures provided by the Supreme Court indicate that only 16 percent of civil cases are land-related [see Appendix E]. Most cases concerned conflict over sale and purchase of lands (56.3 percent), water rights (27.7 percent) and rent/mortgage matters (12 percent). The provincial judge in Parwan reported that inheritance problems make up

the bulk of dispute in most land cases in his courts.

### *Mediation*

An alternative to court resolution is mediation through the law department (*hoquq*) of the Ministry of Justice. This mainly operates at a provincial level with offices in larger or more established districts. Its aegis is limited to disputes around family matters, land and debt. Assistance is provided through application, with the *hoquq* empowered to summon contestants, or request the police to do so on its behalf. Where resolution or reconciliation fails, the case is sent to the court as above.

## Chapter Two: Land Tenure Policy and Law, Past & Present



Photo courtesy of FAO

Three findings of this study lay the foundation for this chapter:

1. It is necessary to understand the past, at least as occurring in the 20th Century, to understand current land relations in Afghanistan.
2. Formal land policy does not currently exist and has only sporadically been proclaimed; reference to law as the expression of formal policy must be made.
3. Examination of land policy is important at this time given the role government strategies in matters of land ownership have played in generating and sustaining conflict.

The making of the modern Afghan state this last century provides an appropriate context within which state policy on land relations may be explored [Box 10]. Three debates have tended to focus historical analysis of this process. The first concerns how far back the roots of the modern Afghan state, taken to have been established in 1880, may be found.<sup>82</sup> The second is the extent to which Afghanistan evolved as a state and has been sustained in response to regional and international ambitions. Rubin in particular has developed a powerful analysis of the evolution of Afghanistan from buffer state into rentier state by mid-century, followed by full capture by a foreign state (The Soviet Union).<sup>83</sup> Fragmentation

<sup>82</sup> The historical orthodoxy is that the area that is now Afghanistan had no geo-political identity during the 16th to early 18th centuries, at which time it comprised a series of tribal areas between empires of India and Persia. The beginnings of Afghanistan as a discrete geo-political state is located by some historians as the founding of the Durrani empire in 1747, achieved through the gathering of Pashtun tribes in a *jirga* (council) and at which time the khans elected one of their number as king. From that time, Afghanistan acquired features normally attributed to states a definable territory (though its boundaries were disputed) with sovereign status, (though this was not universally recognised), a name and a "government." Other historians date the beginning of Afghanistan as a nation state as 1880, on the grounds that the Durrani Empire constituted more a tribal alliance than a centralised administration; see Dupree 1980 and Olesen 1995.

## Box 10: Periods of the Modern Afghan State

1880 - 1973:	Monarchy: Absolute monarch - Abdur Rahman Khan 1880-1901 Popular absolute monarch - Amir Habibullah Khan 1901-1919 Interregnum monarch - Nasrullah 1919 Constitutional monarch - Amanullah Khan 1919-1929 Reformist monarch - Mohammad Nadir Shah 1929-1933 Modern monarch - Mohammad Zahir Shah 1933-1973
1973 - 1979:	Republic: First Republic - Mohammad Daoud 1973 - 1978 Second Republic - Noor Mohammad Taraki & Hafizullah Amin 1978-1979
1979 - 1989:	Occupied State: Second Republic continued - Babrak Karmal 1979-1986 "Third" Republic - Najibullah 1986-1992
1992 - 1996:	Mujaheddin State: Sebghatullah Mujaddidi 1992 Burhanuddin Rabbani 1992-1996
1996 - 2001:	Islamic State: Taliban - Mullah Omar 1996-2001
2001 -	Interim State: Interim Administration - Hamid Karzai 2001-2002 Transitional Administration - Hamid Karzai 2002 -

of the state followed (1989-1996), succeeded by the rise of the Taliban and a conservative, rural and religious-cultural movement supported by opium production and smuggling.<sup>84</sup> A third line of debate looks more closely at the nature of societies within the area now defined as Afghanistan. As Allan's effort to define place and people in Afghanistan suggests, western notions of ethnicity may cloud understanding of the still very fluid boundaries of tribal territory and identity and encourage inappropriate decision-making as to rights over land.<sup>85</sup>

#### Evolving Tenure Strategies of the Past: 1880-2001

Broadly, there have been four main strategies for rural land policy in Afghanistan over the past century:

1. Pashtunisation policies that saw leader after leader empower loyal Pashtuns to colonise

the territories of minority and potentially rebellious ethnic groups;

2. Settlement policies associated with large dam and irrigation developments, which routinely replaced local occupancy with selected settlers; often these "eligible applicants" were Pashtun nomads (Kuchi), who were to prove less than dedicated to the settled farming lifestyle provided;
3. Structured survey, mapping and recording of land holding, in an effort to clarify, order and control land ownership; and
4. Reforms, designed to bring more equity to land ownership.

All four strategies were implemented in the service of state building and modernisation. All four failed in their objectives. Untangling the conflicts that resulted is a main task facing the current administration. Below is an overview of these strategies, as they evolved under different regimes.

<sup>83</sup> Rubin, *passim*.

<sup>84</sup> See Rashid 2000.

<sup>85</sup> Allan 2001.

## Laying the Foundation for Tenure Disorder: 1880-1919

Although not defined as such, national land policy may be discerned as beginning in Abdur Rahman Khan's reign (1880-1901), and by his efforts to bring the newly defined boundaries of the Afghan state under his control.<sup>86</sup> His instrument throughout was the colonisation of unstable or rebellious areas by loyal Pashtun followers. Accordingly, large numbers of semi-nomadic Pashtun were sent to the north to hold the border against Russia, to discourage rebellion by local Turkic and Tajik people and to exact tribute.<sup>87</sup> The treatment of Hazaras in the centre of the country was particularly cruel, and included the handover of their grazing lands to Pashtun nomads.<sup>88</sup> Already poor, the Hazaras were forced into a tribal serfdom that overlaid their already feudal internal land relations.<sup>89</sup> Rather than binding the new country under one dominant tribe (or doctrine of Islam),<sup>90</sup> such policies laid the foundation for disorder, realised to this day in the cyclical appropriation of land and water.<sup>91</sup> Predictably both the Hazarajat and the north are centres of this disorder.

Land grants were the modus operandi of Pashtun colonisation. The evidence is still found today in deeds ("firman").<sup>92</sup> These were usually given as corporate rights under the name of a tribal leader.<sup>93</sup> This was part of a broader development of record-keeping and bureaucracy. From the outset, judges and their scribes, who were posted to every district in the territory, played a key role in regulating land access. Land taxes were rigorously extracted and recorded.<sup>94</sup>

The reign of Abdur Rahman's son, Amir Habibullah Khan (1901-1919), is generally regarded as a period of consolidation, in which most of the strategies of his father were sustained but in peace. The period is perhaps most notable for the increased role of Islamic clerics in the control of land, laying the foundation for the tug of war over rights and roles that were to subsequently make state history. Religious lands – vast commons over which clerics had control – became more definitively a category of state property in this period.

## Provisional Reform: 1919-1929

The post-war reign of Amanullah (1919-1929) is noted for its reformism, but also for its failed policies.<sup>95</sup> One liberal aspect was to tackle the servitude of the Hazaras and to restore an element of balance in their land relations with their colonisers. Access to grazing was limited and redefined as seasonal rights, allocated to named clan heads and referenced to named pastures surrounding named wells.<sup>96</sup> These entitlements were written in new land documents (*qabala*), and the rights they provided made conditional upon payment of livestock taxes to the district administrator.<sup>97</sup> The Hazaras began to re-cultivate their original lands. This was to prove a brief respite. With Amanullah's forced exile, Pashtun and Kuchi all over the country reasserted their land interests. In the case of Hazarajat, Kuchi increasingly provided credit for farming, placing more and more Hazaras in debt.<sup>98</sup>

Afghanistan's first constitution was introduced by Amanullah in 1923. This introduced the basic

<sup>86</sup> As agreed with the British (1893) in the form of the infamous Durrand Line cutting the Pashtun population in half, and with the Russians in the north (1891, 1895-96). See Cullather 2002.

<sup>87</sup> An important source for this period is unpublished work by Ghani (undated). Also see Rashid op. cit.

<sup>88</sup> See Ghani (undated), Rashid op. cit., and De Weijer op. cit.

<sup>89</sup> Many were to end up as indentured servants in the towns. Levels of rural indebtedness in Hazarajat continue to be extremely high, with sometimes whole villages effectively owned by seasonally visiting Kuchi or settled Pashtun, granted rights at this time, or in subsequent state-directed colonisation [WFP 2000].

<sup>90</sup> A crucial element of the treatment of Hazaras right up until the Taliban period has been their affiliation to Shi'a rather than Sunni Islam.

<sup>91</sup> As Allan writes, "despite years of depredations, murder, torture and theft of land and water by the Pashtun royalty over the following century, they failed to Pashtunise the country" [Allan 2001].

<sup>92</sup> Some of the oldest are made of fine calf-skin, embossed with the King's seal.

<sup>93</sup> Glatzer 1984.

<sup>94</sup> Magnus & Naby 2002, Ghani op. cit., Olesen op. cit.

<sup>95</sup> Most notably in the attempt to separate religion and state, to promote universal education and to emancipate women – all of which broadly failed with especially the rise of religious and ethnic fighting groups, including the famous Young Afghans, and saw Amanullah eventually fleeing into exile [Olesen op. cit., Anwar op. cit.].

<sup>96</sup> Glatzer 1984.

<sup>97</sup> Ibid.

<sup>98</sup> De Weijer op. cit.

principle of state payment for private land that it had appropriated for public purposes (Article 19), a concept that had origins in European law<sup>99</sup> and one that was not to be applied in following decades. In addition, no clear stand was taken on the relative authority of Islamic law or state laws in resolving land disputes; both were to be applied (Article 21). Amanullah also took steps to reclaim barren lands, with assistance from outside experts and financing. By the end of his reign, Amanullah had initiated three dam projects, opening up around 23,000 hectares of new irrigable land settled mainly by Pashtuns.<sup>100</sup>

### Greening the Desert: 1929-1963

The greening of the desert preoccupied both Nadir Shah (1929-1933) and his son, Zahir Shah (1933-1963). This was founded upon major dam developments, assisted after World War II by the American government. The centrepiece was the Hilmand Valley Scheme, which came under American supervision in 1946 and continued until 1979, absorbing around US \$80 million.<sup>101</sup> This comprised a vast complex of dams and irrigation canals, opening up more than 100,000 ha. of land for cultivation. However, this project met with engineering failure after failure.<sup>102</sup> With each expansion, more land was acquired, displacing more people. Early laws governing the acquisition of property do not seem to have been applied.<sup>103</sup> Pashtun nomads were favoured as settlers, with plans to settle 20,000 families on 15-acre plots, towards the creation of a "Pashtun homeland" and buffer against agitating landless in Paktya.<sup>104</sup> Problems with plot size, soil and the fact that farms were far from the houses provided, resulted in recurrent failures of the settlements. Many Pashtun were transferred to the north, increasing

tensions and displacement. Both ethnic rebellions and landless peasant uprisings occurred regularly. Even the semi-official newspaper, *Islah*, urged reform.<sup>105</sup> By the 1950s, a further range of dam projects, funded by the Soviet, Chinese and western governments, were underway. These were more focused on providing irrigated land for the landless and poor,<sup>106</sup> a trend encouraged by growing Soviet influence and communist party formation during the 1960s.<sup>107</sup>

### Bringing Land Under State Control: 1963-1973

By the early 1960s a new approach to the "land problem" was launched. This took the form of classical land registration and entitlement programmes, such as was being advocated by the World Bank and USAID at the time. Building on the Australian "Torrens" system, the entire land area would be mapped, each plot surveyed, numbered and its mapped coordinates recorded on a similarly numbered file held by government, along with information as to ownership. Certificates would be issued as proof of ownership.<sup>108</sup> Such titles, it was argued, would be easily and reliably used as collateral for formal bank loans. This system was also seen as a means of bringing customary, religious and other landholding norms into a single, integrated national system – and under the control of the state. The register could also double as a list of taxpayers.

In Afghanistan, the Land Survey and Statistics Law 1965 laid out the process (see Box 11).<sup>109</sup> In 1963, using USAID funds, the government established the Department for Cadastral Survey in Kabul, and built a training institute for surveyors and draftsmen. Survey work was launched in 1966 with the help of more than 400 American vehicles,

<sup>99</sup> Amanullah involved Turkish and Egyptian advisers whose own legal systems have origins in the Napoleonic Code.

<sup>100</sup> These were the dams of Butkhak, Ghazni and Kharwar/Logar [Majrooh 1986].

<sup>101</sup> See Cullather 2002 for a detailed account of this development.

<sup>102</sup> See Cullather op. cit. for the litany of engineering, soil and land use planning failures.

<sup>103</sup> The Law for Appropriation of Property for the Public Welfare in Afghanistan 1314 (1935) and the Law for the Sale of Land Under Dams and Rivers 1318 (1939).

<sup>104</sup> "Settling Pashtun nomads in a belt from Kabul to Kandahar would create a secure political base for the government and bring them within reach of modernization programs" [Cullather op cit; 529].

<sup>105</sup> Emadi 1997.

<sup>106</sup> For example, 30,000 acres were opened up in 1960 in the USSR Darunta/Nangarhar Project, and two large commercial farms in the Jalal Abad Valley were begun, employing 9,000 landless peasants [Majrooh op. cit.].

<sup>107</sup> At this time, Afghanistan was receiving the highest level of development aid per capita in the world [Cullather op cit; 530]. Locally generated revenue plummeted, with local taxes dropping from one-third of the total budget in the 1950s to around one percent by 1963; see Rubin 1996. Also see Rashid op cit., Emadi 1997, Magnus & Naby op cit. and Majrooh op cit. on this period.

<sup>108</sup> See World Bank Land Policy 1975.

<sup>109</sup> See Appendix J for translation of the law.

645 technical staff and as many support staff.<sup>110</sup> The costs were enormous. Within a year the government's Annual Report on Progress was reporting that cheaper and faster "inventory" surveys were replacing the cadastral surveys in order to speed up registration of owners.<sup>111</sup> These resulted in the collection of the same information (name of owner, jeribs of land, land types, tax payer's name etc.), but without the benefit of being able to precisely relocate the farm on the map. Maps were still produced but at smaller scales and without coordinates.

Even with this shortcut, the survey was never completed [see Appendix I]. By 1977 around 20,000 villages and around 45 percent of all landowners had been surveyed.<sup>112</sup> Only Nimroz Province was covered in its entirety. Although around half the total land area of the country was surveyed, this included less than one-fifth of total arable land (of a total of 7.36 million ha.). While not a single title deed was ever issued, the resulting 5,502 registers provided a basis for calculating land taxes, a main purpose of the programme. The registers have also subsequently provided a basis for the confirmation of ownership in the court-endorsed transactions described earlier. They were also to provide a tool for the reformist policies described below.

A main output of the exercise was to formally bring several million hectares of land under formal

government control. Some 850,000 ha. were identified (or rendered) as "government land," and another 2.6 million ha. of pasture and barren land were placed under state control or outright ownership. As we have seen, it was around this time that descriptions of what constituted government land began to enter state law.

#### Tackling Inequities: The Land Reforms 1973-1979

While the survey continued, little attention was paid to distribution. By the early 1970s, government reports barely mentioned the survey project, focusing instead on the Hilmand and Arghandab Valley projects, the Paktya Development project and programmes designed to improve distribution of seed and fertilizer.<sup>113</sup> Nonetheless, the question of how rural farmland was distributed continued to arise. In 1971, following the conduct of surveys in seven provinces, the annual Survey of Progress report stated that, "Thirty-five percent of farmers are landless, eking a living on other people's land..." and also declared that,

"The inequitable distribution of farm production between the landlord and the peasant is the reason why peasants hesitate to make changes in their farm practices. The continuation of this situation is the reason why land ownership of large sizes remained

#### Box 11: Land Survey & Statistics Law 31 Jawsa 1344 (1965)

This law comprises 70 articles that aim "to acquire land statistics of the country, to set up and maintain a land register and to organize tax affairs." Tax forms were to be completed by each landowner, attested to by witnesses and by the chief of the village and returned to the declaration office. The law set up the Cadastral Survey Department to conduct surveys of all usable land, whether in private or public ownership. Once each farm was surveyed, mapped, registered and confirmed, certificates of title would be issued. Changes in ownership were to be reported to a special statistics office. A land registration court would hear disputes arising during the registration process. Owners of large plots were encouraged to subdivide their holdings. Government land was defined, and it was declared that it could be sold "in accordance with the Manual for Nomadic Tribes." Conversion of pasture to arable land was prohibited. Pastures could be leased but not privately owned.

<sup>110</sup> Sources on the survey are mainly government reports: GoA 1964, 1965, 1968, 1970, 1971, 1976 & 1978, and personal communication with staff of the current Geodesy & Cartography Department in Kabul, where the original copies of the land registers are held along with the maps and identified plots (cadastre).

<sup>111</sup> GoA 1968.

<sup>112</sup> GoA 1978.

<sup>113</sup> GoA 1971.

in the hands of a few and why the level of productivity is low ... Devising a comprehensive law in this connection is required to regulate the relationship of peasants and landowners".<sup>114</sup>

Public debate about polarised landholding was fully in the public arena. Distinctions between rich and poor, educated and uneducated, urban and rural were a topic of discussion among the burgeoning student population in Kabul.<sup>115</sup> Freedom of the press was pronounced, with some 30 different publications operating between 1965 and 1973.<sup>116</sup> Criticism against the king and his government increased annually. The drought of 1969-1972 added fuel to dissent. In July 1973, Daoud, the one-time prime minister, overthrew

his cousin the King, and with the help of the Soviet trained army, named himself president and premier of the new republic. One of his objectives was land reform.

#### *Moderate reform: 1975-1976*

President Daoud was anxious to avoid a backlash from conservative rural opinion and forged a modern way forward that would be encouraging rather than coercive.<sup>117</sup> The principles were laid out in the 1975 Land Reform Law, in the 1976 Tax Law and in new articles enshrined in the new Constitution of 1977. The Land Reform Law introduced a generous land ceiling for each class of land, above which the state would buy the excess for redistribution. Compensation for both

#### Box 12: President Daoud's Land Reform

##### The Land Reform Law 15 Assad 1354 [1975]

This law established generous ceilings above which excess land were to be redistributed (e.g. 20 ha. of irrigated land, 20 ha. of gardens and 40 ha. of rain-fed land were permitted per owner). Companies and private agricultural societies were to be permitted to have more land as long as it was arid and made cultivable [Article 3]. Heirs were to have one year to transfer inherited surplus land to another person [Article 3]. Compensation for excess land was to be paid to the owner over 25 years with two percent interest [Article 10]. In addition, improvements to the property such as vines or structures were to be paid for [Article 5]. Priority groups for distribution included landless farmers in the local area, followed by landless nomads and then by other farmers and graduates from agricultural and husbandry schools [Articles 12-13]. They were to pay for the land in installments at three percent interest [Articles 16 & 22]. If the new owner did not use the land within six months, or if he took a job, the land was to revert to the government [Articles 18 & 42]. The farm could not be transferred, sold, mortgaged or subdivided until the full payment made and a final certificate of title was issued [Article 37]. A special council of ministers was to be established to devise guidelines, draft regulations [Articles 23-25]. A reform office was to be established under the finance ministry to implement the law [Article 26]. A special high court on land reform was to be formed as the final arbiter of disputes [Article 28].

##### Land Tax Law No. 338 Saratan 1355 [1976]

For tax purposes, all land was to be ordered into three classes with seven degrees [Article 4]. Each degree was to indicate a different proportion of land that would be tax-exempt. Landowners who were exempt from paying taxes were to include those who owned two jeribs or less, those who were working five jeribs or less, government and municipalities [Articles 17-18]. Cooperative members were to get a reduction in tax rates [Article 19]. No land could be transferred if tax payment was outstanding [Article 5]. Tax payments could be delayed or cancelled in cases where the owner could explain convincingly why he was unable to pay, e.g. due to natural disasters or problems of crop failure [Article 22].

<sup>114</sup> GoA 1971.

<sup>115</sup> Marsden writes that the late 1960s witnessed growing dissent as young people came to the capital to take advantage of expanded educational opportunities, particularly in Kabul University, "but found a system that was still highly elitist. Radical movements found fertile ground among Kabul's student population" (Marsden 2002).

<sup>116</sup> Majrooh op. cit.

<sup>117</sup> See Edwards 1998, Dupree op. cit., Majrooh op. cit. and Emadi 1997.



the land and structures on the land would be paid to the owner. The more effective law was the tax law, which delivered rigorous progressive taxation on size of holdings and was designed to impact all but the very smallest owners and the landless. Landless farmers were to have priority access to land for redistribution. They were to pay for the land, by instalment and at low interest rates [Box 12].

The reforms were announced in the First Seven Year Economic and Social Development Plan (1976-1983),<sup>118</sup> and were part of an 18-point national policy, that included the promotion of cooperatives and a promise that new labour laws would be put in place to protect farm and factory workers' rights.<sup>119</sup> In reality, taxes were collected for only one year and little private land was purchased by the state and redistributed. Daoud's ambassador to Cairo at the time later wrote that the survey was by then showing very large landholdings to be fewer than had been imagined.<sup>120</sup> While the

government continued to distribute land, such lands were largely government lands opened up by irrigation projects. Allocation priorities appeared fairer to many than in the past.<sup>121</sup> Priority was given to those living in densely populated areas and to landless farmers. Most of the schemes were run as cooperatives. Intentions to regulate farm worker conditions were not realised.

#### *Revolutionary reform: 1978-1979*

A central platform of the incoming communist government of Presidents Noor Mohammad Taraki and Hafizullah Amin was agrarian reform.<sup>122</sup> Within months of gaining power, their small and mainly urban-supported People's Democratic Party of Afghanistan (PDPA) launched the reform through four cornerstone decrees.<sup>123</sup> Decree No. 6 Against Usury cancelled all loans and mortgages of more than five years on the grounds that crop-share repayments of one-fifth annually would have

#### Box 13: The Revolutionary Land Decree Of 1978

The stated aim of the Land Decree of 1978 was "to abolish the feudalist and pre-feudalist relations of the country's social and economic system; to free people of class distinctions and to increase production [Article 1]. No family (defined as a nuclear family by Article 2) was to occupy more than 30 *jeribs* of first- grade land or its equivalent [Article 3]. Excess lands above this were not to be sold, leased or mortgaged [Article 4]. Government was to fix fair water-sharing [Article 5]. No payment was to be made for excess lands. Government was to pay for houses and other fixed improvements [Article 9]. Land was to be distributed to landless farmers free of charge [Article 17]. Recipients were to promise to develop the land and they were prohibited from inheriting additional land [Article 23]. This was to be either five *jeribs* of garden, six *jeribs* of two-season, irrigated land, eight *jeribs* of one-season, irrigated land, 12 *jeribs* of lower grade, one-season irrigated land, 25, 33 or 50 *jeribs* of rain-fed land depending upon quality [Article 12]. Land was to be allocated by public lottery [Article 16]. Fragmentation and over-subdivision was to be limited, and sub-divisions at time of inheritance could not fall below five *jeribs* of Grade 1 land [Article 20]. It was also compulsory to register land ownership; if a person gave more than 20 percent incorrect information on the registry, he would lose a portion of his holdings in proportion to the amount of incorrect information given and that land would fall to government for redistribution [Article 31].

<sup>118</sup> GoA 1976.

<sup>119</sup> Seven year, five year, three year and annual plans were variously drafted from 1955 (Plan for 1335-1340 (1956-1961)) until 1986 (Plan for 1986-1990), but few of these are available.

<sup>120</sup> Majrooh op. cit.

<sup>121</sup> Majrooh op. cit., Edwards op. cit.

<sup>122</sup> The communist coup, the "Saur Revolution" took place on April 28, 1978 with the murder of President Daoud and 30 members of his family. Taraki was himself murdered on September 15, 1979, and Amin took over. Amin murdered on December 27, 1979.

<sup>123</sup> Although the impact of the PDPA was to be in rural areas, party members were mainly drawn from urban students and elites [Edwards op. cit., Rubin 1996]. Problematically, the party had little military backing [Rubin 1996].

covered the value of the loan. Given widespread crushing debts and interest rates, this was popular and the minister of agriculture was confident that more than 80 percent of the rural population would directly gain from this single intervention.<sup>124</sup> Implementation proved difficult where there was no institutional framework in place to enforce the decree, and in circumstances where it was found that few mortgagors had the written evidence of loans and shares paid upon which the cancellation of their debts depended.

The sister Decree No. 8 on Land Reform followed in November 1978, its principles having been widely publicised in the *Kabul Times*.<sup>125</sup> This decree revisited the existing categorisation of land and made sharp reductions in land ownership ceilings, (e.g., from a 20 ha. to a six ha. ceiling for irrigated land). The excess would not be bought by the state, but directly expropriated without compensation. No one, including the royal family, was to be exempt from the reform. Free redistribution focused on landless labourers and tenants, small peasants (those owning less than 2.5 acres) and landless nomads. Tenancy was to be abolished [Box 13].

Implementation began in Kabul province and spread. Regional branches of the cadastral department were forced to provide information as to who held large holdings.<sup>126</sup> Handover of lands took place in villages with much publicity and party-led celebration.<sup>127</sup> Eight months later, the government announced that 250,000 families had been given 600,000 hectares of redistributed land.<sup>128</sup> How many peasants took up these lands is not known; it only took one peasant in an area to be murdered by an angry landlord and his body

hung in the square to discourage others.<sup>129</sup> Not all villages were affected, however. Where there were few PDPA party members, little action was taken, because there was no one to organise the public meetings. In other areas, whole communities were affected.<sup>130</sup>

In the event, the reforms were highly unpopular, especially with the more conservative religious communities. Rebellions abounded almost from the outset (beginning in Paktya), but accelerating in earnest after the Decree No. 6 On Marriage was announced. This prohibited the payment of a bride-price, banned child marriages and required that both partners consent to the union. Decree No. 9 On Education was almost as unpopular. It enforced education for girls and women, and implementation began in public co-educational classes. Sometimes the teachers were young women from the towns and considered inappropriately dressed.<sup>131</sup> Resistance took on the shape of a *Jihad* (holy war). Once news of the disturbances in Paktya spread, "the Mullahs, grateful for the God-sent opportunity to discredit the government, further began to issue *fatwas* (Islamic legal rulings) charging the government with shamelessness and irreligiosity."<sup>132</sup> This was despite the fact that the reforms against usury and high bride prices had direct support in Islamic law. Taraki and Amin were, however, rigorous in their secularity. They denounced the reaction as counter-revolutionary, they arrested and executed the reforms' opponents and launched a concentrated campaign of ideological education, including rallies and daily articles in the *Kabul Times*. The Soviets provided arms and advisers. Resistance increased.<sup>133</sup> By June 1979 much of the country was in uprising. The army was

<sup>124</sup> Recorded by Anwar 1988. Seventy-one percent of farms were considered below the five-acre ceiling and many owners had been forced to mortgage their land [ibid.].

<sup>125</sup> These were first published in May 1978 within *The Basic Lines of Revolutionary Duties of Government*, put forward as a preliminary to formulation of a new Constitution. See Yunas 2001. See Appendix J for a translation of the Land Reform Decree 1978.

<sup>126</sup> Pers. comm., deputy chair, Geodesy & Cartography Department, Kabul.

<sup>127</sup> Edwards op. cit.

<sup>128</sup> Rubin 1996, Anwar op. cit.

<sup>129</sup> Emadi 1997.

<sup>130</sup> Edwards op. cit. Edwards describes how in some areas, the reforms had little impact while in others, most people were affected, especially by the usury reform. He details a case in Khas Kunar where an entire community was put out of business as it lived on the rewards from mortgages.

<sup>131</sup> Edwards op. cit.

<sup>132</sup> Anwar op. cit.

<sup>133</sup> For 50 years, the tribal-feudal ruling class and the bureaucracy it served had successfully resisted attempts by central government to implement much less dramatic reforms. The reaction now was accordingly greater [Edwards op. cit.].

<sup>134</sup> Rubin 1996.

disintegrating and unable to assist.<sup>134</sup> Annoyed at Taraki's failure to keep control, the Soviets engineered his murder and replaced him with Amin. Amin, in turn, was unable to stem the rebellion and was similarly duly dispatched. Babrak Karmal was made president in December 1979 and the supporting Soviet invasion began a month later (and would ultimately involve 115,000 troops). Flight began in earnest.<sup>135</sup>

*Why did the reforms fail?*

There are many reasons for the failure of the reforms. There were technical problems, such as attempting to redistribute land without an equal effort to carry through redistribution of water rights, and the disabling effect of banning local usury without providing alternative routes through which farmers could borrow money for seeds and fertilizer. The PDPA was quick to realise its mistake in the latter area and launched a new drive towards cooperatives to fill the gap, but seemingly too late. Meanwhile, the local capital that was available - often coming from workers returning from the Middle East - could not be spent because private money lending and renting of land were disallowed. There was also the fact that the proportion of very large landholdings above the critical six-hectare mark was not as abundant as thought. In some areas, the available land to distribute to those who had listed their names under the different categories of "eligible applicants," (landless, not enough land to live on, nomads, etc.) quickly ran out. The proportion of these applicants was higher than the state had appreciated and the number of very large landholdings fewer.<sup>136</sup>

More powerful factors relate to the manner of implementation. As Anwar observed, the PDPA

The PDPA were "men in a hurry," an elite launching a reform prior to establishing legitimacy in the rural areas.

were "men in a hurry," an elite launching a reform prior to establishing legitimacy in the rural areas.<sup>137</sup> Rural people had long kept the state at arms' length whenever they could, but here was an administration penetrating to the very heart of the rural community.<sup>138</sup> The urban origins of the small party did not help; decrees affecting farmers were first read out and celebrated in Kabul. Rural people resented the arrival of

officials in the village, sometimes including young, poorly dressed (i.e. partly uncovered) women, telling them how to run their lives.<sup>139</sup> While these were reforms of the kind that the poor had been advocating for decades, this was not how even they had imagined it would come about. Cultural



Photo courtesy of Steffanie Fries/WFP

<sup>135</sup> By the end 1978 some 80,000 refugees had reached Pakistan.

<sup>136</sup> Definition of "eligible applicants" – persons who could apply for redistributed land altered in subtle ways over the reform programmes; in Daoud's 1975 Land Reform Law, priority persons were landless workers on the land that was to be redistributed, followed by landless nomads, farmers and labourers in the area and graduates of agricultural and husbandry schools [Article 13]. Under the 1978 Land Reform, "eligible applicants" were listed in six grades, priority being given to landless farmers working on the land to be redistributed and those who had lost land to government for public uses, and ending with landless farmers and nomads in other provinces [Article 24]. Later, the Taliban Law on Land 2000 listed "eligible applicants" for redistributed land as being first, farmers with no or insufficient land, second, farm workers, third, retired state workers and fourth, nomads. See Appendices J & K for these articles.

<sup>137</sup> Anwar op. cit.

<sup>138</sup> Ibid.

<sup>139</sup> Majrooh op. cit., Edwards op. cit.

<sup>140</sup> Edwards op. cit.

norms were offended; There was widespread annoyance at the abandonment of traditional exhortations like "God is great!" in favour of, "Death to the reactionaries!" or, "Land to the peasants!"<sup>140</sup> Marches, parades and rallies in the villages were impressive, but culminated in an embarrassing transfer of land documents and a procession sometimes to the new properties. The humiliation of the original owners - to whom they would have to return to beg the seeds government was not providing - raised anxieties.<sup>141</sup>

As each redistribution rally finished and the TV, radio and officials hurried to the next village, those left behind began to feel that the show had counted more than the reality.<sup>142</sup> The Party did not have the manpower to support those to whom land had been distributed or to protect them from the wrath of dispossessed landlords. Many were troubled by the illegality – by custom and by religious law – of depriving people of land without payment, a principle that even the reformist Daoud had been careful to emphasise as essential only a year or so earlier (1977 Constitution). Uncertainty that the PDPA could follow through grew along with repugnance as to its methods. Rubin concludes that it took little time for the poor to sense that they were not, after all, being given a choice between freedom and exploitation but "a choice between leaders they knew, with whom they shared much, and leaders whom they did not know, who believed in an alien ideology and who showed by their actions that they could not be trusted."<sup>143</sup>

Many perceived their whole society to be under attack. The

linking of the land and usury reforms with the marriage reform, discussed earlier, was particularly potent. While the marriage decree was welcomed in Kabul with a flurry of couples marrying in civil ceremonies and on their own accord,<sup>144</sup> "the banning of sale and purchase of brides enraged peasants across the country."<sup>145</sup> This was a practice that was the cement of a host of social and economic relations, and had the sanction of rich and poor and all ethnic groups alike. To add insult to injury, district officials began to arrest those who broke the new rules, and as to be expected, most of the victims were poor and powerless farmers and landless farm workers.<sup>146</sup> Being forced to attend literacy classes in public coeducational classes, which were often led by young, female party members from the city, added to local fury.<sup>147</sup> Significantly, the cause of the first rebellion in Paktya was not the land or usury reform, but a reaction to being forced to send women to the literacy centre.<sup>148</sup>

#### Retrenchment: 1979-1985

In public at least, President Karmal sustained the land reform initiatives with the same vigour as Taraki and Amin, complaining of counter-revolutionaries impeding its implementation.<sup>149</sup> In practice, the reform was scaled back through several amendments to Decree No. 8 on Land Reform during 1979-80. These changes eliminated references to ridding the country of feudal land relations, and exempted mullahs and commercial farmers from adhering to the ownership ceilings.<sup>150</sup> By 1981, under Russian advisers, the reform had gained the order of a planned project, which

No farmer or farmland was safe. Asset-stripping and extortion flourished, as myriad warlords, militias and parties gained, lost and regained territory, and in some areas secured land specifically in order to launch large-scale poppy production.

<sup>141</sup> Ibid.

<sup>142</sup> Majrooh op. cit.

<sup>143</sup> Rubin 1996.

<sup>144</sup> Anwar op. cit.

<sup>145</sup> Majrooh op. cit.

<sup>146</sup> Ibid.

<sup>147</sup> Nor was the campaign assisted by the use of teaching which exemplified "A" stands for Amin and "T" stands for Taraki [Edwards op. cit.].

<sup>148</sup> Anwar op. cit.

<sup>149</sup> Anwar cites the *Moscow New Times* as reporting Karmal as saying that he had "distributed 6,657 ha. free of charge to 296 families and at present more than 70,000 ha. are ready for distribution. 1,217 peasant cooperatives have been set up but due to the destructive actions of counter-revolution only 207 units are operating ...." [Anwar op. cit.].

<sup>150</sup> Article 22 of 1980 Constitution [Appendix D]. See Appendix C for amendments to the 1978 Decree.

<sup>151</sup> The *Socio-Economic Development Plan* for 1982-83 soberly recorded that, "The First Phase of Land and Water Reform was completed last year (1981-82) ... effective measures were adopted to make up for the past mistakes, improve methods of utilisation of land and water resources and expansion of the cooperative movement. The Law Concerning Utilisation of Water and the plan for the second stage of land reforms came into effect in 1360 (1981)" [GoA 1982].

was to be planned for, budgeted and reported on annually.<sup>151</sup> In addition, instead of appropriating private properties for redistribution, needy landless farmers were offered plots in cooperative schemes using government lands or supposedly un-owned public lands.<sup>152</sup> The 1983 plan declared that this Nationwide Land Reform Operation would involve distribution of 2.55 million ha.<sup>153</sup>

In the meantime, some original landowners were regaining their land, either voluntarily from tenants who had found it impossible to farm without the support of landlord capital, tools and water, or by default, as farms were abandoned with the exodus of thousands of farmers in the face of periodic Soviet-led pillaging of their villages. Farm production plummeted and retreated into mainly subsistence farming. By regulations in 1982 and 1983, the land ceiling quietly ceased to apply to several new categories of persons: *mullahs*, *khans* who supported the government, military officers and commercial farmers.<sup>154</sup> In some areas, land was officially returned, at least up to the ceilings laid out in the decree. Compensation for land that had been appropriated but which could not be returned to owners, also began to be paid. More telling, land taxes ceased to be collected.

#### The End of Reform: 1986-1989

Karmal's ouster by Major General Najibullah in May 1986 marked a further scaling back of the reform. Within a year, the new prime minister launched a programme of national reconciliation designed to restore stability to rural areas. He denounced the fact that "land has not been properly distributed ... and thousands of land reform officers have received salaries for doing little work," a claim that was soon to be echoed in the opinion of retreating Soviet generals.<sup>155</sup> They observed that no more than one-third of the programme had been implemented. This was

nonetheless a substantial 700,000 hectares of new or redistributed farmland. A new land decree was passed in June 1987, raising the ceiling on land ownership from six hectares back to 20 hectares of first-grade land. This had little impact, as most landowners affected had already been exempted from the ceiling under earlier regulations. More significantly, the new law allowed landowners to rent their land out again and to hire labourers. Though important clauses empowering the state to determine "the land interests of society" were not revoked, Najibullah restored the protection of property clause to his new Constitution of 1987. He also introduced a constitutional clause assuring heirs of their right to inherit land.

None of these reversals could overcome the damage that occupation and war, if not the land reforms, had done to rural life and production. By the time the Soviets left in 1989, more than half a million homes had been destroyed and less than half the arable land area was being cultivated.<sup>156</sup> Half a million household heads were widows, life expectancy dropped and the country was littered with landmines.<sup>157</sup> Tenure security itself, though not directly affected, was held in abeyance. Neither those who remained nor those who left knew what the future held. The land reform movement came to an end at the beginning of the 1990s with a new edict that confirmed that compensation would be paid for all seized lands that could not be returned to the original owners. Agricultural policy turned firmly to the promotion of commercial agriculture and the distribution of subsidised inputs, such as improved seed and machinery, some of it provided for free by a repentant Soviet administration. State companies were permitted to buy wheat directly from farmers, excluding middlemen. Nomads and poor peasants continued to be allocated land on the few new settlement schemes. Writing in 1991, Nathan & Berger were bewildered at the lack of clarity in the local situation as to land ownership and observed that

<sup>152</sup> Several new edicts were issued in 1982 and 1983. By the end of 1982, 140 new cooperatives were registered.

<sup>153</sup> GoA 1983.

<sup>154</sup> Nathan & Berger 1991, Rubin 1996.

<sup>155</sup> Rubin 1996.

<sup>156</sup> At the peak of the war in 1985, interviews that the Swedish funded Agricultural Survey carried out with 5,000 farmers showed that more than half of their villages had been bombed, 11 percent had had their crops destroyed and nearly a quarter had had their irrigation systems damaged and lost livestock [SCA, 1988]. Gaining a statistical picture of the decline in production between 1978 (for which there were much official data) and the late 1980s became a main objective of the survey.

<sup>157</sup> UNDP 1993.

"social institutions that normally sustain rights and deal with problems have fallen into disarray." Assuming at that time that mass refugee return would occur, they warned that the majority will be sharecroppers or subsistence farmers and who "will benefit little from the conventional, commercially oriented production programmes that are being promoted."<sup>158</sup> political environment was not, however, conducive to stable land relations. Fragmentation among local factions was rife. Ominously, as it were, in a last-ditch effort to keep control, Najibullah offered autonomy, weapons and tanks to local leaders who could keep communications open in the countryside. Land appropriation by *mujaheddin* (fighters in a *Jihad*) began with a vengeance.

#### Collapsing Land Relations: 1990-2000

Najibullah clung onto power until April 1992, at which point the *mujaheddin* captured Kabul and proclaimed it an Islamic state. By 1994 the peace accord they had agreed to among themselves had unravelled, and banditry and violence escalated to unprecedented levels.<sup>159</sup> No farmer or farmland was safe. Asset-stripping and extortion flourished, as myriad warlords, militias and parties gained, lost and regained territory, and in some areas secured land specifically in order to launch large-scale poppy production.<sup>160</sup> Land documents held no sway. Traditional agreements collapsed.<sup>161</sup> Typically, poor households bore the brunt of these expansions, unable to pay the bribes demanded of them to keep the militias at bay. Government lands were also routinely invaded, and the construction of unplanned, self-help housing in towns was rife.<sup>162</sup> Fragile lands were degraded by cultivation of inappropriate crops like cumin,



Photo courtesy of UNHCR

or through excessive sinking of boreholes, which lowered the water table. The importation of pumps to lift water to higher lands, sometimes deprived downstream communities of traditional water rations. In the absence of order or planning, each community fought for itself, and families were pitted against families.<sup>163</sup>

The Taliban, a little known faction in 1994, rose to power in this environment, their capture of Kabul in 1996 raising expectations of peace and order.<sup>164</sup> To some extent and in some areas, this was achieved during the five years of Taliban rule. In other areas, inter-factional fighting and land-grabbing continued as individuals and groups gained and lost power. This included those favoured by the Taliban, such as Pashtun nomads from the south and Pashtuns from the north, who, as noted earlier had been evicted by resentful, indigenous populations. With the support of the Taliban, they now sought to recover their lands. In some areas, and most famously in the Shomali Plains and the Hazarajat, Taliban zealotry and vengeance (in the form of blockades followed by compulsory conscription and tithing) reduced whole communities to destitution, destroyed

<sup>158</sup> Nathan & Berger op. cit.

<sup>159</sup> Rashid op. cit.

<sup>160</sup> Rashid op. cit., Gohari 2000.

<sup>161</sup> See Pain 2001.

<sup>162</sup> Rashid op. cit., Gohari op. cit. and see Appendix H.

<sup>163</sup> See Pain op. cit. for examples.

<sup>164</sup> Rashid op. cit., Gohari op. cit.

<sup>165</sup> WFP 2000.

<sup>166</sup> Matinuddin op. cit.

farms and deeply disturbed land relations.<sup>165</sup> In general, the Taliban's approach to land reflected its typical mix of intentions: on the one hand seeking to restore stability to the land sector, including recovery of lost properties; and on the other, adopting such partisan support that new cycles of resistance ensued.<sup>166</sup>

Nonetheless, by 1999, the semblance of orderly policy making resumed through the issue of edicts. Those related to land sought to build on Najibullah's efforts and restore land relations to pre-reform, pre-revolution times. Because these decree-driven pronouncements, in effect, remain current policy today, their strategies are discussed in the next section.

## CURRENT TENURE POLICY & LEGAL FRAMEWORKS

### The Absence of Guiding Policy

The Afghanistan Transitional Authority (ATA) is less than one year old, and specific land policy has not been issued. Certain public documents may be examined for clues that may help determine how land policy will be handled by the current regime. These include important statements made by President Hamid Karzai and his ministers at various meetings such as during the Tokyo Ministerial Meeting in January 2002, in a report to donors in April 2002 and again during the Afghanistan Support Group meeting in October 2002.

In Tokyo, the then-Afghanistan Interim Administration (AIA) did include "agriculture and rural development, including food security" among its priority areas for action, but specific mention of land rights (even those of returning refugees) was not made. Although the conference welcomed the efforts of donors in bringing issues to the table,<sup>167</sup> only the Asian

[The current] vision bears the hallmark of an international hand offering up the conventional - and now somewhat outdated - panacea of land registration as the way forward.

Development Bank (ADB) had identified "unclear tenure rights" as an issue to be addressed.<sup>168</sup> Specifically, it proposed that,

- in the short term, "existing rights and records" be assessed;
- in the medium term, "a computerised registry linked to a national cadastre" be set up;
- in the longer term, "land tenure policy development" be promoted.

In its approach paper, The World Bank eschewed mention of the topic altogether.<sup>169</sup>

A more definitive guide to current policy is the National Development Framework (NDF), an overarching document produced by the Afghan Assistance Coordinating Agency (ACA) in conjunction with the Ministries of Planning and Reconstruction in April 2002. The NDF is still a draft and has not yet been approved by the cabinet. The statement is curiously passive in its recognition of the disturbance to land relations wrecked by years of war. However, pursuant to the ADB, the framework states that,

"Access to land is regulated through Islamic and customary law. There is a need for a programme to produce a nationwide land registry and to settle disputes between individuals and groups over land. Such a registry would allow for the use of land as collateral for entrepreneurial activities."<sup>170</sup>

Aside from the minor inaccuracy concerning the legal framework through which access to land is regulated (which, as shown above, has also been very potently exercised through state law), this vision bears the hallmark of an international hand offering up the conventional - and now somewhat outdated - panacea of land registration as the

<sup>167</sup> See Government of Japan 2002. The World Bank effort included a range of studies conducted from 1997, a series of workshops held in November 2000 and April 2001 and a joint Bank-UNDP conference in June 2001. See World Bank 2001.

<sup>168</sup> ADB 2002.

<sup>169</sup> World Bank 2001.

<sup>170</sup> GoA 2002a. Under the Governance and Security section, it was again noted that, "Uncertainty over land ownership will hinder investment from the private sector as well as the ability of individuals to use land as collateral" [ibid]. More significantly, the NDF did add that "a credible system to resolve land disputes and provide certainty is urgent" [ibid].

way forward, a strategy examined in the next chapter. The NDF as a whole looks to the private sector and international investment into Afghanistan as the engine of growth. There is a concern among the AACA and other government departments to find ways to release land to foreign investors appears to dominate the land agenda, such as it is.

Though not surprising given the short time period involved, this strategy remained undeveloped when the National Development Budget (NDB) was presented to donors in October 2002. Tackling land tenure issues remains absent in this document as well. Though the Ministry of Rural Reconstruction and Development (MRRD) paid fleeting lip service to the role of "inequalities in access to productive assets" in sustaining poverty in the NDB, it presented no plan to address these inequalities.<sup>171</sup> The budget from the Ministry of Agriculture remained fixedly focused on providing seed, fertilizer, breeding stock and other inputs for arable and livestock development. However, policy points under the proposed Rule of Law programme do state that,

"The situation in the north of the country requires measures to be taken to end displacement and to permit returns of Internally Displaced Persons (IDPs).

"The displacement of large numbers of nomadic pastoralists (Kuchi) represents a complex socio-economic problem that requires the appointment of a government focal point and close cooperation with assistance agencies to resolve.

"A policy must be crafted that foresees the settlement of disputes among the protagonists at different levels, includes provisions for their commitment to implementation of agreed measures for peace and security, reconciliation and justice."<sup>172</sup>

These three concerns, while not supported with a plan of action or funding, do fairly accurately identify three primary crisis points in current

rural land relations. The last in particular hints at recognition that some form of dispute resolution and reconciliation is going to be necessary. For further development on these concerns, we need to turn to the land law itself.

### Policy Through Law

The context for this necessarily begins with the Bonn Agreement of 5 December 2001. This established that the overreaching framework for all matters, including those of property, would be the 1964 Constitution until such time as a new constitution is prepared (due by end 2003).<sup>173</sup> At the same time, "existing laws and regulations are to apply," provided they are not inconsistent with the Bonn Agreement or the 1964 Constitution. The AIA was given the right to repeal or amend those laws and regulations.

In February 2002 the AIA accordingly abolished all laws, decrees and private constitutions that were inconsistent with the 1964 Constitution.<sup>174</sup> At the same time, it ordered each ministry to study legislation in its sphere that was in force prior to 21 December 2002, and to bring forward amendments or fresh legislation as needed in order to remove the above-mentioned inconsistencies. Therefore, unless repealed or amended, or obviously in contradiction to the 1964 Constitution, decrees in existence during the Taliban era still represent the applied law.

### *Constitutional positions*

Current articles on property in the 1964 Constitution have been mentioned above (and are reproduced in Appendix G). Taken together these have the following implications:

- A person who has taken out a loan or who has mortgaged his land cannot have his land taken from him unless a specific law is made that allows this to happen [Article 26].
- No member of one ethnic group may be prevented from moving to or living within an area of choice, provided this is done legally [Article 26].

<sup>171</sup> GoA 2002b.

<sup>172</sup> *Ibid.*

<sup>173</sup> Provisions relating to the monarchy and executive and legislative bodies were not to apply [Clause II 1(i)].

<sup>174</sup> Decree No. 66; see Appendix K for translation.



- The state may not dispossess people of their land unless it is essential for a public purpose. In that event, the owner must be fully compensated for the loss, and paid prior to being evicted [Article 29].
- Nobody other than government may appropriate private land; warlords who do so are acting illegally [Article 28].
- There are no longer limitations on the amount of land any person or body may hold (ceilings) - unless and until a special law provides for this [Article 29].
- Foreigners may not own land, but they may lease land from Afghan owners [Article 29].
- Courts are to deal with property disputes on the basis of statutory laws; only where no clear provision exists will the principles of

*Hanafi* Jurisprudence of the *Shariat* of Islam be used to render a decision and even then, the decision must fall fully within the rights laid out in the Constitution [Article 102].

#### *A commitment to restitution*

Although of limited coverage, the above represent tangible policies. Already these have been appended.

First, in 2001 and in accordance with international law, the AIA promised that "the recovery of movable and immovable properties such as land, houses, markets, shops, apartments etc. will be effected through relevant legal organs." Furthermore, it committed to work with UNHCR on the monitoring of this commitment [Articles 5 & 8 of Decree on the Dignified Return of Refugees 2001].<sup>175</sup>

#### Box 14: Examples of Land Loss

- Landlessness in Bamyan is severe "due to occupation of Tajik homes and land by military personnel."
- Around 50 percent of people are landless in Sholgara in Balkh, "where the Pashtun minority has farms of 300-500 *jeribs*."
- 1,000 Pashtun families have been expelled from five areas of Farkhar and are now landless.
- Pashtun living in Kunduz have also been targeted by Uzbek authorities and find their farms occupied by warlords; "The Governor of Kunduz is said to occupy 1,700 *jeribs* of land belonging to refugees."
- In Iman Sahib, Uzbek returnees are being prevented from living there by current Turkmen residents; "One commander is reported to have taken all livestock and all land in his area."
- There are reports in Moqur in Ghazni of forced occupation of land by local commanders; "One commander has sent his men out to capture land for his own use."
- In Besud, 8 *jeribs* of land have been occupied by a commander, who sold the land then disappeared. So the returnee has found an occupant who holds a court certificate of payment.
- A widow in Kunduz reports that her husband's family will not release any share of his land to her.

Source: District Profiles UNHCR 2002c.

<sup>175</sup> See Appendix K for translation.

Second, the Afghan government has more recently created a special court under the Supreme Court to hear property disputes [Decree No. 136 of September 2002].<sup>176</sup> These disputes may relate to issues of possession going back as far as 27 April 1978, the date of President Daoud's murder and the establishment of the PDPA communist regime of President Taraki (and thereafter Amin and Karmal).

The land disputes court is likely to find itself quickly inundated with hundreds - if not thousands - of cases, especially if access to the court is made public, simple and cheap.

Hearings will be held on the basis of individual claims/submissions. Submissions will be reviewed by a panel of experts (the Disputes Resolution Commission) prior to decision by the three-judge special court. The court's ruling will be final. So far, no advertisement for applications, elaboration of procedure as how to apply to have a dispute heard or establishment of detailed principles upon which the court will rule have been made. It is not clear, for example, how far the special court will use state law, civil law or Shariat to guide its decisions, and if the last, then how far it shall enforce decisions based upon Hanafi doctrines upon non-Sunni claimants.

It might be expected that the initiative for this court arises from the presumed immense number of cases where returnees or displaced persons have been unable to recover rural homes or farmland. However, it is more likely that the catalyst has been a growing number of cases involving high-profile individuals, whose concerns relate mainly to difficulties in recovering valuable urban properties.<sup>177</sup> Whether or not this is true, the land disputes court is likely to find itself quickly inundated with hundreds – if not thousands – of cases, especially if access to the court is made public, simple and cheap. It is highly unlikely that its plan to be a single-circuit court moving around the country will be sufficient to meet the

high demand for dispute resolution. In particular, this will be the case if, as implied, ordinary courts at district and provincial levels are no longer able to hear land-related disputes.

It remains to be seen just how many of the pending or latent cases involve rural farmland. UNHCR's recent district profiles highlight one of its priority concerns as the lack of housing or damaged housing for returnees (respectively reported as 45 percent and 38.4 percent in September 2002).<sup>178</sup> In Shiba in Bamyan for example, UNHCR reported serious overcrowding among returnees, where 298 houses have been totally destroyed and another 643 partially destroyed.<sup>179</sup> As municipalities come to grips with their situations, more figures are emerging. For example, the deputy mayor for property in Kabul knows for certain that 600 private homes are wrongfully occupied, but suspects that there may actually be many times that number [Appendix I]. Many of these cases originate from the redistributions of 1978-1980, but many more are emerging as the result of civil war and disorder since 1990, and from the current control of many districts and villages by warlords and their militias. With each passing week, awareness of the large extent of lost farmland is coming to light, though on a still *ad hoc* basis. Box 14 provides examples drawn from UNHCR's district reports. The UN refugee agency says it will publish a fuller analysis of the district reports by early 2003.

It is also not clear on what basis the court will rule, or indeed how current cases are resolved. Although not inconsistent in principle, Islamic law, civil law and state law provide different guidance and strategies. None appear to cover the kind of problems being encountered to the depth required for safe and lasting decisions. The Law on Land 2000 provides a sketch of the basis

<sup>176</sup> See Appendix K for translation.

<sup>177</sup> Such a case, for example, is that of the governor of Paktya Province, Babrak Khan, who lost many valuable houses and land in Kabul to government occupation and reallocation during 1978-79, properties since sold or built on by purchasers, and which he has allegedly been unable to retrieve. The manager of a guest house in which the author was staying claimed that in almost every guest house in Kabul there is a steady stream of wealthy returnees, particularly from England and America, who have come to reclaim their valuable properties and hope to sell these or rent them out now that prices are so high. Not all of them want to stay. It is these people who are complaining so strongly to ministers. Some of them would stay if they could get their houses back to live.

<sup>178</sup> UNHCR 2002b.

<sup>179</sup> UNHCR 2002c.

### Box 15: The Current Legal Basis for Retrieving Rural Land

- If the land has not been distributed to a new owner and there is valid documentation then the land will be returned to the claimant or to his children.
- If the land was distributed (under the land reforms), then the current occupant will pay the owner for the land at present-day values. If they can't agree on a price, the owner may reclaim the land and may also claim "all the lost harvests" from the occupant.
- If the land has been distributed to the government, it does not have to return the land to the owner, but will pay the farmer at present day values, and in one instalment.
- If the land was distributed to a person who has subsequently sold the land to another, then the current owner may claim costs from the person who sold him the land, when returning the land to the original owners.
- If the boundaries of the property have been altered (reduced), then the occupant must compensate the owner for the land area that has been lost.
- Owners and occupants are to agree on the value of buildings constructed since the owner lost the property and to come to an arrangement to repay the costs to the occupant who constructed the buildings or improvements; and
- No claims for degradation to the land may be sought.

Source: Chapter Four of Law on Land 2000.

on which judgements could be made [Box 15]. While this could be used to recover land appropriated by warlords, neighbours and relatives, its terms are firmly fixed on recovering land that was distributed following the 1978 revolution. This Law on Land 2000 was published under Taliban Edict No. 57 along with 25 other rural sector laws.<sup>180</sup> An informal translation of this land law is provided in Appendix K.<sup>181</sup>

#### *Restoring government property*

Another new law decreed by the Afghan government was to halt the distribution of government property in municipal and rural areas

[Decree No. 99 of 4.2.1381 (2002)]. This reflects a government objective of re-securing government property, an effort that has spearheaded what limited policy evolution/legal regulation has been undertaken, other than the above-mentioned court. Nonetheless, in practice, warlords are still visibly distributing land to their followers, often using unutilised government lands for the purpose.<sup>182</sup>

Developments in support of securing government property are mainly focused on the re-drafting of a Taliban edict on the subject [Decree No. 26 Concerning Land 1999]. A translation of the

<sup>180</sup> These ranged from orders or edicts (*firman*) concerning the organisation of agricultural and livestock activities, laws for nature and forest conservation and hunting, orders relating to poppy cultivation, rules for parastatals, orders from the Supreme Leader "Regarding Working Restrictions For Women in Local and International NGOs," "Regarding Punctuality of Workers on Government Duties" and an "Order to Government Officers Not to Serve Persons Who Have Trimmed Their Beards."

<sup>181</sup> The law was not freshly drafted by the Taliban, but re-issued and amended from the Rabbani and Najibullah decrees, which were themselves amended versions of the Revolutionary Land Decree of 1978, with many clauses extending back to President Daoud's Land Reform Law of 1975.

<sup>182</sup> One documented case relates to the distribution of land in peri-urban areas around Kabul, for which loyal soldiers of the United Front may apply on payment of around US \$350 into a private account. One receipt seen by the author was number 1,223. UNHCR has reported cases in the eastern region, among others, of warlords planning urban developments on peri-urban, rural lands that are then handed over to supporters. Warlords are allegedly encouraged in these developments by one or other supporting members of cabinet.

<sup>183</sup> Redrafting has been undertaken by a committee composed of representatives from the Ministry of Agriculture, Irrigation and Water under the leadership of the Ministry of Justice.

proposed new law, with comparative reference to the 1999 Taliban version, is provided in Appendix K. The draft makes changes to only eight of the 26 standing articles.<sup>183</sup> Only three of the changes proposed are matters of substance, and none significantly alter the intentions of the law.<sup>184</sup> Should the cabinet approve the law, it will in effect be re-issuing the Taliban decree.<sup>185</sup>

It will be recalled from the discussion above that the definition of government land has not been stable over the years. In summary, government land was first defined in 1965 as part of the Survey and Statistics Law guiding registration. However, this did not identify current government land. Rather, it stated that all land that was registered to the government, including all wastelands, would be called government land. The government then proceeded to register as much land as it could from 1966-1975. This amounted to 856,000 ha. of agricultural land (mostly under schemes of one kind or another) and 943,500 ha. of wasteland.<sup>186</sup> The status of the additional 1.6 million ha. of pasture registered is unclear. Surveyors have offered different views as to how much of this was registered as belonging to government, and how much was recorded as

"public land." The question was largely irrelevant under the Revolutionary Constitution of 1980, which firmly placed pasture under the description of state land.<sup>187</sup> By 1992, this was retracted to include only "unclaimed pasture."

To recover government land the Taliban/ATA Law on Land orders that even if no documentation exists, properties that have been under effective government authority since 1965 will be held to belong to government [Article 2]. "Effective" is not defined, but could be considered to mean occupation and/or use by government, through development of structures or otherwise. The decree also lays out other stipulations [see Box 16]. In addition, Article 22 is emphatic that,

"Government officials or persons who misuse their power and occupy the lands of others by force of arms must not only return the land, but be punished in accordance with the law."<sup>188</sup>

How far the government is able to enforce the law under current conditions is moot. The Minister of Agriculture indicated that, should the law be put into effect, 85 percent of the government's land would be restored to the government.

#### Box 16: The Current Legal Definition of Government Land

- All lands for which the government has paid compensation and for which there is related documentation;
- All lands for which the government has paid compensation and where, if the relevant documentation has been lost from government offices, there are sufficient witnesses to testify that the estate is government property, or where there is evidence of public development or structures;
- Lands registered as government land with documentation, even though compensation may not have been paid;
- Lands that have been under the control of government since 1965 and developed by government;
- Water channels that are not under proven private ownership and the lands irrigated from these channels;
- Land designated for housing in urban areas that has been allocated, but where no construction has taken place within the specified time limit;

<sup>184</sup> As per changes to Articles 7, 23 & 24. The most interesting clause that was dropped was the Taliban directive about how village commons may be defined: "If a man with a loud voice stands at the last house of the village and shouts, the last point at which he may be heard marks the beginning of *maraa* (public land)" [Article 7].

<sup>185</sup> By end October 2002 the proposal had apparently been discussed twice by the cabinet but no decision was made.

<sup>186</sup> See Appendix I.

<sup>187</sup> By contrast, President Daoud had been careful to only specify "forests" in his 1977 Constitution.

<sup>188</sup> Law on Land 2000.

- All government properties sold to the private sector by municipalities of other government departments without written statement of transfer;
- All government lands that were distributed from April 1978, but where no subsequent development was undertaken and where no documents of transfer were issued; and
- All lands which in *Shariat* prove the right of government.

Sources: Taliban Decree No. 26 Concerning Land 1999 and proposed ATA redraft, and Taliban Law on Land 2000.

However, the law may, in fact, serve the purpose of redefining government land, and in the process, may reduce its scope. For example, even though vast lands may have been under the control of the state in 1965, they may not all meet the criteria of having been developed by the government since.<sup>189</sup> The final limits placed upon government land come, however, from the corollary definition of other classes of land, which explicitly exclude government land. Table 1 sets these out. Most striking are the distinctions drawn among government land and public land and wasteland.

#### *Government as administrator*

While the state limits the range of its own tenure, it does retain to itself controlling jurisdiction of how other classes are used and who uses them. For example, *maraa* is thus to be "reserved for use by villagers."<sup>190</sup> Rights to its use may be obtained through *Shariat* provision,<sup>191</sup> and remembering that *Shariat* itself acknowledges local customary rules.<sup>192</sup> Therefore, the arrangements for *maraa* will be through largely informal rules. The connotation is that these are common lands rather than public lands. They are treated classically, however, as being both *un-owned* and *un-ownable*. That is, no space is made in the current law for consideration of local commons as private, group-held property.

Arrangement for the use of *mawaat* is more formal. This may occur through issue of leases, and which assumes the state as the lessor.<sup>193</sup> A distinction is drawn between barren lands that belong to the government and *mawaat*; the latter may be sold by the state, at fair prices.<sup>194</sup>

#### *Opening up new farmland*

The thrust of current land policy is one that has roots in past policies to open as much land as possible to arable farming, mainly through dam and irrigation developments like the Hilmand Valley Scheme (1949-1979). As discussed above, most of the land actually surveyed in 1966 onwards was so-called barren and virgin land, recorded as "under government," and excluded from the Books of Ownership and Taxation. Disposal of these lands to the private farming sector has been policy for years, often with Pashtun nomads prominent in the line of 'eligible applicants.' This was both to encourage them to become settled farmers and to build Pashtun hegemony in invaluable, new farmland areas. An example of implementation of this policy under the Taliban was given earlier in the case of Altamur Village in Logar Province. While current policy may have lost its Pashtunisation objectives, the Ministry of Agriculture remains firmly committed to the expansion of arable land, and is looking to cabinet support for this development.

<sup>189</sup> The definition relating to *Shariat* is less constrained, given that its main interpreter, the civil law, does not describe government properties so much as define the limits of private possession [Book Three, Title One, Chapter One, Part One Rights of Ownership of Civil Law]. However Edict 26 describes *Shariat* proof as being "by the evidence of legal documents, history of use, the evidence witnesses provide and by developments that have been undertaken on the land" [Article 10], all which limit the land which the state may claim as its own.

<sup>190</sup> Article eight of Edict 26/draft decree.

<sup>191</sup> Article 84 of Edict 57 on land [Law on Land 2000].

<sup>192</sup> At least as stated in the Civil Law, Article 26.

<sup>193</sup> Article 15 of Edict 26/draft decree.

<sup>194</sup> Articles 87 and 88 of Law on Land 2000.

TABLE 1: CURRENT LAND CLASSES

Tenure Class		Dari Name	Specified Owner	Use/User	Extent to Which May be Transferred Into Another Class
1	Private land	<i>Amlaki shakhsi</i>	Private persons	Not specified	Not specified
2	Government land	<i>Amlaki Dawlatii</i>	Government	Not specified	To private lands such as "lands made ready for agriculture, and not under any plans for urban development, minerals or pasture" <sup>195</sup>
3	Public land	<i>Maraa</i>	Un-owned land	Public purposes such as pasture, graveyards and to be "reserved for use by villagers"	Nil [but use rights may be awarded] <sup>196</sup>
4	Religious land	<i>Waqf</i>	Public land available for common, religious purposes	For "common good"	None ["may not be sold, rented, mortgaged, gifted or inherited"]
5	Wasteland, defined as desert, mountains, hills, rivers, virgin lands, barren lands, forests	<i>Mawaat</i>	Un-owned land from which government land is specifically excluded <sup>197</sup>	Not specified	May be brought under lease with permission of the head of state

Sources: Taliban Decree 26 Concerning Land 1999, proposed ATA redraft and Taliban Law on Land 2000.

Allocation of new lands for farming purposes was a main objective of the Law on Land 2000, passed by the Taliban under a general Agricultural Decree No. 57 and still the operative law today. The source of these new lands is to be government lands, and specifically those areas that have either been gifted to the state, state agricultural lands or "wastelands made ready for agriculture" [Article 43]. "Eligible applicants" are once again defined as the local landless followed by nomads to make way for retired government workers, who will receive land instead of pensions. Successful applicants will pay for the land in up to 10-year instalments and at a price set by a special commission.

The contents of this law go hand-in-hand with the Edict on Acquisition of Property 2000, another law that is yet to be scrutinised by the ATA. This confirms that the state will only take land for public purposes. It defines public purposes as buildings, highways, pipelines, communications, electricity, tunnels, water supply, religious schools, mosques, underground mineral resources, lands of cultural and scientific value, forests, dams and lands that are part of water "catchment."

#### *Pastoral rights*

The status of pasture is central to the land categorisation. Arguably, it has been definition

<sup>195</sup> Article 43 of Law on Land 2000.

<sup>196</sup> Article 84 of Chapter Nine of Law on Land 2000 provides for "rights to *maraa* use may be obtained through *Shariat* provision."

<sup>197</sup> But over which the state exercises jurisdiction and may be the lessor; see Article 13 (2) of Edict 26 of 1999/Draft Edict in Appendix K.

of pasture and the will to bring this under control that has driven definition of government and other classes of land. In 1965 the Survey and Statistics Law defined pasture as any land that had been used for grazing in the past (and irrespective of whether it was in deserts, hills or valleys and definable therefore as various wasteland, barren land or public or private land) [Article 63]. Conversion of pasture to agricultural land was not permitted [Article 64]. Pasture could not be privately owned and its use was to be supervised by provincial governors. They were instructed to delimit and survey pastures. They could allocate use rights to these pastures through the issue of grazing licences [Article 64-65]. The Law of Pasture Lands 19 Hoot 1349 (1970) elaborated this position, emphasising that "new rights to use pastures may be acquired through application to provincial administrations." [Article 16]



Photo courtesy of Chris Johnson

Many rights were so acquired through the 1970s, mainly by nomadic peoples seeking to secure summer pastures [see Appendix I]. This was in addition to rights that were allocated to nomads through settlement schemes on government land or reclamation of "wasteland."<sup>198</sup> As had been the case under King Amanullah in the 1920s, pasture rights were conditional upon payment of a livestock tax to the local administrations. Once allocated, the usufructary nature of the grants tended to blur, as did the distinction between government as owner or administrator, so each side considered itself the owner. The core conflict area was not, however, between state and pastoralists, but between pastoralists and settled villagers, who considered a good part of the grazing land to be their own property. By 1980, an interim constitution, drawn up by the largely

Marxist government, had sided with the nomads, declaring that,

"The government will guarantee for the nomads, tribes and livestock breeders vast opportunities to use pasture free of charge on an equitable basis and guarantees for the nomads the right to unhindered passage over national territories" [Article 20].<sup>199</sup>

Attempts by both the Taliban – and now the ATA – to unravel the complex status of pastureland and pastoral rights through the re-issue of a slightly amended version of Decree 26, need to be seen in this light. The result is complicated.

First, an attempt to clarify lands over which rights may be held is being made by drawing clearer distinctions among government land, public land, wasteland and private land. Pasture may exist in all of these classes. Under Decree 26 in its existing and proposed version and the Law on Land under Decree 57, pasture rights appear to be obtainable through sale or lease of government land and obtainable by lease through public auction from wastelands. No private rights over pasture may be obtained in public lands (*maraa*). As discussed above, these are by definition "un-owned and un-

<sup>198</sup> The 1965 *Survey and Statistics Law* permitted government lands to be sold "following the Manual for Nomadic Tribes" [Article 56]. Reclamation of wastelands was to be encouraged and re-claimants were to be given a certificate of title [Article 57]. "Land allocated to nomads, banished persons or settlers may not be sold for 20 years" [Article 62].

<sup>199</sup> The 1964 Constitution also offers specific support to nomads: "The government will help the nomads, tribes and livestock breeders through grants in aid, favourable bank loans and other aids in order to enable them to grow more animals, market their products and raise their material, cultural and living standards" [Article 20]. This was sustained in the 1987 and 1990 Constitutions.

ownable lands." However, the Taliban and proposed ATA decree are quite clear that these lands are to be reserved for villagers – that is, not nomads [Article 8].

And indeed, this is so firmly the case that the Taliban Law on Pasture 2000<sup>200</sup> goes so far as to refer to local rights over public land as "private rights." "Private pasture" is declared as including *maraa*. This reinforces the impression gained earlier of *maraa* as less "public land" than "commons," over which there could be potential for communities to exercise private group rights. This however is not carried through in the proposed redrafting of Decree 26, which instead confirms that neither government nor individuals may secure private rights in *maraa*.

As has been the case in the past, ethnic, arable-pastoral, territorial, and development conflicts are raising the question of pasture and its ownership.

The lines of conflict between local and seasonal or other rights over *maraa* are therefore clear. This is even more so in the provision of the Law on Pasture where "public pasture" is defined as including barren lands and lands on the edges of cities and villages" [Article 2]. This opens up potential areas of dispute, and indeed refers to the very lands that appear to be under such widespread contestation: lands on the edge of villages, used by both local people and nomads, and which may be as easily classed as *maraa*.

When the related policy of encouraging farmers to expand their cultivation as far as possible is added to this mixture, the ingredients for dispute are stirred. This is particularly so as deep well technology begins to be employed, making the conversion of dry lands into arable lands possible.

The levels of contention may reach violence and murder – securing pasture with guns is not unknown.<sup>201</sup> There are innumerable cases where Kuchi nomads claim their pasture is being encroached by settled peoples (as illustrated in Box 4 in Chapter One), and as many cases where settled people feel their local commons are being encroached by outsiders. Issues of land degradation also enter the fray. There are cases in the west

for example, where short-term cumin production on fragile pasture is leaving behind ruined soils unable to regenerate grasses, rendering them useless after one or two years for either cultivation or pasture.<sup>202</sup> Other pastures are being degraded through overuse, itself often possible through new water development. Particularly where land rights have been held in a delicate balance among different sets of users, the installation of boreholes and irrigation channels carries with it an assertion of ownership that may seriously unsettle norms. As has been cyclically the case in the past, ethnic, arable-pastoral, territorial, and development conflicts are increasingly crystallising in the question of pasture and its ownership. Despite a fairly



Photo courtesy of Chris Johnson

<sup>200</sup> Published under Decree 57 along with the Law on Land.

<sup>201</sup> De Weijer op. cit.

<sup>202</sup> De Weijer pers. comm.



substantial history of attention, this is yet to be satisfactorily resolved.

In this respect, it is worth recalling the strategy of the recent budget planning process for "the appointment of a government focal point and close cooperation with assistance agencies" to resolve the complex socio-economic problem of the displacement of large numbers of nomadic pastoralists (*Kuchis*).<sup>203</sup> This was in fact very promptly initiated through a cabinet decision in early October 2002 to establish a commission on *Kuchis*, comprising inter-ministerial representation. This was closely followed by the formation of a Kuchi Vulnerability Working Group, launched by MRRD, but under the chairmanship of the Minister for Tribal Affairs. The two bodies have declared they will work together; the working group is serving as an advisory group to the commission.

Humanitarian aid and related water development for rehabilitation are the shared primary objectives, but with recognition of the need to resolve underlying land conflicts also a key concern.<sup>204</sup> MRRD is considering how humanitarian and dispute resolution needs could be met by developing institutions at the community level. Meanwhile, a political approach to the land grievances of Kuchi is apparently being considered at higher levels, in the form of a proposed Kuchi shura or "parliament" of some 30 representatives, with the intention of giving nomads a voice. In

With or without guidance from a still unformed new civil administration, decisions on land relations are being made at a political level, and mainly by edict.

the current climate of resentment toward Kuchi actions during the Taliban period, this could backfire, hardening antagonisms and making the resolution of long and complex land conflicts even more difficult.

A comprehensive land policy is yet to be formulated by the ATA. The principle strategy on offer – registration of private lands to

provide a basis for collateral – appears curiously mismatched to circumstances and dislocated from a long history of rights recordation on the one hand, and longstanding use of land as security for loans on the other. This approach appears to still refer to only arable lands, not the all important pasture rights that increasingly conflict with arable rights. Nor is it clear that the murky area of what constitutes government land has been resolved. Meanwhile, a history of land tenure policy does in fact exist, expressed currently in Taliban decrees. Continuity with the recent past rather than change is a main trend, largely by default than design. The result suggests a return to strategies of the 1960s, a return reflected in, rather than driven by, the choice of the 1964 Constitution as the guiding set of principles. With or without guidance from a still unformed new civil administration, decisions on land relations are being made at a political level, and mainly by edict. How far this *ad-hoc* approach will be able to produce sustainable solutions and stability in land relations is a subject of the following discussion chapter.

<sup>203</sup> GoA 2002d.

<sup>204</sup> GoA 2002f.

## Chapter Three: Discussion



Photo courtesy of Alejandro Clitchei/WFP

### CURRENT LAND RELATIONS: AN OVERVIEW

#### A Casualty of Mismanaged State-Making

Land tenure issues have been a catalyst to the social and political disquiet in Afghanistan of the last century, helping to trigger local conflict, rebellion, disorder, civil war and even foreign occupation.

In particular, the manipulation of land rights at an official level – including but not limited to the revolutionary agrarian reform of 1978 – has played a significant role. For just as land policy and land law have become integral elements of state making, the right to land has been continually buffeted back and forth in the yet unfinished

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Oftentimes, the objectives are well meaning, or imposed for assumed modernisation. However, time and time again, the willingness of the rural population to bow to coercive, and at times, cruel change – even to their ultimate benefit – has been misjudged. Controlling land access to punish the disloyal and reward the loyal and to build nations within nations has had costs that are still being paid today. This strategy began with Abdur Rahman's reordering of territory, and has been periodically sustained since, particularly in the skewed distribution of new lands resulting from dam and irrigation development. Land-seeking pastoralists have frequently been the instrument - willing colonisers but also uniquely adaptable, and

currently entering what may or may not be a lasting period of stark tenure insecurity and territorial limitation. Overlapping land rights abound, particularly at the interface of marginal rain-fed cultivable lands and pasture.

As the state itself has fragmented over the last two decades, so contestation over land rights has descended from the centre to the periphery, involving a widening range of properties, including family farms and houses. As is frequently the case, war and instability have reignited old disputes and provided opportunities for seizures ("retrievals") and the appropriation of vast lands by the government, not always for public purposes. Warlords have followed the route of their predecessors, helping themselves and their followers to valuable land in much the same way as the Taliban, the *mujaheddin* and kings did before them. A worrying dimension to these developments is the periodic declaration by various commanders that certain ethnic groups are no longer allowed to live in the territory under their control.<sup>205</sup> Plans abound in both rural and urban areas to provide supporters with land through means that appear illegal under state, civil and customary law. Some are under implementation. Land (and related control over water) remains the ultimate booty in the agrarian state.

#### A Bedrock of Inequitable Relations

Of course, the modern land history of Afghanistan cannot be interpreted simply as a mosaic of shifting territories, alliances and ethnically disposed disputes. For just as clearly we have seen that the foundation of land relations has been – and still is – supported by a rural production system that is seriously inequitable in terms of ownership of land.

The exact dimensions of the inequities, both past and present, have proven difficult to measure. Strong regional divergences are apparent in report after report throughout the last four decades. Even more complex are the layers of tenure arrangements that accrue. At any given time, a

single farmer may be owner, tenant, sharecropper and mortgagor - and may even be in transition from one status to another with respect to one or more of his plots. The extent to which surveys have come to grips with these distinctions over the years has been insufficient. As a result, we have no clear picture of land ownership today, and the picture from the past is inconsistent. The fact that official and unofficial change has continued to occur throughout this "transitional" period, and that the current situation is still self-evidently fluid, do not make things any more apparent.

#### Continuing Polarisation

Without hard data, it may nonetheless be inferred that polarisation in land assets is more likely to have increased than declined since 1978.

In the first instance, land shortages will have increased because of population growth since the 1970s, and the reduced availability of new farmland through dams and irrigation. Fragmentation of plots, competition for land and a squeeze on the poor are some possible results. Second, civil turmoil, destruction or abandonment of properties, flight and dislocation suggest that possibly thousands (if not several million) who were not entirely landless (or homeless) in 1977, may be so now. Third, the asset-stripping behaviour of elites, militias and warlords over the last decade could only have left many landless while increasing the land resources of a minority.

Fourth, drought has tipped the scales against the already poor, apparently reducing thousands to landless and livestock-less destitution. This is occurring at a time when the drought has also made traditional landlords uncertain about their own crops and access to cash, and therefore less willing to invest in sharecropping partnerships or to offer loans. It therefore may be predicted (and has anecdotally been described), that in such times of economic stress, debts will be called in, land under mortgage will be taken over and the poor will lose the little they still possess. Cases

At any given time, a single farmer may be owner, tenant, sharecropper and mortgagor - and may be in transition from one status to another with respect to one or more of his plots.

<sup>205</sup> Pers. comm. N. Jawad.

such as one noted in the previous chapter of armed *Kuchis* demanding payment for access to land they had foreclosed on 20 years before, will be common.

*Fifth*, the unregulated Afghan economy, occurring in spite of – or because of – war, disorder and anarchy will have an adverse effect on resource distribution. The literature on this grows monthly, beginning with Rubin.<sup>206</sup> More recent studies highlight the destabilising affects of war and black illegal economies on fragile mainstream markets.<sup>207</sup> Trade in (and tax on) guns, fuel and smuggled goods (from wheat to emeralds), mass extraction of timber and marble, the poppy/opium economy, along with economic blockades of dissenting areas (such as in the Hazarajat between 1996-1998), all deliver wealth and opportunity for some and oppression, peonage and destitution for others. Even the dramatic wealth from the poppy cultivation sector in the 1990s, involving more than three million farmers, has shown little sign of reducing inequities.<sup>208</sup> On the contrary, land ownership in that sector may have polarised further, as wealthy families reinvested their returns, while poor cultivators remained burdened by high interest rates and forced sales at low prices to meet repayments.<sup>209</sup>

### Adaption and Change

At the same time, we know that Afghan society is changing, and that many of the roots binding the poor to their patrons may be loosening. One-time benefactors are feeling economically squeezed and are less able to provide. Their clients are moving away from the village to the town, from farming into petty trading, and they are becoming more educated. All of these factors are changing social relations. Klijn, for example, describes how client families returning from Iran continue to provide certain services to their one-

time lords, but now mainly out of gratitude for past support and to sustain social relations and pride.<sup>210</sup> They, like the many thousands who left Afghanistan to find refuge or employment in neighbouring countries, Europe, America or the Middle East, have returned with means, education or skills that open opportunities for off-farm employment, enable them to purchase land for the first time and provide a new basis for relating to one-time khan families in the community.<sup>211</sup>

Significantly, these trends include women, a growing number of whom are reluctant to step back into their traditional roles. In small numbers, they have been among the first to challenge current land inequities. This has been illustrated in the rising number of cases where returning refugee widows lodge complaints with courts when they find are unable to secure any share of their husband's land.<sup>212</sup>

Such shifts mirror changes within family relations as a whole. Sons from privileged families who were sent away for education and who now have jobs and means, may never return to farm, knowing that the farm has been virtually subdivided away. A new form of land relations emerges in the household, one that distinguishes the sons who farm from those who do not farm. The latter will probably receive less of a share of the family property than was the case in the past. Many of these arrangements are in transition and uncertain. [Box 17]

In addition, UNHCR reports that a surprising 74.3 percent of returnees do not have farmland to which they can return.<sup>213</sup> While it is difficult to know refugees' land status, it may be assumed that a "significant" number of refugees did not own land, surviving as workers, tenants, or sharecroppers in varying degrees of dependency to landowners. They left the country landless and

<sup>206</sup> Passim.

<sup>207</sup> For example, Bhatia & Goodhand op. cit.

<sup>208</sup> ACBAR op. cit.

<sup>209</sup> Mansfield 2001 cited by Pain & Lautze 2002. Also see ACBAR op. cit.

<sup>210</sup> Klijn op. cit.

<sup>211</sup> Even prior to 1978, Iran, Pakistan and the Middle East were destinations of migrant labour. The trend increased during the communist era, and while several million refugees have returned, several million more remain overseas, periodically remitting money to their families.

<sup>212</sup> Pers. comm. C. le Duc UNHCR and see UNHCR 2002c.

<sup>213</sup> UNHCR 2002b. Some observers dispute this statistic. One peer reviewer for example reminds the author that "many refugees will not be willing to state their real status for fear of perhaps losing an additional benefit they may receive as landless persons." He adds "My own personal experience from the camps in Pakistan indicates that the majority of refugees in camps did own land with the exception of a small number of nomads. Many returned to Afghanistan in the autumn and spring to cultivate and went back again in summer to collect the harvest."

may return landless. Not surprisingly, a significant proportion of refugees (with their now much enlarged families) are not attempting to return to their rural homes, but to cities and towns looking for work.<sup>214</sup>

### Dependency, Debt and Destitution

The uncertain trends aside, a substantial proportion of the rural population is unable to produce enough to sustain its own living, and

instead is locked into dependency on others, be they landlords, shopkeepers or more affluent relatives. While land is not the only means of production (in the classical model of land, water, seeds, labour and capital), the strong correlation between land ownership and wealth suggests that landlessness and near-landlessness are safe indicators of this dependency. It could even be the case that most of those dependent on farming are in debt. Indebtedness as a whole seems to be as severe a problem as it was 30 years ago

#### Box 17: Changing Land Relations in The Village

##### Leaving land to needy family members

Ahmad was born 50 years ago in Kunduz. On his father's death he and his four brothers inherited their father's lands. Ahmad was already at university in Kabul at this time and his share was made slightly smaller than those of his other brothers. Ahmad has remained in Kabul, and his land has since been appropriated by poorer relatives. He receives no rent and no crops, because his standard of living is so much higher than his relatives in the village. In principle, he could return and reclaim the land. "I would be given it." However, he does not believe he would ever do so. He has a house of his own in Kabul - a house that he first rented from the government as a civil servant on the condition that if he paid the value of 40 years' rent, he would obtain an ownership certificate. He has made the required payments and now has a document for the land. The property is very valuable today. If he decided to return to Kunduz, he could buy a whole new farm just from renting out his house in Kabul. "I would not need even to sell it," he said. [Mir Ahmad, Kabul]

##### Leaving land to tenants

Mahmood's father moved to Kabul in 1976, leaving his land under the care of tenants. These tenants were then given the land during the revolution in 1978.

"Even though I could reclaim my father's land, what would I do with it? I was born in the city and I want to work in the city. I do not want to live in the village or be a farmer. I could take the land from the tenants through the courts because now all land is being returned to owners. But I would have to let the land out again, and people in the village would be angry that I had taken the land from one group of families and given it to others. Or, I could make the tenants pay for the land. But I know they have little money, as each one only has a small share of the farm."

[Mahmood, Kabul].

##### The limits of subdivision

"Our village has 75 households in five sub-villages. Our fathers have been here for several centuries. They began as just two families. The way in which land is owned has never changed. Most people have no land, and they farm for others as sharecroppers. Forty of the 75 households live as sharecroppers. We also have eight Hazara families here who have no land and work as labourers. There are no large farms here. When the communists wanted to redistribute land there was nothing to distribute here. Our biggest problem is land shortage. My own farm has been subdivided down to 100 square metres. From my point of view, I do not have land. Our children have to leave and work in the cities. Among my brothers, one is in Peshawar, one in Paktya, two in London and one is working for DACAAR in the village. Only one brother is looking after the land. Ninety percent of the village is like this. From this village alone 26 sons are in London. "We grow food and vines to support ourselves but our children send us money to buy clothes and build canals." [Bidmoskh Village, Hajamari district, Ghazni]

<sup>214</sup> Figures published in September report that more than half have "returned" to Kabul (600,000) and Nangarhar (300,000) [UNHCR 2002b].

when action was finally taken to limit it in the form of the 1978 decree against usury.

Living on borrowed assets or money and sinking further into debt appears to be a widespread trend, affecting a very large number of people. How far charity or finding petty employment may bring landless and near-landless families out of destitution is not yet known. It may be a good deal less than hoped. Labour is still heavily preoccupied with farming in order simply to gain a share of food. Selling eggs and other minor items, collecting grass, water and herbs and even making carpets, do not show signs of improving the livelihoods of the very poor.<sup>215</sup>

#### Instability and Ambiguity

Given that many Afghans have been away from their homes and farms for sometimes a generation, instability and ambiguity in land relations on their return may be expected. Even if a refugee possessed a farm and returns to find it intact and unoccupied, he (or his children) will face problems applying the asset base to a much-enlarged family membership. As monitoring of returnees improves, the dimensions of the problem will become clearer.<sup>216</sup> Internal displacement of whole communities further disturbs land relations and heightens insecurity among occupants, who know

from the experience of neighbouring communities, districts or provinces that neither documents nor officialdom will be able to secure their property in the face of warlord vandalism, and/or ethnic resentment. How many people have been displaced and on what grounds are also not yet known. UNHCR and the government have recognised that more local-level return commissions are necessary to help returnees re-establish viable land and living arrangements.<sup>217</sup> Predictably, the north, where tensions are among the most severe, is the site of the one of the first of these commissions.

What is known is that the depth and extent of tenure failure is

a good deal greater than assumed – a fact that helps to explain the inattention to such matters in the administration's plans or budgets. This tenure failure seems to reach deep into rural areas. Even in quiet communities that have seen almost no violence over the last 24 years and have not endured co-option by land-grabbing leaders, the instability of the last decade has stirred old grievances. These may go beyond ethnic divides, such as is described in Box 18. Lawlessness exacerbates this insecurity. The significance of the few cases where the state or its agents in the provinces and districts or the courts have successfully resolved disputes and

Internal displacement of whole communities further disturbs land relations and heightens insecurity among occupants, who know from the experience of neighbouring communities, districts or provinces that neither documents nor officialdom will be able to secure their property in the face of warlord vandalism, and/or ethnic resentment.

#### Box 18: Unsettled Relations in Villages

"We have been in this area for two centuries. But we only have documents from the time of Amanullah. He returned the land to us that his own grandfather, King Abdur Rahman, had taken and given to two families from other places. That was 120 years ago. When we got the land back, we got signed documents, saying the land belonged to our grandfather, not to theirs. However, later the outsiders got their land back again under the last Shah. They got the land registered as their own land in 1960s. Those outsiders are Pashtun and they were given one-sixth of our land. We are also Pashtun, but we are not related. They came from Warna on the border in no-man's land. Today those households number eight with many members. They expand their land on that side of the river. We are not happy with them being here. This is not their land. We want them to go away. We will never be happy until they leave."

[Bidmoskh Village, Hajamari District, Ghazni]

<sup>215</sup> Allen op. cit., Bhatia & Goodhand op. cit., Lautze et al. op. cit., Pain & Goodhand op. cit., Pain op. cit.

<sup>216</sup> UNHCR's returnee monitoring in particular is expected to yield interesting data. How far the ATA's own inspectorate system around the country is providing information is not known.

<sup>217</sup> Pers. comm. A. Tyler, UNHCR, Kabul.

Photo courtesy of FAO



helped people recover their lands cannot be overrated.

## CHALLENGES

A general finding of this study is that long years of misdirected policy have entrenched, rather

than improved, deeply inequitable and often unjust land ownership relations among tribes, between agricultural and pastoral systems and among feudally-arranged classes of society. Attempts to remedy these have been poorly executed. The question facing the new administration is whether to ignore unsatisfactory and conflict-ridden land relations and hope that they will resolve themselves through increased employment and urbanisation, or to deal with the issues directly - and if the latter, then how? What route can promise success without breeding conflict? And what will constitute success? Will the restoration of land ownership patterns to those of 1978 be enough, or will it only paint a veneer of stability over an unsound foundation? Is it possible to achieve real tenure security without change in the relations between landlord and tenant, pastoralist and settled farmer, Pashtun and Hazara? Is it possible to achieve lasting peace without tackling the various disorders in land relations? How far are stable land tenure relations a determinant of stability overall?

### 1. Putting Land Relations on the Agenda

There are signs that both the ATA and the international community are recognising that disorder in land relations cannot entirely be ignored, if peace and stability - let alone socio-economic transformation - are to come about. As described in the previous chapter, the administration is making tentative moves in this direction, as are supporting agencies, at least in

In looking to ways forward, a host of difficult questions arise...

- How may matters of rural tenure be addressed where warlords are in control?
- How important is restitution to pre-war conditions and will this solve the problem?
- How may questions of tenure security be tackled without risking more conflict?
- How may the traditional disparities in land interests of arable and pastoral societies be balanced?
- Could the promotion of land rights be a workable route to gender equity?
- Will the planned policies offered by the administration thus far, such as registration and entitlement, meet the need for tenure security?
- Should the mortgaging of rural land be promoted, or should other ways of securing loans be explored?
- How will the current drive to open Afghanistan to foreign investment affect rural land relations? What needs planning for?
- What may be learned from past experience in the use of land tax to levy much-needed revenue?
- Who should administer tenure relations: people, state, or courts?

- Are definitions of government land changing in the right direction? How adequate are the constructions for pastureland and commons?
- Is the law good enough for ordering land relations in a consistent and fair way? What are the implications for using religious law to resolve land disputes? And which school of religious law?
- How do urban and rural tenure issues relate and do they need to be treated separately? Could there be mileage in focusing on urban problems first?
- How real is the problem of farm fragmentation and when should the state step in, if at all? How should severe under-capacity in government be dealt with? Will capacity building be enough, or must other ways forward be found? How many tenure problems will the state be able to resolve anyway? What should be its role in the short and longer term?

... including the larger questions:

- Is peace conditional to restoration of stability in land relations? Or is such restoration a prerequisite to peace?
- How may urgency/expediency be balanced with longer-term needs for transformation?
- May ethnic concerns be addressed separately from tenure concerns?
- How may land rights ever be equitable where there is such pressing land shortage?
- Do restitution issues need to be treated separately from reconstruction and equity issues?
- Is promotion of land rights a workable route to social transformation?

matters of restitution. The UN Centre for Human Settlements (UNCHS- Habitat), for example, now recognises resolution of property rights as essential to rehabilitation of Kabul City and has begun the process with an investigation into the legal norms. FAO's agricultural projects, some of which have operated throughout the conflicts of the past 24 years, are beginning to turn their attention to the tenure constraints that impede local development.<sup>218</sup>

Through return commissions, UNHCR is opening routes through which issues of tenure may be locally addressed. Even during the month of October 2002, this author noted new acknowledgement within the assistance community that instability in land rights may well be helping to sustain disorder and delay recovery. Arguably, "land tenure" is slowly now becoming part of the public agenda. It is both timely and necessary to formulate a more explicit and comprehensive

Though constitutional principles would not alone amount to resolution, the formality and inclusiveness of the constitutional process would help identify the routes and means through which resolution may evolve.

strategic commitment to tackle land ownership matters.

## 2. Developing a Sound Legal Basis for Land Rights Management

The legal issues facing law as a whole in Afghanistan are immense, and extend into matters of the nature and source of law itself. This involves, for example, not only the need for definition as to the relative role and authority of customary, statutory and religious law, but clarity in identifying which sources of religious law are to apply and when. These are in themselves

fundamental constitutional and judicial development issues, elements of which have been periodically revisited in Afghanistan's history. They are matters that will surely exercise the minds of jurists mandated to define the judicial

<sup>218</sup> For example, the earlier-mentioned Nangarhar Agricultural Development Authority's 30,000 ha. estate, where it is being recognised that a crucial decision that needs to be made to determine the future of production in the area, is the tenurial basis on which that land is held or distributed [pers. comm. D. Davis FAO]. Another FAO-supported programme, the Development of Sustainable Agricultural Livelihoods in Eastern Hazarajat, has recently deemed land relations a key activity for moving forward [pers. comm. D. Hitchcock FAO].



environment. Working in the abstract may not be easy however. Land ownership matters could provide a very concrete arena for such legal issues to be worked out. Every encouragement should be given to the independent Judicial Commission to consider the legal and judicial requirements needed to support tenure security.

It has also been observed that the forthcoming constitution-making process could - and perhaps should - be a route through which deep-rooted contentions over land access are publicly laid out and explored. Though constitutional principles would not alone amount to resolution, the formality and inclusiveness of the constitutional process could help identify the routes and means through which resolution may evolve. Because many of the issues are too deeply rooted in principles of human rights and justice, attempts to block matters of tenure from the constitutional agenda would be unproductive. Nonetheless, how to guide this process must be carefully considered and the issues involved handled with care. Exploring land rights through constitution-making is a journey upon which several post-conflict states have already been forced to embark, as they recognize the extent to which land ownership and how it is distributed and governed becomes integral to the construction of a democratic, modern, agrarian society. Afghans should therefore expect the next constitution to break ranks with the past and develop a solid chapter on land rights.

### 3. Identifying Institutional Responsibility

However, the building blocks towards such decision-making are still to be put in place. Each ministry's vision - to the extent that a vision exists - currently focuses on its own sectoral interests. No single ministry has taken on land tenure issues or offered a concrete institutional framework

While returning people to their homes should be a priority, it may prove futile if it merely regenerates the problems of the past.

through which multi-sectoral tenure concerns may be addressed. There is also a discernible divide between the political and executive arms of state overall (and quite aside from the relationships with the judiciary). Cabinet members have brought land recovery issues into a court-bound process, and, in particular, have taken legal and practical steps to reclaim government properties. Policy makers, attempting to lay out a framework for the future development of the state, have settled on registration of landholding as one of the pre-conditions of an investment-friendly environment. As outlined later, this may prove to be an in-effective plan. More important for the moment, these different agenda need integration into a single and consistent strategic vision as to how land rights should be ordered, governed and sustained in the future.

### 4. Learning From International Experience

Unfortunately, international experience in resolving deep-rooted property rights issues is quite limited. Even where peacekeeping has moved into peace-building initiatives along UN coordinated lines (of which UNAMA is a current example), its ability to address anything beyond immediate priorities has generally been deficient. Efforts in Rwanda, Burundi, Kosovo, Sierra Leone and East Timor, among others, have allegedly been at once late, halting and insufficiently professional in technical support, or thorough enough in analysis to offer lasting ways forward in matters of property.<sup>219</sup>

Though some useful elements have come out of these experiences,<sup>220</sup> it is unclear that their more fundamental lessons have been absorbed. Such lessons include evidence that the conventional strategy of first helping people recover lost property and only then addressing the problems associated with land ownership, though logically appealing, may be flawed.<sup>221</sup> That is, while returning people

<sup>219</sup> See Fitzpatrick 2002 and the plethora of papers on different situations he refers to at [www.unhcr.ch/refworld/pubs/](http://www.unhcr.ch/refworld/pubs/) and [www.un.org/peace/reports/peace\\_operations/docs](http://www.un.org/peace/reports/peace_operations/docs).

<sup>220</sup> As evidenced in the establishment of a Rule of Law Team within UNAMA.

<sup>221</sup> The fact that nearly a decade after the ending of apartheid in South Africa, for example, the government is still unable to find a satisfactory way forward to restore the land rights of 14 million residents in the ex-homelands, is salutary. The questions that are proving most difficult to answer are simply these: restore land to whom exactly, on what terms, and sustained through what kind of system, and with what impact upon those to whom the land is not restored? These have raised yet more complex matters, such as the relationship of chiefs with their subjects with respect to land ownership, contrary norms among customary and European-derived systems, the different history of occupants in the area, some being indigenous and others forcibly settled in those areas. While far removed from the difficulties being faced in Afghanistan, the echoes of commonality are ominously familiar.

to their homes should be a priority, it will prove futile if this only serves to regenerate the problems of the past. While this seems common sense, opportunistic interventions have repeated themselves around the world, failing to solve the fundamental land conflicts that contributed (or even caused) displacement or instability in the first place. Instead, a new layer of "wrongful" occupation may result which promises that conflict will surely re-emerge.

Examples of this may be seen in Kosovo and Bosnia, but the case of East Timor is particularly instructive for Afghanistan.<sup>222</sup> Initially, the UN Transitional Authority in East Timor assumed that its main task was to help those who owned property prior to the civil war in 1999 to reoccupy their homes and lands. Interim, unlawful occupation of houses posed the largest problem, particularly as some of the occupants had sold the land to others. In practice, older land grievances were reignited, with as many as five claimants demanding the same land: the current occupant who paid for the property in 2000/01, the occupant prior to the civil war in 1999, indigenous interests displaced through colonial occupation and holders of titles issued in both the Portuguese and Indonesian eras.<sup>223</sup>

In such situations, governments (and lawyers and law) must decide how each level of "legal" acquisition should be regarded. The unravelling of what is (often ethnically) discriminatory history is a messy but ultimately essential element of effective restitution. In the process, new administrations are in addition forced to make fundamental decisions as to the kind of society to be reconstructed, such as what constitutes "equity," whose rights or interests are to be "more equal" than others. This takes land tenure development well beyond the remedial steps originally envisaged as necessary. This is tiresome, difficult - and involves fundamental political decisions. But it can hardly be avoided if real progress is to be made.<sup>224</sup>

## 5. Locating Restitution Within Reconciliation

In practical terms, the above suggests that first, conventional selection of a cut-off date may not be sufficient in itself to guide lasting restitution, particularly where ethnic differences are involved. Second, it is apparent that the restitution process itself may be better reconstructed as a process of reconciliation, within which contesting parties are able to bring their concerns to the table with a view to resolving these once and for all. The impossibility of honouring all interests will become apparent to all those involved. Compromises will be become more obviously necessary. In some cases, the classical route of paying compensation to those whose rights cannot be met through restitution will be workable. So far Afghanistan's budget plans provide no such line item, and yet it could prove to be one of the most valuable expenditures. Third, experiences elsewhere also suggest that the building of detailed pathways and parameters to land conflict resolution is crucial, and could provide the substance of new and improved law.

More general tenure development issues would in addition come into better focus through such an integrated restitution and reconstruction approach. A simple example is the need for greater clarity in the way in which potential arable lands are defined vis-à-vis pasture, and the need to develop more efficient ownership norms for pastureland. This links directly with a broader need for clear policy-making, such as in deciding how far investment in the expansion of the arable and pastoral sectors will be balanced.

## 6. Moving Beyond the Farm

A related issue is the need to clarify the distinction between local-public and national-public properties, particularly as they affect the interface of land rights of settled and mobile peoples. How to structure and tenure local public lands, or commons, is an issue that many nations are

<sup>222</sup> As described by Fitzpatrick 2002.

<sup>223</sup> See Fitzpatrick op. cit. An attempt to avoid similar issues of overlapping rights led the Rwandan government to limit restitution rights to more recent refugees. But in promising land from its own resources, the Rwandan government has not permitted the conversion of most of its game parks and forests to settlement areas, with drastic environmental effects [Government of Rwanda 2002].

<sup>224</sup> It might be noted here that restitution developments are found much closer to home, in many of the states of the former Soviet Union and in Eastern Europe; e.g. in Estonia, Bulgaria, Albania. Versions of restitution and redistribution operate in Armenia, Georgia, Moldavia and some parts of Kyrgyzstan and Azerbaijan. However in all these states, the restitution is largely from state to people, or from collectives to individual owners, essentially privatisation processes, and very different from those being looked to in Afghanistan.

currently addressing. As in Afghanistan, many countries have seen local commons appropriated by national governments on the assumption that they are un-owned lands, or too broadly owned to be viewed as private property.

Today, however, there is a declining emphasis on individualisation as the only route through which private property may be expressed, and growing awareness of the enormous potential of group-owned properties. This is manifesting in two related developments, 1) adjustments in the function of the state by reducing its property-owning roles wherever possible and particularly at local levels; and 2) acknowledging a new respect for customary norms of land ownership, including customary mechanisms for holding property like swamps, pasture and forests in common.<sup>225</sup> Two main results have been the provision of new tenure norms to allow for group-owned private property,<sup>226</sup> and clearer and more formal arrangements to allow different (e.g. seasonal) interests in the same land to co-exist. There is much in these developments that could prove useful to the handling of pasture tenure in Afghanistan, and at the same time, help move conceptions as to distinctions in government, public and common land further forward.

## 7. Taking Community-Based Approaches Seriously

This brings us to the core of a likely way forward: to create institutional approaches to land conflict resolution and tenure management that build upon community-based development initiatives. A commitment to community-based approaches is broadly hinted at in emerging policy documents, but so far shows little evidence of being seriously pursued. Instead, the

There is a need to clarify the distinction between local-public and national-public properties, particularly as they affect the interface of land rights of settled and mobile peoples.

the brief experience of the new administration; the very real manpower/capacity disability in the central administration and its provincial and district arms; a preference to wait for the outcome and directives of a constitutional jirga prior to developing locally-elected government institutions; an understandable distaste for the regimes of many un-appointed warlords at the local level; and fear of provoking more disorder. Or it may simply be the case that the expressed commitment to community-based approaches is but an echo of an international aid mantra, without absorption of the implications for how business is best done in bottom-up development. In any event, the central state is preoccupied with establishing its own authority within the country as part of the commitment to restoring order. Encouraging local level governance is not high on the agenda, even though this could provide one route to more secure local conditions, not least because it involves ordinary Afghans in the peace-building initiative as actors rather than beneficiaries. Even in settled times, states often have difficulty knowing when to let go, when the burden of decision making would be more fruitfully shared with the ordinary citizenry and dealt with by them at the periphery.

It may simply be the case that the expressed commitment to community-based approaches is but an echo of an international aid mantra, without absorption of the implications for how business is best done in bottom-up development.

The handling of tenure problems so far reflects this difficulty.<sup>227</sup> That communities do exist and have the capacity to govern their land relations cannot be doubted. This is a fact demonstrated on an ongoing basis, particularly by non-government agencies, which often have no

<sup>225</sup> Forests, and their ownership, are proving to be a main arena of practical developments. See FAO 2002 and Alden Wily 2001.

<sup>226</sup> That is "commonhold," in contrast to individual forms, such as conventionally implied in freehold and leasehold. See Alden Wily 2001 for an exposition of the case in reference to African commons. See the digital library on commons development <http://dlc/dlib/indiana.edu>.

<sup>227</sup> Periodic armed intervention to enforce government land decisions (as demonstrated in the recent involvement in November 2002 of American forces in a land dispute involving Kuchi in Kikara Village near Khost) may have a function, and certainly reassures a querulous population that the central state may have teeth. In reality, however, even these interventions may need more force to be sustained, and at the end of the day require the kind of reconciliation at the local level suggested above.

alternative but to involve and work directly with community members. The challenge they seem to face is less about local capacity to organise and act than enabling local decision-making to occur in more inclusive environments. It is still the case, for example, that women remain largely invisible in local-level shura. Ensuring that the poor and very poor (sometimes the majority in a community) are represented also remains a challenge. Notably, the general experience of NGOs in Afghanistan at this time is that incremental progress can be made – at the local level and within the context of practical developments.<sup>228</sup>

It is therefore timely to consider piloting practical dispute resolution at the local level, with a view to resolving the cases themselves, and also accumulating norms that may, in turn, fashion workable policy and law. Such "learning by doing" could lead to community-based tenure management systems.

Helpfully, Afghan society appears to already have a socio-spatial basis in *manteqa* that could be a viable spatial framework. *manteqa* – meaning area or location – usually refers to a cluster of related village communities that work together, make decisions or operate in some way as a single unit. Members of a *manteqa* know the social and territorial limits of the unit. These areas and their populations are workable as operational units to the extent that a range of social linkages and events already define its natural boundaries. Within this manageable context, the full range of local property issues could be addressed, including land tenure administration itself.

#### 8. Keeping Equity on the Rural Land Agenda

Also at issue are the troubling questions of fair distribution of arable land. Realistically, new Afghan administrations are unlikely to be able to avoid this issue any more than those have before them. Hopes that

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the problems of landlessness will go away or sort themselves out through market forces, growth and urbanisation are optimistic. This is especially so given that involuntary landlessness shows signs of increasing rather than declining. The fact that landlessness has become even more tied to destitution adds to the urgency for governance systems to address, rather than avoid, the situation. And whatever decisions about land tenure policy are made, they are likely to impact and govern land distribution as well.

#### 9. Learning From the Past

A main objective of this preliminary review has been to discover how land relations have been managed in the past in Afghanistan. As was discussed in previous chapters, issues of equity have been at the heart of decision-making over the last 30 or so years, alongside the equally crucial management of arable-pastoral and inter-ethnic land relations. There is nothing novel about

a modern government deciding or being forced to tackle how agricultural land is distributed.<sup>229</sup> The Afghan experience tells us, however, that lessons of local history need to be learned: that the forced redistribution of land is unlikely to be a lasting solution and could contribute to war and instability, even where the beneficiaries are the majority. What is less certain is how far formal encouragement towards equity, in the form of compulsory but indirect measures, may be an acceptable route.

Previous attempts of the latter have been seen in President Daoud's use of land ownership ceilings and the compulsory sale of the excess to the state, alongside progressive taxation on the basis of farm size. Neither strategy had the opportunity to be fully tested, so the jury is still out as to how effective they would be if large landholdings emerged as being considerably fewer in number than originally assumed.

<sup>228</sup> Based on discussions with CARE, the Danish Committee for Aid to Afghan Refugees (DACAAR) and the Afghanistan Development Association (ADA).

<sup>229</sup> This has preoccupied governments as far apart as Japan, Philippines, Mexico and South Africa. See The World Bank 1975, Binswanger & Deininger 1995, World Bank 2002.

Written accounts and anecdotal evidence do suggest, however, that neither ceilings (as long as the excess will be paid for), nor progressive land taxation, were an anathema to those most affected (the larger landholders). Other typical strategies, such as the banning of informal sector money lending for farming to limit chronic indebtedness, confronted important structural as well as policy problems. There have also been (mild) efforts to limit land hoarding by, for example, requiring properties that remain underdeveloped after distribution to revert to government (a strategy which remains policy today). All these strategies deserve further examination, and particularly those that relate to taxation. Widespread taxation, at some level, will have to be restarted as part of state development and support.

As observed above, Afghanistan has not been alone in facing inter-tribal, agro-pastoral or internally over-stratified land relations, within which a substantial number of citizens live in poverty and dependency on others. During the 1960s-1970s, for example, when reforms were taking place in Afghanistan, many other states around the world were involved in similar exercises.<sup>230</sup> Much may be learned from these experiences.<sup>231</sup> Since then, particularly beginning in the 1990s, there has been a new wave of land reform worldwide that is trying to find more fruitful ways forward.<sup>232</sup> The current wave of reform involves more than 50 countries.<sup>233</sup>

What is driving current policy formation is an interest in making land more easily and securely available to foreign investors.

## 10. Equity For Growth, Not Instead of Growth

Today, land reform worldwide is less driven by redistribution objectives as it was in the past.<sup>234</sup>

What is driving current policy formation is an interest in making land more easily and securely available to foreign investors.<sup>235</sup> However, issues of distribution inevitably arise, and routes towards more equal holdings in the agricultural sector, or at least actions to minimise further polarisation in the amount of land owned, ultimately become quite prominent.<sup>236</sup> This may be illustrated in the menu of actions being pursued today, such as introduction of laws to protect mortgagors from unfair foreclosure; promotion of credit access without using land as collateral and risking land

loss; protection of the rights of family members from eviction and forced land sales; restrictions on the transferability of land in general, save through listed market procedures; imposition of land ceilings and stronger

development conditions to limit growth in large estates, land hoarding and speculation; development of land workers' rights charters, protecting access to farmland and their housing; rental restrictions; and introduction of regulations prescribing how crop shares are determined and implemented. As in the past, promotion of cooperatives and other forms of farmer associations to facilitate market access are also quite prominent.<sup>237</sup>

<sup>230</sup> Iran's White Revolution is the closest example in the region. The land reforms of Japan, Taiwan and Korea are generally considered the most successful (The World Bank 2002). Other reforms were underway in this period in Bolivia, Mexico, Chile, Brazil, Guatemala, Ecuador, China, Cuba, Philippines and Kenya. Regrettably there are few comprehensive overviews, but see World Bank 2002 for a useful bibliography of mainly country studies.

<sup>231</sup> For example, many countries have experimented with imposition of ceilings, still a norm in Africa (see Alden Wily & Mbaya op. cit.) and less successful in Asia (Korea, Japan, Philippines, see World Bank 2002). India's experience is particularly useful in respect of limiting mortgaging and more general tenancy reforms (Appu 1997).

<sup>232</sup> This is supposedly the intention, for example, of The World Bank's recent effort to bring together a state-of-the-art analysis of land tenure policy (World Bank 2002). For the World Bank's own shifting positions as a lead donor and a main supporter of agrarian tenure reforms, see The World Bank 1975, Binswanger & Deininger op cit. and The World Bank 2002.

<sup>233</sup> Readers may find the land policy section on the World Bank's website ([www.worldbank.org/landpolicy](http://www.worldbank.org/landpolicy)) a useful shortcut for finding many Bank and non-Bank papers on international land policies. Of particular note are the resources under the heading "Regional Workshops on Land Issues," which include hundreds of up-to-date descriptions and 33 country status papers.

<sup>234</sup> Save where it is integral to restitution as is the case in South Africa, Zimbabwe and Namibia in Africa, and in most Central and Eastern European countries, following the ending of communism/collective agriculture. Hungary and Romania have made more specific efforts to redistribute land more evenly at the same time as restoring ownership.

<sup>235</sup> See, for example, the case of Africa in Alden Wily 2001.

<sup>236</sup> Perhaps there is no clearer indicator of the extent to which equity remains in the land tenure development equation than in the naming of the current World Bank policy development, - "Land Policy for pro-poor growth and development." [The World Bank 2002].

<sup>237</sup> The World Bank 2002.

## 11. Keeping an Eye on the Land Security Needs of Women

There are also significant innovations in land policy and the evolution of a range of concrete actions coming from previously unlikely sectors, such as from domestic land relations, and particularly related to the land rights of women.<sup>238</sup> These are most prominent where women are acknowledged as the major force of agricultural production, the case in most African, Asian and Latin American states.<sup>239</sup> The argument is simple: there is no incentive for labour - in this case women's labour - to increase or modernise production without part-ownership of the means of production. Receiving a share in the fruits of production (in the family standard of living) is not enough for serious investment by women in the farm. This kind of argument might not resonate with Afghan women where their role in farming or livestock maintenance is generally uncalculated and constrained by socio-cultural norms that prevent them being visibly active on the farm. It is too early to suggest direct reforms in rural gender land relations. Nonetheless, the new administration should be aware that improvement in the land security of women could present one of the important routes eventually towards improved land relations overall and to be vigilant in providing support in this area as needs arise. Currently, these appear to centre upon assuring widows of their land rights.

## 12. Putting Registration in Perspective

Finally, it is necessary to consider the matter of registration and entitlement,

There is no incentive for labour - in this case women's labour - to increase or modernise production without part-ownership of the means of production. Receiving a share in the fruits of production (in the family standard of living) is not enough for serious investment by women in the farm.

The need to promote the availability of reliable, equitable and repayable credit schemes in rural areas, would seem to be a more useful policy direction than seeking to improve the credit-worthiness of the small farm.

given that these have been the most concrete tenure development strategies yet offered by the ATA, as expressed within the draft NDF. Broadly, this followed the advice given by the Asian Development Bank towards establishment of a "nationwide registry" to "allow for the use of land as collateral for entrepreneurial activities."<sup>240</sup>

The use of farmland as collateral may be addressed first. The need for credit in farming cannot be disputed.

The use of the farm as the basis of that credit may be queried. This is particularly so where the credit gained through using the farm as collateral results not in the improvement of the productive asset and livelihood, but has a widespread effect of pushing at least the very poor into sometimes irrevocable destitution and landlessness. In such circumstances, planners have a duty to find more effective means through which poorer farmers may access credit. These days, more and more banks are less willing than in the past to offer loans on this basis, holding the use of a poor family's primary source of survival and shelter (farm and housing) as collateral as unsafe (as well as morally questionable).<sup>241</sup> Even with respect to larger properties, restrictions on foreclosure are now common.<sup>242</sup> Restricting informal money lending has also been shown to have its limits as in the case of the usury decree of 1978. The need to promote the availability of reliable, equitable and repayable credit schemes in rural areas, would seem to be a more useful policy direction than seeking to improve the credit-worthiness of the small farm.<sup>243</sup>

Research drawn together by The World Bank also shows that small landowners have almost never benefited from the

<sup>238</sup> For example, from new requirements that land sales may not take place without the written permission of spouses, from stronger gender proportional representation in applications for settlement places, from laws that prevent the sale of land on which spouses and children are dependent, provisions for co-ownership of primary houses and farms, etc. See FAO 2002, Alden Wily & Mbaya op. cit.

<sup>239</sup> Agarwal 1994, Yngstrom 2002, Ovonji-Odida et al. 2000.

<sup>240</sup> GoA 2002a.

<sup>241</sup> Alden Wily & Mbaya op. cit., The World Bank 2002.

<sup>242</sup> Foreclosure, as conventionally understood, has been eliminated in most British commonwealth law countries, for example.

<sup>243</sup> Several NGOs are apparently successfully developing fair credit extension programmes as part of their development effort. One is ACTED, which operates credit for house building and farm re-cultivation in Parwan Province.

credit-supply effect of holding a land title, though there is just as much evidence that larger landowners have.<sup>244</sup> There is also the question as to what extent possessing land titles should be a requirement for lending. In conditions where registers have proved less than reliable as evidence of current ownership, a document that provides testimony from local leaders and neighbours to the effect that the occupant is the owner of the property may be more persuasive.

There are many related questions and problems about the utility and cost-effectiveness of registration as a route to tenure security.<sup>245</sup> Registration programmes are rarely ever completed. Titling is still underway in many first-world states, and where it has been launched in developing countries, it is moving even more slowly.<sup>246</sup> For example, the much-admired titling programme of Thailand has continued for 30 years,<sup>247</sup> and after 50 years of titling in Kenya, more than half the land area has still not been registered.<sup>248</sup> Costs run into the billions.

Time delays and costs are worst where the register is cadastrally-based, that is when each parcel of land is identified by named area location and plot number as well as tied to map references. This is to indisputably link the register and the deed of title. The assumption is that the exact boundaries of a farm cannot be safely determined without mapped references. However, this ignores local reality, where the determination of mapped boundaries will generally be a matter of local testimony (unless the owner holds a Geographical Positioning System (GPS) and is able to relocate the boundary through taking new readings). As a result, clear distinction is beginning to be drawn between the importance of recorded land interests, and the adoption of heavily bureaucratic and costly centralised systems, especially those that are based upon mapping.<sup>249</sup>

Other problems associated with conventional registration and entitlement programmes that limit their efficacy as a means of enhancing tenure security.<sup>250</sup> These are :

1. Significant land rights are usually lost in the registration process. This has been because classical registration has encouraged (and sometimes enforced) individualisation of commons and the elimination of seasonal or other secondary rights from the registration. This has proven especially detrimental to the poor, who often share land access to swamps, forests and pastures. A related trend has been the dispossession of all but the privileged household head, through the registration of an individual in the register and on the certificate of title. Women and family members have been the most affected.
2. Registration exercises as a whole tend to focus on arable rural lands, placing pastoral rights in a yet weaker position.
3. Where registration has been used as a tax register, there is widespread deceit as to number of plots owned and especially their estimated size. In this respect, identification of owners and their registration based upon already mapped plots has had enormous advantages, given that unclaimed plots become registered as belonging to the state.
4. All too often, registers themselves cease to have meaning, where title deeds are rarely issued or collected and where transactions take place outside of the register. Often the register gets massively out of date and the picture it provides becomes increasingly removed from reality. The less the register may be relied upon the less legitimate it becomes. Its fundamental claim to represent a reliable source of ownership is seriously damaged.

<sup>244</sup> The World Bank 2002.

<sup>245</sup> The literature on this is enormous. The issues are fairly well covered among the collected papers of regional workshops on land policy matters held under the leadership of the World Bank in 2001/02. Refer again to [www.worldbank.org/landpolicy/](http://www.worldbank.org/landpolicy/) and also The World Bank 2002.

<sup>246</sup> Less than 10 percent of the world's farmed area is titled. Under one percent of the African continent is yet subject to surveyed entitlement [Augustinus 2003].

<sup>247</sup> Haldrup 2002.

<sup>248</sup> Alden Wily & Mbaya op. cit.

<sup>249</sup> De Soto's work is considered seminal on the relevance of recordation and entitlement in enabling peasant farmers to turn their land into live capital, but emphasising the need for the systems to be cheap, simple and accessible [De Soto 2000].

<sup>250</sup> See Alden Wily & Mbaya op. cit., The World Bank 2002.

5. The over-centralisation of the registry and cadastre has rendered it inaccessible, expensive and not well used.
6. The registers themselves have often been corrupted. Illegal changes are made and false deeds are produced that contradict the record of the register.

### *The Afghan case*

Most of the above resonates with Afghanistan's own experience. During the national registration programme launched in the 1960s, the government was unable to complete registration even after years of significant time, financial and manpower investment. At the time, fewer than half of Afghan farmers had their farms registered, and through population growth, inheritance and transactions, the proportion of registered holdings will be less today. The conventional focus on arable – as opposed to pastoral – land entitlement and the registration of pasture as simply "government land" helped to widen the already prominent inequities in land ownership. How far the poor and very poor were excluded as owners, is not known. Many of those who had mortgaged their land may have found that their creditors were noted as the owners of the farm.

However, some modifications that the Afghan government was able to make to its registration effort in the 1960s are more positive. These included abandoning the establishment of a cadastral-based register in order to reduce costs and to speed up the process, the abandonment of early plans to issue a title deed for each registered property and to instead make documentation the responsibility of the occupant, and the decentralisation of the register to the provincial level.

These changes seemed sensible. The need for each owned land parcel to be precisely surveyed, mapped and its coordinates recorded is largely unnecessary in Afghanistan. Most farm boundaries are visible, stable and permanently marked, and those that are less well marked, such as rain-fed farms, are known by those to whom it matters – the owner, neighbours and community members

who may be called upon to determine whether or not the boundary has been moved.<sup>251</sup> The utility to owners of receiving certificates that describe their land in terms of coordinates is also dubious;<sup>252</sup> re-locating boundaries through this means generally requires a surveyor. With new and speedy use of GPS for this task, the accepted range of inaccuracy of several metres may render the readings useless where farms include only a handful of *jeribs*, or where it is precisely within the space of a few metres that an ownership dispute exists. Falling back on traditional descriptions of boundaries and using neighbours and local leaders as witnesses seems commonsense. What is lost is accuracy in the measured size of the plot, but this is relevant to taxation only where the bands of tax grades are so close that a difference of one *jerib* makes a difference to the tax amount owed. Such taxation policy is in itself a questionable strategy, given that it doubles the amount of calculations and impacts the smaller rather than larger landholder.

### *Making the register more accessible*

The land register in Afghanistan is not a single document, but a compilation of 5,502 distinct books of ownership and taxation. Three copies of these books were made. One copy remained, and still remains, under tight security in Kabul. Like many land registers, it is unsullied by the multitudes of transactions (including disposition to heirs) affecting the properties that the books record. This means that the register has died; it is not a live and active record of exactly what has happened to each property. Those listed as owners may not be the current owners. The whole purpose of registration is defeated.

This may also be the case with the second and third copies of the register. One set was sent to the 17 geodesy & cartography offices in the provinces, many of which were destroyed during the Soviet occupation and more recent fighting. A third set was sent to the provinces. Some appear to have ended up in the provincial or district land matters office under the Ministry of Agriculture. Others are held in provincial law offices (arms of the Ministry of Justice). Still others appear to be available to the provincial courts. None of the registers seem to have been updated.

<sup>251</sup> De Soto suggested with respect to cases in South America that were similarly afflicted by over-attention to expensive and unsustainable survey mechanisms, "Listen to the barking dogs – if they know where the boundaries are you can assume local knowledge" [De Soto op. cit.].

<sup>252</sup> See Alden Wily & Mbaya op. cit. for a comment on this experience in a number of African states.



Nonetheless, it is in the archives of the courts that an astounding body of transaction records do exist. How well these records are ordered is unclear, but the very fact that court officials are able to retrieve substantial documents of land transactions makes it unwise to assume that the "register" is unusable. How far such records have lost their integrity (such as by recording false deeds) is also not known, but such fraud clearly exists. Nor again is it clear how many registered landholders have formally recorded changes in land ownership. Finally, it needs to be remembered that the majority of farmers did not have their farmland registered at all. Transaction by informal and customary means almost certainly remains dominant for these people and for many of those whose land is recorded in registers.

### *A deeply entrenched history of recordation*

While questions may reasonably be asked about the utility (and cost-efficiency) of adopting a mapped approach to registration, or even issuing original certificates of title against that registration, this does not necessarily detract from the usefulness of written records of land ownership.

Recording land grants, rights and transactions in Afghanistan dates back to the 1880s. The recording of rights operates in all tenure systems, including customary, civil/*Shariat* and state based laws. These systems share the practice of using witnesses – neighbours and local notables – as a way of evidencing property that was accepted into state law in the form of Taliban edicts. Even where people do not record transactions in writing – largely the poor – the utility of written documentation appears to be widely acknowledged. Transactions that have been implemented more informally, such as those involving witnesses, appear to have legitimacy. Such transactions are known and may be referred to again. This may even help to boost the legitimacy of official documentation in areas where the integrity of the register and related transactions have been compromised by misuse, including the wrongful or coerced issue of false deeds by local leaders. When the accuracy of the register is thus itself threatened, such testimony

can also help restore the integrity of formal records.

### *Recordation lessons*

The strategic lessons to be learned here seems to be that recordation procedures not only need to be kept simple, cheap and rooted in common sense - but also local. Accessibility and accountability to owners themselves is paramount, and arguably a sure way to ensure integrity in land records. Community-based tenure management deserves to be explored. Such an approach could build on what already exists in terms of land records from different sources. Records of current ownership could be built up, based not upon expensive mapping and survey but upon recorded testimony and description of plots. As long as the system is local and locally managed, it should be relatively easy for all transactions to be recorded. The extent to which transactions are recorded may be held as the ultimate test of the utility of the records. In such

Recordation procedures not only need to be kept simple, cheap and rooted in common sense - but also local.

a system, the task of government would become the provision of clear technical guidance, support and monitoring. This would highlight the wider need to rethink the future role of the

state in governance overall. Permitting and assisting communities to develop such rational working land ownership administration systems would contribute significantly to the meaning of "democratic governance."

Where the courts have acquired, by default, a host of non-judicial functions in such areas, they could discard their administration function and regain their proper function as independent centres of dispute resolution.

### **Principles for Moving Forward**

Determining how to move forward in the matter of land rights management must be a priority of the ATA. The main finding of this preliminary study has been that attending to land tenure matters will be time and money well invested, and may well prove to be one of the more important stepping stones to lasting peace.

Based on the analysis put forth in this paper, there are several simple working principles that may guide the way forward:

### 1. Adopt an incremental approach

The ATA has already adopted an incremental approach to progress in a number of areas; land tenure should not be an exception. Developing land policy on a national level will be impossible in the current environment, as will focusing on a single issue, or single front. Dealing directly with a range of real issues on the ground, and at a local level, will be an effective catalyst for larger-scale change.

### 2. Explore "learning by doing"

There are many issues associated with land ownership about which it will be hard to find policy consensus at this time. There are still others that cannot be determined through policy development alone. Learning by doing through concrete, pilot approaches that address local land relation issues in the field would help identify the appropriate levels and frameworks for working out land administration and dispute resolution. In addition, pilot programmes could explore the extent to which unformed and inequitable community-based systems may be usefully transformed into working land management institutions.

### 3. Build on what exists

The need to avoid reinventing the wheel or adopting high-cost approaches to improving tenure security is essential. Again, through pilot approaches in specific areas, it will be possible for the ATA, or delegated agencies, to better explore the nature of land ownership, the extent to which transaction recordation exists or is still taking place, the extent to which the information in original registers is still valid and the usability and relevance of more informal documentation of transactions held in village, district and provincial offices. Such exercises would do a great deal to inform decision makers about how to sustain (or not) land ownership registration. It would also help policy makers avoid the recurrent temptation to make big decisions on such important (and potentially expensive) systems development without research, practical information and guidance.

### 4. Develop principles of land policy and law

In the interim, there should be a coordinated effort towards developing principles and objectives governing the management of land ownership



Photo courtesy of FAO

(policy) and creating carefully considered legislation (land law). Tinkering with the provisions of previous administrations, while serviceable to an extent, will quickly prove insufficient and may even misdirect, or make impossible, the adoption of more workable approaches in the future. Though there may be political preference to avoid discussion of land tenure issues as part of the constitutional process, this cannot be avoided. Taking prompt action to provide well-considered options to the constitution makers would be advisable.

### 5. Establish an institutional focus

A prerequisite to all the above is a clear and comprehensive policy-making process, as well as an institutional foundation for such decisions to be implemented and sustained. A commission approach might be necessary in order to encompass the different interests of different ministries and actors. While there may be reluctance to establish yet another independent commission, a more simply constituted working group could be created in the first instance, to map out the kind of issues which need to be addressed in the short and longer term.

## THE ROLE OF RESEARCH

As highlighted by this preliminary review, there is still far too much about land tenure in Afghanistan that is not known. The need for further investigation, including collation of existing knowledge, is considerable. Investigation and analysis can help guide strategic planning, pilot programmes and implementation. The AREU has already taken action to imbue its investigations into rural livelihoods with mechanisms to track information about both historical and current land holding assets of its 600 or so respondents. A deeper examination of land relations, particularly of sharecropping and land mortgaging in strategically selected communities, would add significantly to understanding transitions at this stage.<sup>253</sup> The territorial history and character of pastoral hudoos also deserves closer examination, as this could have important implications for internal pastoral land relations, particularly as they relate to the pasture rights of settled peoples, and link directly with the need to rethink how pasture land is tenured. This research could be usefully linked and coordinated with the Kuchi

Vulnerability Working Group within MRRD mentioned earlier. So too could an appropriate reference group involving key government ministries be established to gain a better understanding of the nature of current land conflicts in priority areas. Taking into account the emerging difficulties being faced by returnees, partnership with UNHCR in some of these areas would be crucial.

Finally, the Geodesy & Cartography Department, in partnership with AIMS should embark on the more concrete task of computerising the information contained in the 5,502 registers as quickly as possible. This would happen in parallel to pilot practical examination of registered and other documented information suggested above. Such a listing of original owners could well prove to be a viable foundation, particularly where changes in ownership may have largely occurred within the descendant family. Even if the existing registers are discarded altogether, the information they contain represents a very important historical record as to how land was distributed prior to the war and conflict of the last 25 years - something that has yet to be properly analysed.

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<sup>253</sup> Ideas mentioned here are elaborated in a research concept note that may be requested from AREU.

## Appendix A: Terms of Reference

### 1. Introduction

The purpose of the Afghanistan Research and Evaluation Unit (AREU) is to conduct quality action-oriented research that will inform policy and improve practice in order to increase the accountability and impact of humanitarian and development programmes for Afghans. Fundamental to the purpose of the AREU is the belief that its work should make a difference to the lives of Afghans and it seeks, therefore, not just to produce reports but also to be part of a process of change that will significantly improve the quality, impact and accountability of assistance efforts. As part of this effort to produce positive change, AREU is producing a series of issues papers to inform policy makers and practitioners and to stimulate debate on critical topics relating to the reconstruction and development of Afghanistan.

### 2. Specific Objectives of the Lands Issues Paper

The Afghanistan Transitional Administration's National Development Framework (2002) has the following ambitions with respect to land:

*'Access to land is regulated through Islamic and customary law. There is a need for a program to produce nationwide land registry and to settle disputes between individuals and groups on land. Such a registry would allow for the use of land as collateral for entrepreneurial activities' (p.35)*

The recent Multi-Donor Comprehensive Needs Assessment for the Natural Resources and Agricultural sector had effectively nothing to say about land issues. Anecdotal evidence suggests that access to land has been deeply transformed over the last 25 years of chronic conflict and that the effects of drought have been to increase the mortgaging of land assets. The issue of access to land is likely to be major issue with respect to the returning refugee population. Yet concerns about land and understanding about rights, ownership and access to land are minimal. The report of Nathan Associates and Louis Berg (1991), essentially a compilation of existing documentation, is the most recent documentation that has been found.

Land should be a central issue in building understanding about the asset base of rural

livelihoods, not least because of the economic role that growth in the agricultural sector is seen to contribute to recovery processes. However at present land issues and understanding of just how land relations work and have been transformed over the last 25 years is not being addressed.

### 3. Terms of Reference

The specific tasks of the consultancy are as follows:

- Review relevant documents and interview key informants in the Afghanistan Transitional Administration, the assistance community (multilateral and bilateral donors, UN agencies and NGOs), and Afghan communities. The consultant will need to spend some time in Kabul city, but will also need to make one or two trips to other regions of Afghanistan (security permitting).
- Write a land issues paper that can be published in monograph form (approx. 40 pages) in an easily accessible style for practitioners. The paper must begin with an executive summary not exceeding 3-4 pages written in a form that is publishable as a separate briefing paper. The purpose of the land issues paper will be to review the current understanding and knowledge with respect to land as an asset within the livelihoods of rural Afghanistan, identify the key policy issues that are likely to arise in relation to these, and, if appropriate, make recommendations for policy makers and practitioners.
- Present the key findings of the issues paper at a seminar in Kabul (prior to finalizing the paper).
- Prepare a concept note for a more in-depth research proposal to build understanding of key land related issues.

### 4. Duration

The consultancy will for 30 working days between mid-September and end of October 2002. The finalized issues paper and research concept note must be submitted by October 31st, 2002.

## Appendix B: List of Interviewees

### KABUL

Akrami, Najibullah, Administrator/HRD Director, Afghan Development Association

Al-Salem, Reem, Associate Protection Officer, UNHCR Jalalabad

Alim, Saidi Yusuf, Chairman, Law Drafting Department Ministry of Justice

Arif, S., Area Manager, DACAAR

Asif, Mohammad, General Director of Mapping

Atmar, Haneef, Minister of Rural Reconstruction & Development

Azarbaijani-Moghaddam, Sippi, Senior Gender Expert, European Union

Bakhtanai, Nasrullah, Director of Soils Department, Ministry of Agriculture

Bruderlein, Claude, Director, Harvard Programme on Humanitarian Policy and Conflict Research

Davis, Don, FAO, Jalalabad

de Weijer, Frauke, Pastoralist Adviser, Ministry for Rural Rehabilitation and Development

Fakherpour, Ziauddin, Director, AFGA (Land Social Services Association)

Hashimzai, Qasim, Adviser to the Minister of Justice

Hedayati, Sayed Noor Aga, Deputy Mayor for Kabul City for Properties

Hellencourt, Nouchine-Yavari, Consultant, UNCHS

Hitchcock, David, Senior Farming Systems Development Officer, FAO Regional Office

Jawab, Ghulam Mustafa, Deputy Minister of Agriculture

Jelani, Ghulam, Afghanistan Information Management Service

Karimi, Abdul Rahim, Minister of Justice

Kawauchi, Toshi, Senior Protection Officer, UNHCR

Khirad, Shah Mohmood, Chairman of Afghan Lawyers Association

Lamoureux, Christine, Research Officer UNIFEM

le Duc, Carol, Gender Adviser UNHCR

Leader, Nicholas, Adviser, Ministry of Rural Reconstruction & Development

Macefield, Abi, EU Adviser, Ministry of Rural Reconstruction & Development

Madadzai, Gul Ahmad, Member of Afghan Lawyers Association & Legal Adviser, Ministry of the Interior

Mahmood, Zaved Hasan, Rule of Law Officer, UNAMA

Mahood, Zabib DAACAR

McLeod, Ewen, Consultant UNHCR

Middlebrook, Peter, Public Administration Reform/Capacity Building Adviser, EU

Mohamed, Hassan, Assistant Country Director, CARE

Mohamad, Nazar, Deputy Technical Chair, Geodesy & Cartography Department, ATA

Mohammed, Ferozi Akbar, National Officer, Legal Unit UNAMA

Mohammed, Khair, Director of Surveys, Geodesy & Cartography Department, ATA

Nazir, M. National Area Based Development Programme, Rural Rehabilitation & Development

Noori, Pis Mohammad, Regional Director for Kabul Province, Geodesy & Cartography Department, ATA

Pathmanathan, Gajan, Sector Manager Rural Development Sector Unit South Asia Region, World Bank

Petrie, Charles, Director Programme Policy & Planning UNAMA

Rahjo, Aziz, Assistant Protection Officer, UNHCR

Rajabov, Shruhrat, Consultant, UNCHS

Saloni, Abdul, ex-Deputy Minister of Planning

Sharifi, Mohammedi, Public Prosecutor (Qazayi Dawlat), Ministry of Justice

Staniksai, Nasrulla, Head of Civil Law Department, Faculty of Law, Kabul University

Taher, Nader, Assistant Programme Manager, CARE

Taous, M., Head of Planning, Ministry of Agriculture

Tyler, Alex, Protection Officer, UNHCR

Wilson, Kerry Jane, Programme Manager, DACAAR

Yaqin, Yoohurallah, President of Geodesy and Cartography Department, Prime Minister's Office

Yousafi, Iqbal, Deputy Minister for Land Reclamation and Management, Ministry of Agriculture

Zewari, Najia, Programme Officer UNIFEM

LOGAR, WARDAK, GHAZNI, PARWAN

Ali, Saied Mehr, Chairman of Qalai Now Village, Charkh District, Logar Province

Asif, Mohammed ADA

Azim, M., Provincial Agricultural Officer, Parwan

Aziz, Sultan, Director of Agriculture for Wardak Province

Dufour, Simone; Kuhn, Christine; Bunyan, Christian, ACTED, Chaharikar, Parwan Province

Elders of Bidmoskh Village, Hujamari District, Ghazni Province: Mohammed Sami, Mohammed Dbaidullah Yousuf,, Ahmmed Jon, Abdul Satar, Achmmed Kaka

Hamid, Abdul, Agricultural Manager, Nerkh District, Wardak Province

Halim, Mohammed, Extension Manager, Wardak Province

Ihrari, Khawja Attah Mohammad, Deputy Governor, Parwan Province

Junas, Mohammed, Horticulturalist, ADA, Bidmoskh Village, Hujamari District, Ghazni Province

Karimi, Mohammed Asif, Zonal Director for South West Afghanistan, ADA

Karim, Mawlawi Fazal, Judge/Head of Provincial Court, Parwan

Khan, Khamran, Leader of Niazi Group of Kuchi, Wardak Province

Khan, Mohammed Anwar, Village Leader of Altamur Village, Logar Province

Omer, H.M., President of Shura for Water and Power in Charkh District, Logar Province and Chairman of Pingrom Village Shura

Ramitullah, Agriculture Manager for Jalriz District, Wardak Province

Safi, Saduddin, South Central Zone Director, Afghan Development Association (ADA)

Sharifullah, Omar, Administrator, South Central ADA Office, Mengele, Saidabad District, Wardak.

Zakir, District Administrator, Khuwaja Omari District, Ghazni Province

Zekurullah, Provincial Veterinary Officer, Wardak Province

## Appendix C: Land Types and Classification of Arable Lands

Table 1 provides the breakdown by land type classically used in Afghanistan. Table 2 provides more detailed categorisation of arable land. This was the schema first developed for tax purposes in 1965 and since modified by different administrations and most recently, the Taliban.

The country is also commonly divided into 11, discrete agro-ecological zones, not provided here. These combine distinctions of terrain, climate, altitude, rainfall and soils, and broadly relate to distinctions in farming systems and productivity.<sup>254</sup>

Table 1: Land Cover Categories and Area in 1993

Land Cover	Area (Ha.)	Percent of Total Land Area
1 Urban	29,494	0.05
2 Orchards: Fruit Trees, Vineyards, Gardens	94,217	0.1
3 Agricultural Land - Irrigated	3,207,790	5.0
A Intensively cultivated (2 crops)	1,559,654	2.4
B Intensively cultivated (1-2 crops)	1,648,136	2.6
C Occasionally cultivated every 2-3 yrs		
4 Agricultural Land - Rain-fed	4,517,714	7.0
5 Pistachio Forests	1,337,582	2.1
6 Natural Forests		
7 Rangeland	29,176,732	45.2
8 Barren Land	24,067,016	37.3
9 Marsh Land	417,563	0.6
10 Water Bodies	248,187	0.4
11 Snow Covered Areas	1,463,101	2.3
	64,559,396	100

Sources: Figures 8 & 13 in FAO 1999.

Table 2: Classification of Arable Lands

CLASS 1965, 1976	DESCRIPTION	CURRENT CLASSES (Edict No. 57 of 2000)
Gardens	Irrigated orchard and gardens	Grade I
Agricultural Land - Grade I	Irrigated, wheat followed by rice	Grade II
Agricultural Land - Grade II	Irrigated, wheat followed by other crops	
Agricultural Land - Grade III	Irrigated, once a year only, mostly wheat	Grade III (50+% irrigated)
Agricultural Land - Grade IV	Irrigated, every other year, fallow in between	Grade IV (15+% irrigated)

<sup>254</sup> For example, the Southern Mountains, Western Stony Desert and Badakhshan. Aside from tinkering to pay more attention to administrative boundaries, accessibility and levels of food vulnerability on the other (e.g. WFP's 34 food economy zones), these zones are still used, most recently in a FAO crop and food supply survey (see Maletta 2002).

Agricultural Land - Grade V	Irrigated, every 2 or more years, fallow in between	
Agricultural Land - Grade VI	Rain-fed, irrigated in spring only, mostly wheat	Grade V (less than 15% irrigated) Also Rain-fed cultivated every 2nd year
Agricultural Land - Grade VII	Rain-fed, in flat-lying areas, wheat, melon etc.	Grade VI Rain-fed cultivated after 2 years
Agricultural Land - Grade VIII	Rain-fed, in sloping areas, mostly wheat	Grade VII Rain-fed cultivated after 3 or more years

Sources: 1965 Survey & Statistics Law, 1976 Land Reform Law, 1978 Land Reform Decree, 1999 Land Edict





## Appendix D: An Overview of Rural Landholding Data

### 1960s

A village survey in Parwan Province in 1961 showed that there were a total of 922 plots shared among 250 land owners. Significantly, whilst this provides an average of 3.65 plots each and an average total holding of 1.42 jeribs of land (under one acre), the mean size of farms owned was only 0.525 jeribs. The range of farm size was from 0.2 jeribs to 30.25 jeribs.

In 1964 the Ministry of Planning produced data on a sample of 413 villages that showed that 60.5 percent of land was farmed by owner-occupiers; 13.8 percent of farmland was farmed with the involvement of sharecroppers; 5.5 percent of the land was under mortgage and 20.2 percent of the farmland was under 'other arrangements' [GoA 1964].<sup>255</sup>

The 1967 Survey of Progress reported that "the vast majority" of farmers own less than one ha. of irrigated land and than only 2.2 percent of farmers own more - but that these together hold 42 percent of the total cultivated land, suggesting gross inequity in holdings [The World Bank 1978].

In 1968, the Central Survey Office reported that only 27% fully owned their land. Most were crop share tenants (47%), renters (8%) or part-owner operators (17%) [GoA 1968].

### 1970s

In 1970 the government undertook surveys in seven provinces covering 796 households [GoA 1971]. Differences among provinces were significant. Landlessness for example ranged from 13 percent in Parwan to 49 percent in Kandahar. Landlords, renting out their land or hiring workers, ranged from one percent in Parwan to 23 percent in Nangarhar. Smallholders farming their own land nonetheless dominated. They constituted a proportion ranging from 37 percent of farmers in Kandahar to 86 percent of farmers in Parwan. A table collating 25 pages of data is reproduced below. An important finding of the survey was that sharecroppers, renters and workers were essentially landless farmers; that is, there was little to no evidence that they owned more than their household plots and sometimes not even those constructions.

In October 1971, Whiting and Hughes published a report based upon interviews with 723 farmers in all provinces, with a focus on irrigated agriculture. This found that 61 percent of farmers owned and farmed mainly their own land; 11 percent rented out the greater proportion or all their land ('landlords') and 28 percent were landless, farming others' land through rent of sharecropping arrangements. The majority (69 percent) hired no labour, 19 percent hired one

Table 1: Land Ownership in 1970

Type of Farmer	No. Households	Percent
Landlord	81	10.2
Owner-Operator	439	55.2
Renter	23	2.9
Sharecropper	177	22.2
Agricultural worker	76	9.5
	796	100

Source: GoA 1971

<sup>255</sup> In 1973 Dupree reproduces this data (but without source cited). The category of 'Other' remained unexplained; it may have referred to absentee landlords or it may have referred to lands that were under a complex of landlord/tenant or landowner/sharecropper arrangements.

labourer and all landlords and a few others (12 percent) hired more than one permanent labourer. *Afghan Agriculture in Figures* was published by Government in 1978 and produced a comprehensive picture of agriculture at the time. In 1975 the total population of Afghanistan was just over fifteen million people with a projected growth rate of 2.5 percent. In 1968, 72 percent of the population was rural and depended upon agriculture. A total of 1,307,170 landowners were identified. Together, they and their tenants, workers or sharecroppers cultivated around four million hectares, of which 2.5 million ha was irrigated. The average farm size was 3.5 ha in 1976. Some 14,340 households were members of 126 cooperatives in 1978 with seven new cooperatives established in 1979.<sup>256</sup>

Despite the fact that the registration survey had been operating for ten years and had by then covered 45 percent of landholders, distribution of ownership was not indicated. One sample study of 225 wheat farms recorded that only 27 percent were owner-operated. Owners farmed 17 percent with workers. Most farms (47 percent) were cultivated by crop-sharing tenants. Eight percent of farms were rented. One percent was farmed through a mixture of renting and sharecropping [GoA 1978].

Information on farm size and ownership in Nangarhar Province in 1964 showed that the average size of farm was 24.2 *jeribs* (4 ha.) and that 58.5 percent of farmers owned at least some land, if not always enough. The remainder were tenants, working for landowners or leasing land [ibid].

A larger sample drawn from the richer provinces of Kunduz and Baghlan provinces in 1972-73 showed that 78 percent of farming families owned some land. Another six percent were part-owners. Sixteen percent were landless tenants, renting in land or sharecropping. Among landowners, farm size was unevenly distributed. Around one third had less than five acres, one third between five and 12.5 acres, and another third with more than this amount [GoA 1978]. Prompted by the current drive for land redistribution, the *Kabul Times* published this picture of skewed land ownership.

Drawing upon work by Vladimir Glukhoded of the USSR Academy of Sciences in 1981 and *Afghan Agriculture in Figures* cited above, Emadi produced the following stark summary for the year 1978. This asserted that 70 percent of farmers were landless at one extreme and six percent of farmers owned 10 percent of the land area at the other. The remaining 24 percent of peasants owned seven percent of the land area. The accuracy of this data is disputed by some; Rubin, also partly using Glukhoded's work indicates around 35 percent of the rural population were landless at that time (Rubin 1997). This is more consistent with another survey (Mukherjee) reported by Rubin which suggested around 30 percent were landless. Nonetheless, the figures do tally with the implications of data presented by Government in 1978, which suggested that the vast majority or rural dwellers were landless or owned too little land to live on [GoA 1978].<sup>257</sup>

Table 2: Distribution of Landholdings among Landowners 1978

Land Holding Size	No. Landowners (Households)	Percent
2.02 - 4.05 Ha	1,084,8241	83
4.05- 10.12 Ha	156,842	12
10.12- 20.9 Ha	65,351	5
	1,307,017	100

Source: Reproduced from Emadi 1997.

<sup>256</sup> Information variously extracted from Tables 1, 2, 20, 23, 106, 135, 141 GoA, 1978.

<sup>257</sup> Reference is made here to the famous Table 23 in *Afghan Agriculture in Figures*, which does not directly explain the relation of the farm population of 10,839,870 persons in 1967-1968 to the indicated number of land owners (1,307,170). Many have since interpreted this as meaning that only 1.3 million of 10.8 million rural dwellers were landowners (12 percent).

## 1980s

In contrast, results from the Agricultural Survey of Afghanistan carried out ten years later (1988-1989) showed that on a national basis only 18 percent of those who were farming owned no land at all [SCA 1990]. The sample was substantial at around 30,000 households in all provinces. The average size of farms owned overall was 5 hectares. Sharecroppers, either full or part-time (some working on their own farms as well), made up another 17 percent of farmers. Tenants, also either full or part-time (again some working on their farms as well), made up another 4 percent. Caretakers, such as for absentee landlords made up only 1.5 percent of farmers. Those who owned land and only farmed their own land represented the majority - 78 percent of farmers interviewed.

Given the diversity among provinces, analysis of the survey data in ranges is probably more meaningful:

## Among landowners -

- Between 62 and 99 percent of farmers only farmed their own land [owner-occupiers] and the average size of their farms ranged from 4.1 jeribs to 240 jeribs;
- Between 0 and 35 percent of farmers both farmed their own land and sharecropped other land and the average size of their total farm (although not all owned by them) ranged from 4.6 jeribs to 135 jeribs;
- Between 0 and 14 percent of farmers both farmed their own land and rented other land and the average size of their total holding (although not all owned by them) ranged from 5 jeribs to 66 jeribs.

## Among the landless -

- Between 0 and 34 percent of farmers were only sharecroppers and the average size of the land they had access to ranged from 3.3 jeribs to 112.5 jeribs;
- Between 0 and 12 percent of farmers were only tenants and the land they accessed ranged from 3 jeribs to 100 jeribs;

## 1990s

A later survey by the Swedish Committee of Afghanistan showed that 87 percent of farmers in Nejrab District in Kapisa province owned at least some part of the irrigated land they farmed.

Only 40 percent of farmers owned all the land they cultivated (1991). The remaining 60 percent either rented or sharecropped part or all of the land they farmed [SCA 1992b]. Farm size among small, medium and large landowners was not highly variant, most farmers cultivating between 3-6 jeribs of irrigated land. As well as not knowing the ownership pattern in respect of rain-fed land, the sample was very small (61 farmers).

The picture for Shulgara District in Balkh Province in 1991 was more complete - but the sample yet smaller. Eighty-four percent of farmers owned rain-fed land and 55 percent owned irrigated land. Sixty-nine percent of the total available land was cultivated by the owner and 31 percent cultivated under sharecropping arrangements. Sharecroppers owned less than 18 percent of the total land area but were the vast majority. Overall, 80 percent of farmers owned less than 50 percent of the land area [SCA 1992a].

A survey conducted in Mehterlam District in Laghman Province in 1991 showed that 68 percent were owners and 22 percent landless, mostly living by sharecropping others' land. Five percent of owner-occupiers had their land under mortgage [SCA 1992c].

The 1991 survey in Qarabagh District in Ghazni Province (sample 95 farmers) showed 82 percent of farmers owned land and 17 percent were landless, again gaining access to land through sharecropping [SCA 1992e].

The picture in Maydan Sha District in Wardak province in 1991 was different with 100 percent of farmers owning at least some land (sample of 98 families). Four percent additionally rented in other land in 1991 and one percent sharecropped. Three percent of farmers had the farm under mortgage, and which in all cases had involved the surrender of ownership until the loan was repaid [SCA 1992d].

The high rate of landholding is less surprising in Nad Ali District in Hilmand province, where most of the land has been distributed through various government schemes. There all but one farmer interviewed owned irrigated land and 68 percent of them had additional labour in the form of sharecroppers. Five percent of farmers rented out land. Only one third of farmers farmed only their own land [SCA 1992f]. Most farmers therefore

were both owners and sharecroppers at the same time.

Some fragmentary information is available through more recent surveys. In 1997 the NGO DACAAR carried out surveys in two villages in Ghazni and Laghman Provinces. Respectively 36 percent and 16 percent of households in the village owned no land at all. Distribution among the landed was very uneven with respectively 11 percent and 22 percent of households owning around 60 percent of the total farmland in the village [Klennert 1997a, 1997b]. Another study produced the following picture in 1999 for around 1,500 households in Paktya, Wardak and Badghis -

More than half (57 percent) rented land from others. Thirty-five percent of all households had no land at all. Only 15 percent rented less than half of the land they were cultivating from others. Of those with no land, five households (21 percent) did not engage in any agricultural activity at all, because of age, infirmity and, in one case, because the household could not find land to rent. Four percent of the sample rented land out to others [Allen 1999; 8].

Reviewing studies in 1998, the WFP VAM preliminary assessment of food economies concluded that distribution of landholding is uneven but 'most egalitarian in the east and centre of the country where less than 40 percent of farm households cultivate less than the average for their province' (average holding size was 1.4 ha or 3.5 acres). At the other extreme, over 70 percent of farm households cultivate less than the provincial average in the north east and in the river valleys of Herat and Kandahar' [Clarke & Seaman 1998].

2000s

A study undertaken by the Strategic Monitoring Unit (now AREU) in Badakhshan in 2001 provides up-to-date information on nearly 9,000 households. Whilst the reliability of this data is no stronger than for other large scale surveys (or indeed for the smaller surveys), the result are interesting as drawn together in the following table. The diversity is wide, with proportions of landless households very high in two districts and high in four others. In only one district was landlessness not a problem. Most of those indicated in the tenant and sharecropper categories are either landless or small landowners [SMU 2001].

Table 3: A Provincial Case - Badakhshan in 2001

District	% landless	% Small landowners	% Medium landowners	% Large landowners	% tenants	% sharecroppers
Argu	53	15	19	13	0	26
Baharak	40	32	26	2	0	10
Darayam	13	25	55	6	0	38
Eshkashem	7	15	43	35	0	15
Jurm	35	20	43	2	0	2
Keronmanjan	21	17	32	30	26	0
Keshem	59	15	18	9	13	10
Ragh	25	20	36	18	10	36
Shar-I-Buz.	2	44	19	35	0	10
Shegnan	9	57	21	14	46	6
Shohadda	25	47	27	1	0	22
Teshkan	42	7	27	24	0	33
Wakhan	47	27	18	9	0	19
Yaftal	25	9	51	15	0	19
Yamgan	20	31	8	1	0	1

Source: compilation of data extracted from Table 1 in SMU 2001.

Pending the release of Vulnerability Assessment Data by the World Food Programme/UNDP, the most up-to-date survey of land ownership is found in a crop and food supply survey conducted by FAO/WFP during May-June 2002 [Maletta 2002]. Data on nearly 5,000 farms in 540 villages were collected. The average farm size overall was found to be a surprising 6.79 ha., ranging from an average of 1.12 ha. in the east to 12 ha. in the north.<sup>258</sup> Problematically, the study did not investigate ownership patterns and seems to assume that each farm is discretely owned and farmed, rather than sharecropped or rented. Nor is there any information on those who have no land at all. Still, the survey provides a comprehensive picture as to how farm sizes are

distributed (see Table 4 below) and from which farm ownership may to an extent be inferred.

Thus, if it is assumed for the moment that each farm has a farmer then at once it is clear that land ownership remains in 2002 as polarised as it has ever been (quite aside from those with no land at all). Less than two percent of farmers own or farm 18.4 percent of the total farmland in the country. Conversely, twenty four percent of farmers together farm less than two percent of the farmland area. Two-thirds of all farmers share under 16 percent of the farmland area. Had the landless been identified and incorporated in the statistics, the picture would have been even more strongly polarised.

Table 4: A National Picture of the Distribution of Farming Areas in 2002

	Farms in Sample	Average Size (ha.)	Percent Farms	Percent Farm Area
Total	4,966	6.79	100	100
Below 1 ha.	1,180	0.47	23.76	1.65
1-1.99 ha.	768	1.32	15.47	3.01
2-4.99 ha.	1,200	3.03	24.16	10.78
5 -9.99 ha.	803	6.83	16.17	16.26
10-49 ha.	935	18.01	18.83	49.91
50 -99 ha.	63	66.19	1.27	12.36
100+ ha.	17	119.84	0.34	6.04

Source: Reproduction of Table 1 in Maletta 2002 for FAO.

<sup>258</sup> It is not clear from the Preliminary Report whether all farmland was included or just cereal lands (the focus of the survey). There is no information on how farm sizes were gauged.

## Appendix E: Land Cases In The Supreme Court

Table 1: Compilation of Cases March-October 2002

Period	Court	Total Cases	Land Cases	Percent	Type of Land Cases	Percent
March - May 2002	Supreme Court	1,035	255	24.6	Sale & Purchase 156	61.1
					Water 76	29.8
					Rent & Mortgage 22	8.6
					Gardens/boundaries 1	0.4
	Primary & Provincial Court	2,315	224	9.6	Sale & Purchase 118	52.4
					Water 46	20.5
					Rent & Mortgage 50	22.3
					Gardens/boundaries 10	4.46
June- Aug 2002	Supreme Court	832	195	23.7	Sale & Purchase 116	59.48
					Water 66	33.8
					Rent & Mortgage 13	6.6
	Primary & Provincial Courts	118	24	20.3	Sale & Purchase 15	62.5
					Water 7	29.16
					Rent & Mortgage 2	8.3
Current Sept. 2002	Primary & Provincial Courts	212	27	12.7	Sale & Purchase 4	14.8
					Water 12	44.4
					Garden/boundary 11	40.7
Total		4,512	725	16		

Source: Research & Statistics Dept of Supreme Court & Civil Rights Division of Supreme Court

TABLE 2: LAND CASES PENDING IN THE SUPREME COURT BY AREA

PROVINCE	NO.	PROVINCE	NO.
Kunar	6	Kunduz	4
Tarkhar	3	Heart	4
Hilmand	2	Badakhshan	2
Balkh	4	Jowzjan	3
Ghazni	10	Baghlan	8
Parwan	7	Laghman	5
Khost	1	Wardak	3
Paktya	15	Kabul	15
Logar	4	Faryab	11
Nangarhar	14	Kunduz	5
Samangan	2	Paghman	1
Bagdhis	1	Farah	2

Source: Research & Statistics Dept of Supreme Court & Civil Rights Division of Supreme Court

## Appendix F: Afghan State Land Laws

The following list is incomplete. Dates are in the solar Islamic calendar used in Afghanistan. The exception is the dates during the Taliban period, which used the lunar calendar. Gregorian dates are in brackets. Because the Islamic year is March to February, it is likely that some of the Gregorian dates are incorrect, by six months, which could make the correct year either one before or one after.<sup>259</sup>

There are also inconsistencies with spelling. Thawr, Thor and Thour are variously used for example to mean the same month. Whichever spelling is given in the law is retained.

### *Under Zahir Shah Administration 1933-1973*

- Law for Appropriation of Property for the Public Welfare in Afghanistan, 1314 (1935)
- Law for the Sale of Land Under Dams and Rivers, 1318 (1939)
- Law for Settling Ownership and Tax Matters, and the Price of Water for Lands Below the Arghanab and Kajakai Dams, 6 Hoot 1344 (1965)
- Land Survey and Statistics Law 31 Jawsa 1344 (1965)
- Law of Pasture Land 1970

### *Under Daoud's Administration 1973-1978*

- The Civil Law of the Republic of Afghanistan 1974
- No. 311 of August 6 1975, Law Regarding Land Reform, Issue No. 10 Serial No. 311, 15 Zemarai 1354 (1975)
- Law on Progressive Taxation Decree No. 367 of 26 Jawza 1355 (1976) Gazette No. 338, Issue 7 of 15 Changash 1355
- Law Concerning Land Survey and Registration of Settlement Survey Law Decree No. 718 of 30/5/1355 (1976) Gazette Issue 346 and also Issue No. 12 Serial No. 347 of 1355

### *After the "Saur" Revolution 1978-1979*

- Decree No. 6 of the Revolutionary Council on Land (Limiting Loans & Mortgages & Cancelling

Debts) Extraordinary Issue of Gazette, Serial No. 402, 22 Changash 1357 (1978)

Decree No. 8 of the Revolutionary Council Regarding Land, 9 Qaws 1357 (November 18 1978)

Decree (unnumbered) of the Chairman of Revolutionary Council Regarding the Start of Land Distribution to Eligible Applicants in Gazette No. 420, Issue 23, 15 Hoot 1357 (5 April 1978)

Regulation on Land Reform in the Warm Provinces Gazette Issue 420

Land Matters, Issue No. 416 January 6 1979

Second Decree on Distribution of Land Gazette No. 422, 31.2.1358 (21 May 1979)

Law on Compensation and Selling Kabul City's Detailed project Lands based On the Master Plan of 1357, Gazette Issue No. 3 Serial No. 426, 15 Thawr 1358 (1979)

Decree of Chairman of Revolutionary Council Regarding Land Distribution to the Eligible Applicants, Gazette No. 4, Serial No. 427, 31 Thawr 1358 (1979)

Issue No. 426 May 5 1979 Concerning Acquisition and Sale of Land

Issue No. 427 21 May 1979 Concerning the Distribution of Land to Beneficiaries

Regulation on Land Reform in the North of Afghanistan Gazette Issue 427

Decree No. 2 on Land of Revolutionary Council in Gazette Issue No.4 Serial No. 427 of 31 Thawr 1358 (1979)

Issue No. 430 7 July 1979 concerning constitution of cooperatives, arranging of residence, regulation of project residence Issue No. 438 6 November 1979 Order under Land Law

Issue No. 438 6 November 1979 Concerning Decree No. 8 on Land

Issue No. 348 6 November 1979 Concerning Land Taxation

Law of Farmland Reform, Gazette Issue No. 15 Serial No. 438 15 Agrab 1358 (1979)

Regulation No. 2 under Decree No. 8

Concerning Land Reform in Gazette issue No.

<sup>259</sup> Afghan months generally begin around 21<sup>st</sup> of the western month, so no direct translation of months can be made. Hamal is March 21-April 20; Saur is April 21-May 21; Jawza is May 22-June 21; Saratan is June 22-July 22; Assad is July 23-August 22; Sunbula is August 23-22 September; Mizan is September 23-October 22; Agrab is October 22-21 November; Qous is November 22-21 December; Jaddi is December 22-20 January; Dalwi is January 21-19 February; Hoot is February 20-20 March.



15 as above (1979)  
 Law on Land Taxation, in Gazette Issue No. 15 as above (1979)  
 Law for the Regulation of Land Distribution Gazette Issue 438  
 Law on Land Tax Gazette Issue 483  
 Issue No. 489 6 September 1979 Land Decree

#### *Soviet Period 1980-1989*

Issue No. 502 19 February 1982 Taxation and Income  
 Issue No. 514 22 August 1982 The Law of Acquisition and Sale of Land  
 Issue No. 517 7 October 1982 Land Regulation Annex I to Edict No. 8 of Land Reform of 1978 Gazette Issue 517  
 Issue No. 521 6 December 1982 Concerning Taxes and Income  
 Decree No. 8 of Revolutionary Council on Land Issues Gazette 550 29.11.1362 (18 February 1984)  
 Two Amendments to No. 8 Gazette Issue 550 Regulation on Land Gazette Issue 550  
 Regulation No 1 under Decree No. 8 Gazette Issue 550  
 Regulation No. 2 of Decree No. 8 Gazette Issue 550  
 Decree on the Exemption of Debts of Farmers from Land Issues Gazette Issue 562, 31.4.1363 (22 July 1985)  
 Ratification No. 147 Regarding Approval of Regulation on Distribution of Residential Houses, Government Houses and Plots of Land in Kabul City Gazette Issue No. 14, Serial No. 593, 30 Mizan 1364 (1985)  
 Decree of Council of Ministers Regarding Approval of Regulation of the Provincial Department of Agriculture and Land Reform, Gazette Issue No. 18 Serial No. 597 30 Qaws 1364 (1985)  
 Ratification No. 90 Regarding Adjustment of Some Articles and Appendix of Regulation Concerning Distribution of Government Residential Houses and Land in Kabul City Extraordinary Issue of Gazette, No. 613 22 Asad 1365 (1986)  
 Decree No. 81 dated 30.2.1366 Regarding Approval of Land Compensation Law, Extraordinary Issue Gazette 10, Serial No. 639 of 10 Saratan 1366 (1987)  
 Ratification No. 224 dated 19.08.1366 Regarding Adjustment to Article 2 of Regulation on Urban Projects for the 25 Year Plan of Kabul City, Gazette No. 19 Serial No.

656, 15 Jadi 1366 (1987)  
 Ratification No. 244 dated 26.08.1366 Regarding Regulation on Land Leases Gazette No. 22 Serial No. 659 30 Dalwa 1366 Regulation on Land Rents Gazette Issue 659 (1987)  
 Decree of Revolutionary Council for Exemption of Returnees from Land For Returnees, . Gazette Issue 637, 14.3.1366 (4 June 1988)  
 Decree of Revolutionary Council on the Exemption of Land, Shops, and Other Taxation of Returnees Gazette Issue 632, 25.1.1366 (14 April 1988)  
 Decree of Revolutionary Council on the Exemption from Penalty Relating to Land Issues Like Fertilizer, Agricultural Machinery and Seeds from Previous Years. Gazette Issue 632, 25.1.1366 (14 April 1988)  
 Decree on Distribution of Land for Returnees. Gazette Issue 643, 12.5.1366 (2 August 1988)  
 Decree No. 237 dated 24.02. 1367 Concerning the Law of Cadastral Survey in Gazette No. 12 Serial No. 674 of 31 Sunbula 1367 (1988)  
 Decree No. 332 dated 06.04.1367 Regarding Law on Land Taxation, Gazette No. 14 Serial No. 676, 29 Mizan 1367 (1988)  
 Law on Private Investment for Irrigation of Virgin Lands Gazette Issue 700

#### *Najibullah Period 1989-1992*

Decree on Selling of Apartments. Gazette Issue 668, 31.3 1367 (21 June 1989)  
 Decree on exemption of Tax penalty on Farmers and The Owner of the Land, Gazette Issue 679, 15.9.1367 (6 December 1989)  
 Decree on the Return of Properties of the Returnees, Which are Under the Control of Government, Gazette Issue 715, 15.2.1369 (5 May 1991)  
 Decree to Return Houses, Apartments, which are Under the Control of Government to the Owners, Gazette Issue 725, 1.7.1369 (23 October 1991)

#### *Mujaheddin & Rabbani Period 1992-1996*

Decree on Prevention of Possession of Others' Property Without Any Reason Gazette Issue 767, 31.5.1372 (22 August 1993)  
 Land Law Gazette Issue 769  
 Decree on Cancellation of Law for Arranging Land Relations Gazette Issue 771, 15.8.1373 (6 November 1994)  
 Decree on Changing Grazing Areas to Agricultural Land Gazette Issue 771, 15.8.1373 (6 November 1994)

*Taliban Period 1996 - 2001*

Decree on State Lands Gazette Issue 783  
1.1.1376 (21 March 1997)  
Decree No. 108 dated 19.05.1419 Regarding  
Non-Intervention in Survey and Cadastral Maps  
in Extraordinary Issue as above (1420)  
Decree No. 26 About Land dated 13.04.1420  
Regarding Properties Extraordinary Issue  
Gazette Series No. 788  
Decree No. 20 dated 15.06.1420 Regarding  
Cancelling Individual Plans on Government  
Properties and Avoiding the Destruction of  
Public Properties and Assets in Extraordinary  
Issue of Gazette as above (1420) (1999)  
Decree No. 21 dated 05.06.1420 Regarding  
the Properties that have been Surveyed but  
not Yet Settled, in Extraordinary Issue of  
Gazette as above (1420) (1999)  
Decree No. 38 on Land  
Decree on Compensation for Land in Gazette  
Issue 794  
Regulation for the Survey of Land for Housing,  
Factories in Kabul City in Gazette Issue 794  
of 2000  
Decree No. 57 on Land in Gazette Issue No.  
795 (2000)  
Decree on Land Regulation Gazette Issue 795  
(2000)  
Decree on Pasture Land and Maraha in Gazette  
Issue 795 (2000)  
Decree on Tribal Forests in Gazette Issue 795  
(2000)

Decree on Protection of Property  
Amendment to Edict 26 Gazette Issue 797  
(2001)  
Amendment to Edict 38 Gazette Issue 797 (1  
article amended) (2001)  
Amendment to Edict 38 Gazette Issue 788 (1  
article amended) (2001)  
Regulation of for the Distribution and Selling  
of Government Apartments in Gazette Issue  
798 (2001)

*Karzai Period 2001 -2002*

Decree No. 66 of January 26 2002 Abolishing  
All Decrees and Legal Documents Issued and  
Enacted before December 20 2001<sup>260</sup>  
Decree No. 99 dated 4.2.1381 Prohibition on  
Distribution of Government Unutilized and  
Intact Lands (not yet gazetted)  
Decree on Domestic and Foreign Private  
Investment in Afghanistan No. 134 in Gazette  
No. 803 2002, 2 Sumbula 1381 (2002)  
Decree No. 136 on Establishment of a Special  
Property Claims Court, 13.6.1381 (not yet  
gazetted)  
Decree of the President of the Afghan Interim  
Administration on Dignified Return of Refugees  
of 13.03.1380 (2001)  
Draft Edict 2002 Concerning Government Land  
1381

<sup>258</sup> A misleading title; no laws were abolished by this decree; each existing law has to be scrutinised and determination made to repeal or amend the standing law.

## Appendix G: Property Clauses in Afghan Constitutions

### 1923 (First) Constitution

April 9, 1923 - The Constitution of Afghanistan [Nizamnama-e-Assasi-Daulat-e-Aliya-e-Afghanistan Hamal 20, 1302] Promulgated by King Amanullah [1919-1929] with a significant Constitutional Amendment January 28 1925 [Dalwa 8, 1303]

#### Article 19

In Afghanistan, everyone's real and personal property in his possession is protected. If real property of a citizen is required by the Government for a public purpose, then in accordance with provisions of a special law, first the price of the property shall be paid and then it may be expropriated.

#### Article 21

Land disputes will be decided in accordance with both Shariat and the general civil and criminal state law codes.

#### Article 22

Expropriation without compensation of property (and forced labour) may be undertaken in times of war

#### Article 26

"Nothing shall be taken from anybody in violation of laws."

### 1931 (Second) Constitution

[Asoolnamah-e-Assasi-ye-Daulat-e-Aliya-e-Afghanistan 1310] The Constitution of the High State of Afghanistan, Promulgated under King Nadir Khan (1929-1933)

#### Article 15

Secured property as previously (see Article 19 of 1923)

#### Article 16

Restricted entry to houses and land without an order under Shariat or state law.

#### Article 17

Confiscation of property prohibited 'except for those who stay abroad and indulge in movements and propaganda against the government of Afghanistan' (except in a state of emergency Article 115)

### Article 26

"Nothing shall be taken from any body in violation of laws."

### 1964 (Third) Constitution

Promulgated under King Zahir Shah (1933-1973)

#### Under Article 26

Retained the role of public interest as able to interfere with private rights.

"Indebtedness of one to another cannot cause deprivation of curtailment of the liberty of the debtor. The ways and means of recovering debt shall be specified in the law."

"Every Afghan is entitled to travel within the territory of his State and settle anywhere except in areas prohibited by the law'.

#### Article 28

"A person's residence is inviolable. No one, including the State can enter or search a residence without the permission of the resident or on the orders of a competent court and in accordance with the conditions and procedures specified by the law." (except in a state of emergency Article 115)

#### Article 29

"Property is inviolable. No one's property can be confiscated except in accordance with the provision of the law and the decision of a competent court." (except in a declared state of emergency Article 115)

"Expropriation is allowed only for securing public interest, against an advance equitable compensation in accordance with the provisions of the law."

"No-one shall be prohibited from acquiring property and exercising the right of ownership of the same, within the limitations of the law. The way of utilising property shall be regulated and guided by the law, for securing the public interest."

"Investigations and declarations of a person's property may only be made in accordance with the provisions of the law."

"Foreign States and nationals are not entitled to own immovable property in Afghanistan. Subject to the approval of government, immovable property may be sold to the diplomatic missions of foreign states on a reciprocal basis and also to international organisations of which the State of Afghanistan is a member."

#### Article 37

"The main purpose of laws designed to systematise labour is to reach a stage where the rights and interests of all categories of labourers are protected, suitable conditions of work are provided and the relations between the workers and employers organised on a just and progress manner."

#### 1977 (Fourth) Constitution

In the name of Allah, The Compassionate, The Merciful February 27, 1977 (Hoot 5, 1355). First Republican Constitution. Promulgated under President Daoud (1973-1978).

#### Under Fundamental Objectives

##### Article 7

"To institute constant, profound and basic economic and social changes based on the principles and values enshrined in this Constitution to secure the interests of the majority of the people of Afghanistan."

##### Article 8

"To eliminate exploitation in all its forms and manifestations."

#### Under Chapter Two Economic Principles

##### Article 13

"Resources such as mines, forests, and energy large industries, communications, important air and surface transport ...are part of the nation's property and their administration shall belong to the State."

##### Article 14

"Limits on agricultural property shall be determined and fixed by the Land Reform Law."

##### Article 15

"Private property and enterprises, based on the principle of non-exploitation, shall be regulated by Law."

##### Article 16

"Cooperatives, and production and consumption cooperative companies, with the participation of the people therein, shall be encouraged, protected and guided by the Government, in accordance with the provisions of the law, to ensure the interests of the majority of the people."

##### Article 19

"Taxes shall be collected on the basis of social justice in accordance with the provisions of the law."

##### Article 32

Retained the 1964 clause on indebtedness (see above)

##### Article 33

Retained the 1964 clause of freedom of movement and settlement (see above)

##### Article 35

Retained the 1964 clause (Art. 28) on inviolability of one's house but added that, "The ways of utilising property shall be regulated and guided by the law for the purpose of ensuring the interests of the public."

##### Article 36

No person's property shall be confiscated without the provision of the law and the decision of a competent court.

The expropriation of private property is permitted only by virtue of the law for the purpose of ensuring the interest of the public and in exchange for just compensation. No person shall be prohibited from acquiring property and exercising the right of ownership therein, except within the limits of the law.

The ways of utilising property shall be regulated and guided by the law for the purpose of ensuring the interests of the public.

##### Article 41

"... The main purpose of the laws ... is to reach the stage in which the rights and interests of all toilers, farmers, workers and traders are protected, suitable working conditions provided, and which relations between the worker and the employer are regulated on a just and progressive basis."

Revolutionary Declarations 1978-1979  
Constitutional Subject Laws under Khalqi  
Presidents Noor Mohammad Taraki & Hafizullah  
Amin

- May 9, 1978 Basic Lines of the Revolutionary Duties of the Government of Democratic Republic of Afghanistan;
- May 14, 1978 Decree No. 3 Legal Procedures of State;
- March 27, 1979 Law for High Council for the Defence of the Homeland & Law for Regulating the Duties of the Revolutionary Council and the Government and Legislative Procedure.

1980 (Fifth) Constitution  
Interim Constitution of Afghanistan Fundamental  
Principles of the Democratic Republic of  
Afghanistan Promulgated under President Karmal  
(1979-1986)

Article 17

Ownership exists in the Democratic Republic of Afghanistan in the form of public property, which is shared by all, cooperative and private ownership. The state preserves and protects all forms of ownership. Underground resources, other national resources, energy resources, banks, insurance organisations, major means of production in heavy industries, communications installations and radio and television stations belong to the state. People's property enjoys special protection.

Article 19

The government respects and guarantees ownership of the peasants and other land holders over land according to the provisions of law. The government will adopt measures to implement democratic changes in agriculture in the interest of vast masses of peasants with their active participation.

Article 20

The government will guarantee for the nomads tribes and livestock breeders vast opportunities to use pastures free of charge on an equitable basis and guarantees for the nomads the right of unhindered passage over national territories.

Article 22

The government will preserve and protect private ownership according to law. Using

private property contrary to the interests of society and people is not permitted. The government guarantees private property of Afghan nationals obtained through legal means. Inheritance rights in connection with private property will be defined and guaranteed by law. Expropriation of property against payment in accord with social justice and law is permissible.

1987 (Sixth) Constitution of Afghanistan  
The Constitution of Afghanistan In the name of  
Allah, the Beneficent, the Merciful  
Promulgated under President Najibullah (1986-  
1992)

Comprises 149 Articles in Thirteen Chapters

Retained the content of Articles 17, 19, 20 and 22 above (under different numbers). In addition -

Article 29

"The hereditary right to property shall be guaranteed by law on the basis of Islamic Shariat"

Article 30

"Expropriation is only allowed in public interest and against just and prior compensation in accordance with the law. Confiscation of property is not allowed without the sanction of the law and the decision of a court."

Article 59

"The citizens of Afghanistan have the right to travel and free choice of settlement and residence in the country."

1990 (Seventh) Constitution  
In the name of Allah, the Beneficent, the  
Merciful [Only slightly amended version of  
1987 Constitution] Promulgated under  
President Najibullah (1986-1992)

A revision of the 1987 law; abolished five or six articles of 1987, not affecting property.

1992-1996 (Eighth) and Draft Constitution of  
Afghanistan

The Draft Constitution of Afghanistan 1992 of the Islamic State of Afghanistan In the name of Allah, the Compassionate, the

Merciful  
Drafted by the Mujaheddin under Rabbani  
(1992-1996)

#### Article 48

The State respects and supports independence and dignity of mankind - personal status, life, property and residence are immune from encroachment.

#### Article 65

The economic system of the Islamic State of Afghanistan is based on the principles of personal property, public property and state property.

#### Article 67

Keeping in view the larger interests of the country and principles of the Shariat, underground resources and mines, forests and unclaimed pastures, basic sources of power, historical relics, installation of telecommunications, big dams, ports, lines of communication, big industries, radio and television will be determined in separate laws.

Investment by the private sector in the exploitation of forests, pastures, sources of power and business in communication appliances, is legally permitted.

#### Article 71

The State will extend financial and technical facilities, in order to develop agriculture with a stress on increase of agricultural products and cattle farming, to tillers and landowners under the laws.

It will also create congenial conditions for building mechanised and agricultural farms - in the private sector as well as in the form of companies, and reclamation of arid land.

#### Article 73

In Afghanistan, foreign nationals are not entitled to hold landed properties. Sale of land to diplomatic missions of foreign countries is allowed, subject to the agreement of the government, on the basis of bilateral relations and to international agencies of which the Islamic State of Afghanistan is a member.

#### Article 74

The State supports all kinds of legal ownership

in the public sector as well as in the private sector. Every legal owner is entitled to the outcome of his profession or work.

Legal assets of a person are immune from intervention.

Confiscation of properties is subject to legal orders according to verdicts of the courts. Procurement under the law will take effect only in security or public interest and after due compensation has been paid.

1996-2001 Principles of the Islamic Emirate Hanafi Shariat: Islamic Jurisprudence becomes "the Constitution"

- Specific principles articulated in statements and edicts included -
- Establishment of a pure Islamic state
- Islam to be the religion of the State and the government and the people
- Shariat alone to be the law and to be enforced through Shariat courts
- Hejab to be ensured for women
- A religious Police Force to operate
- An Islamic Army to be formed
- The state economy to be transformed into an Islamic economy.

2001. Reapplication of the 1964 Constitution Without Articles on Monarchy, Executive, Legislature, through Bonn Agreement 5 December 2001, pending drafting of a new Constitution, to be effected by end 2003.

In October 1999, the UN Security Council passed Resolution 1267 imposing economic sanctions on Afghanistan for offering sanctuary to Osama Bin Laden. Additional sanctions were imposed in December 2000 because of the Taliban's continuing support for terrorism and poppy cultivation. After September 11 2001, six Security Council resolutions have been passed.

Resolution 1383 of December 2001 echoed the terms of the Bonn Agreement signed on 5 December 2001. The Bonn Agreement established an Interim Authority, charged, inter alia, with convening an emergency Loya Jirga within six months to decide upon a Transitional Authority 'to lead Afghanistan until such time as a fully representative government can be elected through free and fair elections to be held no later than June

2004'. Specified key tasks of the Transitional Authority are to establish a Constitutional Commission, a Civil Service Commission, a Judicial Commission and a Central Bank of Afghanistan.

Under the Bonn Agreement, the legal framework and judicial system was to be founded upon the 1964 Constitution "to the extent that its provisions are not inconsistent with those contained in this agreement, and with the exception of those provisions relating

to the monarchy and to the executive and legislative bodies provided in the Constitution" (Clause II 1i). At the same time, 'existing laws and regulations are to apply' provided they are not inconsistent with the Bonn Agreement, international legal obligations to which Afghanistan is party or 'with those applicable provisions contained in the Constitution of 1964, provided that the Interim Authority shall have the power to repeal or amend those laws and regulations' (II 1ii).

## Appendix H: Note on Land Tenure Issues in Kabul City

A Master Plan was developed for Kabul city in 1974. The Master Plan allocated 16,830 ha. of the total area (32,400 ha.) area for housing. Implementation of its centrepiece, the demarcation of around 100,000 plots to provide for construction of 600,000 apartments, began in 1978. Less than 3,000 apartments were built, mainly during 1979-1989. Nonetheless, 70 percent of applicants at the time did receive housing or more often, plots on which to construct houses, on a payment by instalment basis. Plots of around 8,000 ha. were distributed.

From 1990, the capacity of the municipality to provide housing, water, sewerage, electricity, roads and public amenities fell to almost zero and self-help construction flourished. Rarely did these houses meet the specifications of the Master Plan. Nor were occupation/ construction undertaken through legal means. Many of these houses are of unstable construction or fall within the designated green belts and hilly areas of the city. Around 6,000 houses fall within this category; either being illegally sited, illegally constructed and/or occupied.

In addition, many of these occupants have purchased these apartments or houses on the basis of fake documentation. In addition, an estimated 600 older private properties have been wrongfully given to and/or inhabited by especially Taliban and post-Taliban commanders, some as recently as one year ago. During the communist period, compensation was generally paid when authorities took private property although at less than open market rates. When mujaheddin or Taliban leaders appropriated property they rarely paid compensation although sometimes this was planned but not executed before the authorities lost power.

The municipality is dealing with these problems through, first, the creation of a joint commission to address claims for restitution of housing on a case-by-case basis. This commission comprises representatives from the municipality, the office of the Kabul governor, the Ministry of Justice, the Primary Court of Kabul and the criminal department of the Ministry of Interior, and is located in the Police Department of the Municipality. It is not a full-time commission. On

investigation, the rightful owner of the property is identified and the land handed back to that owner, his children or representative. Often the rightful owner is still the municipality. Current occupants including those who occupied, bought or been sold properties under illegal circumstances will be evicted but may apply for allocation of other housing. Appeal to the Kabul Primary Court may also be made when agreement cannot be reached.

Second, rather than destroying the houses of those who have constructed homes in unscheduled areas of the city or on land which has not formally been sold to them, the municipality plans to re-launch low-cost housing construction on the remaining 1,000 ha. of total housing land (16,830 ha.) available within the city limits and to expand the city limits towards the north (Shomali). The municipality also proposes to purchase some of the private one-storey houses within the 6,000 ha. private housing areas and construct high-rise apartments. It estimates that around 250,000 apartments are currently needed. Those living in unstable or poorly sited areas such as on the hillside greenbelts with receive first offer of housing, which they may purchase at subsidized rates and on payment by instalment. Their houses will then be destroyed, following payment of compensation where the construction was undertaken with official approval and/or on documented payment. To pay for new housing and related road and other service developments, the municipality proposes to invite foreign investors to undertaken building on a commercial basis, alongside provision of low-cost housing schemes suitable for those with less means. However no donor and no investor have yet been forthcoming. Meanwhile, according to the deputy mayor in charge of properties on the Kabul City Council, "Kabul fills weekly with more returnees looking for housing or finding their own homes destroyed or occupied and without the means to build their own houses." The invasion of foreign personnel has inflated prices to levels that are unaffordable to Afghans. Officials in the Mayor's office are grateful for the assistance being provided by the German government in urban water, street lighting and road development but resent the high proportion of foreign money being used to support the internal community instead



of Afghans struggling to find a permanent home in their city. "We have seen this before. An invading group comes in claiming to be our saviours, then before long we see they are just helping themselves. The question is how long it

will take the people to become angry all over again," the deputy mayor said.

Source: Discussion with Sayed Noor Aga Hedayati, Deputy Mayor for Kabul City for Properties.

## Appendix I: Registered Farmland in Afghanistan

TABLE 1: SUMMARY OF SURVEY & REGISTRATION OF LANDS 1966-1978

ITEM	JERIB	Ha.
Total Tax Units Covered	5,502	
Total Plots Surveyed	1,333,731	
Total Land Owners Identified	584,816	
Total Jeribs Surveyed:	25,975,618	5,195,124
Private Land Surveyed:	10,432,511	2,086,502
Irrigated Land	6,840,189	136,804
Rain-fed Land	3,592,322	718,465
Government Land Surveyed:	2,502,887	855,269
Irrigated Land	968,306	193,661
Rain-fed Land	1,534,581	306,916
Non-Agricultural Land Surveyed:	13,040,220	2,608,044
Pasture	8,322,708	1,664,541
Barren/Desert	4,717,512	943,502

Sources: Drawn from data provided by Geodesy & Cartography Dept. October 2002

TABLE 2: SURVEYED AND REGISTERED LAND BY PROVINCE

PROVINCE	ESTIMATED AGRICULTURAL LAND IN HECTARES	SURVEYED AREA 1966-1975 IN JERIBS	AREA NOT SURVEYED IN JERIBS
KABUL	150000	1220736	279264
PARWAN	100000	427292	572708
LOGAR	60000	38162	501838
GHAZNI	400000	634384	3365616
WARDAK	80000	18826	61174
PAKTYA	140000	79084	1320916
BAMYAN	140000	10494	1389452
NANGARHAR	119000	179166	1010834
KUNAR	30000	59192	240808
LAGHMAN	20000	50818	149182
KANDAHAR	310000	2916806	183194
URUZGAN	160000	185024	1414976
ZABUL	100000	48503	51497
HILMAND	230000	1853394	404606
NIMROZ	148200	1482484	-
FARAH	300000	456914	2543086

HERAT	650000	570566	79434
BADGHIS	500000	16219	483781
GHOR	500000	114872	4885128
KUNDUZ	260000	1208374	1391026
BAGHLAN	340000	528144	2871856
TAKHAR	316600	1421514	1744486
BADAKHSHAN	500000	141382	358618
BALKH	511200	4635408	476592
JOZJAN	400000	352524	3647476
SAMANGAN	300000	465812	2534188
FARYAB	600000	435238	5564762
TOTAL	7,365,000 ha.	25499012 jeribs	46879034 jeribs
		[5,099,802 ha.]	[9,375,806 ha.]

Source: Geodesy & Cartography Department October 2002.

Note: This data seems to have been hastily collated, so it may not be wholly accurate in some cases.

## Appendix J: Selected Past Laws in Translation

Land Appropriation Law for Public Welfare 1935  
[18 Agrab 1314]

### Summary

This law provided for the state to appropriate private lands for public purpose. Public purpose was defined as for roads, bazaars, water development, mosques, military installations, factories hospitals, homes for the poor, sanatoriums, orphanages, government offices, water reservoirs for fighting fires, other construction and developments for public needs and 'all other developments that benefit the public in general' [Article 2]. The district council must approve the purpose [Article 3]. Plans for using the property must be prepared prior to appropriation [Article 4]. Two to four experts will evaluate the property [Article 4]. The price to be paid will be set at present day values [Article 4]. The owner may protest the price or other aspects of the appropriation, up to the Minister. Payment had to be made to the owner, in the presence of a judge [Article 9]. If the property is not used for the purpose intended, then the owner may buy the property back and at the price it was sold to him [Article 11]. If a tenant is on the property then he shall be compensated in accordance with current regulations and customs [Article 13]. The value of improvements and inputs such as seeds and labour that have been put into the property that year will be included in the purchase price paid by government [Article 14].

Land Survey and Statistics Law 1965  
[31 Jawsa 1344]

### Summary

This law comprised 70 Articles with the aim to "acquire land statistics of the country, to maintain land register and to organize tax affairs." (Article 1) This was primarily to be through the issue and completion of tax declaration forms. These were to be distributed free to all landowners, and completed in quadruplicate, attested by witnesses and by the chief of the village, returned to the declaration office and which would issue a receipt [Articles 1-4].

Interestingly, provision was made for communal property also to be registered [Article 5(f)].

Chapter three provided for the cadastral survey department to be set up and to conduct surveys of "all useable land in Afghanistan whether it is of private or public ownership." [Article 13] The cadastral survey was to ascertain and mark the lot boundary lines and to determine the area of each parcel or lot. [Article 15] Record of this would cancel all prior documents relating to the land. [Article 15] The cadastral survey was to set boundary marks to facilitate relocation of the property boundary lines. [Article 16] and cadastral maps would be prepared and each lot given a number and located on the map [Article 17]. Information about the lots and their claimants would be made public "for at least three days" [Article 19]. Where no disputes arise, certificates of title will be printed and issued to the registered owner 90 days after the issuance of the decree of registration. [Article 20] "No certificate of title shall be delivered to the lot claimant where there exist boundary disputes until adjudicative decision has been rendered by the land registration court." [Article 20]

"The land statistics deputy shall prepare a land registration system for the parcels surveyed. Landowners shall provide all necessary information as to their rights of ownership to the land and their rights of water supply, its limitations, or modes of conveyance, to the land statistics office." [Article 21]

Failure to register ownership will render the land to the government. [Article 26]

Critical institutions: the land statistics office, to which applications for information, or change of details are made, the land registration court to hear disputes as to boundaries or other matters at any time. A property clearance department under the Ministry of Finance was also to be established and its mobile committee charged with identifying excess holdings. [Chapter Four]

"The possession of a legal certificate of ownership, legal settlement, legal document or its equivalent shall be deemed as evidence of ownership. [Article 32] Somewhat loose definition, clarified in Article 43 as able to be defined and registered on the basis of the following :

- all royal decrees as to the sales or awards in favour of the landowner which prove private ownership;
- the orders issued from the prime ministry as to the sale of lands;
- all legal deeds of ownership;
- affidavits of common usage; and
- all documents which pertain to rights of irrigation waters, land tax receipts, tax list, etc.

A condition for usability of most of the above is that ten villagers or close neighbours vouch for the validity of the document [Article 43].

*Jerib* defined as 1936 square metres [Article 46].

Chapter Five provided for redistribution. "All excess land will be determined after the property undergoes survey and the area possessed over and above the allowable land for private ownership, after being considered by the Committee of Assessors, will be declared excess land." [Article 47] The amount that is considered "excess" is not directly stated but in later clauses referred to as 50 *jeribs* of irrigated land [25 acres] 100 *jeribs* of partly irrigated land with one crop [50 acres] and 150 *jeribs* of rain-fed land [75 acres] [Articles 55, 60].

"The owner may determine from which of his land the excess shall be taken." [Article 51]

Also, the potential for large holdings to be broken down into smaller plots holdings is provided: "Whenever the Committee of Assessors comes across any inherited property which has not been apportioned yet, the matter will be directed to the Court for legal apportionment, and then the Committee will deal with each of the heirs separately." [Article 52]

Government lands are defined as including:

- lands developed by Government and registered as its own;
- wastelands not registered as private or government land;
- *moquofa* lands, lands given by government or persons for some special of charitable purpose; to be dealt with as "specialised properties." [Article 54]

Possession: Article 55 provides that if a person has occupied wasteland continuously for 20 years

he shall be awarded the ownership, after proved by verbal testimony of ten prominent persons in the village and the village chief, and if has no other land or garden in excess of 50 *jeribs*, inclusive of this land.

Government land may be sold following the Manual for Nomadic Tribes. [Article 56] Reclamation of wastelands is encouraged, with permission of government, and re-claimer may gain a certificate of title. [Article 57] Land allocated to nomads, banished persons or settlers may not be sold for 20 years. [Article 62]

#### *Pasture*

Pasture is defined. Article 63 says that, "Lands situated on hills or in valleys or deserts etc which have been grazing fields in the past will remain pasture land. Provincial governors shall direct the delimitation and survey of pastureland within their respective jurisdictions after which survey returns shall be forwarded to the provincial land offices and a copy thereof will be forwarded to the Ministry of Finance. Provincial governors are enjoined to administer and to supervise pasturelands." [Article 63]

And that, "The conversion of pasture land for agricultural purposes is prohibited..." [Article 64] "Pasture lands are open to the public, provided, however that pasture land allocations from governmental agencies heretofore granted shall be recognised and respected. No pastureland shall pass into private ownership. Grazing rights (licences) are not transferable by the licensees. Pastureland shall not be utilised other than for grazing purposes." [Article 65] "Government departments are not authorised to permit the tillage of pasture land for revenue purposes or to convert the same into agricultural land." [Article 67]

#### Law of Pasture Land 1970

##### Summary

The above articles were later built into a separate Law of Pasture Lands 19 Hoot 1349 (1970). This forbade purchase, sale or lease of pastures [Articles 6-7] and confirmed the right of persons with official documents to use the pasture [Article 15]. New rights to use the pastures can be acquired through a decision made by the administrative council of each province and the endorsement thereof by the Ministry of Agriculture and irrigation [Article 16].

## Land Reform Law 1975 [15 Assad 1354]

## Summary

This law comprises 44 Articles and came into effect on 15 Assad 1355 (1976). The law established ceilings [Article 2]:

- 100 jeribs of two crop, irrigated land [20 ha.]
- 100 jeribs of orchards [20 ha.]
- 150 jeribs of one crop irrigated land [30 ha.]
- 200 jeribs of rain-fed dry land [40 ha.]

Companies and private agricultural societies were permitted to have more land as long as it was arid and made cultivable [Article 3]. Heirs have one year to transfer inherited surplus land to another person prior to acquisition by the state [Article 3].

Government acquisition of surplus land was to be on the basis of compensation, to be paid over 25 years, along with two percent interest. [Article 10] In addition, improvements to the property will be paid for ("trees, buildings and other paraphernalia"). [Article 5] Any land not covered by proprietorship documents was to be considered state property. [Article 7]

## Land to the Landless - on Payment

Redistribution by government was to be to landless Afghans with priority to the farmer of the land (sharecropper, tenant, worker), landless nomads, other farmers and land labourers and graduates of agricultural and husbandry schools. [Articles 12-13] New owners were to be given temporary ownership documents pending payment for the land. [Article 16] The new owner was given four months to take possession of the land and duty bound to exploit the plot. Failure to cultivate for six months would also result in restoration to government. [Article 42] No subdivision was permitted. The owner would forfeit the land if he took a job. [Article 18] Payment by the new owner of the land could take place in instalments and could be carried on by descendants, at rates of three percent interest to cover administrative

costs. [Articles 16 & 22] Land received was not to be transferred or mortgaged until fully paid for. [Article 37]

## Implementation

A special council of ministers was to be established to devise guidelines, draft regulations etc. [Articles 23-25] A reform office was to be established under the finance ministry to implement the law. [Article 26] A Special High Court on Land Reform was to be formed to deal with disputes and its decision was to be final. [Article 28]

## Land Tax Law 1975

[No. 338 Saturday Saratan 1355]

## Summary

This law is made on the basis of Order No. 367 from the Prime Ministry 26 Jalzal 1355 [1976]

## Chapter 1: General

## Article 1

The purpose of this law is to bring order to land taxation.

## Article 3

To charge tax is the right of government.

## Article 4

All registered land will be classified in accordance with Table 1. Therefore, all farmland will be located within three classes and seven degrees.

## Article 5

Owners may transfer land only when no land tax is outstanding.

Chapter 2: Recognition and Receiving Tax  
Chapter 3: Privileges and Exemptions

## Article 17

An owner with two jeribs or less of Class I land is exempt from paying tax.

A person who works land of five jeribs or less is exempt from tax.

Table 1

Land Category	Area in Jeribs	Amount that will be tax-exempt
I	5 or less	2
II	6 or less	2 + 100 square meters
III	7 + 1 beswa*	3
IV	12 + 10 beswa	5
V	25 or less	10
VI	33 + 10 beswa or less	13 + 10 beswa
VII	50 or less	20

\* Beswa is one twentieth of a jerib or 100 square meters.

Article 18  
State lands or property of municipality do not need to pay tax.

Article 19  
There will be a 20 percent discount for cooperative members who own five or less jeribs and a 10 percent discount for those who own 10 jeribs or less. This discount will only apply for as long as the owner is a cooperative member.

Article 20  
Lands that have been distributed in accordance with the Law on Land Reform, and also dry land that has been sold in order to develop agriculture, will be tax exempt for three years.

Article 21  
Farmland affected by natural disasters are exempt until rehabilitated or for three years. An extension may be applied for.

Article 22  
If the harvest is affected for reasons of natural problems then the taxation will be reduced or cancelled for as long as the owner can give convincing reasons as to why he is unable to pay. Reduction will be in accordance with the extent of evidential damage.

Chapter 4: Criminal Orders  
[Not translated]

Chapter 5: Miscellaneous Orders  
[Not translated]

Article 26  
All landowners including those who in accordance with this law are enjoying exemptions, if they have any taxation due before this date, must pay before the end of Dalwa 1355. Otherwise they will be fined.

Article 27  
The tax-paying body has to inform the concerned authorities if there are any changes in the classification of his land for these purposes:

- (i) if the class of the land has dropped down and the period and the basis of taxation will be the new classification;
- (ii) and if the degree has gone up, in that case, the new level of taxation will be taken from the fourth year from the date it has risen; and

(iii) the Ministry of Finance has the authority to determine changes in the degree of lands.

Article 28  
If every member of a family has his or her own land, the tax due will be assessed based on the total area.

Article 29  
The Ministry of Finance is responsible for preparing and implementing the orders of land taxation in accordance with this law.

Article 30  
All previous laws on taxation are hereby repealed. This law will commence on the date of this gazette.

The Land Reform Decree, No. 8 of 1978

Chapter One: General Orders

Article 1  
This order is given based on the aim of the People's Democratic Party of Afghanistan and the superior goals of the great revolution of (Thour) for the purpose of practically implementing Orders I and II of basic and revolutionary duties of the Democratic Republic of Afghanistan and for other purposes, such as:

- To abolish the feudal and ex-feudal relations for the country's social and economic system;
- To generalise and deepen the relationship between labourers and farmers to empower the unity of the people of Afghanistan and make a society free of class distinctions and exploitation;
- Increasing the agricultural productivity to provide adequate and varied food types, raw materials for export and to develop industries in the country.

Article 2  
Definitions

Family: comprises husband, wife and children of under 18 years of age ... a person who is 18 years old or above but not married is considered a family in respect of land distribution

Landless farmer: a person who does not own private land and works on someone else's land based on a previously signed agreement

Farmer who owns inadequate land: person who directly works on the land and owns less than five jeribs of 5th grade land [rain-fed]

Agricultural worker/labourer: person who does not own land but does some agricultural or related activities on the land, based on an agreement and who receives salary in goods or money

Owner: person who legally occupies his land and has a legal document for this;

Nomad with lowest financial ability: this refers to a person whose sole income source is doing a shepherd's job

Plot: the land that is occupied by one or more persons holding in common ... gardens and vineyards are counted separately from the lands that are not used for gardens and vineyards even when they are owned by the same person

Area of farmland: one or several plots of land that are fully or partly owned by one person and which are located as one plot or many plots in one or many villages or districts or provinces

Excess land: that part of one's farmland that is more than the permitted amount to be owned in accordance with this edict.

#### Article 3

No family must occupy more than 30 jeribs [6 ha.] of the first grade land or equivalent to that amount.

#### Article 4

No one is allowed to mortgage, lease or sell lands that are considered more than the quorum, excess and other lands that are to be distributed in accordance with the clauses of this edict.

### Chapter Two: Regulation of Irrigation

#### Article 5

Water distribution must be done fairly in order to make best use of water resources.

#### Article 6

The capacity of annual water flow in a channel or other source of irrigation is to be fixed by the Ministries of Water and Power and Agriculture and accordingly to the capacity the annual amount of water that is give to each jerib of land in a fair manner.

#### Article 7

Repairing of water taps and other irrigation structures must take place based on the protocol signed between the area's irrigation reconstruction department and either the farmer or cooperative.

### Chapter Three: Land Distribution

#### Article 8

Land that is, according to this law to be distributed to eligible applicants is as follows:

- more than the quorum of permitted land to be held; and
- land that is gifted to the government.

#### Article 9

The Department of Land Reform will take possession of lands that are excess of the quorum and without giving payment.

#### Article 10

Land is divided into three categories and seven grades. To adjust these with the first grade the following co-efficient is to be observed.

#### FIRST CATEGORY

First grade garden, vineyard, two-season irrigated I: 1.00

Second grade two-season irrigated: 0.85

#### SECOND CATEGORY

Third grade one-season irrigated 50%+ :0.40

#### THIRD CATEGORY

Fourth and fifth grade rain-fed land cultivated every second year: 0.20

Sixth grade rain-fed land cultivated after every two years: 0.10

#### Article 11

The measurement unit is jerib, equivalent to 2,000 square metres or one fifth of one hectare. Half a jerib or less is not counted when measuring the area of farmland, but more than half a jerib is counted as one jerib.

#### Article 12

One plot of any grade is distributed without any charge to the eligible applicant and his family according to the following:

- Garden and vineyard (first grade): 5 jeribs
- Two seasonal irrigated (second grade): 6 jeribs
- One seasonal irrigated (third grade): 8 jeribs
- One seasonal irrigated (fourth grade): 12 jeribs



- Rain-fed land (fifth grade): 25 jeribs
- Rain-fed (sixth grade): 33 jeribs
- Rain-fed (seventh grade): 50 jeribs.

Land distributed to farmers who own inadequate land must not exceed five (5) jeribs including his previous land.

#### Article 13

One plot of land that includes two grades or more must be converted to five jeribs of the first grade based on the coefficients provided above and then the excess distributed to eligible applicants.

#### Article 14

Lands must be distributed to the first grade eligible applicants without observing the lottery.

#### Article 15

Observing the priority, land must be distributed next to applicants of the second grade, then, if land remains, to the third and fourth grade and if distributable land still remains, the fifth and sixth grade applicants get the land, based on the lottery system. Priority among farmers who own inadequate land goes to those who own the smallest piece and those who are living nearest to the distributable land.

#### Article 16

Lottery is to be done in public by the responsible commission and when the majority of applicants are present. The plot number that coincides with the applicant's name will be distributed to him in accordance with specified regulations.

#### Article 17

Structures and equipment belonging to the land which are occupied and distributed to eligible applicants or cooperatives, will be bought by the Agricultural Development Bank for a reasonable price and paid for in instalments over ten years, and then sold to the applicants, cooperatives or government farms. The Bank will receive the money from applicants, cooperatives or government over ten years under specified conditions.

#### Article 18

Land belonging to government and government organisations are not affected by this order.

#### Article 19

Every family or member of a cooperative may

develop and then occupy up to 30 jeribs of barren land equivalent to the first grade, following agreement with the Department of Land Reform.

#### Article 20

Excessive sub-division of farmland into small pieces that reduce the value of agriculture and harvest is prohibited and will be regulated.

#### Article 21

Government will specify areas of agriculture, pasture and forest observing their economic efficiency and environmental status.

#### Article 22

The date of land distribution to eligible applicants in different regions of the country will be announced through different orders of the chairman of the revolutionary council, through radio, press or television.

### Chapter Four: The Eligible Applicant and His Responsibilities

#### Article 23

The following are requisite attributes of persons considered eligible applicants for redistributed land:

- Afghan nationality;
- 18 years of age or above;
- landless farmer or farmer owning inadequate land, agriculture worker or vulnerable nomad;
- having no income source other than the money received from working the land or as a labourer;
- a person who promises that he or his family members will develop the land and look after it; and
- a person who must not be the heir of a deceased owner, or if he is, must cancel his position in writing.

#### Article 24

Prioritisation for eligible applicants is as follows:

##### FIRST-GRADE APPLICANTS:

- Landless farmers who are working on distributable land; and
- Landless farmers or the farmer who owns inadequate land whose land was occupied by the government for a public use;

##### SECOND-GRADE APPLICANTS:

Landless farmers or agricultural worker of the village where there is distributable land;

**THIRD-GRADE APPLICANTS:**

Farmers who own inadequate land in a village where there is distributable lands that have remained from a previous distribution to applicants of grade one and grade two persons;

**FOURTH GRADE APPLICANTS:**

Landless farmers of a village where there is distributable land and vulnerable nomad who resides in that village (usually for one part of the year);

**FIFTH GRADE APPLICANTS:**

Landless farmers or agricultural worker of the province where there is distributable land; and

**SIXTH GRADE APPLICANTS:**

Landless farmers or nomads of other provinces wherever distributable land is available.

**Article 25**

Eligible applicants have the following obligations:

- The applicant must complete the form and submit it to the appropriate commission within three months from the issuing date of this edict;
- The applicant must report the specifications of the land on which he works along with full information as to its owner;
- The applicant is responsible for occupying distributed land and developing it within three months of it being distributed to him;
- The applicant must have direct contact with the Department of Land Regulation of the area and the Department of Land Matters;
- The applicant must take part in the identification and numbering of distributable land in his area;
- The applicant must pay the loan from the Agricultural Development Bank as specified in regulations; and
- The applicant must pay land tax on time.

**Chapter Five: Administration****Article 26**

Commissions for solving disputes arising out of implementing the orders of this edict will be established at district and provincial levels. Decisions of these special commissions at provincial level will be final.

**Article 27**

Organisation, duties, powers and responsibilities

of the people's special committees regarding the implementation of programmes are specified by regulation.

**Chapter Six: Distribution of Inherited Lands****Article 28**

If the occupant dies, his family members must develop his land

If the members of the family are either women or young children who cannot work on the land, they may give the land to a farmer to work on or may lease the land until such time as one member of the family is able to work the land.

**Article 29**

- Areas of more than 30 jeribs of first-grade land or equivalent, which are the property of the deceased, are considered more than the permitted amount of land (quorum).
- The heirs may divide the land among themselves provided that the portion for each heir is not less than five jeribs of the first-grade land or its equivalent
- If one or more heir does not receive land because of shortage of land, they may apply to receive distributable land.

**Article 30**

Heirs must not distribute excess land among themselves.

**Chapter Seven: Penalties and Orders****Article 31**

- If a person does not register his land without a legitimate excuse, his land will be considered to belong to government.
- If a person gives more than 20 percent information about his land which is incorrect, then he will have the same amount taken from him and that land will become the property of government.

**Article 32**

Persons who destroy structures or equipment on distributable land must pay three times more than the real price of what has been destroyed and those persons will also be put under investigation.

**Article 33**

Violators of any order in this edict will be sentenced to imprisonment for periods from one month to three years.

## Chapter Eight: Miscellaneous

## Article 34

Occupiers must cultivate land in accordance with instructions from the Ministry of Agriculture as to what is appropriate for that land type.

## Article 35

If the Commission of Land Reform observes that during an operation a person has occupied the land of another but does not hold a legal document and it is found to be correct on investigation then all but 10 jeribs of first-grade land will be taken over as government property.

## Article 36

The Afghan Fertilizer Company or other companies will open branches in areas where land reform has been undertaken and will provide loans, distribution of seeds, equipment and other items as appropriate to their business.

## Article 37

If a person loses a characteristic mentioned in Article 23 then his land will revert to government and be distributed to another eligible applicant.

## Article 38

Government may specify regulations to further the implementation of this edict.

## Article 39

After this edict is in effect, the Land Reform Law of 1354 and articles of any other law that is contrary to this law is cancelled.

## A Land Law of 1993

Decree of the President of Islamic State of Afghanistan No. 182 of 02.08.1373 Regarding the Cessation of Converting Pasture Lands to Agricultural Lands

The following clauses are approved for making better use of pastures, in order to feed and cherish animals and developing the quality and quantity of animal production that is one of the basic elements of the country's national economy:

- (1) No one can convert areas of pasture to farmland for his personal use.
- (2) Violators of this order will be dealt with and punished.
- (3) Governors of the provinces and especially the governor of Kunduz are responsible to secure and look after pastures in accordance with this law.
- (4) This edict is in effect after being signed and must be published in the official Gazette and other print media.
- (5) After this decree comes into effect, all documents contrary to this decree are cancelled.

Professor Burhanuddin Rabbani

President of the Islamic State of Afghanistan.

## Appendix K: Translation of Selected Current Land Laws

### LAW ON LAND 1996

Taliban Decree No. 837 dated 28.3.1375 [1996]

The opinion of the Supreme Leader regarding government land in respect of the seeking of detailed advice on a legal or religious matter, based on *Shariat*, following the opinion of a central council of scholars, is approved for implementation.

- (1) Those pieces of public lands that were given to any person after the Saur Revolution including during Rabbani's time (1978-1996) or by any local power, without the issue of documents, without going through the correct legal process, and the person who received the land has not occupied the land, until the issuance of new orders, this land remains under the control of the government.
- (2) Those government lands that have been given to a person by Rabbani or local powers with the issue of legal documents and the person has occupied the land, that land will remain under lease to the occupier until further orders.
- (3) Those government lands that people have occupied without having any legal or real documents must be given through public lease.

LAW ON LAND UNDER DECREE NO. 57 Taliban Islamic Emirate of Afghanistan Ministry of Justice Issue No. 795, 2000<sup>261</sup>

This law is presented along with other agricultural sector laws in Gazette No. 795. Other subjects under this volume of mainly agricultural laws and which together fall under Decree No. 57 of 2000, include the following -

Forests, nature protection, plant disaster prevention, veterinary services, hunting and wildlife protection, pasture and public lands, organisation of agriculture and livestock activities, plant disaster prevention services, import and distribution of veterinary drugs, rules for the department of agricultural cooperatives, rules for the staff of the institute of agricultural

monitoring, rule for salary distribution to tractor and combine harvester staff, charter of agricultural activities of parastatals, charter of the parastatal for improved seed production, order of the supreme leader concerning working restrictions for women in local and international NGOs, order of the supreme leader regarding the prevention of poppy cultivation, second order on the same, message from the supreme leader regarding the prohibition of opium cultivation [sic], order of the supreme leader regarding posting and employment of Taliban, *mujaheddin* and others, order of the supreme leader regarding punctuality of workers, order of the supreme leader regarding taboos on unlawful activities during the war, order of the supreme leader concerning stopping machines after the call for prayers in the evening, order regarding not accepting foreign attorneyship letters, order regarding the punishment for aggressors, forgers, liars, etc. and order prohibiting service by government officers to persons who have trimmed their beards.

The Land Decree comprises twelve chapters as follows:

CHAPTER 1: General Orders

CHAPTER 2: Documents Relating to Land Ownership

CHAPTER 3: Categorising Land

CHAPTER 4: Redistribution of Taken Lands to their Original Owners

CHAPTER 5: Eligible Applicants

CHAPTER 6: Land Distribution

CHAPTER 7: Land Transfer

CHAPTER 8: Leases

CHAPTER 9: Religious lands [Waqfi] and Public Lands [Maraa]

CHAPTER 10: Distribution of Agricultural and Non agricultural lands

CHAPTER 11: Penalties

CHAPTER 12: Final Provisions

An informal translation of certain chapters follows.

Chapter Two: Documents Containing the Legal Right of Ownership

Article 4

Documents representing or demonstrating rights of land ownership include:

<sup>261</sup> Note that this is still applied in 2002 as it has not been repealed or amended as of end October 2002.

- (1) Document in accordance with *Shariat* as issued by a court for the purchase, ownership, gift, distribution, exchange of land, surrender letter, correction letter, and the document of the final decision of a court based on the issue of an ownership document, and which will be valid under the following conditions:
  - (a) where there is an original copy in the court. Documents that are not registered in the court will be considered legal only after approval of the court;
  - (b) where there are documents demonstrating a right where there is no evidence against its legitimacy; and
  - (c) land where there is a valid taxation certificate.
- (2) Purchase documents issued by order of the emirate and the prime ministry will be valid under the following conditions:
  - Where the document has been issued by the correct authorised body or department;
  - Where the land is registered under the taxation department.
- (3) Tax paying documents are valid under the following conditions;
  - \* As set out in (2) above;
  - \* Where the land is noted in the original book of registration and taxation;
- (4) Documents of *haqaba* [water rights] are valid under the following conditions;
  - where there is no evidence against their legitimacy;
  - where the land is shown in the registration book of ownership and taxation;
- (5) *Urfee* [customary] documents will be valid under the following conditions; the seller of the land must have the appropriate document acknowledging sale; the customary document should have been prepared before the 15th of Asad 1354 [1975] and the buyer should have filled the declaration form and after approval by the neighbouring landowners, submitted the document to the concerned department before the year 1357 [1978].

In areas where the declaration form had not been distributed prior to 1357 or it was distributed but the registration book has been fully destroyed, if there is no dispute concerning the ownership of the land and the purchase and occupation of the land is

recognised as valid by the neighbours and the area's state department, then the document will be accepted as valid.

- (6) Formal documents of land will be recognised under the following conditions:
 

The basic document of the land indicating the legal right should be available; The document must be sent to the concerned authority after completing the process; The document must be shown as registered in the book of ownership and taxation; There must be no contrary legal claim on the land.

Legal land document (*qabala Shariat*) will be recognised under the following conditions:

- The document must have been prepared by the appropriate court after completion of the legal registration process; and
- The document must be shown to be registered in the book of ownership and taxation.

#### Article 5

Documents that are not registered in the book of ownership and taxation do not necessarily render them illegitimate under Article 4. Documents under the third part of that article are excepted.

Any kind of flour mill or other structure or agricultural equipment fixed on the land must be put in the legal document of the land and registered in the book of ownership and taxation.

#### Article 6

Documents demonstrating land ownership under this law will be sent to the concerned court after completion of the legal process by the concerned person and the court will convert the *Shariat* document into a legal state law document.

#### Article 7

A person who has land in many different areas may gain his land document from the local court where the land is situated after completion of the appropriate formalities from the concerned areas and specifying the total area of his land.

#### Article 8

The flourmills, traditional grinding machine, and other agricultural structures that are not moveable and are located in a person's farmland and are known as his property, must be put on his land documents and registered in the original book of registration and taxation.

## Article 9

The farmer who does not have a legal document for his land and his land is not registered in the ownership book of the government, if no one claims that land and there is sign of structures and agricultural activity, and the neighbours and the local state authorities approve his occupation, then the land may be known as his property.

If the emirate (government) is able to present the documents showing that the above person's occupation is illegitimate and this claim has not been challenged by the passage of time and the land is now known as the property of the emirate, then in this case the following actions will be taken;

If the land is 10 *jeribs* or less of first grade land or its equivalent, it will remain with the farmer and if the land is more than 10 *jeribs* of first grade land, then the land will be sold to the farmer at current market prices and this amount may be paid in annual instalments over five years.

## Article 10

Concerning an excessive holding, action as set out in Article 9 will be taken.

## Article 11

The following actions will be taken in respect of those persons who have been resettled and who have received land from government before this law came into effect:

- (1) If a resettled person or his children who has paid all instalments due on the land, then he will receive a document of ownership;
- (2) If some instalments have been paid, then the outstanding amount will be recalculated at present day values and on its payment the document will be issued;
- (3) If the settler has paid none of the amount due, the price will be fixed in accordance with present day values and once paid, the document of ownership will be issued;
- (4) If the settler or his children because of some local problems or difficulties has been forced to leave the land and returns and no government structure was in the interim built on that land, and when his previous occupancy is recognised by the neighbours and at least five reliable people of the area, then the authorities may give him the right of occupancy and when payment on all due instalments has been made at present day

values, and issue a document of ownership; and if on part of this land a state building was constructed, then the remaining part will be given to the claimant and the part where the building stands will be taken by the government and will compensate him for the loss if payment had been made. If the entire land has been built on by government, then the compensation will relate to the entire estate.

## Article 12

Those persons who have received land from government have not paid for the land, will receive only the occupation certificate and will not be considered owners of the land. After payment of the due amount they will receive ownership documents.

## Article 13

If the person loses his ownership documents then another document will be issued.

## Chapter Three: Classifying Land

## Article 14

The Department of Land Classification of the Ministry of Agriculture will be charge of technical and administrative management of land.

The following departments have a common responsibility in this regard:

- The High Court
- Ministry of Finance
- Ministry of Water and Power
- Ministry of Agriculture and Livestock
- Department of Survey and Mapping
- And the local concerned authorities.

Practical work will be carried out by the classification missions in the area.

## Article 15

The classification mission will perform in the following manner: etc.

## Article 16

The Commission for Clarification has the following powers and responsibilities:

- Categorising farmland areas, distribution of documents and distribution of land to eligible applicants;
- Specifying farmland areas, distribution of documents and lands to eligible applicants;
- Specifying the limits/area, grade and share of water for lands;

- Defining the differences and boundaries among people's property, government property, common lands, religious lands and barren lands;
- Preparing documents for court and transfer of disputes to authorised courts
- Registration of land areas and legal documents;
- Sending the legal document for registration to the property register and tax office in the area;
- Delivering legal documents to owners;
- Restoring previously distributed lands (after 7th of Thour 1357) according to Shariat to its owner, representative or heir/s; and
- Sending reports on activities to the Department of Land Matters in the concerned provincial and central offices.

#### Article 17

The Cadastral Department has the following duties:

- Providing information about registered maps, results of the cadastre and listing of probable owners;
- Measuring and drawing of land parcels by sketches;
- Determining land boundaries;
- Adjusting local measuring units to the *jerib* system; and
- Undertaking necessary duties to identify parcels on maps.

#### Article 18

Representatives of agriculture, water regulation and taxation are responsible for defining the grade, water share and tax class of properties.

#### Article 19

An owner or his legal representative must cooperate with the clarification committee until its work is complete.

#### Article 20

In order to carry out regional operations of clarification, commissions are to be established as follows:

- the governor will serve as chairman;
- the director of agriculture will serve as deputy chairman;
- the accountant, chief of irrigation department, chief of studies and land mapping and the security commander of the city will be members;
- chief of the land regulation department will serve as secretary; and

- the commission must meet monthly or more as necessary.

#### Article 21

A commission for regulating land issues is established in Kabul to assist regional offices. Its composition will be:

- the minister of agriculture and livestock will be chairman;
- the deputy chairman will be the head of land regulation;
- the members will include the director in charge of information in the ministry of agriculture, director of water regulation, director of mapping and registration (cadastre), director of income/benefit of the Ministry of Finance; and
- the commission will meet quarterly or more.

#### Article 22

If it is known and proven during clarification of boundaries that the land is different from documentation, the committee will investigate and make a decision on the matter.

#### Article 23

Government will compensate private owners for land appropriated for public use.

If all or part of a person's land falls within land belonging to a resettled eligible applicant who has paid all due instalments for the land, then government will compensate the applicant. If the resettled person or eligible applicant has paid a part of due instalments on the land, action will be taken to exchange that part.

#### Article 24

Land included in a project that was converted to structures or residential housing before clarification, will not be clarified by the clarification commission and will be purchased by the concerned department from the owner or his heirs who can demonstrate legal documents for that property.

#### Article 25

Disputes that cannot be solved by the clarification commission will be sent to the court.

#### Article 26

The area of a deceased owner's land must be legally distributed among heirs by the court in the area.

#### Article 27

People whose lands are in a collective document

by the name of an elder of the village or someone else may seek clarification of his right and documents be issued as follows:

- \* Preparation of a description of the area of land, boundaries and water shares, excluding the person who occupies the land;
- \* Signatures and fingerprints of every occupier to be taken; and
- \* Where land is owned by different individuals, this must be indicated when re-registration and clarification is undertaken.

#### Article 28

If the document of several owners in common is undivided, then each person's portion equivalent to the area in the ownership document or equivalent in tax documents will be specified in separate parts but if other participants do not agree the matter will be referred to the court. The occupied land beyond the commonly held area as specified in the document will be considered excess and action will be taken in accordance with this law.

#### Article 29

Land that was registered in the name of a person for tax payment, an agricultural purpose, or lifelong responsibility and the person has paid tax for at least 40 years, will be recognised as his property.

#### Article 30

In areas where tax documents or other documents have been destroyed and there are no copies in the capital, will be clarified through *Shariat*.

### Chapter Four: Redistribution of Taken Lands to Farmers

#### Article 31

Lands which were occupied forcefully from their owners or their children in accordance with the communist regime following the 7th day of Thaur 1357 (1978) will be addressed through the following actions:

- (1) If the land has not been distributed, after going through the process of claim and has the documents, after these are reviewed and approved, the land will be returned to the claimant, his children or his representative;
- (2) If the land was distributed and the owner comes and claims the land, then the price of the land at present day values will be taken from the person who has taken the land and given to the previous owner; if no agreement

can be reached between the two parties then the land will be given to the previous owner, or if he is dead, to his children, or his representatives, and if the previous owner claims all the harvests produced during the past years, then the harvests will be returned to the previous owner;

- (3) The third part of this article is an exception. If the taken land has been distributed to organisation or government agricultural farmlands and structures have been built on the land, then the organisation which has buildings on this land will have to pay the price of this land at present day values and that will be given to the previous owner, or in accordance with the value of comparable neighbouring lands. Also, this value must be paid in one instalment. The assessment of the value of the land will not include the value of the buildings or developments on the land; and
- (4) If the taken land comes under a city master plan, the organisation that will build on it will have to compensate the original owner.

#### Article 32

If the land was distributed to a person and he or his children has given or sold the land to another person contrary to the documented agreements at the time, the following actions will be taken:

- (1) If the distributed land was transferred to another person and no non-agricultural changes have been made, then the land will be given to its real owner and those who have bought the land will receive their money from the person who sold the land to them;
- (2) If structures were built on the land, provided the previous owner agrees, the price will be paid by the one who constructed the buildings to the previous owner; if the previous or real owner does not agree and the value of the building is equal to the land, the building must be evacuated and given to the original owner;
- (3) If the shape of the land was changed in a way that decreased the value of the land, the current occupant will have to return the land along with the amount of value lost.

#### Article 33

Concerning the person whose occupied land was



exchanged with someone else's land, the following actions will be taken:

- (1) If there is no change in the agricultural character of both lands, the lands will be returned to their real owners;
- (2) If after exchanging, the exchanged lands were distributed to others, the exchanged lands will be returned to their real owners; and
- (3) If structures have been built on the exchanged lands or the person whose land was exchanged with others' land changes the land or transfers it, then the original owner of the land has the right to choose either to take the land or the value of the land.

#### Article 34

If a persons in accordance with the law is recognised as the owner of the land but he is absent and because of his absence restitution of the land is not possible, then to secure his property or his right, the authorised court will appoint a legal professional consulting with the department of land issues of the Ministry of Agriculture will act responsibly to secure the property of the absent person.

#### Article 35

If the property of the government or the property of the people based on the laws of that time contrary to Islamic Shariat were distributed to the people or the lands were occupied by the people informally, the following actions will be taken regarding this issue:

- If the property is private property, it will be returned to the real owner, his children or his representatives;
- If it is state property, or if it is private property but the owner has no deserving children, the land will be go to the state; and
- Regarding sub-article number one and two, the person whose land was occupied illegally does not have any right to claim any degradation or losses to the land.

### Chapter Five: Eligible Applicants

#### Article 36

A person having the following attributes is eligible to receive land:

- a citizen;
- 18 years of age or above;
- a farmer who has no land or insufficient land to farm;
- a farm worker;
- a retired state worker; and
- a nomad.

The person should promise that he or any male member of his family will look after the land and work on the land.

#### Article 37

Prioritisation of applicants will be undertaken by three elders and the village leader, the mullah, and the commission.

#### Article 38

The legitimate applicant, after his legitimacy has been established, must first fill the form and return the form within fifteen days to the commission. After receiving the land he must commence work on the farm. He must pay the value of the land, in instalments if wished. He must pay tax on time.

#### Article 39

The legitimate applicant having the characteristics under Article 36 will be prioritised as follows:

- (1) [a] the farmer who has no land and who has a large family;  
[b] the farmer who has no land and whose land was appropriated by government;
- (2) the landless farmer or labourer living in an area where land is available for distribution;
- (3) the farmer with insufficient land and the retired state worker who has served the government for at least 25 years and instead of his pension he will receive land. In this case, fourteen years of his service under the communist regime will not be counted.
- (4) The vulnerable nomad who usually stays part of the year in a village where there is land to be distributed and other nomads.

#### Article 40

Vulnerable tribes, communities and nomads who are taken from one place to another place and settled there by the government must complete their documents evidencing that they no longer have land in the former location in the concerned court of the area. The Department of Land Matters will recognise them as the fourth category of deserving applicants. If there is land in the area where they are to be resettled, they will be given it.

Ministries of Agriculture and Livestock, Water and Power, Education, Public Health, Communication and the Department of Rural Development are

responsible for carrying out their duties in respect of these people.

#### Article 41

In case the eligible applicant dies the following actions will be taken concerning the distributed land:

- (1) The heirs of the deceased person may work on the land after finishing paying due instalments; After payment of the due instalments the heirs have the right to divide the land among themselves or to transfer the land to someone else.
- (2) If the heirs are underage or all female or they have a health problem, they may give the land to a farmer or worker to work on it, or may lease the land.
- (3) If the eligible applicant or his heirs do not want to work the distributed land, after this law comes into effect, they may return the land to the government and be repaid instalments paid.

#### Article 42

Eligible applicants who are married or who are responsible for a family have higher priority than those who are single who are in the same classification of applicants.

### Chapter Six: Land Distribution

#### Article 43

Provided there is no need to establish farm or any project on them, the following lands may be distributed:

- (1) gifted lands to the Islamic Emirate, only when not gifted for a specific purpose
- (2) state agricultural lands and waste lands that have recently been made ready for agriculture.

#### Article 44

- (1) Lands will be distributed to the eligible applicants when requested by the Ministry of Agriculture and Livestock and with the approval of the Supreme Leader. Payments of a fair price will be made in instalments over a ten-year period and until the instalments are completed the applicant will have the land on approval.
- (2) The price of the land, considering the price in the local area and the time of distribution will be fixed by the High Commission appointed by the Supreme Leader.
- (3) The specified time for due instalments after this law is in effect will be one year.

#### Article 45

The law is divided into three classes and seven grades for the purposes of clearing the documents specifying ownership and distribution of the land. While changing the grades to grade one the following calculations will apply:

- (1) Grade I: gardens, orchards, vineyards or two-season irrigated land x 100  
Grade II: two season-irrigated land x 0.85 [two crops per year]
- (2) Grade III: one-season irrigated land where 50 percent or more is annually irrigated x 0.67  
  
Grade IV: one-season irrigated where 15-50 percent is annually irrigated x 0.40
- (3) Grade V: one-season irrigated land where less than 15 percent is cultivated and irrigated and also rain-fed lands that are cultivated every other year x 0.20  
Grade VI: Rain-fed land that is cultivated after every two years x 0.15  
Grade VII: Rain-fed land that is cultivated after more than two years x 0.10.

#### Article 46

The unit for measuring land is *jerib* which is 2,000 square metres or one fifth of one hectare. To calculate the area of land for distribution the area less than one half a *jerib* or less than that is not calculated. More than half a *jerib* will be counted as one *jerib*.

#### Article 47

Distribution to ineligible applicants of any of the grades of land will be done as follows:

- Grade I (garden, vineyard, orchard) two hectares equivalent to 10 *jeribs*;  
Grade II (two season irrigated) 12 *jeribs*;  
Grade III (one season irrigated) 15 *jeribs*;  
Grade IV (one season irrigated) 25 *jeribs*;  
Grade V (one season irrigated and rain-fed) 50 *jeribs*;  
Grade VI (rain-fed cultivated every two years) 66 *jeribs*; and  
Grade VII (rain-fed cultivated every three or more years) 100 *jeribs*.

#### Article 48

The average annual income or benefit of the land of one *jerib* of land will be specified differently according to the area or regions by agriculture and irrigation departments or the department of mapping and land registration and the body which is responsible for land matters.

## Article 49

If the number of the applicants is more than the land available in every grade, the grade will be distributed based on lots in public.

## Article 50

- (1) The small and scattered remaining pieces of land will be distributed first to the neighbouring farm workers who have inadequate land, secondly to the neighbouring land owners, or to those who have the least land in the area, sold at present day values. In this case, the buyer will have to pay the money in one instalment.
- (2) If the owners mentioned in sub-article do not want to buy the land, the land will be sold at public auction.

## Article 51

The Ministry of Water and Power gives agricultural projects to the Department of Land Matters provided that there is no need to establish a state agricultural farm on it.

## Chapter Seven: Land Transfer and Development

## Article 52

Eligible applicants, resettled persons have the right to transfer their land after payment of all due instalments, and after obtaining legal documents. Heirs may also transfer land after subdivision is specified.

## Article 53

Permanent transfer of land for structures and immovable equipment must be effected under legal *Shariat* documents.

## Article 54

Land transfer is to take place in a local court through the Department of Land Regulation and Organisation. Registration of land transfer in the Department of Tax is to be effected without charge. The local court will receive some of the property as transfer tax.

## Article 55

Any changes to a property in grading it or in its quantity will be registered.

## Article 56

Transfer of government land to other departments will take place through the Department of Land regulation of the Ministry of Agriculture and Livestock, after approval from the Supreme Leader.

## Article 57

Persons who hold land in different areas may exchange land with government provided that land is not under a farmland project of government.

## Article 58

Land exchange between two people is to be done by legal document in the local court.

## Article 59

The following actions will be taken in respect of farm land distributed during the communist regime (from 7th of Thour 1357 to 8th of Thour 1371) to cooperatives, organisations and private companies:

- If the body is operative, it must pay the cost for the land according to present-day values
- If the body is not operative government will take the land without compensation.

## Article 60

Land transfer that takes place contrary to this law is not accepted.

## Chapter Nine: Area of Maraa (Public Lands) and Waqfi (Religious Lands)

## Article 84

*Maraa* is publicly owned property. Neither an individual nor government may occupy this land but rights to its use may be obtained through *Shariat* provisions. *Maraa* is kept unoccupied for public requirements such as pasture graveyards, dumps etc.

## Article 85

Where a person has occupied *maraa*, even if the occupation is of longstanding, if it is proven to be *maraa*, then the land will be taken from him.

## Article 86

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

## Chapter Ten: Distribution of Virgin Lands and Barren Lands That Are Ready for Cultivation

## Article 87

- (1) No one is permitted to occupy virgin or barren land except with permission of the supreme leader.

- (2) If a person has occupied barren land and does not have a letter of permission from the supreme leader then he is not known as the owner.
- (3) Distribution of virgin and barren land will be undertaken by the department of land affairs of the Ministry of Agriculture after approval of the supreme leader.
- (4) Virgin and barren lands will be sold to the user at a fair price, based on agreement between the Department of Land Matters and the buyer. The previous occupant will have priority to purchase.
- (5) An evaluation commission will be established with representatives from different ministries including the Cadastre Department and will fix the price of the land. The Department of Land Matters may review the price fixed. The price will be approved by the Board of Ministers and finally by the supreme leader.
- (6) Payment for the land must be in five instalments within five years of the date of distribution.

#### Article 88

- (1) The lands that are designated for distribution must be the property of the government, either barren or virgin and they should not be under any plan like the city master plan, or plans for pasture and mineral development. Private lands are not allowed to be distributed.
- (2) Evaluation of virgin and barren lands by the profession commission consisting of the representatives mentioned in sub-article 3 of Article 87 of this law before distribution will be undertaken for the following purposes:
  - (a) to assess whether the land is useable for construction or agriculture;
  - (b) to conduct the concerned area's survey;
  - (c) to find and specify the water resources and deep wells in terms of underground and surface water;
  - (d) to ensure that the neighbouring land interests are protected for development of the land in terms of water rights and other important issues; and
  - (e) to reconstruct and construct water dams and channels for irrigating the area.

#### Article 89

Specifying the criteria for distribution of virgin and barren lands for establishing agricultural farms by private and joint companies using

agricultural machinery is to be carried out as follows:

- To individuals up to 20 ha.;
- To agricultural companies up to 100 ha.; and
- To joint companies up to 500 ha.

#### Article 90

The applicant for virgin or barren land must submit a letter to the Department of Land Matters in the capital or provinces. The application letter must be assessed by the Commission of Assessment and Transaction and handed to the Central Department.

#### Article 90

The applicant for barren or virgin land must submit a letter to the Department of Land Matters. The letter will be evaluated by the Provincial Commission of Assessment and Transaction and then handed over to the Central Department of Land Matters. The time limit for considering applications of land up to 500 ha. is three years.

#### Article 91

As soon as the farmer starts work on the land, he will be issued an interim document. After payment of instalments, the user will be issued a legal *Shariat* document for his land.

If it is proven that the user has not continued to develop the land in accordance with the agreement, the land will revert to government and the interim document cancelled. Previously paid instalments will be returned to the user.

#### Article 92

The user is exempt from paying tax from his first harvest for five years.

#### Article 93

Ministries of Agriculture and Livestock, Water and Power, Mines and Industries, the Agricultural Development Bank and other concerned Departments have the following duties:

- Surveying farms;
- Reconstruction and renovation of dams and channels that are government's responsibility;
- Providing credit for irrigation development and other developments in accordance with *Shariat* and banking law;
- Helping provision of machinery, seeds, improved animals, drugs for animals, etc.;
- Providing technical advice; and
- Assisting marketing

## Articles 94 -96 Not Translated

Article 94 provides for the distribution of virgin and barren lands, to be effected through preparation of three copies of agreements.

Article 95 provides for the monitoring of development of virgin and barren lands.

Article 96 provides guidance on production in annual development plans.

Article 97 makes users responsible for developing the lands following directions on crop production

## Article 98

Channels belonging to private properties must be bought by the user at present day values.

## Article 99

The transfer and sale of virgin and barren lands is possible after obtaining legal documents based on *Shariat*. In the case of death, the heirs may take over responsibilities and secure legal documentation for the land.

## Article 100

If the Department of Land Matters is unable to solve disputes regarding rehabilitation of virgin and barren lands, then the cases must be referred to the courts.

LAW ON PASTURE AND MARAA (Public Lands)  
Under Decree 57 of Gazette Issue No. 795 of 2000

## Article 2

- (1) All types of land including hills, deserts, mountains, riverbeds, forests that have places where grass grows and supports animals are known as pasture.
- (2) Pasture falls into two classes: (a) private pasture, which includes *maraa* (local public land)
- (b) public pasture, including barren lands (*mawaat*), in accordance with sub Article 9 of Article 2 of Law of Land Regulation, and land on the edges of cities and villages.

## Article 3

- (1) Pasture may only be used for feeding animals.
- (2) Private pasture may be used by residents of the adjacent communities.
- (3) Public pasture may be used by anyone.

## Chapter Two: About Private Pasture

## Article 4

- (1) If a person or government is unable to prove ownership over a private pasture, they may not occupy it as an owner.
- (2) Residents of an area may use the pasture for feeding their animals in accordance with this law.
- (3) The right of using pasture cannot be bought or sold.

## Article 5

- (1) The area of pasture must be specified, marked and registered, based on Shariat by a Commission.
- (2) If the pasture area had not been previously described before this law comes into effect, then the council of ministers must appoint a commission for implementing sub-article 1 of this article in every province.

## Article 6

Buying, selling and leasing pasture is prohibited.

## Article 7

Areas of private pasture are not to be sold or leased for expansion of agricultural activities or any other purposes.

Government development projects for public utility are exempted from this order.

## Article 8

The Council of Ministers may pay compensation for farmlands, private springs, channels that are located in or around pasture which is useful for public purpose.

## Chapter Three: Public Pasture

## Article 9

The *mawaat* pasture (barren lands) is for public use, and its purchase, sale, or lease may only be undertaken with the permission of the supreme leader.

## Article 10

The grazing of goats and camels in pasture found within forests is prohibited in the public interest.

## Article 11

The Council of Ministers may take necessary actions in order to secure and improve the pasture.

## Chapter Four Miscellaneous (not translated)

## LAWS RELEVANT TO LAND PASSED BY THE TRANSITIONAL AUTHORITY 2002

Decree of the President of the Afghan Interim Administration Ref No. (297) Date: 13, 03, 1380 on the Dignified Return of Refugees

The Afghan Interim Administration, confident that the Bonn Agreement on Afghanistan dated 14.09.1380 (5 December 2001) has laid down the foundation for lasting peace, stability and social and economic progress in Afghanistan, safeguards the right and freedom of all returnees, observes the freedom of returnees to establish residence, to participate in the process of reconstruction, consolidation of peace, democracy and social development, AIA guarantees their safe and dignified return, expresses its gratitude and thankfulness to the countries that have given them refuge in the very difficult and hard days Afghanistan experienced, and expects that in conformity with the principle of voluntary repatriation, Afghans will be given the opportunity to decide freely to return to their country, and declares the following:

Article 1. Returning Afghan nationals, who were compelled to leave the country and found refuge in Iran, Pakistan and other countries of the world, will be warmly welcomed without any form of intimidation or discrimination.

Article 2. Returnees shall not be subject to harassment, intimidation, discrimination or persecution for reasons of race, religion, nationality and membership of a particular social group, political opinion or gender, and will be protected by the State.

Article 3. All returnees, irrespective of their political affiliations, are exempted from prosecution for all (with the exception of individual criminal accusations) criminal offenses committed up to 01.10.1380 (22 December 2001), prior to, or in exile against the internal and external security of the country, according to enacted laws.

Article 4. The provisions of Article 3 of this decree will not apply to those returnees who have committed acts constituting a crime against peace or humanity, or a war crime, as defined in

international instruments, or to acts contrary to the purpose and principles of the United Nations.

Article 5. The recovery of movable and immovable properties such as land, houses, markets, shops, *sarai*, apartments and etc. will be effected through relevant legal organs.

Article 6. All returnees will be guaranteed the same human rights and fundamental freedoms enjoyed by other citizens.

Article 7. The implementation of the provisions of this decree is the responsibility of the Ministry of Repatriation; law and order organs are obliged to assist the Ministry of Repatriation in this task.

Article 8. UNHCR and other relevant international agencies will be allowed to monitor the treatment of returnees to ensure these meet recognized humanitarian law and human rights standards, and to ensure that commitments contained in this decree are implemented.

Article 9. This decree is valid as of 1.10.1380 (22 December 2001) and will be printed in the Official Gazette.

Hamid Karzai,  
President, Afghan Interim Administration

Decree No 66 Date 16-11-1380 Decree on the abolishing of all decrees and legal documents enacted before 22 Dec 2002

Since the work of Interim Administration of Afghanistan is based on Bonn Agreement and 1964 constitution and it has been emphasised that all laws and regulation of Afghan Interim Administration should be consistent with 1964 constitution. For the purpose of achieving this objective the following articles are approved.

Article 1  
All Laws, decrees and private constitutions, which are inconsistency with 1964 constitution and Bonn agreement, are abolished.

Article 2  
Ministry of Justice has been assigned to study and review all legal document which were enacted before 1 -10-1380 with the help of each relevant ministry expertise, this study should be in the light of Bonn agreement and 1964 constitution,

the inconsistent provisions must be abolished and may bring new amendments, addition and cancellation, bearing in mind the new situation needs, Ministry of Justice should propose these changes to the cabinet for approval

#### Article 3

All Ministries are responsible to cooperate with the justice ministry program for study the procedure of work in relation to legal documents

#### Article 4

This decree is in force after its signature and will be published in the official gazette

Hamid Karzai, President of Afghan Interim Administration

Decree on the Establishment of Land and Property Disputes Court No. 136 of 200t

Circular Letter No. 4035 dated 19.6. 1381<sup>262</sup>

Decree No. 136 dated 13.6.1381 of President of Islamic Transitional Administration of Afghanistan contains the following:

Based on the need for studying complaints of our refugee and displaced compatriots, who want to obtain their properties, a special court has been established according to the following Articles within the structure of Supreme Court:

#### Article 1

In this decree, ownership includes land, residential houses, apartments, shops, commercial warehouses and other real estate.

#### Article 2

Solving disputes of properties is limited on possession, which has taken place in the absence of the owner from 7 Saur 1357 (27 April 1978) until the establishment of Interim Administration.

#### Article 3

This court is unique and centralised. If it is needed its delegation travel to various provinces in order to study the relevant cases, assigning this delegation takes place with the proposal of chief judge of the special court and approval of the chief justice.

#### Article 4

This court shall have three judges.

#### Article 5

Relevant cases to the Special Court of Property Dispute is investigated by the Dispute Resolution Commission before being studied in the court; and the special court issues its judgment after receiving the view of commission as experts and juries.

#### Article 6

Investigation of property dispute cases will be performed by the direct request of individual's real person and body corporate or referred by relevant governmental departments.

#### Article 7

The decision of the court is final and must be observed. Parties to the dispute cannot appeal against the court decision. The reviewing of the court judgment is the responsibility of President of the Afghanistan Transitional Administration.

#### Article 8

The chiefs of police in Kabul and provinces are responsible for the enforcement of the court judgments.

#### Article 9

Distinction of forged documents is the responsibility of this court and forgery cases are referred to competence authority for further follow-up and prosecution.

#### Article 10

Governmental departments are responsible for the implementation of this decree.

#### Article 11

Personnel for the structure and budget of this court are submitted by the supreme court and will be approved by the President of the Afghanistan Transitional Administration.

#### Article 12

Special courts on property disputes are active until disputes on property exist.

<sup>262</sup> Translated By M A Ferozi, Rule of Law Unit UNAMA 13 October 2002.

## Article 13

This decree is effective after its signature and must be published in the official gazette.

*Hamid Karzai*

*President of Islamic Transitional administration of Afghanistan*

The decree is sent to you for your proper action.  
Mawlawi Fazwal Karim Hadi Shinwari  
Chief Justice

An Excerpt from the Law of Domestic and Foreign Private Investment Decree No. 134 of 2nd Sumbula 1381 (2002) in Official Gazette 803 2002

## Article 14

Foreign investors may lease land for short, medium and long-term periods, in terms of 10 years, 20 years and 30 years. Lease of the land is tied to the starting of the investment project. The investment commission in convincing situations may extend the above-mentioned periods.

## Article 23

Compensation to foreign and domestic investment is permitted only when public interest is involved. In this instance the government pays the fair price for it according to present-day values or through the estimation of a reliable international evaluation agency before the compensation takes place.

## Article 24

The investors may take the money received in compensation out of the country without paying tax on this income.

DRAFT EDICT ON LAND 1999 with notes in italics comparing the content with that of the Taliban Edict No. 26 of 13.4.1420 (1999)

For the purpose of adopting a comprehensive approach to the issues of land and in order to solve the problems of land issues between government and individuals in an orderly and consistent manner.

## Part One: Government Lands

## Article 1

All those lands for which no compensation has been paid but which have been previously registered as government land and for which

documents are valid will be held to be government lands.

*[Same as Taliban 1999 law]*

## Article 2

Those lands which have been under the control of the government for more than 37 years and on which the government has made developments will be held to be government lands and no individual claims for those lands will be heard.

*[Article 2 of the Taliban 1999 law had 35 years]*

## Article 3

Whether destroyed or intact, karezes and water canals which are not under proven private ownership will be held to be government lands, including those lands which are irrigated from those karezes and water canals.

*[Same as Taliban 1999 law]*

## Article 4

Housing land in urban areas which has been allocated for the purpose of house construction by the municipalities and where the time limit has expired and no construction has taken place for any legal reason, shall be returned to the government.

*[Same as Taliban 1999 law but with this additional sub-clause 4 (2):*

*If the properties mentioned in sub-article 1 have been given as compensation to the owner, then they will remain with the owner even though he has not developed the land.*

## Article 5

1 All those lands which before the enforcement of this edict for which compensation was paid in accordance with the law may not be subject to individual claims.

*[Same as Taliban 1999 law]*

2 Those lands before this Edict for which compensation was paid and upon which public works such as roads, housing etc. have been implemented but for which documents are not held by Government will in general be taken as government lands and no further investigation is permitted, even where Shariat documents testifying to the contrary are in the hands of individuals.

*[Same as the Taliban 1999 law]*

3 All those lands for which compensation was paid prior to this Edict but for which documents have been lost from government



offices, will be held to be government land if there are witnesses who may testify to the fact, even where government has not developed the property, and no individual claims based upon Shariat documents may be heard.

*[Same as the Taliban 1999 law]*

#### Article 6

All those lands which according to Shariat prove the right of government may be taken as government land.

*[Same as the Taliban 1999 law]*

Part Two: About Maraa Properties (Public Land): Pastures (Charagha & Malchar) and Unused Lands (Matroka)<sup>263</sup>

#### Article 7

*Maraa* is that kind of lands for which there is no proof of ownership by either government or individuals *[Same as Taliban 1999 law but with the following added sub-article (2):*

*If a man with a loud voice stands at the last house of the village and shouts, the last point at which he may be heard marks the beginning of maraa.* This clause has been dropped in the draft Karzai edict.

#### Article 8

(1) *Maraa* is counted as public land for which neither government nor individuals may bring under their ownership, unless provided for by a law.

(2) *Maraa* is to be used for public purposes such as pasture, graveyards etc. and are to be reserved for use by villagers.<sup>264</sup>

*[Same as Taliban 1999 law]*

#### Article 9

If any person has exercised ownership for a substantial period over land that is proved to be *maraa* then that land shall be taken from him.

*[Same as Taliban 1999 law]*

#### Article 10: Private Land

(1) Private properties are those lands for which private ownership is demonstrated in *Shariat* or state law.

(2) *Shariat* property may be proved by the evidence of legal documents, history of use, the evidence of witnesses and by developments that have been undertaken on the land.

*[Same as Taliban 1999 law]*

#### Article 11: *Waqfi*

*Waqfi* means those private assets that are given to God for common good.

*[Same as Taliban 1999 law]*

#### Article 12

(1) Upon donating land for *waqfi*, this land will be no longer be considered as private property.

(2) *Waqfi* land may not be sold, rented, mortgaged, gifted or inherited.

(3) Land given as *waqfi* and the income from that land will be used for the purpose for which it was given.

*[Same as Taliban 1999 law]*

#### Article 13: *Mawaat* [wasteland, dry land and desert]

(1) Desert, mountains, hills, rivers, virgin lands, barren lands and forests are to be known as *mawaat*.

(2) Government land, private land, *maraa* land and *waqfi* lands are excepted from the above.

*[same as Taliban 1999 law]*

#### Article 14

(1) Nobody may bring *mawaat* land under his ownership without obtaining the express permission of the Head of State.

*[same as Taliban 1999 law]*

(2) If any person has *mawaat* land without the permission of the Head of State, this land will not be considered to be private property; occupation does not imply ownership. Only the Head of State has the authority to approve occupation.

*[Same as Taliban 1999 law]*

#### Article 15

Those lands in sub-article (2) of Article 14 may be leased through auction. The previous occupant has priority in award of the lease.

*[Same as Taliban 1999 law]*

<sup>263</sup> Literally means "isolated" or "left behind" or "kept apart."

<sup>264</sup> *Maraa* could be interpreted as a form of common property, owned by a group or all.

## Miscellaneous

## Article 16

A person occupying or using government land will not be forced to pay tax on that land unless and until government ownership is proven.  
*[Same as Taliban 1999 law]*

## Article 17

(1) Those lands which are the subject of dispute between government and people will remain with government until such time as the appropriate court makes a final decision.  
*[Same as Taliban 1999 law]*

(2) Government may not construct buildings, sink wells, plant trees or otherwise develop lands mentioned in sub-article (1).  
*[Same as Taliban 1999 law]*

## Article 18

(1) All government properties such as agricultural farms, plots or apartments, may be rented or leased through auction.  
*[Same as Taliban 1999 law]*

(2) With the exception of those government ministries or enterprises which have their own bank accounts, all revenue derived from renting or lease of government lands will accrue to the government account.  
*[Same as Taliban 1999 law]*

## Article 19

(1) All government lands which from 7 Saur 1357 (1978) until the coming into force of this edict have been distributed to individuals without issue of documents and where no development of the land has subsequently been undertaken, will revert to government property.  
*[Same as Taliban 1999 law except that the date is different; it mentions 7 Saur 1357 until 6 Mizan 1375 (1996)]*

(2) If land referred to in sub-article (1) has been given to private persons and they have subsequently developed the property, they may directly apply to the joint commission to be set up by each provincial government to rent that property without public advertisement.  
*[Same as Taliban 1999 law]*

(3) If properties referred to under sub-article (1) above are occupied without legal or Shariat documentation, the land may rent or lease that land from the joint commission as identified in sub-article (2).  
*[Same as Taliban 1999 law but both this clause not the Taliban clause contradict the intentions of 19 (1).]*

(4) Developed or occupied lands must be given to the individuals without lease.  
*[Same as in Taliban 1999 law]*

(5) New occupation and incomplete construction are strictly forbidden on government land.  
*[Same as Taliban 1999 law]*

## Article 20

With respect to government properties that have been sold to the private sector by municipalities or other government departments while no written statement of the transfer is available such transaction will not be considered legal or legitimate in accordance with *Shariat*.  
*Same but with prior sub-article -*

(1) *With respect to government properties that have been sold to the private sector by the government from 7 Saur 1357 until the time when this law comes into effect and if such transactions have been undertaken in an unfair or unjust manner, the transaction must be cancelled. In case of cancellation, a written order by the supreme leader is required.*

## Article 21

Any person who leases or rents government lands must hold the lease personally.

*[Same as Taliban 1999 law but with a prior sentence stating -*

Concerning leases, the role of those who were previously the representatives of relocated people in Hilmand or other provinces, is now cancelled].

## Article 22

(1) No one has the right to occupy forests or water catchments, dig deep wells, or install water pumps in them. The encroachers will be punished in accordance with the law. The government officials or the ones who misuse their power and occupy others' lands using weapons must not only return the land but also undergo punishment in accordance with the law.

*[Same as Taliban 1999 law]*

Article 23

- (1) There is no new survey and mapping of the land without written order of the president.
- (2) Bringing any change, replacement or correction to the cadastral map is not permitted. In case of disobedience the offender will be dealt with in accordance with the law.
- (3) Giving information to the people about government properties is not permitted.
- (4) The ownership department, the cadastral department and other departments must cooperate with the government's judicial authorities when required and show and specify the property concerned.

This is a new Article. Article 23 in the Taliban 1999 law says the following: all government farms in the country must be clarified and each clarification should result in written statements by the Supreme Leader]

Article 24

- (1) The department of land issues is responsible for looking after government's properties. In case of any legal dispute, it should give or

deliver the case to the concerned authorities to avoid the loss of government's right.

Article 24 of the Taliban 1999 law is as above in the current Article 23, with the exception of one sub-Article which reads: No payment is permitted for preparing site information.

- (2) If the judicial authorities of the government find a property of the government that is being occupied illegally by other people or government departments and the concerned authorities have not acted against this, they can follow the case and then restore the property to its rightful owner, in order to secure public interest.  
*[Same as Taliban 1999 law but as Article 25]*

Article 25

All concerned government departments must abide by the orders of this decree.  
*[Same as Taliban 1999 law but as Article 26]*

Article 26

After this decree comes into effect, Decree No. 26 dated 13.4.1420 (Arabic year) published in Gazette Issue No. 788 dated 6.5.1420 will be repealed *[new]*.

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## Acronyms and Abbreviations

AACA	Afghan Assistance Coordination Authority
ACTED	Agency For Technical Cooperation and Development
ADA	Afghan Development Association
ADB	Afghanistan Development Bank
AFGA	Land Social Services Organisation
AIA	Afghanistan Interim Authority
AIMS	Afghanistan Information Management Service
AREU	Afghanistan Research and Evaluation Unit
ATA	Afghanistan Transitional Authority
DACAAR	Danish Committee for Aid to Afghan Refugees
ECHO	European Commission Humanitarian (Aid) Office
EU	European Union
FAO	(UN) Food and Agriculture Organisation
GoA	Government of Afghanistan
GPS	Geographical Positioning System
Ha	Hectare
ICARDA	International Centre for Agricultural Research in the Dry Areas
MoJ	Ministry of Justice
MRRD	Ministry of Rural Reconstruction and Development
NDB	National Development Budget
NDF	National Development Framework
NGO	Non-governmental Organisation
PDPA	People's Democratic Party of Afghanistan
SCA	Swedish Committee for Afghanistan
SMU	Strategic Monitoring Unit (now AREU)
UNAMA	United Nations Assistance Mission in Afghanistan
UNCHS	United Nations Centre for Human Settlements (UN-HABITAT)
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNIFEM	United Nations Development Fund for Women
USAID	United States Agency for International Development
WFP	(UN) World Food Programme

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