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Land Tenure and Administration in Rural
Afghanistan: Legal Aspects

by

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Executive Summary

The draft Land Policy framework that was recently approved by the Ministries of Agriculture, Urban development and Justice requires corresponding changes in the legal framework for land. As stated in the policy document “land management in Afghanistan is governed by an ineffectual and inadequate legal framework.” The inadequacy of the legal framework is one of the main factors responsible for perpetuating informality in land relations.

Since the policy framework is in place, revamping the existing legal framework for land has become among the priorities of the Ministries of Agriculture, Justice and Urban Development. The crucial question now is how to put in place an appropriate land law in conformity with the supreme law of the land and with the land policy. The land policy implicitly provides guidance that the existing legal framework will form an essential backdrop against which the development of a new law has to emerge. This means the existing legal framework has to be consolidated, fine-tuned and developed in accordance with the land policy and the constitution.

The objective of the legal component of the Asian Development Bank’s Technical Assistance on capacity building for land policy and administrative reform is to assist the government of Afghanistan to identify important issues, gaps, deficiencies and inconsistencies in the existing legal framework for rural land and address the shortcomings as required by the draft national land policy. The legal component also has as its main objective to make comprehensive proposals of modifications that are appropriate to address deficiencies and to fill gaps in the legal framework for rural land.

This work took place over a period of three months (June - August 2007). During this period, the consultant undertook a review of the legal framework for rural land, provided advice on the development of a revised legal framework for land and prepared this report.

The report is organized as follows:

Part 1 gives an introduction to the objectives of the project and scope of the legal work.

Part 2 provides a discussion and recommendation on the development of a revised legal framework for land. Subsequent to identifying the problem areas and gaps in the existing legal framework, the first important task in the process of drafting land law would be to prepare a draft legislation that would serve as a starting point for consultations and debates among key stakeholders. The report considers two distinct models for the development of a revised land law. It is recommended that the drafting of a revised land law follows a model that presupposes the formation of two technical drafting groups with separate but complementary responsibilities.

The first technical group would be responsible to do the actual drafting work in close collaboration with the second technical group. The task of the first technical group would be twofold: to provide insight on the gaps and deficiencies of the existing legal framework based on the real practices of land management, conveyance, cadastral services, and other related issues as well as to provide comments and suggestions on draft provisions as the drafting work proceeds along. The second technical group would focus on drafting. While the diversity of the topics that need to be covered by a comprehensive land law makes the case for commissioning more than one person to handle the actual drafting work, depending on the level of competency and familiarity with the issues of the expert drafter, commissioning an individual expert may also be an option.

While the first technical group obviously should be composed of lawyers who have good knowledge of land law and experience in drafting, the second technical group should be composed of persons with real experience in the practice of land management and

administration. This group may constitute representatives of relevant departments of the Ministry of Agriculture, the Cadastral Department (AGCHO), the Supreme Court and the Ministry of Justice. The main responsibility of this group would be to ensure that the drafters develop the law based on the norms, belief system, customary practices and needs of ordinary Afghans.

On the structure of the revised land law, since the line ministries have adopted a comprehensive land policy, this report makes a case for Afghanistan to have an Organic Law that sets out general principles covering all land. This Organic law then would be followed by more detailed primary legislation on a range of topics. The primary advantage of drafting one Organic law is that it can have internal coherence, consistency and comprehensiveness. These other primary laws will distinguish between rural and urban topics but will all have to follow the Organic Law principles. The government will have to decide whether to have two independent laws for both the urban and the rural sides. If this happens, the draft Organic Law can always split up logically into more manageable packages after the drafting is completed in a comprehensive and coherent manner.

Part 3 provides an overview of the history of land law in Afghanistan. This part describes the main tenets of the land laws that were proclaimed since 1965 with the objective of highlighting the legal culture with respect to land administration in Afghanistan, which should be considered in revamping the existing legal framework.

Part 4 gives a detailed overview of the existing legal framework for land. The legal basis for rural land management and property rights in Afghanistan stems from the Constitution, the Land Management Law of 2000, the Civil Code, a series of presidential decrees, and principles of Islamic Law. The central purpose of the post-Taliban decrees appear to be protection of public/state land from land grabbers as well as restitution of land that was expropriated after the Saur revolution of 1978. The existing legal framework for land calls for revision on two main counts: lack of strict enforcement and the existence of gaps and outdated provisions in the legal framework. The lack of strict application of laws is interwoven with issues pertaining to institutional capacity and governance.

Since 1965, successive governments have proclaimed a torrent of new land legislation in various forms aimed at promoting their economic and political agenda. In addition to the numerous laws, decrees, resolutions and orders issued at the national level, at the provincial levels, there have been resolutions and instructions that have been *de facto* carrying the weight of the law. In practice, the haphazard lawmaking process and the coexistence of layers of normative legal documents have led to confusion arising from a number of inconsistent, overlapping and sometimes contradictory or incomplete legal provisions in a number of areas.

To help identify inconsistencies and gaps in the coverage of probable legal and factual settings under the current reality, the local counterpart of this consultant has attempted to collect and systemize currently effective normative legal documents.¹ The compilation and systemization is aimed at identifying normative legal documents and legal provisions which are out of date, or which are inconsistent with subsequent or higher ranking normative legal documents, or which have been expressly or implicitly repealed by subsequent normative legal documents, and recommendations will be made thematically for their revision.

Part 5 deals with land administration in Afghanistan. According to the law and practice in the country, various government agencies play the role of land administrator at different levels. However, inefficiency and lack of coordination between the different agencies have been the defining features of the system. The main functions and responsibilities involved in the rural land administration of Afghanistan include distribution of land, issuance of formal property deeds, clarification of rights over land, acquisition (expropriation) of land, surveying, recording of maps of land plots, and determining land grades and property tax.

¹ Mr. Abdul Samad Kamawi building on prior efforts, notably on the work of Mr. Rob Hager, prepared an updated index of land related laws. Please see annex 1.

However, the level of coordination between the land administrative bodies leaves a lot to be desired. They operate in an environment where there is no structured coordination mechanism. There is confusion about the roles of the Amlak and the Cadastral Department resulting in overlapping functions. The level of information or data sharing between the cadastral department and Amlak is not always as envisaged by the Cadastral Law of 1988. The collaboration between Amlak and the judiciary does not work as envisaged by the Land Management Law. Especially, in regard to referral of clarified property documents to the court for issuance of formal (sharia) deed the practice discloses a legal limbo. Amlak does not refer clarified documents to the courts because the courts are reluctant to prepare sharia deed based on Amlak's submissions.

The judicial system has been further contributing its share to the existing confusion and inefficiency of the land administration system. Many disputes arise in connection to property documents unlawfully and illegitimately produced by the court system. The existing property recording system in the courts, which is riddled with corruption and fraudulent documents, in part stems from the lack of structured and effective coordination between the different land administrative bodies.

In addition to the problems mentioned above, the destruction of property documentation during the war, the lack of security and the ineffectiveness of government power in many areas also contribute to the ineffectiveness of the land administrative bodies.

To remedy the ineffectiveness of the land administrative bodies in a cost effective way and to ensure social acceptance of determinations of property rights, land allocations, public records of immovable property and other land related decisions an active involvement of communities is imperative. In addition, this report makes recommendations on rules and principles that should be incorporated in the revised land law to streamline land administration processes and to harmonize the functions of the various land administrative bodies.

Part 6 analyses land tenure classification under the laws of and traditional practice in Afghanistan. Land tenure classification in Afghan law and practice is somewhat hazy. The lack of clarity stems from the coexistence of layers of inconsistent laws and sources of laws relevant to the subject. The status of the relevant provisions in these laws is not very clear. Three different pieces of legislation are relevant to land tenure classification in Afghanistan: the Civil Code, the Land Management Law of 2000 and Presidential decree No 83, which was issued after the collapse of the Taliban. This part identifies the inconsistencies in the current land related laws and makes recommendations to address the problem. The main recommendations are:

- The law should be modified to clarify classification of ownership in clear terms. It would be in line with the reality and the general guidance provided by the land policy to classify ownership of immovable property into state, public, private and community ownership. Further, the law should clearly define the role of the state and responsible government agencies in relation to managing state and public owned land.
- The law should clearly provide whether government departments can own land in their own names. If the option for allowing government departments to own land is preferred then the law should clearly prescribe under what conditions government departments can own land and the terms of their ownership and the procedures for selling or otherwise disposing of such government owned land.

Part 7 analyses the relevant laws on proof of land ownership. Since the promulgation of the first law on land administration in the country, there has always been disparity between the law and the practice in regard to how ownership of land is acquired and legally proven. The most recent relevant law, that is, decree No 83 establishes as its basic principle that private ownership of land can only be proven through formal ownership document.

This law supersedes all previous laws relevant to establishing ownership of property rights including through customary documents. Although it is not rational to presume that all customary deeds are legitimate, providing that all ownership of private property can only be established by producing legal deed disregards the reality of existing property rights regime of property ownership.² Prescribing the establishment of ownership right only through valid legal deeds is not a reasonable legal requirement considering the mass destruction of property records and the variety of legitimate informal property rights that exist in the country.

To implement the policy guidance on proof of ownership, recommendation is made that the revised law should consider the existing property rights regime, which does not always make it easy to categorize ownership typologies in black and white terms. There are gray areas that give rise for legitimate claims. In disputes involving private individuals, as a matter of settled practice, courts consider secondary proof such as Amlak registration, tax records, customary deeds, and local knowledge as basis for proving land rights. This practice should be formalized through a modified land law for the country. The chaotic property rights regime in the country call for establishing a realistic and effective way of re-identifying legitimate and valid right to land. This would be in accordance with the guidance provided by the land policy.

Part 8 deals with land distribution issues. Land distribution remains one of the most crucial land related problems in Afghanistan. It raises questions at different levels. First, there are legal issues that stem mainly from the gap between the law on books and the practice. Governance and equity issues also arise in connection with land distribution. The quasi-official and unofficial land distribution practices that have become the dominant way of getting access to land place ordinary citizens in a position of disadvantage.

The uncoordinated and somewhat unjust practice of land allocation appears to disregard the connection between allocation of land and the conditions necessary for achieving the purpose for which the land was allocated. Put differently, the system clearly lacks in appropriate land use planning based on fundamental principles of poverty reduction and human and social developments. For example, it has not been unusual practice to allocate land for resettlement or development of residential houses in areas where access to water and employment are clearly limiting factors.

This part provides a detailed description and analyses of the current laws and the practice in regard to land distribution. Distribution to Landless Farmers is discussed against the backdrop of existing practice and the draft land policy. Also distribution of barren lands and allocation of land for returnee resettlement are discussed. In all cases, recommendations have been made to address identified problem areas in line with the guidance provided by the draft land policy.

Commercial Agricultural Lease is also discussed in this part. There are good indications that much of the state-owned irrigated and rain fed land is not producing revenues for the state through active and well managed leases, concession agreements, and also through direct operation of agricultural enterprises. While there are several complicated reasons for these lost revenues and inefficient use of resources, the restrictive nature of the law also makes it unattractive for the private sector to pursue this avenue.

State issued leaseholds have not been usual occurrences in Afghanistan. However, in many other countries concessions or leaseholds have been the subject of great controversy. There have been valid criticisms that state issued leaseholds or concessions have been misused to the detriment of local villagers and pastoralists resulting in environmental damage and displacement of people.

² Gebremedhin, Yohannes, Legal issues in Afghanistan pertaining to Land Titling and registration, (USAID/LTERA, Kabul, p.14)

Realizing the actual and potential problems, the Ministry of Agriculture has drafted an amendment of article 69 of the Land Management Law that prescribes maximum lease period. The amendment of article 69 also includes an annexure dealing with the management of lease of arable lands to private investors. The draft amendment purports to establish working rules regarding the maximum periods for which land can be held for different kinds of agricultural activities.

The draft amendment for commercial leasing is a step forward in the right direction. However, the legal framework for commercial leasing program should be developed in a way that leaseholds are issued in ways that transparency is ensured and the displacement of poor farmers and encroachment of their traditional farming and grazing land are prevented. To address such concerns and prevent abuses, this part makes recommendations on some rules and principles that should be entrenched in the revised law.

Part 9 deals with the law and practice of land clarification in rural Afghanistan. The concept of land clarification in Afghanistan is intimately intertwined with the history of the modern Afghan state's increased interest to consolidate its control over land. Nevertheless, the current need for land clarification is more linked to the series of socio-political changes and conflict that the country has experienced over the last three decades than anything else. As a result a contentious land reform program, confiscation, disputed redistribution of rights to land, massive land grab, informal expansion of settlements that resulted from war and social changes, and transactions not sanctioned by formal law, a good part of the country's lands has changed hands many times. The crucial question in this regard is whether the current law and practice are appropriate and effective in dealing with the chaotic property rights regime that exists in the country.

To address the shortcomings of the current system, among others, it is recommended that the revised law should establish clearly defined link and procedures for partnership between community-based land clarification processes and Amlak department to overcome the heavy land clarification burden of the land clarification body.

Part 10 discusses cadastral surveying. Although the activities of the cadastral department have been frozen by virtue of presidential decree No. 83, the cadastral survey law of 1988 remains unrepealed. The cadastral department may undertake surveys only at the request or approval of the Office of the President of the country.

The cadastre survey law of 1988 calls for the establishment and maintenance of a countrywide rural land registry in Afghanistan, detailing the boundary of every parcel along with the owner, the quality and quantity specifications of every parcel of land, the use of the property, the value of the property, and several other pieces of relevant information. The goal that the law aims to achieve would be extremely useful under normal circumstances. Given the chaotic property rights regime as well as the socio-political instability, it would not be practical, affordable and even desirable at this point to launch a countrywide survey as envisaged in 1988 or 1965.

It would therefore be worthwhile to look for an option of property boundary surveying that is affordable and practical in terms of implementing land survey by using local resources and available formal as well as informal institutions. One decision is whether to undertake systematic mapping of property boundaries, or adopt the sporadic approach, that is, describing boundaries on single properties when an ownership transfer takes place.

For the purpose of imposing property tax, concurrent to conducting survey of land over a long time scale, either the systematic or the sporadic approach to boundary description can reintroduce the property declaration form once used in the country and rely on property owners' declaration, with the added protection of village representative's approval of the legitimacy of the declaration of the declaration for agricultural land.

In most rural areas where community elders are likely to know with certainty the history of property rights attached to a given parcel of land, it would be practical to consider a community based land survey committee that would work on a systematic basis in villages which view that activity as valuable with the formal cadastral survey team. In addition to ensuring legitimacy such a mechanism would also facilitate a method for the speedy and cost effective determination of rights and boundaries as well as efficient resolution of disputes.

Part 11 briefly discusses land use conversion. Although unlawful conversion of agricultural land use to other uses is prohibited by law, in practice, there have been conversions of farm lands to housing and pastures to resettlement sites. In most cases such unlawful conversions have been effected by powerful land grabbers and government agencies.

Although there is one provision in the Land Management Law of 2000 that prohibits unlawful land use conversion, there is no regulation that set out clear standards and procedures under which conversion would be allowed. This part identifies the gap that exists in the legal framework with respect to regulating land conversion. Recommendations are made that a regulation be issued under the revised land law. Further, certain principles that need to be embodied in the regulation are recommended in line with the Ministry of Agriculture's policy/strategy statements and the draft land policy.

Part 12 deals with adjudication of property rights. Due to destructions of property records in many provinces and rampant fraudulent deeds that have made their way into the formal archives, the property recording system in the nation lacks certainty and public trust. Moreover, many lands that have not been officially recorded have been unlawfully occupied in various ways.

In most parts of rural Afghanistan the property rights situations have not been fairly and authoritatively determined. Many factors such as land grabbing, demographic changes, internal displacement, ecological changes, changes in tribal or clan power balance and unorganized repatriation come into play to make the existing property rights situation chaotic and undermine inter- and intra-community traditional social pacts on use and access to land.

While formalizing traditional rights and customary agreements might resolve most frictions and multiple claims over land, the significant changes in property holding in many areas require a process for clarification and certification of claims and agreements. To determine who acquired what right and the circumstances in which that right was acquired and to authoritatively establish and record property rights a workable adjudication procedure is essential. To overcome the challenges of placing heavy administrative burden on the government in dealing with the chaotic property rights situations in rural areas the revised law should provide for the establishment of an adjudication system to systematically determine "who" has "what" right over a given land. This part recommends broadly the basic tenets of establishing such a system.

Part 13 deals with recording of immovable property rights. The existing system for recording of rights to immovable property requires improvement or redesign in many respects. The process for completion of property transfers is very lengthy and very costly primarily due to the involvement of too many agencies in signing off every transaction. Lack of institutional capacity and integrity also contribute to the inefficiency of the system. While some important measures have been taken to improve the documentation of interests in immovable property and the retrieval of recorded property information, there is an urgent need to focus on weighing options for addressing systemic anomalies that can and should be dealt with immediately to improve the existing system. There are also systemic redesign options that need to be considered and decided over a longer time scale.

There is no coherent land registration law in Afghanistan. Registration law is needed to establish the operational rules and administrative framework for a land registration system. This part highlights important policy issues that ought to be addressed prior to drafting a registration law as well as other key issues that should be considered when drafting a land registration law.

A new registration law should consider a two-tier recording system to establish a decentralized immovable property recording system. This suggestion is based on the fact that rights over community pastures and farm lands located within village boundaries require a simple, cost effective and easily manageable system. The records of such properties can be managed and maintained by local communities, in collaboration with district and provincial offices. On the other hand, immovable properties that involve interests that can be transferred for consideration such as vast areas of irrigated lands, orchards, agro-industrial enterprises, state owned immovable properties require formal recording system that would facilitate market transactions, protect buyers and sellers, and promote access to credit.

In line with the draft national land policy, the law should envisage the gradual integration of the various land administration agencies. Towards achieving this policy objective, the law should consider replacing the existing judicial function for certifying and recording title deeds to an administrative function vested in Amlak. To accommodate the traditional notion of title deed legitimacy, the law should introduce the position of an administrative (registry) judge to certify and issue title deeds.

Part 14 deals with legal issues surrounding pastureland. The lack of good local governance infrastructures in rural Afghanistan is reflected by the causes and mishandling of the widespread frictions over pasture. There are well documented reports on the situation of pastoral issues in Afghanistan that make it unnecessary to restate them in great details in this report. Although a new draft pasture law is being prepared under the auspices of the Ministry of Agriculture, the Law on Pasture and Public Lands proclaimed in 2000 by the Taliban administration technically remains in effect. However, this law is not enforced or complied with in practice.

While there are serious factors related to the ecology, governance, historical claims that contribute to frictions and disputes on pasture, the inadequacy of the legal framework is also a serious contributing factor to the whole problem. This part identifies the main gaps and deficiencies in the legal framework that have direct link to the key legal challenges and problems surrounding pastureland. Further, recommendation is made on how to legislatively address these challenges and problems.

Part 15 summarizes the main conclusions and recommendations of the report.

1. Introduction

The Ministry of Agriculture together with other relevant government ministries has recently approved a comprehensive land policy. The draft policy framework requires corresponding changes in the legal framework for land. As stated in the policy document “land management in Afghanistan is governed by an ineffectual and inadequate legal framework.” The inadequacy of the legal framework is one of the main factors responsible for perpetuating informality in land relations. However, it is not only the deficiency in the legal framework that makes the land administration system ineffectual, lack of adequate enforcement mechanisms are also at the heart of the problem. Needless to say, the lack of strict application of the law is directly linked to the broader question of governance and rule of law in the country.

To understand the positive elements and deficiencies in the existing legal framework for land, it is necessary to examine its main features against the backdrop of the land tenure and administrative practices. Therefore, the objective of the legal component of the Asian Development Bank’s Technical Assistance on capacity building for land policy and administrative reform is to assist the government of Afghanistan to identify important issues, gaps, deficiencies and inconsistencies in the existing legal framework for rural land and address the shortcomings as required by the draft national land policy.

The legal component also has as its main objective to make comprehensive proposals of modifications that are appropriate to address deficiencies and to fill gaps in the legal framework for rural land. This report will provide thematic and policy critique on crucial issues rather than provision-by-provision comments of the layers of legislation with the objective of identifying gaps and areas of deficiencies and recommend legislative measures to address the problems.

At present, land users and all stakeholders primarily rely on individual officials of the government, powerful elements in the society, and the informal structure for the overall management of their interest in land and for the resolution of any consequential disputes. This state of affairs can only change when stakeholders will be able to depend instead on clear laws and recourse provided by an effective land management system and an equally effective legal system. In sum, to offer an acceptable level of predictability in land relations and enable the Ministry of Agriculture to manage rural land affairs efficiently, the legal framework and the necessary implementing mechanisms must come to be regarded as transparent, predictable and fair. To achieve this important objective, ensuring the full participation of local communities in managing land affairs is imperative.

The concept of ‘local community’

The concept of “local community” has been one of the most important features of the recent discourse on land management and administration in Afghanistan. It has been used to denote a coherent social unit where customary principles and practices are recognized as the legitimate way in which local residents manage land relations. This concept incorporates several contemporary visions and expressions of land management and administration within the policy and strategy development processes such as: clarification and certification of property rights, natural resource management, dispute resolution, the participation of communities in land allocation, and partnerships between rural inhabitants and government institutions in decentralizing natural resource management.

In the context of rural Afghanistan, ‘local community’ may be defined as a grouping of households and individuals, living in a defined geographical area, which has a social structure for safeguarding collective interests including arable land, pasture, cultural sites, and water resources. The defined geographical area may be a village or zone (*manteqa*) depending on the type of land. In the context of community pasture and cultivable land that are located within

village boundaries, the term 'local community' means the inhabitants of a village. In regard to public pasture management, local community should mean the inhabitants of *manteqa*.

The above definition leaves out details such as size of territory, reference to clan or tribal system, reference to representation criteria in order to propose a single definition that would be applicable throughout the country in a way that promotes the strengthening of organic social representation structure and longstanding social consensus. The village social structure customarily manages land relations within the village's customarily defined territory and adjacent areas in the case of pastures.

The social fabric that holds *manteqa* together is neither tribal nor religious denomination and therefore empowerment of social groups would significantly contribute to the reconciliation process and better management of land resources. Moreover, it offers the opportunity to strengthen social representation infrastructures in which community members would have the power to tackle the problem of land grabbing and cross-provincial frictions over public pasture.

Fundamental principles of devolved power and decentralized decision making on land issues are at the heart of the local community based land management and administration system. This involves the formal recognition of local communities' shared responsibility in resource allocation and decision making, particularly in clarifying, certifying and recording property rights. For the proponents of the land management and administration reform, the conceptual basis for community based land management and administration is that the formal system is inadequate, overloaded, and ineffective.

The idea of community based land administration system thus goes beyond dispute resolution to create legitimate institutions that bring rural residents closer to legal processes. What distinguishes community based land administration from the formal land administration system is the potential for mutual accountability between the government and community, and the aptness of local space in correctly defining the types of diverse problems that present themselves for socio-legal solution.

2. Developing a Revised Legal Framework

Since the policy framework is in place, revamping the existing legal framework for land has become among the priorities of the Ministries of Agriculture, Justice and Urban Development. Before the government embarked on the process of formulating land policy, there had been a tendency to move forward towards drafting a new comprehensive land law without formulating a clear land policy. The question related to drafting land law prior to articulating the government's policy on crucial issues has been rendered moot after the Ministry of Agriculture in collaboration with MOUD and the Ministry of Justice adopted a comprehensive land policy. The crucial question now is how to put in place an appropriate land law in conformity with the supreme law of the land and the land policy.

The land policy implicitly provides guidance that the existing legal framework will form an essential backdrop against which the development of a new law has to emerge. This means the existing legal framework has to be consolidated, fine-tuned and developed in accordance with the land policy and the constitution.

2.1 Law Reform (drafting) Process

Within the framework of the policy guidance, the development of new land law should be based on informed analysis of the current reality of land occupation and use, traditional tenure and land management systems, and the social organizations of local communities. This principle

presupposes that the process for developing a new land legal framework will resist the temptation to either wholesale carry over the provisions of existing legal framework or to rely unduly on principles and provisions of foreign legal systems. What would be appropriate and practical in terms of legitimacy and implementation of the law is to build on the existing legal framework. This requires identifying antiquated provisions and principles, deficiencies and gaps in the law and revamping them as necessary.

Subsequent to identifying the problem areas and gaps in the existing legal framework, the first important task in the process of drafting land law would be to prepare a draft legislation that would serve as a starting point for consultations and debates among key stakeholders. Two models may be considered to prepare a draft land law. The first model to consider would be the conventional approach of commissioning one or more legal experts to develop a draft land law. While this approach may be superior in terms of speedy development of draft legislation, it would not be the best approach in terms of grounding the draft law on deeply entrenched norms, practices and belief systems.

The second model presupposes the formation of two distinct technical drafting committees with separate but complementary responsibilities. The task of the first technical group would be twofold: to provide insight on the gaps and deficiencies of the existing legal framework based on the real practices of land management, conveyance, cadastral services, and other related issues as well as to provide comments and suggestions on draft provisions as the drafting work proceeds along. The second technical group would be responsible to do the actual drafting work in close collaboration with the second technical group. While the diversity of the topics that need to be covered by a comprehensive land law might justify the commissioning of more than one person to handle the drafting work, depending on an expert's level of competency and familiarity with the issues, commissioning an individual expert may also be an option.

While the first technical group obviously should be composed of lawyers who have good knowledge of land law and experience in drafting, the second technical group should be composed of persons with real experience in the practice of land management and administration. This group may constitute representatives of relevant departments of the Ministry of Agriculture, the Cadastral Department (AGCHO), the Supreme Court and the Ministry of Justice. The main responsibility of this group would be to ensure that the drafters develop the law based on the norms, belief system, customary practices and needs of ordinary Afghans.

2.2 Structure of the Revised Land Law

Two questions are of utmost importance with respect to the structure of the revised land law: First, whether the country should have two independent legal frameworks to govern the rural and urban sides separately or whether a comprehensive land law to provide the general framework rules and principles for both rural and urban sides would be more appropriate. The second question is whether there are aspects of the rural and urban land issues such as formalization of informal settlement or pastures that merit distinct legislative treatment.

The first question appears more straightforward in the context of land issues in Afghanistan. There are many crucial issues such as grabbing, allocation, acquisition, proof of ownership, and classification of tenure that are cross-cutting to both the urban and rural land reality. Since the line ministries have adopted a comprehensive land policy, there is a case for Afghanistan to have an Organic law that sets out general principles covering all land. This Organic Law then would be followed by more detailed primary legislation on a range of topics. The primary advantage of drafting one Organic law is that it can have internal coherence, consistency and comprehensiveness. These other primary laws will distinguish between rural and urban topics but will all have to follow the Organic Law principles.

The government may find it appropriate to finally decide to have two independent laws for both the urban and the rural sides. If this happens, the draft Organic Law can always split up logically into more manageable packages after the drafting is completed in a comprehensive and coherent manner.

3. History of the Rural Land Legal Framework: An Overview

Prior to Zahir Shah, the state had very little control over land, although successive governments starting from the reign of Amir Abdulrahman Khan (1880-1901) increasingly made attempts to consolidate control over land. King Abdulrahman's initiative to consolidate state control was driven by his intent to enhance state revenue. In addition to introducing formal taxation on land, the King also nationalized Waqf land. Prior to the King's initiative, land tax was collected by local overlords in the areas of control.

The earliest formal land related law that this consultant was able to access is the Law of Land Survey and Statistics of 1965 proclaimed during the reign of Zahir Shah (1933-1973.)³ The stated purpose of this legislation was threefold: 1) generate accurate statistics related to land resources, 2) organize land registries, and 3) manage taxation for land. From the reading of the entire text and investigation about the way the King's government attempted to implement the law, the primary purpose of the proclamation appears to be the collection of revenue in the form of land taxation.

The drafters and/or the legislator at the time must have realized that the fledgling land management institutions that existed at the time were not adequate, especially to clarify ownership and other rights to land. This can be easily deduced from how the legislation provided for the recording of land quantity, document of property right, and tax document. The law instituted the "Ezharnama" which was basically a land declaration form sent to land owners requesting them to declare the quantity and size of land as well as ownership and tax documents. Those holding right over land were obliged to fill out the form and have their information attested by witnesses and submit their attested declaration to the Land Distribution Authority. In the event that any person becomes unwilling, without good cause, to fill out the "Ezharnama" form his/her neighbors were required to fill out the form. The law also provided that minors and those with mental incapacity should meet their obligation through their guardians. The "Ezharnama" was not used as a conclusive proof of ownership or title but as a *prima facie* proof of probable ownership. In the absence of inspection capability of the government, prescribing criminal punishment for providing false information or misrepresentation was thought to be a deterrent against fraud.

Although Zahir Shah's government made significant efforts to inventory rural land and to lay the institutional foundations for land surveys, more consequential legislative intervention took place during the period of President Daoud (1973 - 1978.) President Daoud heralded his government's land reform program by proclaiming the Land Reform Law of 1975. It seems that the underlying purposes of the Land Reform Law were the consolidation of state control over land resources, equitable redistribution of land and improving productivity of land resources.

The Land Reform Law of 1975 introduced the concept of surplus land. This concept was generally meant to limit the size of agricultural land that can be owned by any person. According to the Land Reform Law, ownership could be substantiated by producing valid formal deed. Ownership of surplus land by individuals was prohibited (article 2 LRL). However, the law allowed companies and agricultural societies engaged in agriculture to own surplus land on condition that

³ Older land related laws that the consultant was not able to access include Law for Appropriation of Property for Public Welfare in Afghanistan, proclaimed on 18 Aqrab 1314; Law for the Sale of Land under Dams and Rivers in Afghanistan, proclaimed on 22 Mizan 1318; Law of Preparation of Statistics and Regulation of Property and Rights of Sale in Excess Land in Afghanistan, proclaimed on 19 Qaus 1339.

they obtained approval of the Council and the surplus land was barren and developed by the legal person to arable land. Persons who inherited surplus land were also allowed to temporarily own the surplus land but were required to dispose of the land within one year time frame. If they fail to do so, the surplus land would be subject to expropriation.

Implementation of the law was envisioned to be gradual. The LRL provided that expropriation of surplus land would start in areas where large amount of surplus land existed. In terms of compensation, the law drew distinction between the nationalization of surplus land and expropriation of land within the allowed limit. While the owner of surplus land would be eligible for compensation only for the value of any development made on the land, the owner whose land was within the allowed limit but expropriated in the interest of the public would be granted another plot of land of equivalent quality and size.

As indicated earlier, at the heart of President Daoud's land reform was equitable (re)distribution of land. The Land Reform law of 1975 prescribed three requirements for eligibility of land allocation. A person must be an Afghan citizen, of majority age, and landless. The law further set forth a detailed list of those who would have priority in land distribution. These were: 1) farmers who worked on land marked for distribution, 2) landless nomads, 3) agricultural laborers and 4) fresh graduates of agriculture and livestock schools.

Also the law aimed at preventing absentee landlordism, fragmentation of land and undue conversion of land use. The land recipient household was required to assume ownership in four months time and use the land directly, that is, engage in agriculture or livestock activities using the land for the purpose it was allocated for. The law also prohibited sub-division of land by heirs of a deceased landowner. Nevertheless, given the relatively short life of President Daoud's government, the laws proclaimed during this period did not achieve the stated purposes.

From the onset, the government of President Daoud chose an approach to land administration that would require a high level government involvement. For the implementation of the Land Reform Law a Supreme Council composed of the prime minister (chair), vice prime ministers, the minister of justice, minister of finance, minister of planning and minister of agriculture. The Land Reform Law placed a heavy administrative responsibility on the Supreme Council and the Land Reform Administration. The Supreme Council was vested with the responsibility to: 1) design or approve procedures and policies for the implementation of the government's land reform program, 2) propose laws and rules and regulations pertaining to land reform to the Council of Ministers, 3) approve and determine the value of expropriated land and land marked for distribution, and 4) decide on financial and administrative issues.

Although the powers of the Supreme Council permeated the administration of the land reform, the day to day land administration responsibilities were vested in the Land Reform Administration. Among other things, the Land Reform Administration was responsible for land expropriation, land distribution, valuation of agricultural establishments and equipment and determination and clarification of surplus land. The law also provided the establishment of a Special High Court for Land Reform. The court was supposed to handle disputes arising in connection with the land reform.

At the centre of the socio-economic agenda of the group that overthrew President Daoud's government and formed what is now known as the 'communist' government was land reform. The Government of President Taraki proclaimed Decree No. 8 of the Supreme Revolutionary Council Regarding Land in November 1978. Article 1 of the Decree stated in general terms that the decree was issued for the purpose of implementing the high ideals of the "Saur Revolution" and for the achievement of the following objectives:

1. to eradicate feudal relations from the socio-economic system of the country;
2. to coordinate the cooperation between the proletariat and peasantry;
3. to strengthen and unify the people of Afghanistan to establish a society that is free from antagonistic classes and exploitation of individuals by others; and

4. to improve agricultural production in order to achieve food sufficiency and produce agro-industrial raw products for export.

In line with the above stated objectives, the decree provided that no household was allowed to own more than 30 *jiribs* of first grade land. Further, any first grade excess land, that is, land exceeding 30 *jiribs* was taken by the government as surplus land. Such land was confiscated without compensation. At the same time, the decree envisaged the redistribution of surplus⁴ and excess land to landless peasants, agricultural laborers and needy nomads. Besides excess and surplus land, the law provided that land donated to the state, land belonging to the royal family, and state owned land not apt for establishing state farms could be distributed for eligible persons. The law classified land into different categories and grades for distribution purposes.

In 1979 the "communist government" issued a law on land management. This law was essentially issued to govern management of land related documents and offices of land affairs. The law dealt with the specific conditions that allowed landowners to have their property recorded in the official book.

The last "communist government" of Dr Najibullah attempted reversing some of the most significant underlying principles embodied in the laws proclaimed by his predecessor "communist governments" to attune the land legal framework with the principles of Islam and the Afghan traditions. This was driven by the government's interest to make political compromises with the Mujahedeen and their supporters as it came to realize that land had all along been at the center of the conflict. To achieve this objective, in 1988 the government proclaimed the Law on Land Relations Management.

The Law on Land Relations Management raised the ceiling for land ownership to 100 *jiribs* of first grade land. In fact, the law provided exceptions to this general rule to allow the government to allow unlimited ownership, that is, in excess of the maximum limit. Examples of such exceptions were orchards, endowed lands, and lands owned by people who played active role in national peace process.

The legal development during the short-lived Mujahedeen government had only symbolic significance. Despite his limited physical control of the land, like all his predecessor governments, President Rabbani tried to legislatively modify the land relations regime that he found in place. He issued Decree Number 609. The decree was enacted to repeal the Law on Land Relations Management proclaimed in 1988 and to restore lands distributed after the Saur Revolution. The decree derecognized property deeds issued by the communist government. However, due to lack of security the decree was not practically effective.

Soon after the Taliban came to power, it issued Decree No 31 of 1999. The main policy thrust of the decree was to reinstate the practice of "Ezharnama" for the purposes of assessing tax on land ownership. But the main legislative contribution of the Taliban was the Land Management Law of 2000, which was a reformulation of the Law on Land Survey, Clarification and Registration issued by president Daoud's government. The Taliban also proclaimed Law on Pasture under Decree No. 795 of 2000, which is still unrepealed. Both laws will be discussed below.

⁴ Decree no. 8 defined surplus land as land held in excess of the area owned based on valid document.

4. Existing Legal Framework for Land

4.1 Overview of the Legislative Situation

The legal basis for rural land management and property rights in Afghanistan stems from the Constitution, the Land Management Law of 2000, the Civil Code, a series of presidential decrees, and principles of Islamic Law. The central purpose of the post-Taliban decrees appear to be protection of public/state land from land grabbers as well as restitution of land that was expropriated after the Saur revolution of 1978. The existing legal framework for land call for a serious review and reform on two main counts as astutely observed by the Draft Land policy:

The strict application of existing laws is limited both administratively and judicially. In many respects the situation of land management and use is characterized by informality. While many provisions embodied in existing laws are useful, many other provisions have not been sufficiently adjusted to address the post conflict reality; these provisions require reform. Existing land issues dictate a strong imperative to formulate new, relevant and workable legal paradigms. The legal drafting and enactment of any new or amended land laws should be guided by a cogent, clearly established policy.

Since 1965 successive governments have proclaimed a torrent of new land legislation in various forms aimed at promoting their economic and political agenda. In addition to the numerous laws, decrees, resolutions and orders issued at the national level, at the provincial levels, there have been resolutions and instructions that have been *de facto* carrying the weight of the law.

In practice, the haphazard law making process and the coexistence of layers of normative legal documents has led to confusion arising from a number of inconsistent, overlapping and sometimes contradictory or incomplete legal provisions in a number of areas. One of the main problems in this regard has been the fact that all land related laws issued in different forms and at different times are not yet consolidated or collected together with a thorough index and system of cross reference. The outcome of such an unconsolidated condition of the different pieces of legislative documents has been that it is difficult to know for sure which legal provision applies to a particular legal or factual issue. In addition, most notably, presidential decrees issued after the fall of the Taliban and the Land Management Law generally do not explicitly repeal and replace or amend prior inconsistent laws, regulations or traditional systems.

To address existing inconsistencies and gaps in coverage of probable legal and factual settings under the current reality, the local counterpart of this consultant has attempted to systemize currently effective normative legal documents.⁵ The compilation and systemization is aimed at identifying normative legal documents and legal provisions which are out of date, or which are inconsistent with subsequent or higher ranking normative legal documents, or which have been expressly or implicitly repealed by subsequent normative legal documents, and recommendations will be made for their repeal or amendment.

4.2 Sources and Hierarchy of Laws

Pursuant to the Constitution of Afghanistan, the sources of law are the constitution, state law, and Islamic law. However, in practice, consistent with the principles of Islamic jurisprudence, custom is applied both by the judiciary and the informal dispute resolution forums in resolving disputes. The government may proclaim laws that do not contradict with sharia. According to article 3, no law can be contrary to the beliefs and provisions of Islam.

⁵ Mr. Abdul Samad Kamawi building on prior efforts, notably on the work of Mr Rob Hager, prepared an updated index of land related laws. Please see annex 1.

The constitution is clear about hierarchy of laws. Pursuant to article 130 of the Constitution, while processing cases, courts shall apply the provisions of the Constitution and state laws. When there is no state law applicable to an issue in dispute, the courts are required to apply the principles of Islamic law based on the interpretation of the Hanafi school of thought. Nevertheless, in cases involving personal matters, when the parties to the dispute are followers of the Shia sect, the court shall resolve the issue in dispute in accordance with the principles and rules of the Shia school of thought. The Shia principles and rules are also applied by courts in all other cases that involve followers of the Shia sect when there are no constitutional and state law provisions applicable to the issues in dispute.

The Constitution embodies a few provisions that pertain to immovable property.⁶ Article 40 establishes the sanctity of private property and prohibits unlawful confiscation and expropriation.⁷ Article 41 of the Constitution prohibits foreign ownership of immovable property.⁸

4.3 Main Normative Legal Documents (legislation) Pertaining to Rural Land

As in many aspects of the legislative sphere in Afghanistan, there are layers of laws and customary and religious principles and practices concerning land. There is no basic or comprehensive land law in Afghanistan. Nevertheless, the Land Management Law remains the main legislation governing rural land. As indicated earlier, this legislation was proclaimed by the Taliban administration in 2000. With minor amendments, mainly on anachronistic matters, this law was almost wholesale carried over from the Land Management Law of 1974.

Another important piece of legislation is Decree Number 83 issued in 2003. The decree was issued with the stated objective of governing land relations in a uniform and integrated manner. Most importantly the decree attempted to establish clear rules on land rights and proof of ownership. Notwithstanding these stated objectives, the practices and tenure arrangements that the decree aimed to drastically change continue to persist. The persistence of the practices and traditional tenure arrangements is attributed primarily to enforcement constraints related to the broader governance and institutional issues and the ineptness of the decree when applied to the post-war reality. This decree is discussed later in this report in the context of classification of tenure and proof of ownership.

Other decrees issued by the current government include presidential decrees No 99 issued on June 23, 2002 and presidential decree No 104 issued on December 11, 2005. Both decrees will be discussed later in the context of land distribution.

Further, two important aspects of rural land, that is, rights to pasture and its management as well as expropriation are governed by two pieces of legislation proclaimed by the Taliban administration.

⁶ Articles 9, 14, 15, 38 and 40.

⁷ Article 40 of the constitution states that:

- Property is immune from invasion.
- No person shall be forbidden from acquiring and making use of property except within the limits of law.
- No person's property shall be confiscated except within the provisions of the law and the order of a competent court;
- Expropriation of personal property is permitted only for securing public interest, in return for prior and just compensation according to law;
- Inspection and disclosure of private property shall be carried out only in accordance with the provisions of the law.

⁸ According to article 41 foreign individuals do not have the right to own immovable property in Afghanistan. Lease of immovable property for the purpose of investment is permissible in accordance with the law. The sale of estates to diplomatic missions of foreign countries and international agencies, of which Afghanistan is a member, shall be permissible in accordance with the law.

Book three of the Civil Code of Afghanistan contains numerous articles that provide general principles and rules on both movable and immovable property. These provisions deal with rights of ownership, restrictions of ownership, joint ownership, termination of joint ownership through sub-division, allocation of benefits, conditions of possession, transfer of ownership, patrimony and distribution thereof, and inheritance. While the Civil Code was partly inspired by the French Civil Code, provisions dealing with patrimony and inheritance were based on Sharia rules and principles.

4.4 Land Management Law of 2000

The Land Management Law of 2000 is essentially a reformulation of the Law on Survey, Verification, and Registration of Land proclaimed during President Daoud's administration. The law on survey, later repealed by the Law of Land Relations Management (issued on February 3, 1988), was proclaimed with the main purpose of redressing the unfair land distribution made by the predecessor government of Zahir Shah. Although the law was already repealed by the Land Relations Law of 1988, the Land Management law of 2000 specifically mentions the Law on Survey, Verification and Registration of Land among those laws that it repealed.

The underlying purpose of the Land Management Law springs from the land distributional effect of the land reform processes that successive governments implemented from 1974 to 1988. In retrospect, all these reforms brought the potential conflict between economic efficiency and equity to the fore.

The Land Management Law, however, appears to have been premised on the interest of restoring historical justice rather than arguably efficiency and for sure equity. The Land Management Law provides for the restitution of land expropriated or confiscated after 1978 to former owners. While the factors that caused first the Taliban Administration and then the current government to adopt restitution policy and law are not difficult to understand, the question remains whether this policy was able to achieve socio-political equilibrium in the society. Put differently, was restitution of all land to former owners, regardless of size and current reality, a good public policy in terms of achieving equitable distribution of land in rural Afghanistan? The answer to this question depends on the nature of land ownership distribution that prevailed prior to the Saur revolution. This report does not attempt to answer this question as reversing the restitution policy does not appear to be an option that the current government entertains. Nevertheless, it is still important to examine the current land distribution law and practice from the standpoint of efficiency as well as equity.

5. Land Administration

The term "land administration" is a term that is often used in different senses. In the oft-quoted "Land Administration Guidelines" prepared by the United Nations Economic Commission for Europe in 1996, the term "is used to refer to the processes of recording and disseminating information about the ownership, value and use of land and its associated resources." The guidelines further elaborates that "such processes include the determination (sometimes known as the "adjudication") of rights and other attributes of the land, the survey and description of these, their detailed documentation and the provision of relevant information in support of land markets."

Although "land management" is sometimes used interchangeably with "land administration" in the land discourse in Afghanistan, land management is used in this report to refer to the system by which the use and development of land resources are planned. Sound land management and

administration system would aim at promoting social, economic and environmental benefits in a sustainable manner.

According to the law and practice in the country, various government agencies play the role of land administrator at different levels. However, inefficiency and lack of coordination between the different agencies have been the defining features of the system. The main functions and responsibilities involved in the rural land administration of Afghanistan include distribution of land, issuance of formal property deed, clarification of rights over land, acquisition (expropriation) of land, surveying, recording of maps of land plots, and determining land grades and property tax.

The law entrusts the Amlak General Directorate at the Ministry of Agriculture with the overall management of state owned land and administration of all rural land affairs. Among the technical and administrative responsibilities that the *Amlak* General Directorate has is its mandate for the administration and supervision of the land verification process. The *Amlak* chairs and monitors the activities of the Verification Committee composed of the representatives from the Supreme Court, ministries of Finance, Water and Energy, Agriculture, and AGCHO. Pursuant to article 16 of the Land Management Law, the following are the Committee's main responsibilities and powers:

1. Verify landholding areas; distribution of certificate and land to the eligible person.
2. Determine boundaries, category and water rights.
3. Classify private, State, pasture, endowed and virgin land.
4. Refer verification documents to the competent court for the preparation of formal deed, and also refer disputes to the competent court in accordance with the provisions of the law.
5. Restore land [illegitimately] distributed after 7 *Saur* to the rightful owner or his legal heirs or representative.

Pursuant to article 20 of the Land Management Law, the Land Clarification Panel that operates in the capital is supported by provincial land clarification committee. This committee is chaired by the provincial governor and has as its members the head of the department of agriculture, director of provincial finances, head of water department, head of cadastral department, chief of security department and head of Amlak.

Conducting surveying and determining boundaries and rights to land are other aspects of land administration governed by the Land Management Law. The cadastral Department is responsible for conducting surveys and determining boundaries and rights attached to lands. According to the Land Management Law and the law on cadastral survey, the cadastral department is obliged to submit the results of its survey and determinations on boundaries and property rights to Amlak.

The judiciary is vested with the responsibility to issue formal deeds to immovable property owners and function as custodian of legal ownership documents.

However, the level of coordination between the land administrative bodies leaves a lot to be desired. They operate in an environment where there is no structured coordination mechanism. There is confusion about the roles of the Amlak and the Cadastral Department resulting in overlapping functions. The level of information or data sharing between the cadastral department and Amlak is not always as envisaged by the Cadastral Law of 1988. The collaboration between Amlak and the judiciary does not work as envisaged by the Land Management Law. Especially, in regard to referral of clarified property documents to the court for issuance of formal (sharia) deed the practice discloses a legal limbo. Amlak does not refer clarified documents to the courts because the courts are reluctant to prepare sharia deed based on Amlak's submissions.

The judicial system has been further contributing its share to the existing confusion and inefficiency of the land administration system. Many disputes arise in connection to unlawfully

and illegitimately produced property documents by the court system. The existing property recording system in the courts, which is riddled with corruption and fraudulent documents, in part stems from the lack of structured and effective coordination between the different land administrative bodies.

In addition to the problems mentioned above, the destruction of property documentation during the war, the lack of security and the ineffectiveness of government power in many areas also contributes to the ineffectiveness of the land administrative bodies.

To remedy the ineffectiveness of the land administrative bodies in a cost effective way and to ensure social acceptance of determinations of property rights, land allocations, public records of immovable property and other land related decisions an active involvement of communities is imperative. This overarching principle is increasingly gaining currency both among the public and relevant government officials. This assertion can be easily supported by quoting the following from the draft land policy document:

- It is national policy that the administration and management of land be conducted through a consolidated, cohesive, transparent and representative land administration body which possesses the necessary technical and administrative support, both at the national and local level. An institutional framework will be created with the objective to streamline certification and registration operations and provide appropriate access to the public. The institutional framework should include a body entrusted with the authority to determine land allocation in coordination with local communities.
- It is national policy that all land administration functions be gradually consolidated in a single government body to ensure efficiency, avoid duplication and better utilize available technical knowledge and professional skills.
- It is a national policy to gradually and as practical establish within the new land administration body a consolidated, simplified and localized system of land registry that is transparent and accessible to provide less costly, efficient transfers of property, updated changes in ownership, provide greater accountability to landowners and focus the function of the court on the resolution of land-related disputes.

5.1 Recommendations

- The development of a modified land law should approach the operation of the land administrative bodies flexibly to allow a more formalized and effective community participation in areas such as adjudication and recording of property rights. The Land Management Law and other decrees issued by the current government appear to have underestimated the resource requirements of pervasive government role in land administration. This fact has resulted in a great deal of legal uncertainty that is perpetuating informal and extra-legal ways in which people satisfy their land needs. At the same time, the current legal framework for land disregards the usefulness of local resources and institutions in administering natural resources such as pasture and forest. The ADB technical assistance project for capacity building for land policy and administrative reform has piloted the effectiveness of community participation in clarifying, certifying and archiving property rights including for pastures at the village level. Responding to pilot experiences that have emerged from the ADB and other projects will be essential in revising the existing legal framework for rural land administration.
- One of the underlying objectives of the draft land policy is to establish an efficient land administration system. Streamlining and gradually consolidating the functions of the various land administrative bodies will be essential to achieve an efficient land administration system. There is therefore the need for the legal framework to clearly define the powers and responsibilities of the different agencies and the areas of their collaboration in a structured fashion. Such provisions in the revised legal framework for land should aim at harmonizing

the functions and operations of the various land administrative bodies and avoiding overlap in responsibilities to facilitate the gradual formation of a unified land administrative body.

- Consider to make the preparation, archiving and retrieval of formal deeds an administrative function within Amlak for rights over rural land. Limiting the role of the courts to providing judicial oversight/review will have several benefits such as ensuring an essential checking mechanism within the land administration system, improve efficiency and minimize costs and delay. Considering the deeply entrenched traditional public trust in sharia (title) deeds issued by the court, it is suggested that the government can assign administrative judges to work in Amlak to finally authenticate and hand the documents to property owners.

6. Classification of Rural Land Tenure

Land tenure classification in Afghan law and practice is somewhat hazy. The lack of clarity stems from the coexistence of inconsistent layers of laws and sources of laws relevant to the subject. The status of the relevant provisions in these laws is not very clear. Three different pieces of legislation are relevant to land tenure classification in Afghanistan: the Civil Code, the Land Management Law of 2000 and Presidential decree No 83, which was issued after the collapse of the Taliban.

According to the Civil Code, land is classified into public and private. According to article 481 of the Civil Code, properties owned by individuals shall be considered as privately owned property, and properties, which are not owned by individuals and are allotted for public utility purposes, shall be considered as public property. The Civil Code further describes public property as follows: 1) movable and immovable property of the state, 2) movable and immovable property of [public] juridical persons⁹, 3) movable and immovable property allotted for public interest, and 4) Movable and immovable properties which have been recognized as public property based on the provisions of the law¹⁰. In addition to the above, cultivable land which is not owned by any person is deemed to be public property. The law prohibits accessing such land without the permission of the government (article 1991, Civil Code). The Civil Code, however, provides that a person who occupies and develops barren land, *zameen-e-bayer*, with the permission of the government shall own the land (article 1992 Civil Code.) Any property shall cease to be public property upon the expiry of its designation for public use. The expiry of such designation is determined either by law or when the purpose for staying under public ownership ceases to exist (article 483 Civil Code).

The Land Management Law categorizes land tenure as state and private. All land considered public land, including those that have not been recorded in the relevant books of the state, are state-owned. According to the Land Management Law, state-owned land includes plots of orchard, irrigated and rain-fed lands, hills, marshy lands, forests, pastures, reed-beds, and other lands which have been registered in the principal book of state lands; land deemed state land, but which are not registered in the principal book of state land; and land in which individual ownership has not been proven legally during verification process.

Although the Land Management Law states that all public land is state-owned land, article 84(1) provides: "pastures are public property, an individual or the State may not own pasturelands,

⁹ Paragraph 2 considers the movable and immovable property of juridical persons as state owned property, however, according to Civil Code the juridical persons can be divided into public juridical person and private juridical person (article 338 of Civil Code). The property of private juridical person can not be the property of public; therefore, this article needs to be modified.

¹⁰ The Law on Land Management of Islamic Emirate of Afghanistan contradicts with the Civil Code because according to article 2 paragraph 8 part 3, public owned lands are deemed state owned land; this article provides: The lands which are considered public owned land, but have not been registered in principle book of Emirate land. Therefore, under Civil Code, public owned lands are not considered as state owned land, however, under this law public owned lands are considered to be state owned lands

unless otherwise stipulated by sharia." Sub-article 2 of article 84 elaborates further by stating that pastures shall be kept unoccupied for the purpose of public needs of the villagers (for cattle grazing, graveyard, threshing ground, etc.)

The Civil Code defines private property in a simple manner. Pursuant to article 481 of the Civil Code, immovable property that is owned by individuals is deemed to be private property. The Civil Code does not explicitly consider immovable property owned by groups of individuals or body corporate as private property. This, however, should be interpreted in the light of Islamic law, which allows the ownership of private property both individually and collectively.

The most recent relevant law, Presidential Decree No- 83 (dated 18/8/1382 or 09/11/2003), adds more confusion to how land tenure is classified in Afghanistan. In simple terms, the decree provides that all land not privately owned belongs to the state. The decree defines privately owned land as property to which ownership can only be proven by a valid legal or *Sharia* based document. This law obviously fails to consider the variety of informal but legitimate property rights that exist in the country.

By virtue of Decree No. 83, the state has attempted to consolidate its control over land and bring more land to the state-ownership fold. Introducing a new statute of limitation is one way that the current government, through Decree 83, has employed to enhance its grip over land. The decree provides that all individual claims to land which has been held by the state for a period exceeding 37 years shall be barred and the state shall be considered the owner of the property (article 2). Further, the decree provides that all land in which the ownership of individuals is not established legally shall be considered the property of the state (article 3). The decree also includes other specific instances in which state restores its ownership of land¹¹.

6.1 Ownership of Mowat (virgin and barren land)

There are both apparent and real contradictions among the different land classifications in the different laws cited above. The LML mixes up the classification of land along tenure and land use lines, which have misled numerous writers to suggest that mowat and waqf actually are independent types of tenure in Afghanistan. One way of acquiring land ownership under Sharia is through reclamation of barren land (mowat). No land can be reclaimed as mowat if it has an owner or is located in the city or is pasture or used to collect wood.

Reclamation of mowat land as a means of acquiring ownership is specifically set forth in the Hadiths, wherein it is stated that "whoever reclaims *mowat* should be the owner." This has been

¹¹ Article 4

1. The lands and land plots allotted by municipalities and other relevant bodies to persons, but on which houses have not been constructed within the legally specified time without legal excuses, such lands and land plots shall be taken back from persons and shall be deemed state lands.
2. Where the allotted lands or land plots outlined under paragraph (1) of the present article have been granted in lieu of the expropriated landed properties shall be an exception to the rule laid down by the present article.

Article 5

1. Individual claims in respect of such properties as might have been expropriated by the former governments in accordance with the expropriation law, and expropriation documents existing in respect thereof shall not be valid.
2. Landed properties expropriated by the former governments and over which public utility projects such as (roads, buildings and other establishments have been constructed and in respect of which the state does not have expropriation documents shall be deemed state properties, the issue shall not be investigated notwithstanding the fact that the contending party be in possession of legal documents in respect thereof.
3. Properties which have been expropriated by previous governments and the documents indicating the allotment of substitution in lieu thereof are lost, but witnesses to the allotment of substitution did exist shall be deemed as state lands regardless of the fact whether or not the state has brought them under possession.

Article 6

Meadows which neither the state nor the individual can own unless otherwise utilized by the state for public welfare.

interpreted differently by different schools of thought. Literalists interpret this to mean that acquisition of ownership does not require the person who reclaims *mowat* to secure permission from the Head of State.¹² The Hanafi School of thought however makes it a condition that the person who reclaims *mowat* secures permission from the head of State prior to claiming possession.

In accordance with the Hanafi School of thought, the Civil Code of Afghanistan treats *mowat* as state property and therefore requires government permission before claiming possession and ownership. (see articles 1991-2). Similarly, the Land Management Law provides that reclamation of virgin and arid land requires the permission of the head of State (article 87). The Land Management Law defines *mowat* as land that has never been cultivated. Save for private, state, pasture and endowed lands, all other deserts, mountains, hills, rivers, arid and rocky lands and jungles are deemed to be *mowat*.

When the state/public ownership dichotomy is seen in the light of Sharia, any distinction between the two loses significant meaning in terms of using property for public interest. According to Sharia, the government may hold both movable and immovable property (*bait-ul-mal*) such as buildings, land, furniture, funds etc. However, such property is not owned by the state but held in trust and used for the benefit of the public. In this regard, the second caliph of Islam, Majesty Omer said: "My position in regard to public purse of Moslems is like the position of an administrator in regard to the property of an orphan". In the case of public property, the right of the state is akin to those of a trustee, allowing the land use pattern to continue by those who hold traditional right. It should be borne in mind that various factors can come into play to change the land use patterns of a given area. Further there are areas of land that may be usable for multiple purposes.

6.2 Community Ownership

The notion of community ownership has been a subject of controversy in land discourse in Afghanistan. The law is not clear on this issue. Most of the public officials consulted for this paper hold a strong view that there is no such thing as community ownership. Mostly they entertain this issue in the context of pasture and invoke the state law as well as the sharia to conclude that such property belongs neither to the state nor to any private person or group of private persons.

6.3 Land Ownership by Government Departments

Article 83 further complicates the question of land tenure classification. Article 9 of Decree No 83 appears to confirm the assertions that have been made by government ministries that land that they control or manage belongs to them. Article 9(1) states that "properties belonging to state departments such as agricultural lands, apartments and so on shall be leased or rented through tenders and bidding in accordance with rules and regulations." This seems to implicitly recognize the ownership rights of government agencies over lands that they have been controlling or managing to promote their functions. The assertion that state departments are the owners of property they should manage as trustees or on behalf of the state has given rise to an awkward legal situation especially in the context of an ongoing program for privatizing state owned enterprises.

There have been ongoing efforts through the assistance of USAID for privatizing land owned by state owned enterprises. Liquidation has been the determined fate for most of these enterprises that still show considerable areas of land as almost their sole asset. This should have been a very

¹² Wahab-ul-Zahali, *Fiq-ul-Islamia Wa Adaltaho*, 2097- 2098.

serious issue that requires commensurate debate before any move to sell off these lands are concluded. Given the chaotic property rights situation in the country, prior to resolving this question one way or the other, establishing a system for property rights clarification and certification would be imperative. Further, a thorough study on land use pattern and the needs and rights of adjacent communities should also be figured out in a consultative process that involves communities and relevant government officials.

Drawing lessons from the experiences of USAID on the handling of lands owned by state owned enterprises, the law should be clarified and revamped.

6.4 Recommendations on Classification of Land Ownership

- The law should be modified to clarify classification of ownership in clear terms. It would be in line with the reality and the general guidance provided by the land policy if ownership of immovable property would be classified into state, public, private and community ownership. Further, the law should clearly define the role of the state and responsible government agencies in relation to managing state and public owned land.
- The law should clearly provide whether government departments can own land in their own names. If the option for allowing government departments to own land is preferred then the law should clearly prescribe under what conditions government departments can own land and the terms of ownership, especially the procedures for alienation of land so "owned".

7. Proof of Land Ownership

7.1 Private Ownership

Since the promulgation of the first law on land administration in the country, there has always been disparity between the law and the practice in regard to how ownership of land is acquired and legally proven. The most recent relevant law, that is, decree No 83 establishes as its basic principle that private ownership of land can only be proven through a formal ownership document. Article 7 of the decree prescribes the following strict rules for establishing ownership:

(1) Private lands are those in respect of which individual ownership has been proved legally and in accordance with the *Shari'a*.

(2) Private ownership shall be proved through valid legal and *Shari'a* documents with the proviso that no invalidating document exists in respect thereof.

This law supersedes all previous laws relevant to establishing ownership of property rights including through customary documents. Although it is not rational to presume that all customary deeds are legitimate, providing that all ownership of private property can only be established by producing legal deed disregards the reality of existing property rights regime of property ownership.¹³ Prescribing the establishment of ownership right only through valid legal deeds is not a reasonable legal requirement considering the mass destruction of property records and the variety of legitimate informal property rights that exist in the country.

¹³ Gebremedhin, Yohannes, (2005), Legal issues in Afghanistan Pertaining to Land Titling and Registration, (USAID/LTERA), Kabul, 14.

7.2 State Ownership

The prescription made by Decree No. 83 on proof of private ownership is further complicated by another provision of the same decree that states that lands in respect of which private ownership cannot be proven through legal deed shall be regarded as state-owned land. The law categorizes property ownership into two watertight compartments. As said earlier, such treatment of the property ownership regime disregards traditionally claimed immovable property as well as ownership claims substantiated by customary deeds.

Pursuant to Decree No. 83, there are several means by which the state can establish ownership of rural land. First, lands that have been recorded as state lands in government documents and recording books are considered as state lands.¹⁴ Second, an immovable property possessed by the state for more than 37 years is deemed as state property. Any claim by any person with respect to such property shall be barred by period of limitation.¹⁵ Third, underground water canal (*kariz*), whether damaged or otherwise, streams and lands irrigated thereby, and other lands in respect of which individual ownership could not be legally proved shall be regarded as state-owned lands.¹⁶

7.3 Recommendations

- The law to be effective should take into account the existing property rights regime, which does not always make it easy to categorize ownership typologies in black and white terms. There are gray areas that give rise for legitimate claims. In disputes involving private individuals, courts normally consider Amlak registration, tax records, customary deeds, and local knowledge as basis for proving land rights. This practice should be formalized through a modified land law for the country. The chaotic property rights regime in the country call for establishing a realistic and effective way of re-identifying legitimate and valid right to land. This would be in accordance with the guidance provided by the land policy. The policy states that:
 - It is a national policy that land ownership may be documented through a process of property clarification and certification process conducted at the community level.
 - It is a national policy that recognition be given to customary documentation and legitimate traditional property rights affirmed by local knowledge, in accordance with a law to be issued to govern the regularization of property rights.
- To implement the policy guidance on proof of ownership, the legal framework should consider incorporating provisions that provide for the establishment of property clarification and certification board composed of community members at a village level, representatives of Amlak, the Cadastral Department and the relevant district administrations. The provisions should define the manner of formation of such bodies and their powers and responsibilities. The responsibilities of the proposed property clarification and certification boards may include determination on the legitimacy and validity of customary deeds as well as claims made without producing any formal or customary document. The law should also provide an opportunity for judicial review in the event that any interested party is dissatisfied with the determinations of the board.

¹⁴ Article 1 of Land Management Law of 2000.

¹⁵ Article 2 of the Land Management Law of 2000.

¹⁶ Article 3 of the Land Management Law of 2000.

8. Land Distribution

Land distribution remains one of the most crucial land related problems in Afghanistan. It raises questions at different levels. First, there are legal issues that stem mainly from the gap between the law on books and the practice. Governance and equity issues also arise in connection with land distribution. The quasi-official and unofficial land distribution practices that have become the dominant way of getting access to land place the poor in a position of disadvantage.

The uncoordinated practice of land allocation appears to disregard the connection between allocation of land and the conditions necessary for achieving the purpose for which the land was allocated. Put differently, the system clearly lacks in appropriate land use planning based on fundamental principles of poverty reduction and human and social developments. For example, there are many instances of allocating land for resettlement or development of residential houses in areas where access to water and employment opportunities are clearly inadequate for residential developments.

The formal system features two forms of land distribution. The two forms of land distribution at status quo are leasehold issued by the government and direct transfer of ownership right made to individuals under exceptional circumstances. What constitutes 'exceptional circumstance' is not governed or defined by any law.

On the legislative books, the Land Management Law, Presidential Decree No. 99 of 4/2/1381, and Decree No. 83, 18/8/1382 are the main laws that govern the allocation of land in rural areas. The Land Management Law allows the distribution of: 1) lands donated to the state provided that they are not endowed for a specific purpose, 2) agricultural areas owned by the state, and 3) *mowat* lands recently developed for cultivation. (Art 43(1) & (2)). The Land Management Law also incorporates inadequate provisions to govern leasing of state land.

Theoretically, the main institutional players for land allocation are the Ministry of Agriculture and the President's office. According to the normal practice, an application for land distribution is submitted to the Ministry of Agriculture. The application has to include the description of the land that is being applied for and a proposal on how the land will be used. If the Minister approves the application, he refers it to Amlak to check that the land applied for is not a pasture, forest, owned by private persons and there is no dispute on the land. Subsequently, the application is evaluated by the land distribution panel, composed of the members of the land verification committee.

However, as will be discussed below there are many instances where other ministries and agencies are involved in directly allocating and administering the distribution of land. There have been instances where the Ministry of Repatriation in consultation with provincial governors allocated lands for resettlement of returnees without consulting the Land Administration Department of the Ministry of Agriculture. The main problem of such a practice has been that the land use patterns of the land marked for distributed for such purpose are not often taken into account.

8.1 Distribution to Landless Farmers

The practice of land distribution at the moment comes short on questions of equity, transparency and efficiency. There is no predictable and fair system of land distribution at present. The glaring negative outcomes of the non-existence of land distribution scheme to the landless have been increased landlessness, increased rural-urban migration and expansion of informal occupation of public land. If left unaddressed for much longer time, it would not be

difficult to imagine that the existing unfairness of land distribution would have far reaching adverse consequences with direct bearing on peace and stability. Recognizing the deficiencies of the existing land allocation system, the National Land Policy document states:

“It is national policy that the government implements an equitable, transparent and clearly defined set of procedures for the allocation of land. Those procedures must ensure transparency and accountability by the allocating authorities and must clearly define the authorities and responsibilities of the allocating authorities and the rights of land applicants. Land allocations must be based upon need and the rural and urban landless will have priority.”

There is no mechanism to distribute land to the landless farmer. If and when the land policy is approved by the full cabinet, the law needs to be revamped in accordance with the policy guidance. The government should not adopt an either-or approach between the competing interests of equity and economic efficiency as if they are always mutually exclusive goals. In fact, in the context of Afghanistan, equity and economic growth can be made to be complementary to each other in terms of having direct link to peace and stability, which is much desired goal in the country. Peace and stability are sine qua non to economic growth and investment. It is difficult to achieve peace and stability if significant number of the rural population is dispossessed of land, which is the natural heritage of the entire population.

As mentioned earlier the basic law on land distribution remains the Land Management Law of 2000. While this law sanctions the distribution of land to landless farmers and nomads as a matter of priority, Decree No. 99 issued by the current President “strictly” prohibits the distribution of virgin and barren land by government ministries and agencies. It is not clear though if the decree also intended to freeze the distribution of all types of state owned land to the landless. Although the practice suggests that there is a strict ban on distribution of rural land to landless farmers, there is nothing in the construction of the decree that explicitly or implicitly suggests that the intention was to freeze the distribution of all types of state owned land to the landless.

McAuslan notes that the decree was meant “to counter what was perceived as widespread distribution of public lands to undeserving beneficiaries at the local, provincial and national levels ...”¹⁷ This assertion is echoed by almost all relevant government officials that this consultant interviewed. However, the practice suggests that the deserving landless farmers are also affected by this decree as distribution of land to landless farmers is frozen at the moment. The status of the provisions of the Land Management Law on distribution becomes further confusing when the assertion noted by McAuslan is examined against the backdrop of the wording of the decree that mentions only virgin and barren land (mowat) without mentioning state owned arable land.

According to article 44 of the Land Management Law of 2000, distribution of land to an eligible person takes place at the request of the Ministry of Agriculture and approval of the Head of State. To be deemed eligible for land distribution, a person must:

1. Be a citizen of Afghanistan.
2. Have attained the age of 18 years.
3. Be a farmer without land or a farmer with insufficient land or agricultural laborer, or retired employee or hapless nomad.
4. Be a person who himself or other male members of his family undertake to cultivate, improve and safeguard the allotted land.

When there is no sufficient land to distribute for all eligible applicants, land distribution would take place according to prioritization categories set by the LML. A landless farmer with dependent family or a landless farmer whose land is possessed by the State for a public interest

¹⁷ Patrick McAuslan, (2007), Land Acquisition in Afghanistan: A Report, (World Bank), Kabul, 14.

purpose shall have the first priority. The second priority category is landless farmers and agricultural laborers who live in a village where there is land for distribution. Farmers with insufficient land and retired government employees who own no land at all or only insufficient land and had served for not less than 25 years are lined in the third priority category for land distribution. The LML provides that the services rendered by government employees under the communist regime are not taken into account. The fourth category consists of needy nomads.

The fulfillment of the above requirements are verified by a verification committee composed of three influential village leaders, village headman and mullah imam. The verification of the committee then would be endorsed by a provincial commission.

The LML also provides for the procedures of distribution including pricing, measurement and payment attached to distribution.

Recommendations

- The law should strike a delicate balance between efficiency and productivity on the one hand and equity and social justice on the other. This should be done with the objective of preventing the marginalization of the majority of the rural population, which would have the potential for giving rise to social instability. The promotion of economic growth and inclusive poverty reduction efforts should not be regarded as mutually exclusive objectives.

Therefore, the revised law should establish priorities among potential land allottees. In line with past practice and legal culture in the country, there is a need for establishing criteria for prioritized land distribution for potential beneficiaries. These criteria should include factors such as need, family responsibility, and primary occupation so that the law prevents the marginalization of the majority of the rural productive force.

8.2 Distribution of Arid and Virgin Land

According to article 88 of the LML, the government may distribute state-owned land, virgin or barren land that are not needed for government development projects or are not included in a master plan of a city. However, the government may not distribute pasture and privately owned land. In conformity with this provision, the law on pasture provides that specific pasture shall not be sold or leased for expansion of agricultural activities or for other purposes. At the same time, however, the same law states that public utility development projects are exception to this rule.

Distribution of virgin and arid lands to individuals, agriculture & livestock institutions, private and joint domestic companies by the general land management department of the ministry of agriculture & livestock, shall take place on the basis of auction after being approved by the Head of State.

Nevertheless, distribution of state owned virgin and barren lands is banned, pursuant to Decree No. 99 issued on 23 June 2002 (2/4/1381.) The decree strictly instructs ministries, government administrations and other agencies to refrain from distributing state owned virgin and barren lands for residential or other purposes. Nevertheless, Decree No 104 provides an exception to this general rule. This is discussed below in section 1.2.3.

Recommendation

- The existing law and practice have been inadequate in terms of setting rules and principles for identifying and demarcating state-owned lands as opposed to private lands and public lands traditionally used by adjacent villages and pastoralists. To remedy the problems in the existing practice, there is a need for the future law to incorporate requirements and guidelines for consulting with adjacent villages and pastoralists who have traditional use rights when identifying virgin and barren land for distribution.

8.3 Other Land Allocation Schemes

As stated above, the Land Management Law deals primarily with the allocation of rural land for agriculture. There have been other uncoordinated land allocation programs such as the allocation of land to returnees and the issuance of land for special housing and development projects. In all these cases, the criteria, forms, procedures and methods of allocation used and recording of rights are not clear.

8.3.1 Land distribution to returnees

A huge number of Afghans fled their home during the war. Some crossed the border in pursuit of safe haven in other countries and others looked for a relative security in a different location within the country. Most refugees and internally displaced persons alike had been away for decades, leading to complex land claims upon their return. Many discovered that family members and sometimes neighbors who occupied their houses and lands were unwilling to hand over control of their properties. The official government involvement in systematically redistributing properties that belonged to refugees to their supporters further complicates the legal landscape.

Land related problems arise as crucial impediments to voluntary repatriation for Afghan refugees. The prospect for outright landlessness, the insufficiency of land in the refugees villages or towns of origin, the current occupation of their land and property by powerful people, and their need for more land than they can access legally are the obstacles identified in relation to repatriation of refugees. Recognizing the plight of returnees and internally displaced persons, the government issued Decree No. 104 on Land Distribution for Housing to Eligible Returnees and IDPs on 16/08/1384. According to article 1 of the decree was for the purpose of distributing intact and uncultivated government land to address the housing needs of eligible returnee and IDP compatriots.

The basic tenets of the decree can be summarized as follows:

- Beneficiaries must be either returnees or IDPs,
- The Land Allocation Commission is responsible for selection of beneficiaries for land allocation. To be eligible, inter alia, returnees or IDPs must not have land or house either in their own name or the name of their spouse or a minor child,
- The Ministry of Agriculture is responsible for identifying land for returnees,
- The Ministry of Refugees and Repatriation is responsible for the overall implementation of the decree, and
- The Ministry of Urban Development is responsible for designing township plans.

From some of the sites that this consultant was able to look into in several provinces, the selection of sites does not seem to be preceded by feasibility or viability study. Settlement sites have been selected and allocated in areas where water and access to employment opportunities are the most notable limiting factors in terms of livelihood sustainability and social connectivity.

Recommendations

- Land allocation for resettlement purposes should be conducted in a systematic and coordinated manner by the government. It is imperative that the law should aim at minimizing opportunities or need for unlawful occupation by returnees, or unlawful sale of government or private property to returnees.
- Allocation for resettlement purposes must fit within a larger framework of urban and rural planning and land use. To ensure that appropriate sites for resettlement are selected, the law should require Amlak to select sites in consultation with the Ministry of Urban Development. The revised law should require that the selection of sites be preceded by viability study. Other ways of land allocation should be strictly prohibited by law.
- Land allocation schemes being implemented as stabilizing measures should be brought under the umbrella of a section on land distribution to be incorporated in a future comprehensive legal framework for land so that all procedures are coordinated and landlessness is tackled in a comprehensive and balanced manner.

8.3.2 Commercial Agricultural Lease

The Land Management Law embodies provisions that are meant to govern commercial agricultural lease. It deals with two types of commercial leasehold: 1) commercial farms, and 2) commercial warehouses and shops. The basic rules governing both commercial farms and warehouses and shops under the Land Management Law are that they:

- Can be issued by the Ministry of Agriculture as well as by other government departments that “own” land,
- State lands are leased through bidding that would be preceded by public notice,
- Commercial lease and warehouse lease may not be granted for a period exceeding three years and one year respectively.

There are good indications that much of the state-owned irrigated and rain fed land is not producing revenues for the state through active and well managed leases, concession agreements, and also through direct operation of agricultural enterprises. While there are several complicated reasons contributing for these lost revenues and inefficient use of resources, the restrictive nature of the law also makes it unattractive for the private sector to pursue this avenue.

Realizing the problem, the Ministry of Agriculture has drafted an amendment of article 69 of the Land Management Law that prescribes maximum lease period. The amendment of article 69 also includes an annexure dealing with the management of lease of arable lands to private investors. The draft amendment purports to establish working rules regarding the maximum periods for which land can be held for different kinds of agricultural activities. The draft amendment law states that the Ministry can lease arable lands for up to 50 years; virgin and barren (*mowat*) land for up to 90 years. Further the draft amendment law aims to authorize other ministries and state administrations to lease land, commercial warehouse, flat, shops etc... for up to three years.

The draft law provides that *mowat* lands may be leased to individuals up to 50 hectares and companies may lease up to 1000 hectares depending on the quality of the land, nature of the project, use of agricultural equipment and amount of investment. The Minister of Agriculture is proposed to have the authority to independently conclude lease agreements in instances where the land does not exceed 300 hectares. When the size of the land to be leased ranges between 300 and 1000 hectares and more than 1000 hectares, the law proposes to authorize the Economic Committee of the cabinet and the full cabinet respectively. However, in all cases, the land management department (Amlak) will process land leases to private investors.

At the moment the draft amendment for the commercial leasing program is being considered by the upper house of the parliament. In tandem with putting in place an appropriate legal framework for commercial leasing, there is a need for the Ministry of Agriculture to address the lack of institutional capacity to efficiently and effectively administer a lease management system.

State issued leaseholds have not been usual occurrences in Afghanistan. However, in many other countries concessions or leaseholds have been the subject of great controversy. There have been valid criticisms that state issued leaseholds or concessions have been misused to the detriment of local villagers and pastoralists resulting in environmental damage and displacement of people.

The draft amendment for commercial leasing is a step forward in the right direction. However, the legal framework for commercial leasing program should be developed in a way that leaseholds are issued in ways that transparency is ensured and the displacement of poor farmers and encroachment of their traditional farming and grazing land are prevented. To address such concerns and prevent abuses, it is suggested that the following recommendations (rules and principles) be entrenched in the law.

Recommendations

- State issued leaseholds should be granted only on state owned land. There is a need to clarify the types of land to which the draft amendment or any future law on commercial leasing will be applied. In conformity with the existing pasture law and land policy, the inclusion of provisions about the continued recognition of existing tenure systems including traditional use rights in lands identified for leasing need to be clarified, lest the new commercial leasing program perpetuate existing legal uncertainties and frictions over land resources. The law should also set forth clear criteria for protection and preservation of reserves, forest, environmentally sensitive areas and other areas that may not be leased. Such provisions should be drafted in conformity with laws on pasture and forest.
- Although in regard to identifying state land for leasing reference can be made to the Land Management Law, since documentations are not always reliable or even available the law should place more emphasis on the role of adjacent village communities.
- Prior to granting leasehold the government must publicly adopt a land use plan.
- Leasehold agreements should not result in involuntary relocation of local communities.
- A refined version of public notice and bidding process must be incorporated in the law. The evaluation of the bid should not only depend on the amount of rent offered but also on the quality of the business plan that should be included in the sealed bidding.
- Further, evaluation of the business plan should be based on environmental and social impact assessment as well as increase in agricultural production and employment opportunity.
- The law should embody clear provisions dealing with procedures for periodic review and recovery of rents due at the appropriate time.

9. Clarification of Property Rights

The concept of land clarification in Afghanistan is intimately intertwined with the history of the modern Afghan state's increased interest to consolidate control over land. Nevertheless, the current need for land clarification is more linked to the series of socio-political changes and conflict that the country has experienced over the last three decades than anything else. As a result of controversial land reform programs, confiscation, unjust redistribution, massive grabbing, informal expansion of settlements that resulted from war and social changes, a good part of the country's lands have unlawfully changed hands many times. The crucial question in this regard is whether the current law and practice are appropriate and effective in dealing with the chaotic property rights regime that exists in the country.

Current law and practice

The Land Management Law provides for a land clarification procedure. According to the Land management Law, this process is monitored and led by the Land Management Department/General Directorate of the Ministry of Agriculture. (Article 14 & 15, LML) The Land Clarification Committee is composed of representatives of the Ministry of Agriculture, the Supreme Court, the Ministry of Finance, the Ministry of Energy and Water Resources, AGCHO and relevant local government departments. (Article 14(2), LML.)

The powers and responsibilities of the land clarification body are clearly indicated in the Land Management Law. Pursuant to article 16 of the LML, the Land Clarification Committee has the following powers and responsibilities:

1. Clarification of landholding, issuance of document and land to an eligible Person;
2. Determination of boundaries, category, and water rights attached to specific area of land;
3. Classification of private, state, pasture, endowed and dead lands;
4. Referral of documents of clarified land to the relevant court for the issuance of formal deeds or legal action;
5. Recording of clarified landholding and property document in land book;
6. Based on Islamic law, restoration of lands that were unlawfully distributed after the Saur Revolution to the rightful owner.

The Land Clarification Committee functions on an ad hoc basis and convenes meetings to deal with disputes that catch the attention of the central power circle. The Committee lacks the resources to systematically clarify property rights countrywide in a systematic and prioritized manner. Therefore, the chaotic property rights regime in the country calls for a more practical, cost-effective and systematic way of clarifying property rights.

Recommendations

- The law should provide for a strengthened land clarification body that will function on a permanent basis and supported by enhanced resources including human, financial and equipment. This body should operate within the Amlak structure.
- The law should establish clearly defined link and procedures for partnership between community-based land clarification processes and Amlak to overcome the heavy land clarification burden of the land clarification body.
- The law should prescribe the periodic updating of records of already clarified properties.

10. Cadastral Survey

A few years have lapsed since cadastral surveying was suspended in Afghanistan by virtue of presidential decree No. 83. The Cadastral Department can undertake surveys only at the request or approval of the Office of the President of the country. Although Decree No. 83 has frozen cadastral surveying activities, the Law for Cadastre Survey proclaimed in 1988 remains unrepealed.

The cadastral survey law of 1988 was enacted with rather ambitious objectives. The stated purpose for proclaiming the law was to determine the boundaries of land, identify the owner, and determine the quantity and quality specifications of land and the type of right attached thereto (article 1 cum 5). The law envisages the surveying of both private and state owned land. According to article 3 of the law, the cadastre survey of lands (irrigated or rain fed), whether private or state owned, shall be carried out by the Cadastre Survey Department of AGCHO.

The cadastre survey law calls for the establishment and maintenance of a countrywide rural land registry in Afghanistan, detailing the boundary of every parcel along with the owner, the quality and quantity specifications of every parcel of land, the use of the property, the value of the property, and several other pieces of relevant information. Pursuant to article 6, the department for cadastre survey shall complete the survey of land delineating each parcel of land in a village and the taxation zone of such land and shall a copy of the results to the administration for land management free of charge.

The goal that the law aims to achieve would be extremely useful under normal circumstances. Many countries have successfully surveyed their land or a good part thereof. In most cases successful surveys were carried out over a long time horizon and covered areas that were largely unsettled. Importantly, countrywide surveys are not normally conducted in a time of social, political and economic uncertainty. Given the chaotic property rights regime as well as the socio-political instability, it would not be practical, affordable and even desirable at this point to launch a countrywide survey as envisaged in 1988.

It would therefore be worthwhile to look for an option of property surveying that is affordable and practical in terms of implementing land survey by using local resources and available formal as well as informal institutions. The first option that is worth considering would be to require property to be surveyed only when transfer takes place. Concurrent to conducting survey of land over a long time scale, for the purpose of imposing property tax, the system can reintroduce the property declaration form once used in the country and rely on property owners' declaration.

The articles on the procedures of surveying and determining boundaries and ownership also raise questions. Article 9 states:

the committee for cadastre survey shall survey and determine the boundaries and the related specifications for land parcels as declared by the landlord, confirmed by his land neighbors, and certified by the representative of the village, chief of water distribution or his representative, and shall record the results thereof on a map and relevant tables.

And article 17 states:

The persons who are not satisfied with the results of cadastre shall submit a written objection within one month upon announcement and posting of maps and lists containing names of owners of lands to the cadastre committee. The cadastre committee shall engage in resolving the objections in the presence of village representative, neighboring land owners, chief of water distribution or his representative.

In case such persons shall be not satisfied, they may submit the case to the relevant court, and the court shall issue a decision within one month [disposing of the case] and officially inform the cadastre committee about the results. Upon the rendering of a decision by the court, the maps and lists containing the names of landlords shall be amended, stamped and signed by the cadastre committee, which shall be final and ready for use.

While the procedure that requires the team of cadastral surveyors to consult with neighbors and village representative is highly desirable in terms of lending legitimacy to the final determination, it offers inadequate mechanism to deal with the types of potential and actual disputes that have become rampant over the last few years.

Several other points in the existing cadastral survey law show practical deficiencies. Article 17 provides for post-cadastre dispute resolution mechanism. It states:

The persons who are not satisfied with the results of cadastre shall submit a written objection within one month upon announcement and posting of maps and lists containing names of owners of lands to the cadastre committee. The cadastre committee shall engage in resolving the objections in the presence of village representative, neighboring land owners, chief of water distribution or his representative.

If the parties become dissatisfied, they may submit the case to the relevant court, and the court shall issue a decision within one month [disposing of the case] and officially inform the cadastre committee about the results. Upon the rendering of a decision by the court, the maps and lists containing the names of landlords shall be amended, stamped and signed by the cadastre committee, which shall be final and ready for use.

Although an opportunity for a judicial review of the cadastral department's determination would be desirable from strictly legal perspective, in the context of existing judicial situation in the country, vesting an appellate jurisdiction in the regular courts does not provide an efficient mechanism for resolving such contentions. Expecting the courts to dispose of an appellate case within a month is not realistic, under the circumstance. If and when the cadastral activities for clarifying property boundaries and rights is reactivated, albeit in a modified fashion, then there will be a need for establishing a more practical method for the speedy and fair resolution of disputes.

Recommendation

- In most rural areas where community elders are likely to know with certainty the history of property rights attached to a given parcel of land, it would be practical to consider a community based land survey committee that would work with the formal cadastral survey team. In addition to ensuring legitimacy such a mechanism would also facilitate a method for the speedy and cost effective determination of rights and boundaries as well as efficient resolution of disputes.

11. Conversion of Land Use

Conversion of land use may have useful or harmful effect on the ecology and the rural development planning. Although unlawful conversion of agricultural land use is prohibited by law, in practice, there have been conversions of farm lands to housing and pastures to resettlement sites and cultivated lands. In most case, unlawful conversions have been effected by powerful land grabbers, government agencies, and villagers whose families expand and need more land to cultivate.

Although there is one provision in the Land Management Law of 2000 that prohibits unlawful land use conversion, there is no regulation that set out clear standards and procedures under which

conversion would be allowed. Article 107 of the LML states that “construction of roads, buildings and establishments, and non-agriculture activities are not allowed on agriculture lands. In exceptional cases the users are required to obtain in advance agreement of the ministry of agriculture & livestock and approval of the [Head of state].”

Recommendations

- There is a need to regulate conversion of land use by law. The clear gap that exists in the legal framework in regard to conversion calls for regulation that clearly set the standards and procedures where conversion of land use can take place. Such a regulation should follow general provisions on land conversion that the revised land law should incorporate.
- Consistent with the Ministry of Agriculture’s strategic documents and the draft land policy, the regulation should embody the following principles: (i) conversion of land use should only take place in strict compliance with land use planning to be made based on land demand and supply; (ii) giving priority to sustainable livelihood and equitable development in the rural sector; (iii) encouraging vertical land use for housing in the urban areas and discouraging land use in rural areas for construction purposes; (iv) promoting the protection of the environment and sustainable use of land.

12. Adjudication

Existing records of immovable property rights in the court *makhzans* are unreliable. Due to destructions of property records in many provinces and rampant fraudulent deeds that have made their way into the formal archives, the property recording system in the nation lacks certainty and public trust. Moreover, many lands that have not been officially recorded have been unlawfully occupied in various manners.

The lack of adjudication system often leads to conflicting claims developing into actual or potential dispute, which often is left unresolved. It is widely believed that the formal court system has not been effective in resolving disputes arising in connection to immovable property rights. While the informal justice system works relatively well in cases involving claimants of property rights who do not have distinguished social and political status or connection, it often fails to deliver justice whenever a dispute involves a powerful person. In instances where powerful people are involved in a dispute arising in connection to property rights, both formal and informal systems tend to step back and avoid confronting the case on its factual and legal merits, leaving the case unresolved or decided in favor of the powerful party. This is a major but perhaps inevitable failing in the system.

In most parts of rural Afghanistan the property rights situations have not been fairly and authoritatively determined. Many factors such as land grabbing, demographic changes, internal displacement, ecological changes, changes in tribal or clan power balance and unorganized repatriation come into play to make the existing property rights situation chaotic and undermine inter- and intra-community traditional social pacts on use and access to land. A report entitled “Land Policy and Implementation in Afghanistan” summarizes the situation in regard to public land as follows:

In recent years, these traditional unwritten agreements have come under intense pressure from population increase and from adverse climatic conditions such as drought. Increasingly, some local communities are effectively controlling nearby public lands, to the practical exclusion of administration by [the Ministry of Agriculture], and forcing nomadic people to negotiate and pay for seasonal camping and grazing rights. In order to

reduce the scope for conflict and ensure appropriate land usage it is time to bring these informal agreements into a more formal setting.

While formalizing such agreements might resolve most frictions and multiple claims over land, the significant changes in property holding in many areas require a process for clarification and certification of claims and agreements. To determine who acquired what right and the circumstances in which that right was acquired and to authoritatively establish and record property rights a workable adjudication procedure is essential. Put differently, due to the prevalence of multiple historical claims, rampant unlawful occupation of land, fraudulent deeds and false claims, determination of the legitimacy and validity of claims and documents is imperative to deal with the disorderly tenurial arrangements and conflicts over rural land.

As noted by the Economic Commission for Europe Guidelines for Land Administration (1996), adjudication "process may operate sporadically or systematically". In the case of Afghanistan, a systematic but prioritized adjudication process based on predetermined criteria would be appropriate.

Recommendations

- To overcome the challenges of placing heavy administrative burden on the government in dealing with the chaotic property rights situations in rural areas the revised law should provide for the establishment of an adjudication system to systematically determine "who" has "what" right over a given land.
- Given the political and social sensitivity surrounding land issues and availability of insufficient resources, the government should adopt an incremental approach to minimize the risk of public opposition to the process and allow time to turn around the positions of key stakeholders. Conducting adjudication process at a manageable scale would also give enough time and opportunity to refine procedures based on lessons learned from the priority areas and ensure proper monitoring and evaluation of the process.
- The adjudication board at a community (village) level should be composed in a way that would lend legitimacy and the benefit of good local knowledge to the process of determining rights. Representatives of Amlak, the pasture Department, and the district office should participate in clarification and certification process meetings with the community representatives.

13. Land Registration

The term 'land registration' is used in this report as the recording of who has what rights to what land, and the administration of the records. Administration of the records over time includes procedures for updating the records when transfer occurs. The condition of the existing system of immovable property recording was briefly summed up by a memorandum that this consultant wrote a few months back as follows:

The existing system for recording of rights to immovable property requires for improvement or redesign in many respects. The process for completion of property transfers is very lengthy and very costly primarily due to the involvement of too many agencies in signing off every transaction. Lack of institutional capacity and integrity also contribute to the inefficiency of the system. While some important measures have been taken to improve the documentation of interests in immovable property and the retrieval of recorded property information, there is an urgent need to focus on weighing options

for addressing systemic anomalies that can and should be dealt with immediately to improve the existing system. There are also systemic redesign options that need to be considered and decided over a longer time scale.

The problem of registration or recording of property rights involving rural land is less pronounced in the land discourse in the country than are other land related issues. Perhaps, the less emphasis on the rural land recording system might be due to the combination of factors such as the much lesser occurrence of transaction involving rural land, the largely informal or traditional occupation or use of land in as well as the suspension of formal land distribution. However, the information of property rights already determined by the cadastral department or clarified by Amlak is recorded in the archives of the Cadastral Department and Amlak. These records are formally recognized by the government upon the issuance of sharia deed by the court.

The existing system that involves multiple government agencies is characterized by inefficiency and corruption. The level of coordination among the relevant government agencies leaves a lot to be desired. In fact, Amlak no longer sends documents of landowners to the courts for the issuance of formal deed because the courts are reluctant potential beneficiaries to issue formal deed based on Amlak's records and request.

13.1 Registration Law

There is no coherent land registration law in Afghanistan. Registration law is needed to establish the operational rules and administrative framework for a land registration system. Simply put, registration law is needed to provide a procedure for the recording of rights over land.

Registration of immovable rights should be distinguished from the process of recording of property rights by Amlak and the cadastral department. However, the processes of determination of rights at Amlak and the Cadastral Department levels are closely linked with the formal recording and certification of rights by the judiciary. As described earlier, the cadastre survey law envisages the establishment and maintenance of a countrywide rural land registry in Afghanistan, detailing the boundary of every parcel along with the owner, the quality and quantity specifications of every parcel of land, the use of the property, the value of the property, and several other pieces of relevant information. The Cadastre Survey law requires the Cadastral Department to complete the survey of land delineating each parcel of land in a village and the taxation zone of such land and to provide a copy of the results to the Department of Land Management at the Ministry of Agriculture. There has not been an effort to update the cadastral survey documents compiled between 1965 and 1978 or continue the surveying activity due to change in government policy.

The highest authority of certifying and recording of immovable property in Afghanistan is the court system. First time ownership and transfer of ownership are certified by and recorded in the registries of the primary courts. The current duplicative system of recording immovable property system is unduly cumbersome, inefficient and costly. Replacing the current judicial nature of the recording of property rights with a primarily administrative process of recording would help streamline the system.

Prior to drafting a registration law, however, there are important policy implementation issues that ought to be addressed with respect to the future of land administration in Afghanistan. The following are examples of such issues that will have significant implications for the land registration system and drafting of land law:¹⁸

¹⁸ The issues stated below are liberally borrowed from a memorandum written by this consultant to the Minister of Agriculture on behalf of the Land Working Group.

- i) the responsibilities of different agencies and levels of government and of local communities ought to be clearly defined;
- ii) the allocation strategies and procedures for urban and agricultural land need to be defined;

The following are among the key issues that should be considered when drafting a land registration law:

- i) administration of registration system;
- ii) contents of registry records;
- iii) basic registration unit;
- iv) definition of registrable interests;
- v) process of recording of first time transaction;
- vi) standards relating to maps and boundaries;
- vii) the legal implication of registration;
- viii) rules governing changes to the registry records.

In addition to the above issues, the following strategic redesign issues ought to be considered and decision made when drafting a registration law:

- i) The merits or demerits of establishing an integrated immovable property information recording system containing the documentation of legal rights and the spatial description and geographic reference of properties to which those rights attach;
- ii) Should the immovable property information recording system be an independently managed administrative function as opposed to a judicial function?
- iii) Should the present practice in most rural communities and most informal urban settlements of documenting land transactions through customary deeds be improved by vesting community shuras with the responsibility of recording deeds of transfer and other documents which affect property rights?
- iv) How can the operational procedures, technical standards and legal authority for land parcel boundary surveying and related activities.
- v) What kind of immovable property information recording system is appropriate for Afghanistan? Is there a need for a drastic shift to a different system? Or is it better to work towards improving and integrating the existing deeds recording system?
- vi) How can the public access to information about property rights be improved through establishing a publicly accessible land information system?

13.2 Recommendations

- A new registration law should consider a two-tier recording system to establish a decentralized immovable property recording system. This suggestion is based on the fact that rights over community pastures and farm lands located within village boundaries require a simple, cost effective and easily manageable system. The records of such properties can be managed and maintained by local communities, in collaboration with district and provincial offices. On the other hand, immovable properties that involve interests that can be transferred for consideration such as vast areas of irrigated lands, orchards, agro-industrial enterprises, state owned immovable properties require formal recording system that would facilitate market transactions, protect buyers and sellers, and promote access to credit.
- In line with the draft national land policy, the law should envisage the gradual integration of the various land administration agencies. Towards achieving this policy objective, the law should consider replacing the existing judicial function for certifying and recording title deeds to an administrative function vested in Amlak. To accommodate the traditional notion of title deed legitimacy, the law should

introduce the position of an administrative (registry) judge to certify and issue title deeds.

14. Pasture

Although a new draft pasture law is being prepared, the Law on Pasture and Public Lands proclaimed in 2000 by the Taliban administration technically remains in effect. However, this law is not enforced or complied with in practice. According to article 2 of this law pasture is defined as “The entire land stretches, including deserts, hills, mountains and mountainsides, marshy lands on both sides of a river and jungle areas covered with herbaceous plants and natural shrubs, which can be used as animal fodder.”

The pasture law of 2000 classifies pasture into private and public. Private pasture is pasture existing within the bounds of villages or towns in accordance with the provision of sub-article 9 of article 2 of the land management law. Pursuant to article 2(9) of the Land Management Law, pasture lands are those lands in respect of which state or individual ownership cannot be proven legally. The term ‘private pasture’ seems to mean “communal pasture” as the context makes it clear that the law is referring to pasture used by villages communally.

Public pasture is defined by the Pasture Law as arid land which, in accordance with article 2(9) of the Land Management Law, does not fall within bounds of villages or towns. According to article 2(9) of the LML, the extent of public pasture land is determined by a human voice scream. The article states that “where a person having a loud voice screams with full strength from the last house of a village or a town, the distance up to which his scream is heard shall be deemed grazing land.” The rationale behind the underlying principle of this provision is to prevent villages from external intrusion by herdsmen from other areas.

The law accords only use rights over pasture, be it communal or public. Article 3 of the Pasture Law states: “The right of use (*Haq Istifada*) of pasture is limited to feeding and grazing animals.” Further, Article 6 in explicit but general terms disallows the buying, selling and leasing of pasture. However, article 7 of the law provides for exception to this general rule. Article 7 reads: “areas of private pasture shall not be sold or leased for expansion of agricultural activities or any other purposes. Government development projects for public utility are exceptions to this rule.”

When it comes to the ownership of pasture the law is not very clear as it appears at first glance. At first glance, it seems that pasture is owned by the public and the state plays the role of an administrator akin to those of a trustee. However, there is a clear inconsistency in the different provisions of the pasture law dealing with tenure issues. The contradictions become apparent when the constructions of articles 4 cum 9 are examined together. Pursuant to article 4, private pasture is pastureland where the government or individuals cannot prove ownership legally. This gives the sense that neither the government nor any other person can act as an owner and enjoy ownership rights. Nevertheless, article 9 vests the power in the [Head of State] to give permission for the purchase, sale or lease of arid land (*mawaat*).

The lack of good local governance infrastructures in rural Afghanistan is reflected by the causes and mishandling of the widespread frictions over pasture. There are well documented reports on the situation of pastoral issues in Afghanistan that make it unnecessary to restate them in great details in this report.¹⁹ It will suffice to quote the problems stated in the Draft Land Policy:

¹⁹ For a comprehensive treatment of the subject see L. Alden Wily, (2004) *Looking for Peace on the Pastures: Rural Land Relations in Afghanistan*, (AREU, Kabul)

The competition for limited resources of pasture in many areas in Afghanistan has adversely affected the economic livelihood of pastoralists and fueled long standing conflicts. The competition over grazing land between pastoralists and settled farmers is a result of ill-conceived historical political agendas, poor land management, lack of adequate land survey, the non-existence of adequate dispute resolution mechanisms, the near collapse of land adjudication and registration systems, and the lack of strict enforcement of existing laws. The lack of adequate management and control over public owned land has resulted in grabbing of land that was traditionally used by pastoralists as well as settled farmers for grazing livestock herds. The regulation of pasture land is an imperative if it is to be protected from threats to its sustainable use such as grabbing of community lands of neighboring villages, grabbing of rangeland, cultivation of traditional grazing land, government designation of grazing rights in what have traditionally been considered communal grazing lands. Pastoral ownership is unclear and formal law ambivalent as to whether pasture lands are state-owned, public or communal.

While there are serious factors related to the ecology, governance, historical claims that contribute to frictions and disputes on pasture, the inadequacy of the legal framework is also a serious contributing factor to the whole problem. The following are the main gaps and deficiencies in the legal framework that have direct link to the key legal challenges and problems surrounding pastureland:

1. The classification of tenure provided by the existing legal framework lacks clarity. For example, while the law uses the terms private and public in providing the classification of tenure, at the same time, the law clearly provides for disallowing all elements of private ownership.
2. The nature of rights over pasture is not clearly provided by the law on pasture, particularly with respect to public pasture. This often causes uncertainty in the use and management of pasture. The law lacks clarity in providing the rights it gives to individual and group of pastoralists on the one hand and the government on the other.
3. The Pasture Law of 2000 envisages the specification, marking and registration of pastures by a Commission appointed by the Council of Ministers. For pasturelands that were not specified marked and registered before the promulgation of the Pasture Law, the law aimed at clarifying all pasture in the country within 6 months time. It is unrealistic to imagine that the government would be able to meet such a heavy responsibility through a government Commission appointed by the Council of Ministers.
4. Due to successive and violent social changes and ensuing disruptions in social and legal developments, disorderly tenure arrangements over pastureland have resulted in conflicts and frictions. Frictions and disputes over pastureland continue to be cause of tension and violent confrontations. Some of the pending disputes have manifested the potential to develop as major cause for full blown violent confrontations. Unless resolved justly, conflicts and frictions over pastureland could have far reaching ramifications on the country's peace and stability in general and on rural development in particular.

The law does not provide a mechanism to resolve multiple claims especially those stemming from historical claims made by local social groups and Kuchi nomads. At present, local communities have generally regained access to their traditionally claimed pastureland, in some cases to the detriment of traditional access claims by the Kuchis. There has been government ambivalence on the weight and validity of traditional claims of the kuchis and the rights granted to the Kuchis by virtue of government decrees, which were mostly issued by King Abdul Rahman and Zahr Shah, vis-à-vis customary claims of adjacent village communities.

The above problems should be legislatively addressed within the framework of the broad guidance that the draft national land policy provides on how to deal with the challenges and problems surrounding pasture. The draft policy states the following:

- It is national policy that access to land resources be clarified and secured as part of an integrated natural resource management which springs from local community based resource management must be conducted under the strict supervision and guidance of the Ministry of Agriculture.
- It is national policy that community based natural resource management strives to ensure environmental protection and usage for all public pasture users.
- It is national policy that the Ministry of Agriculture reactivates land surveying in order to clarify rights to land.

Recommendations

- The classification of tenure needs to be clarified. A clear classification of tenure into community, and public owned pasturelands would be in congruence with Islamic law, the tradition and legal culture in the country. This classification should be recognized by law without prejudice to privately owned land that the owner can use for multiple purposes including for grazing animals.
- There is a need to clearly provide the nature of rights over pasture. The legal culture and custom in the country suggest that right of use would be the most appropriate and practical right over pastureland. Use right over community pastureland would provide sufficient right to the relevant community to protect the resource from external users and to prevent conversion to other use. Importantly it would conform to the idea that communities should be allowed to establish management jurisdiction over community pasture. All pastoralists should continue to have access to public pastureland. However, the formalization of longstanding traditional arrangements would be imperative to deal with actual or potential conflicts over pasture.
- To overcome the challenges of governmental administrative overload, it would be practical for the government to legislatively enable local communities to have formal control over pastures, subject to basic conditions imposed in the interest of protecting the environment and other compelling national interests. This authority should also enable community representatives to clarify and certify property rights over land including pastures.
- With respect to public pasture, the government/legislator should consider the establishment of a joint government-community management system, in which the government and adjacent village communities are contractual co-managers, especially when it comes to determination of access to *Yurts*²⁰ and *Ailoks*²¹, conversion of use, rehabilitation of pasture, resolving disputes on pastures including right of access/passage of nomadic groups etc. The management structure of this body might include representatives of adjacent villages, nomads with traditional access rights, provincial administration and the representatives of Amlak and Pasture Department.
- There is a need for establishing a two-tier system of recording rights at the local level. This option is being suggested based on the fact that simple forms of tenure are envisaged with respect to pasture. These interests in pasture will not be sold or leased and thus neither the right holders nor the government would benefit from requiring the registration of these interests in a system that is primarily designed to facilitate market transactions, protect buyers and sellers, encourage access to credit, etc. And the law should establish the recording of certified rights at the Wuluswali

²⁰ Yurt means a defined boundary within an ailok that a particular group (tribe or clan) uses for grazing cattle. Normally, the boundary and size of Yurt is determined by the number of cattle that a particular group has.

²¹ The word 'ailok' means summer pastures usually found in high altitudes.

and village levels for community and private land rights at the provincial administration level for public pastures.

- The revised law should deal with the challenges of addressing conflicts and frictions over pasture by clearly providing the nature and hierarchy of tenure over pasture. A clear distinction needs to be drawn between tenurial arrangements over community and public pastures based on longstanding tradition in the country. In regard to community pastures, local communities' traditional claims over adjacent pastureland when certified through a land clarification process should override any other claim. The certified use right of a local community over adjacent pasture should be recognized by law as the particular community's exclusive use right.

With respect to public pasture, pastoralist right of access should be dealt with in accordance with the tradition and practice that prevailed prior to 1978.

15. Conclusion and recommendations

This report has provided analyses on crucial thematic issues and made recommendations on the development of a revised legal framework for land. Many lessons can be drawn from Afghanistan's and other countries' comparative experiences. Four lessons drawn from comparative experiences are of paramount importance to the land law development in Afghanistan.

1. The development of land law must be based upon thorough analyses of the relevant traditional norms, legal culture, and belief system of the people of Afghanistan.
2. The institutional support necessary to implement the law must be taken into account when drafting principles and rules so that the law will not be unusable in practice.
3. The success or failure of any land related reform initiative is usually determined by the local communities' level of acceptance. In turn, the level of acceptance of the local communities to any reform initiative is determined by the level of the local communities' participation in the process of conceptualization of the problems and solutions related to land tenure and administration.
4. Once the Organic Land Law is drafted, regulations and other administrative instruments needed to implement it must follow immediately, lest the law become unusable.

The principal recommendation of this report is that Afghanistan is that the development of new land law should be based on informed analysis of the current reality of land occupation and use, traditional tenure and land management systems, and the social organizations of local communities. This principle presupposes that the process for developing a new land legal framework will resist the temptation to either wholesale carry over the provisions of existing legal framework or to rely unduly on principles and provisions of foreign legal systems. What would be appropriate and practical in terms of legitimacy and implementation of the law is to build on the existing legal framework. This requires identifying antiquated provisions and principles, deficiencies and gaps in the law and revamping them as necessary.

As alluded throughout this report, there are many important policy and implementation issues that have yet to be resolved prior to adopting a revised land law. Following are among the most crucial problems:

- There is no detailed strategy for tackling the problems surrounding land grabbing. There is no consensus on whether distinction should be made between the powerful land grabbers who have been at the centre of the problem and others who are secondary beneficiaries including those who bought land from grabbers in good faith;

- The logistics and mechanics of gradually moving towards an integrated land administration body has yet to be thought through;
- In the interim, the responsibilities of different government agencies and of local communities has yet to be clarified;
- There is no clear vision or strategy for allocation of agricultural land for the landless as well as land for resettlement of returnees.

15.1 Specific recommendations made in this report

15.1.1 Land Administration

- The development of a modified land law should approach the operation of the land administrative bodies flexibly to allow a more formalized and effective community participation in areas such as adjudication and recording of property rights. The Land Management Law and other decrees issued by the current government appear to have underestimated the resource requirements of pervasive government role in land administration. This fact has resulted in a great deal of legal uncertainty that is perpetuating informal and extra-legal ways in which people satisfy their land needs. At the same time, the current legal framework for land disregards the usefulness of local resources and institutions in administering natural resources such as pasture and forest. The ADB technical assistance project for capacity building for land policy and administrative reform has piloted the effectiveness of community participation in clarifying, certifying and archiving property rights including for pastures at the village level. Responsiveness to pilot experiences that have emerged from the ADB and other projects will be essential in revising the existing legal framework for rural land administration.
- One of the underlying objectives of the draft land policy is to establish an efficient land administration system. Streamlining and gradually consolidating the functions of the various land administrative bodies will be essential to achieve an efficient land administration system. There is therefore the need for the legal framework to clearly define the powers and responsibilities of the different agencies and the areas of their collaboration in a structured fashion. Such provisions in the revised legal framework for land should aim at harmonizing the functions and operations of the various land administrative bodies and avoiding overlap in responsibilities to facilitate the gradual formation of a unified land administrative body.
- Consider to make the preparation and issuance of formal deed an administrative function within Amlak for rights over rural land. Limiting the role of the courts to providing judicial oversight/review will have several benefits such as ensuring an essential checking mechanism within the land administration system, improve efficiency and minimize costs and delay. Considering the deeply entrenched traditional public trust in sharia deeds issued by the court, it is suggested that the government can assign administrative judges to work in Amlak to finally authenticate and hand the documents to property owners.

15.1.2 Classification of Land Ownership

- The law should be modified to clarify classification of ownership in clear terms. It would be in line with the reality and the general guidance provided by the land policy if ownership of immovable property would be classified into state, public, private and

community ownership. Further, the law should clearly define the role of the state and responsible government agencies in relation to managing state and public owned land.

- The law should clearly provide whether government departments can own land in their own names. If the option for allowing government departments to own land is preferred then the law should clearly prescribe under what conditions government departments can own land and the terms of ownership.

15.1.3 Proof of Land Ownership

- The law to be effective should take into account the existing property rights regime, which does not always make it easy to categorize ownership typologies in black and white terms. There are gray areas that give rise for legitimate claims. In disputes involving private individuals, courts normally consider Amlak registration, tax records, customary deeds, and local knowledge as basis for proving land rights. This practice should be formalized through a modified land law for the country. The chaotic property rights regime in the country call for establishing a realistic and effective way of re-identifying legitimate and valid right to land. This would be in accordance with the guidance provided by the land policy. The policy states that:
 - It is a national policy that land ownership may be documented through a process of property clarification and certification process conducted at the community level.
 - It is a national policy that recognition be given to customary documentation and legitimate traditional property rights affirmed by local knowledge, in accordance with a law to be issued to govern the regularization of property rights.
- To implement the policy guidance on proof of ownership, the legal framework should consider incorporating provisions that provide for the establishment of property clarification and certification board composed of community members at a village level, representatives of Amlak, the Cadastral Department and the relevant district administrations. The provisions should define the manner of formation of such bodies and their powers and responsibilities. The responsibilities of the proposed property clarification and certification boards may include determination on the legitimacy and validity of customary deeds as well as claims made without producing any formal or customary document. The law should also provide an opportunity for judicial review in the event that any interested party is dissatisfied with the determinations of the board.

15.1.4 Land Distribution

- The law should strike a delicate balance between efficiency and productivity on the one hand and equity and social justice on the other. This should be done with the objective of preventing the marginalization of the majority of the rural population, which would have the potential for giving rise to social instability. The promotion of economic growth and inclusive poverty reduction efforts should not be regarded as mutually exclusive objectives.

Therefore, the revised law should establish priorities among potential land allottees. In line with past practice and legal culture in the country, there is a need for establishing criteria for prioritized land distribution for potential beneficiaries. These criteria should include factors such as need, family responsibility, and primary occupation so that the law prevents the marginalization of the majority of the rural productive force.

- The existing law and practice have been inadequate in terms of setting rules and principles for identifying and demarcating state-owned lands as opposed to private lands

and public lands traditionally used by adjacent villages and pastoralists. To remedy the problems in the existing practice, there is a need for the future law to incorporate requirements and guidelines for consulting with adjacent villages and pastoralists who have traditional use rights when identifying virgin and barren land for distribution.

- Land allocation for resettlement purposes should be conducted in a systematic and coordinated manner by the government. It is imperative that the law should aim at minimizing opportunities or need for unlawful occupation by returnees, or unlawful sale of government or private property to returnees.
- Allocation for resettlement purposes must fit within a larger framework of urban and rural planning and land use. To ensure that appropriate sites for resettlement are selected, the law should require Amlak to select sites in consultation with the Ministry of Urban Development. The revised law should require that the selection of sites be preceded by viability study. Other ways of land allocation should be strictly prohibited by law.
- Land allocation schemes being implemented as stabilizing measures should be brought under the umbrella of a section on land distribution to be incorporated in a future comprehensive legal framework for land so that all procedures are coordinated and landlessness is tackled in a comprehensive and balanced manner.
- State issued leaseholds should be granted only on state owned land. There is a need to clarify the types of land to which the draft amendment or any future law on commercial leasing will be applied. In conformity with the existing pasture law and land policy, the inclusion of provisions about the continued recognition of existing tenure systems including traditional use rights in lands identified for leasing need to be clarified, lest the new commercial leasing program perpetuate existing legal uncertainties and frictions over land resources. The law should also set forth clear criteria for protection and preservation of reserves, forest, environmentally sensitive areas and other areas that may not be leased. Such provisions should be drafted in conformity with laws on pasture and forest.
- Although in regard to identifying state land for leasing reference can be made to the Land Management Law, since documentations are not always reliable or even available the law should place more emphasis on the role of adjacent village communities.
- Prior to granting leasehold the government must publicly adopt a land use plan.
- Leasehold agreements should not result in involuntary relocation of local communities.
- A refined version of public notice and bidding process must be incorporated in the law. The evaluation of the bid should not only depend on the amount of rent offered but also on the quality of the business plan that should be included in the sealed bidding.
- Further, evaluation of the business plan should be based on environmental and social impact assessment as well as increase in agricultural production and employment opportunity.
- The law should embody clear provisions dealing with procedures for periodic review and recovery of rents due at the appropriate time.

15.1.5 Clarification of Property Rights

- The law should provide for a strengthened land clarification body that will function on a permanent basis and supported by enhanced resources including human, financial and equipment. This body should operate within the Amlak structure.

- The law should establish clearly defined link and procedures for partnership between community-based land clarification processes and Amlak to overcome the heavy land clarification burden of the land clarification body.
- The law should prescribe the periodic updating of records of already clarified properties.

15.1.6 Cadastral Survey

- In most rural areas where community elders are likely to know with certainty the history of property rights attached to a given parcel of land, it would be practical to consider a community based land survey committee that would work with the formal cadastral survey team. In addition to ensuring legitimacy such a mechanism would also facilitate a method for the speedy and cost effective determination of rights and boundaries as well as efficient resolution of disputes.

15.1.7 Conversion of Land Use

- There is a need to regulate conversion of land use by law. The clear gap that exists in the legal framework in regard to conversion calls for regulation that clearly set the standards and procedures where conversion of land use can take place. Such a regulation should follow general provisions on land conversion that the revised land law should incorporate.
- Consistent with the Ministry of Agriculture’s strategic documents and the draft land policy, the regulation should embody the following principles: (i) conversion of land use should only take place in strict compliance with land use planning to be made based on land demand and supply; (ii) giving priority to sustainable livelihood and equitable development in the rural sector; (iii) encouraging vertical land use for housing in the urban areas and discouraging land use in rural areas for construction purposes; (iv) promoting the protection of the environment and sustainable use of land.

15.1.8 Adjudication

- To overcome the challenges of placing heavy administrative burden on the government in dealing with the chaotic property rights situations in rural areas the revised law should provide for the establishment of an adjudication system to systematically determine “who” has “what” right over a given land.
- Given the political and social sensitivity surrounding land issues and availability of insufficient resources, the government should adopt an incremental approach to minimize the risk of public opposition to the process and allow time to turn around the positions of key stakeholders. Conducting adjudication process at a manageable scale would also give enough time and opportunity to refine procedures based on lessons learned from the priority areas and ensure proper monitoring and evaluation of the process.
- The adjudication board at a community (village) level should be composed in a way that would lend legitimacy and the benefit of good local knowledge to the process of determining rights. Representatives of Amlak, the pasture Department, and the district office should participate in clarification and certification process meetings with the community representatives.

15.1.9 Registration Law

- A new registration law should consider a two-tier recording system to establish a decentralized immovable property recording system. This suggestion is based on the fact that rights over community pastures and farm lands located within village boundaries require a simple, cost effective and easily manageable system. The records of such properties can be managed and maintained by local communities, in collaboration with district and provincial offices. On the other hand, immovable properties that involve interests that can be transferred for consideration such as vast areas of irrigated lands, orchards, agro-industrial enterprises, state owned immovable properties require formal recording system that would facilitate market transactions, protect buyers and sellers, and promote access to credit.
- In line with the draft national land policy, the law should envisage the gradual integration of the various land administration agencies. Towards achieving this policy objective, the law should consider replacing the existing judicial function for certifying and recording title deeds to an administrative function vested in Amlak. To accommodate the traditional notion of title deed legitimacy, the law should introduce the position of an administrative (registry) judge to certify and issue title deeds.

15.1.10 Pastureland

- The classification of tenure needs to be clarified. A clear classification of tenure into community, and public owned pasturelands would be in congruence with Islamic law, the tradition and legal culture in the country. This classification should be recognized by law without prejudice to privately owned land that the owner can use for multiple purposes including for grazing animals.
- There is a need to clearly provide the nature of rights over pasture. The legal culture and custom in the country suggest that right of use would be the most appropriate and practical right over pastureland. Use right over community pastureland would provide sufficient right to the relevant community to protect the resource from external users and to prevent conversion to other use. Importantly it would conform to the idea that communities should be allowed to establish management jurisdiction over community pasture. All pastoralists should continue to have access to public pastureland. However, the formalization of longstanding traditional arrangements would be imperative to deal with actual or potential conflicts over pasture.
- To overcome the challenges of governmental administrative overload, it would be practical for the government to legislatively enable local communities to have formal control over pastures, subject to basic conditions imposed in the interest of protecting the environment and other compelling national interests. This authority should also enable community representatives to clarify and certify property rights over land including pastures.
- With respect to public pasture, the government/legislator should consider the establishment of a joint government-community management system, in which the government and adjacent village communities are contractual co-managers, especially when it comes to determination of access to *Yurts* and *Ailoks*, conversion of use, rehabilitation of pasture, resolving disputes on pastures including right of access/passage of nomadic groups etc. The management structure of this body might include representatives of adjacent villages, nomads with traditional access rights, provincial administration and the representatives of Amlak and Pasture Department.

- There is a need for establishing a two-tier system of recording rights at the local level. This option is being suggested based on the fact that simple forms of tenure are envisaged with respect to pasture. These interests in pasture will not be sold or leased and thus neither the right holders nor the government would benefit from requiring the registration of these interests in a system that is primarily designed to facilitate market transactions, protect buyers and sellers, encourage access to credit, etc. And the law should establish the recording of certified rights at the Wuluswali and village levels for community and private land rights at the provincial administration level for public pastures.
- The revised law should deal with the challenges of addressing conflicts and frictions over pasture by clearly providing the nature and hierarchy of tenure over pasture. A clear distinction needs to be drawn between tenorial arrangements over community and public pastures based on longstanding tradition in the country. In regard to community pastures, local communities' traditional claims over adjacent pastureland when certified through a land clarification process should override any other claim. The certified use right of a local community over adjacent pasture should be recognized by law as the particular community's exclusive use right.

With respect to public pasture, pastoralist right of access should be dealt with in accordance with the tradition and practice that prevailed prior to 1978.

Annex 1: Index of Land Related Laws of Afghanistan

No	Shamsi & Gregorian Dates	OG No	Name of Law	Amendment	Repeal
1	23-Jaddi-1300 13-Jan-1922		Nezmnama Law of Rainfed lands' Agriculture		
2	18- Aqrab-1314 09- Nov-1935		Law for Appropriation of Property for Public Welfare in Afghanistan		OG 639 Law on Land Expropriation of 01-July-1987
3	22-Meezan-1318 14-Oct-1939		Law for the Sale of Land under Dams and Rivers in Afghanistan		
4	19-Qaus-1339 09- Dec-1960		Law of Preparation of Statistics and Registration of Property and Rights of Sale in Excess Land in Afghanistan		
5	19- Sawr-1340 09-May-1961		Taleematnama-e Amlaak Dawlatee (Instruction Manual of State Owned Properties)		
6	10- Aqrab-1341 02- Oct-1962		Law for Fixing the Price and Sale of Water for Lands below Kajaki and Andarab Dams		
7	31- Jawza-1344 21- Jun- 1965	28	Law on Statistics and Survey of Lands		
8	30- Dalwa- 1346 20- Feb-1968	99	Property Registration		
9	30- Dalwa- 1347 19- Feb-1969	124	Regulation on Distribution and Sale of 23 Blocks in Nader Shah Mina	OG 170 Decree No 2302 Of Ministers Council on Amendment of Regulation 30- Aqrab-1349 21- Nov-1970 (Articles 1,3,12,22 and 27)	OG 689 Regulation on Distribution and Sale of State Owned Residential Flats and Plots in Kabul City 31- Hamal-1368 21-Mar-1998
10	16- Hamal-1346 05- Apr- 1969	127	Regulation on Land Distribution for the Eligible in Construction Project of Khayr Khana Pass		

11	15- Hoot- 1348 06- Mar-1971	176	Annexe to Law on Determining Price of Water for Arable Lands under Dam of Kajaki and Arghandab		
12	19- Hoot-1349 10- Mar-1971	180	Law on Pastures		OG 795 Law on Pastures of the year 2000
13	28- Sawr-1350 20- May-1971	185	Regulation on Distribution and Sale of Lands related to Helmand & Arghandab Projects		
14	15- Asad- 1354 06- August-1975	311	Law on Land Reform	OG 354 Annexe to Law on Land Reform (Art 3, 6, 10, 12, 13, 22, 23) 21-Jan-1977	OG 413 Decree 8 of the Supreme Revolutionary Council 30- Nov-1978
15	01- Sunbula-1354 22- Sept-1975	314	Law on Land Expropriation of Khosh hal Kan Meena Project		OG 426 Law on Land Expropriation and Sale of Lands under Detailed City Planning of Kabul City 05- May-1979
16	15- Saratan-1355 06- July- 1977	338	Law on Progressive Tax of Lands		
17	13- Sunbula- 1355 22- Sept-1979	346	Law on Survey, Verification and Registration of Lands		OG 674 Cadastral Survey Law 19-Feb-1988
18	15- Dalwa-1355 03- Feb- 1977	353	Civil Code 4 Volumes		
19	09- Qaus- 1357 30- Nov-1978	413	Decree 8 of the Revolutionary Council 30- Nov-1978	OG 550 Annexe No 2 to Decree No 8 19-Feb-1984 (Art. 3, 8, 10, 12, 22, 24, 25, 26, 27, 29, 31 and 35)	OG 658 Law on Land Relations Management 04- Feb.- 1988

20	16- Jaddi- 1357 06- Jan- 1979	416	1st Annexe to Decree No 8	OG 438 Regulation No 2 to Decree 8 06- Nov-1979 OG 517 Annexe No 1 to Regulation 2 of Decree 8 07- Oct-1982 OG 550 Regulations 1 & 2 to Decree 8 19- Feb-1984	OG 658 Law on Land Relations Management 04- Feb.- 1988
21	15- Hoot- 1357 06- Mar- 1979	420	Decree of the Revolutionary Council of Afghanistan regarding Land Distribution to the Eligible Applicants	OG 427 2nd Decree of the Head of Revolutionary Council on Distribution of Land to the Eligible 06- Mar- 1979	OG 658 Law on Land Relations Management 04- Feb.- 1988
22	13- Sawr- 1358 03- May- 1979	426	Law on Expropriation and Sale of the Detailed Kabul Land Projects on the basis of Master Plan 1357		OG 639 Law on Land Expropriation of 01-July-1987
23	13- Sawr- 1358 03- May- 1979	427	Decree of the President of the Democratic Republic of Afghanistan regarding Land Distribution to the Eligible		OG 658 Law on Land Relations Management 04- Feb.- 1988
24	30- Saratan- 1358 21- July- 1979	431	Third Decree of the President of Democratic Republic of Afghanistan regarding free Distribution of Land		OG 658 Law on Land Relations Management 04- Feb.- 1988
25	15- Aqrab- 1358 06- Nov-1979	438	Regulations No 2 regarding Decree No 8		OG 658 Law on Land Relations Management 04- Feb.- 1988

26	15- Aqrab- 1358 06- Nov-1979	438	Law on Land Management	OG 550 Annexe No 2 to Decree No 8 19-Feb-1984 <i>Paragraph 3 Article 3 & articles 8, 9, 12, 15 and 17</i>	OG 658 Law on Land Relations Management 04- Feb.- 1988
27	15- Aqrab- 1358 06- Nov-1980	438	Law on Land Taxation	OG 610 Decree 160 of Revolutionary Council about amendment of Law on Land Taxation 06- July- 1986 <i>Art 21, 22 and 23</i>	OG 676 Law on Land Taxation 20- Oct- 1988
28	15- Sunbula-1360 06- Sept-1981	489	Decree of the Supreme Revolutionary Council of the Democratic Republic of Afghanistan regarding Lands		OG 658 Law on Land Relations Management 04- Feb.- 1988
29	30- Dalwa- 1362 21- Sawr-1984	550	Decree 8 of the Supreme Revolutionary Council regarding Amendment to Decree No 8 and the Law on Land Management		OG 658 Law on Land Relations Management 04- Feb.- 1989
30	30- Dalwa- 1362 21- Sawr-1985	550	Decree 8 of the Supreme Revolutionary Council regarding Lands		OG 658 Law on Land Relations Management 04- Feb.- 1990
31	30- Dalwa- 1362 21- Feb-1986	550	Law on Land Management		OG 658 Law on Land Relations Management 04- Feb.- 1991
32	30- Dalwa- 1362 21- Feb-1987	550	Regulations No 1 regarding Decree No 8		OG 658 Law on Land Relations Management 04- Feb.- 1992

33	30- Dalwa- 1362 21- Feb-1988	550	Regulations No 2 regarding Decree No 8		OG 658 Law on Land Relations Management 04- Feb.- 1993
34	30- Meezan- 1364 22- Oct-1985	593	Resolution of the Ministers' Council of the Democratic Republic of Afghanistan concerning Acceptance of Regulation on Distribution of State Residential Houses and Land Plots in Kabul City	OG 613 Resolution of the Ministers' Council of the Democratic Republic of Afghanistan concerning Amendment of some Articles of Resolution of the Ministers' Council of the Democratic Republic of Afghanistan concerning Acceptance of Regulation on Distribution of State Residential Houses and Land Plots in Kabul City 13-Aug-1989 (Art 4- sub sec 3 of art 6- sub sec 3 of art 14- arts 3, 7, 8, 9, 10, 13, 15 & 26	OG 689 Regulation on Distribution and Sale of State Owned Residential Flats and Plots in Kabul City 31- Hamal-1368 21-Mar-998
35	15- Qaus- 1364 06- Dec-1985	596	Regulation for Agricultural Cooperatives Promoting Administrations of Ministry of Agriculture & Land Reforms of the Democratic Republic of Afghanistan		

36	30- Qaus- 1364 21- Dec- 1986	597	Resolution of the Ministers' Council of the Democratic Republic of Afghanistan concerning Regulation of Agricultural and Land Reforms of Provincial Administrations		
37	15- Aqrab-1365 06- Nov- 1986	619	Resolution of the Ministers' Council of the Democratic Republic of Afghanistan regarding Enforcement of the Regulation for Attracting Private Investment for Development and Cultivation of Virgin & Barren Lands		OG 700 Law on Private Investment for Development of State Owned Virgin and Barren Lands 21- Sep-1989
38	10- Saratan-1366 01- Aug-1987	639	Law on Land Expropriation		OG 794 Law on Land Expropriation of Taliban 2000
39	25- Saratan- 1366 16- July- 1987	641	Decree of the Revolutionary Council of Afghanistan regarding the Fundamental Principles on Organising Land and Water Relations in the Democratic Republic of Afghanistan		
40	15- Dalwa-1366 04- Feb.- 1988	658	Law on Land Relations Management	OG 742 Decree of the President of Republic of Afghanistan about Amendment of Article 96 of Law on Land Relations Management 05- May- 1991	OG 769 Decree 609 of the President about Repeal of Law on Land Relations Management 06- Nov- 1994

41	30- Dalwa-1366 19- Feb-1988	659	Regulation of Land Lease		OG 795 Law on Land Management of the Islamic Emarat of Afghanistan Year 2000
42	12- Asad- 1366 03- Aug- 1987	643	Resolution of the Ministers' Council of the Democratic Republic of Afghanistan concerning Distribution of Lands for Repatriates who do not have Shelters		
43	31- Jawza-1367 20- Jun- 1988	668	Decree No 241of the President of Afghanistan regarding the Procedure of Selling Flats of Macrorayans of Shahrara and Parwan		OG 725 Regulation on Distribution and Sale of State Owned Residential Flats and Plots in Kabul City 23-Sep-1990
44	31- Sunbula-1367 21- Sep-1988	674	Decree 237 of the President of Democratic Republic of Afghanistan concerning Law of Cadastre Survey		
45	29- Meezan- 1367 20- Oct-1988	676	Decree 332 of the President of Republic of Afghanistan concerning Law on lands Tax		
46	15-Qaus-1367 05- Dec- 1988	679	Decree 859 of the President of Republic of Afghanistan on Exemption of Landlords and Farmers from Lands Taxation		

47	31- Hamal- 1368 21- March- 1989	689	Regulation on Distribution and Sale of State Owned Residential Flats and Plots in Kabul City	OG 725 Regulation on Distribution and Sale of State Owned Residential Flats and Plots in Kabul City 23-Sep-1990
48	30- Sunbula- 1368 21- Sep-1989	700	Law on Private Investment for Development of State Owned Virgin and Barren Lands	OG 795 Law on Land Management of the Islamic Emarat of Afghanistan Year 2000
49	01- Meezan- 1369 23- Sep- 1990	725	Decree 789 of the President of the Republic of Afghanistan regarding Return of Houses and Flats that are under Control/Custody of the Government to their Owners Regulation on Distribution and Sale of State Owned Residential Flats and Plots in Kabul City	OG 798 Regulation on Distribution and Sale of State Owned Residential Flats and Plots of Taliban Administration The year 2000
50	31- Asad- 1372 22- Aug-1993	767	Decree No356 of the President concerning ban to unlawful occupation of movable and immovable properties	
51	16- Meezan-1373 08- Oct-1994	769	Decree 609 of the President about Repeal of Law on Land Relations Management	OG 795 Law on Land Management of the Islamic Emarat of Afghanistan Year 2000

51	15- Aqrab-1373 06- Nov- 1994	771	Decree 182 of the President concerning avoidance of conversion of Pastures to Agricultural Lands		
52	30- Asad- 1374 21- Aug- 1995	781	Decree 343 of the President concerning Property Dealers Law		
53	1378 1999	786	Law of Property Dealers	OG 837 Decree 76 of the President of the Transitional Islamic State of Afghanistan about Amendment and Repeal of Some Parts of the Law of Property Dealers 27-Sept-2004 <i>(sub sec 1of art 2, the whole art 3 & 4, part 6 of art 6, sub sec 2 of art 8, the whole art 9&11 sub sec 1 of art 13, the whole art 14, the whole art 15 sub sec 1 of art 22)</i>	
54	1378 1999	788	Decree 26 of Ameerul-Mo'meneen concerning Properties	OG 794 Decree of Mmeerul-Mo'meneen about Amendment of Decree 26 Year 2000 <i>(Sub Sec 3 of Art 24)</i>	OG 816 Decree 83 of the President of Transitional State of Afghanistan about Properties 05- Jan-2004
55	1378 1999	792	Regulation on Guarding Methods of Movable and Immovable Properties of the Absent, Missing, Apostate, Rebel and Zemmi (Non-Moslems Residing in Islamic State)		

56	1379 2000	794	Law on Land Expropriation	OG 849 Decree 7 of the President of Islamic Republic of Afghanistan about amendment of some articles of Law on Land Expropriation of Taliban of the year 2000	parts 1& 3 of art 3 and the whole articles 12,13,16,17 20 & 22
57	1379 2000	794	Regulation on Determining Price of Rent of Municipalities' Properties		
58	1379 2000	794	Regulation on Distribution and Sale of Residential, Commercial and High Rise Buildings in Kabul City		
58	1379 2000	795	Law on Land Management of the Islamic Emarat of Afghanistan		
60	1379 2000	795	Forest Law of the Islamic Emarat of Afghanistan		
61	1379 2000	795	Law on Pastures Of the Islamic Emarat of Afghanistan		
62	13792000	798	Regulation on Distribution and Sale of Emarat Owned Residential Flats		
63	28- Jawza- 1381 18- Jun- 2002	802	Decree 830 of the President of Interim Islamic Administration of Afghanistan concerning Prohibition of Distribution of State Owned Lands Contrary to City Plan		

64	28- Jawza- 1381 18- Jun- 2003	802	Decree 99 of the President of Interim Islamic Administration of Afghanistan on Non-Distribution of State Owned Virgin and Barren Lands		
65	22- Jaddi- 1381 12- Jan-2003	804	Decree 136 of the President of Transitional Islamic State of Afghanistan concerning Establishment of Special Court of Property Claims Solution	OG 805 Decree 161 of the President of Transitional Islamic State of Afghanistan concerning Amendment of Decree 136 11- Feb- 2003 (Art 2)	OG 817 Decree 89 of the President of Transitional Islamic State of Afghanistan regarding Establishment of Special Courts of Property Claims Solution 20- Jan- 2004
66	15- Jaddi- 1382 05- Jan-2004	816	Decree 83 of the President of Transitional State of Afghanistan about Properties		
67	30- Jaddi-1382 20- Jan- 2004	817	Decree 89 of the President of Transitional Islamic State of Afghanistan regarding Establishment of Special Courts of Property Claims Solution		
68	28- Hoot- 1382 19- March- 2004	823	Decree 112 of the President of Transitional Islamic State of Afghanistan with regard to Revision of Decisions and Orders of the Special Court of Property Claims		
69	1 6/Meezan/1383 27-Sept-2004	837	Decree 76 of the President of the Transitional Islamic State of Afghanistan about Amendment and Repeal of Some Parts of the Law of Property Dealers		
70	14/Hamal/1384 03-Apr-2005	849	Decree 7 of the President of Islamic Republic of Afghanistan about amendment of some articles of Law on Land Expropriation of Taliban of the year 2000		
71	15/Qaws/1384 06- Dec- 2005	868	Decree 104 of the President of Islamic Republic of Afghanistan about distribution of land plots for purpose of shelter to repatriates and IDPs		

Annex 2: Land Management Law of the Islamic Emirate of Afghanistan

CHAPTER 1

GENERAL PROVISIONS

Article 1:

This law has been enacted in accordance with the injunctions of the Islamic *Shari'a* to ensure the following objectives:

1. Better management of land affairs in the country.
2. Solving problems resulting from land reforms implementation during former regimes.
3. Management of property books and their relevant documents.
4. Land registration.
5. Collection of authentic figures and statistics on properties to be used in the future economic and development plans of the Emirate (State).
6. Classification of individual, Emirate (State), virgin, grazing and endowed lands.
7. Distribution of Emirate (State) owned lands as well as barren (mowat) lands.
8. Restoration of lands distributed unlawfully and contrary to sharia after 7 *Saur*, 1357 (S.H.).
9. Establishing a uniform and valid landholding system in the country.

Article 2:

The following terms shall have the following meanings in this law:

1. Landowner: An individual who may exercise possession of land on the basis of legal and sharia ownership documents.
2. Heirs: Individuals who after distribution of an inheritance are recognized as eligible by the relevant sharia court to inherit the property of the deceased.
3. Household: Husband, wife and unmarried children.
4. Resettler: An individual to whom the Emirate (State) has distributed land in a place other than his original place of residence.
5. Legal representative: A person being appointed as a representative by the landowner, his heirs or partners on the basis of sharia form.
6. Agricultural Land: A landed area used for agriculture in accordance with the provisions of this law.
7. Private lands: Plot (s) of lands belonging to individuals, companies, and non-Emirate legal persons in the same or different locations.
8. Emirate (State) lands:

1. Plot (s) of orchard, irrigated and rain-fed lands, hills, meadows, marshy lands, forests, pastures, reed-beds and other lands registered in the principal land book of the Emirate.
2. Lands, which are deemed public lands, but are not registered in the principal book of Emirate (State) lands.
3. Lands in respect of which individual ownership has not been proved legally during rent.
9. Pasture (grazing, derelict) lands:
 1. Pastures are uncultivated lands in respect of which Emirate (State) or individual ownership can not be proved by sharia [legally].
 2. Where a person having a loud voice screams with full strength from the last house of a village or a town, the distance up to which his scream is heard, shall be deemed pastureland.
10. Endowed Lands:

Endowment means to confine a thing to the possession of Allah, which again means that the thing endowed is no longer the property of the endower and does not become under the ownership of the one under whose custody the endowment has been placed.
11. Virgin Land: The land which has never been brought under cultivation, (except individual, Emirate (State), pasture, and endowed lands); all deserts, mountains, hills, rivers, arid and rocky lands and forests shall be deemed virgin (dry) lands.
12. Arid Land: Land which under normal conditions has not been cultivated for a period of 5 successive years, and which can be brought under cultivation after improvement or construction of a new irrigation system.
13. Fragment: A piece of land which is surrounded by public or private lands or by lands belonging to legal persons. The area under orchards or vineyards, despite being part of the same plot, shall be deemed a separate plot.
- 14 Small Fragment: A piece of land with an area of less than one hectare (5 *jiribs*).
15. Excess Land: Portion of the area of landownership possessed by an individual, and which is proved to be in excess of the limits defined in the legally valid landownership document.
16. Legally valid deed: The deed in which characteristics of the owner's land are recorded and which is deemed valid on the basis of the provisions of this law.
17. Eligible: An individual to whom land has been distributed in accordance with the provisions of this law.
18. Changes and alterations in land: Change in the category, area, limits and right of irrigation.
19. Board: Rent and land management affairs.
20. Declaration: A printed form which has been distributed prior to the year 1357 (1978) or after the victory of the Islamic movement for the purpose of registering quantity and quality of land plot (s) belonging to individuals and for determining tax. The declaration form shall not be deemed a title deed and shall only be used for collecting lawful revenues (taxes) due to the Emirate (State).
21. Landless Farmer: A person who does not own land and cultivates the land of another person.

22. Farmer with insufficient land: A person who owns less than one hectare of first grade land or the equivalent thereof and is engaged in agriculture activities.

23. Agriculture laborer: A person who does not own land and performs agricultural works against definite wages in cash or in kind.

24. Indigent nomad: A nomad who, apart from wage-earning and shepherding, does not have any other source of income.

25. Principal book for registration of private lands: A book in which quantitative and qualitative particulars, as well as transfers and alterations of the non-Emirate land plot(s) belonging to individuals, companies, and legal persons registered after thoroughly checking valid deeds in accordance with the provisions of this law.

26. Principal book for registration of Emirate (State) lands: A book in which Emirate (State) lands are registered together with their quantitative and qualitative particulars.

Article 3:

Land Management affairs in the country shall be the responsibility of the deputy minister for land management affairs of the ministry of agriculture & livestock.

CHAPTER 2

LEGAL LAND OWNERSHIP DOCUMENTS

Article 4:

The legal land ownership documents shall be the following:

1. A legal document issued by a court upon purchase, conveyance, gift, inheritance, division, land exchange, letter of exoneration, letter of correction as well as document of the ultimate decision issued on the basis of property deeds and containing the following conditions:

A: To have been registered with a judicial court. A sharia form (waseeqa) without being registered with a judicial court can be valid if confirmed by a competent court.

B. A valid legal document or valid decree when there is no other invalidating document.

C: The land under legal deed, if subject to Emirate taxation, shall be recorded in the tax book.

2. Emirate (State) decree, council of ministers (prime ministry's) decree and a deed in respect of purchasing land from Emirate's (State) landed properties with the following conditions:

A. To have been issued by a competent organization.

B. Legal deed and other valid documents without superseding deed or documents.

C. To have been recorded in the tax book if the land is subject to tax payment.

3. The tax payment document having the following conditions:

A. Legal deed or a valid decree without a superseding deed or decree.

B. To have been registered in the principal book of properties and tax.

4. The water rights document having the following conditions:

- A. It is without a superseding document.
- B. Is registered in principal book of properties and tax.

5. A customary deed shall be legally valid under the following conditions:

- A. The seller possesses a valid deed.
- B. Where the customary deed has been prepared before the 15th of *Asad*, (1354), and the buyer having filled the declaration form before the year 1357 and submitted it to the relevant office after being confirmed by the farmers whose lands located next to the same fragment. In locations where declaration forms were either not distributed or distributed before the year (1357) but the registration book has become extinct, and where no claim to the land existed and the land purchase and the possession thereof by the buyer has been confirmed by the landowners holding lands next to the above fragment, as well as by the inhabitants of the locality where the land is situated and is also confirmed by the local Emirate (State) department.

6. A title deed having the following conditions:

- A. The basic valid document exists in respect of the land.
- B. To have been issued after legal clarification.
- C. To have been registered in the principal properties and tax book.
- D. No justified claim to the land exists.

7. Landownership document (the title deed) having the following conditions:

- A. To have been prepared by the relevant court after legal clarification of the land.
- B. To have been registered in the principal properties and tax book.

Article 5:

Non-registration of the valid documents stipulated under article 4 of the present law does not cause revocation of the deed. The deed mentioned under clause 3 of article 4 is an exception to this rule.

Article 6:

The valid landownership deeds stipulated under the present law shall be referred to the relevant court by the clarification commission after clarification of the land and shall be converted into a legal deed by the court.

Article 7:

A person possessing land in many locations can obtain a legal document for his entire landholdings from the court of the locality where he possesses land and where convenient for him after completing the information form in respect of relevant locations and in respect of clarification of his landholding area.

Article 8:

Watermill, *paikoob* (a foot-operated wooden machine for beating paddy and cereals and removing husk), as well as other immovable agricultural equipments and appliances existing in the landholding area of the person and are deemed to be his property, shall be registered in the legal deed of the person and shall be recorded in the principal land registration and tax book.

Article 9:

(1) Where the landowner is not in possession of a deed and the land possessed by him has not been registered in the Emirate properties book, and other individuals did not make claim for the ownership of the land, and where the signs of agricultural construction have been observed on the land, and where the landowners holding lands next to him as well as agriculture and irrigation departments and the local administrative centre confirmed the location under his possession, the same land shall be deemed his property on the basis of his possession as owner.

(2) If the Emirate (State) provides documents nullifying individual possession stipulated under clause (1) of the present article, and where this claim has not been terminated by limitation and the land is deemed as to belong to the Emirate, in such circumstances the following remedy shall be applied:

Where the land area possessed by a family is up to 10 *jiribs* (2 hectares) of class one land or equivalent thereof shall be given under the possession of the landowner, and the land in excess of 10 *jiribs* (2 hectares) equivalent of class one land shall be sold to the landowner on the current price to be recovered in installments over a period of five years.

Article 10:

In regard to additional land in a landholding area actions shall be taken in accordance with the provisions stipulated under article 9 of the present law.

Article 11:

Settlers having obtained land from the State prior to enforcement of the present law shall be subject to the following actions:

1. Where the settler or his inheritors have paid the entire installments of the land price, they shall be granted the title deed in respect of their related land.
2. Where the settler or his inheritors have partially paid installments of the land price, the remainder installments shall be determined with the agreement of the settler, and after payment of these installments they shall be granted the title deed in respect of their related land.
3. Where the settler or his inheritors have abandoned land due to difficult environmental conditions, and where they make recourse while no Emirate establishments are constructed on the land, and where the landowners possessing lands next to them as well as five influential persons at minimum whose witness is acceptable to the sacred *Shari'a* and the local administration center confirmed their possession of the land, they can obtain the legal deed after payment of the entire installments of the land price on the basis of market rates agreed upon by the settler.

Where Emirate (State) establishments are partially constructed on the derelict land of the settler the remainder of the land shall be handed over to the settler, and the land portion over which the establishments have been constructed shall be possessed by the Emirate (even if the settler has paid the entire installments of the land price).

Where Emirate establishments are totally constructed on the derelict land of the settler and the settler having paid the entire installments of the land price, the land shall still be possessed by the Emirate.

Article 12:

The eligible persons to whom land has been distributed in accordance with the provisions of the present law, and who have not paid the entire price of the land, shall only be granted land distribution and possession certificate. They are not yet deemed the landowners. After payment of the entire land price and upon concluding the agreement in its entirety with the local land management department, they shall be granted the legal deed through the relevant court.

Article 13:

When the person loses legal deed or land distribution certificate, he shall be granted the duplicate thereof.

CHAPTER 3

LAND CLARIFICATION

Article 14:

(1) The general land management department of the Ministry of Agriculture & Livestock shall conduct the process of clarification and land administration from technical and administration points of view.

(2) The Supreme Court of the Islamic Emirate of Afghanistan, finance, water & power and agriculture & livestock ministries, general department of survey and topography as well as relevant local departments shall be jointly responsible to implement the provision stipulated under clause (1) of the present articles.

(3) Practical work on the site shall be carried out by the clarification commission.

Article 15:

The clarification commission shall perform its functions with the following composition:

1. Representative of the land management organization, as chairman.
2. Land clarification and administrative officials of the land management organization, as members.
3. Representatives of the Supreme Court, finance, and water & power ministries, local promotion and propagation department, as well as members of land mapping and registration team (the cadastre team) of the general department of land survey and topography, as members.

Article 16:

The land clarification commission has the following obligations and powers:

1. Clarification of landholding areas, distribution of document and land to the eligible person.

2. Determining the limits, category and water rights of the land.
3. Segregation of individual, Emirate (State), as well as grazing, endowed and virgin lands.
4. Referring documents after land clarification to the relevant court for the preparation of legal deeds, as well as referring lawsuits to the competent courts in accordance with the provisions of law.
5. Registration of landholding area and legal document in the relevant books after clarification.
6. Referring the legal deed for registration in the principal book of properties as well as in the lawful revenues book (tax register) of the Emirate for the relevant location.
7. Submission of legal document to the owner.
8. Restoration of previously distributed lands (after 7 *Saur*, H.S. 1357) to the owner, to the legal representative or to the legal inheritors of the deceased.
9. Sending performance report to the relevant provincial land management department and to the central land management organization.

Article 17:

Team of the land mapping & registration department (cadastre team) and of the general department of survey & topography is obliged to accomplish the following tasks:

1. Provide information on the registered maps, results of cadastre as well as a list of the probable owners.
2. Determine the area and design sketch of land plots.
3. Determine boundaries of the land plot.
4. Adjust local land measuring scale to *jirib*.
5. Perform other duties required to determine the characteristics of land in its relevant map.

Article 18:

Representatives of the Ministry of Agriculture, Water Management and Taxation departments are respectively required to identify and determine the category of the land plots, define the water rights as well as lawful revenues (taxes) in respect of the land parcels.

Article 19:

For clarification of the relevant landholding area, the owner or his legal representative shall be obligated to render cooperation to the clarification commission on the site until the end of its work.

Article 20:

For better management of field activities, and for overcoming practical problems resulting from implementation of land clarification activities, the commission shall be formed in provinces with the following composition:

1. The governor, as chairman.
2. Head of agriculture department, as vice-chairman.
3. *Mustowfee* (director of provincial finances), head of water department, head of land survey and topography department, and chief security officer, as members.
4. Head of land management department, as secretary-cum-member.

The commission shall call its meeting once a month, and if necessary, shall meet more than once.

Article 21:

In order to render better cooperation and to provide technical and administrative support to implementation of field activities as well as to overcoming problems on the spot, the land management commission shall be created in the center with the following composition:

1. Minister of agriculture & livestock, as chairman.
2. Vice-president of general land management department, as vice-chairman.
3. President of promotion & propagation department of the ministry of agriculture & livestock , president of water management of the ministry of water & power, president of topography & land registration (cadastre) and president of revenues of the ministry of finance, as members.

The commission shall call its meeting once in each quarter of the year, and if necessary, shall call more meetings.

Article 22:

Where during the course of land clarification operation it is proved that the limits, area and category of the plot (s) as stipulated in the deed are in contradiction with the statement of the owner or his legal deputy, the issue shall be thoroughly evaluated by the clarification commission and a decision shall be taken thereon.

Article 23:

In order to ensure public interests, the Emirate, if necessary, can retain the land of a person under the following conditions, which shall take place after the clarification:

1. Where the entire or a portion of the land possessed by the owner or his heirs and/or by the settler or by the eligible person with the entire installments of the land price having been paid, falls under a project or is subject to permanent use by the Emirate (State) departments and institutions, the entire or the portion of the land shall be appropriated (by the State) after the clarification in accordance with the provisions of the law.
2. Where the settler or the eligible person has paid a portion of the installments of the land price, actions in regard to compensating the paid portion shall be taken in accordance with clause (1) of the present article.

Article 24:

A land under project, which has been changed into constructions, establishments or into residential quarters prior to clarification, shall not be settled by the clarification commission,

and shall be purchased by the relevant departments upon observing valid documents possessed by the owner or his heirs.

Article 25:

Land-related disputes and claims, if not settled by the clarification commission, shall be referred to the court for clarification.

Article 26:

The landholding area of a deceased shall be legally distributed among inheritors by the court.

Article 27:

Persons whose lands are recorded collectively on the basis of a legal document in the name of tribal elders, a reputed elder (an elder of a village), community subterranean irrigation canal (*kariz*) or in the name of other persons, and the portion of each owner is being specified on the basis of traditional distribution, can settle their respective portions and obtain the legal deed as follow:

1. The list of the area, limits and water rights shall be prepared in respect of each person who is practically in possession of the land.
2. Signature and fingerprints of each possessor shall be obtained on the above list.
3. The land belonging to each person shall be included in the forms for land area evaluation, re-registration and clarification of landholding area.

Article 28:

Where the title deeds belonging to various landowners are prepared on the basis of common boundaries and where the areas of their lands are held in common, following actions shall be taken for their clarification:

1. Dimensions of the original area as well as class one equivalent of the property of each person shall be determined upon observing the property document.
2. If the property document is a tax document, the amount of the annual tax up to S.H. 1354 in respect of each owner shall be obtained from the principal book for registration of properties and the landholding area of each person shall be determined in proportion to the amount of annual tax paid by him.
3. Boundaries of commonly held land, its original area as well as its corresponding class one area shall be determined by the team of the department of land mapping and registration (cadastre team).
4. Share of each person shall be separated in proportion to the area mentioned in the property document or in proportion to tax payment document, and in case of disagreement on the part of his partners or inheritors the issue shall be referred to the court.
5. The land possessed in excess of the area mentioned in the document of the landed property commonly held by the persons shall be deemed additional land and actions in respect thereof shall be taken in accordance with the provisions of the present law.

Article 29:

The land recorded in the books in the name of a person in the form of temporary tax and permanent farming (a life undertaking), and the person has paid its taxes for (40) years at minimum, shall be deemed property of the person concerned.

Article 30:

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

CHAPTER 4

RESTORATION OF APPROPRIATED LANDS TO THEIR OWNERS

Article 31:

Lands being exacted (confiscated) from their owners or their inheritors without compensation on the basis of decrees and legal documents of the then communist and infidel regime after 7 *Saur*, (S.H. 1357) on different grounds contrary to the Islamic *Shari'a*, shall be subject to the following actions:

1. Where the land is not distributed and remains in its former state shall be restored to its real owner, his legal deputy or his legal inheritors by the clarification commission after the clarification process.
2. If the land has been distributed to a person in accordance with the then legal documents, the owner or his inheritors, with mutual agreement of the parties, can collect the price of the distributed land on the current rate from the afore-mentioned person.

If there is disagreement between the parties, the land shall again be restored to the owner or his legal deputy, and in case of demise of the owner, shall be restored to his legal inheritors. If the real owner demands, the land produce shall also be returned.

Clause 3 of the present article is an exception to this rule.

3. Where the land exacted from its owner, whether living or deceased, is distributed to Emirate (state) department, institutions and agriculture farms (one page missing).

Article 33: (?)

Following actions shall be taken in regard to a person whose previously exacted landholding area is exchanged with the landholding area of another person:

1. Provided cultivability of both lands being exchanged has not been altered, the exchange shall be nullified and either person shall be given his respective land.
2. If the exchanged land is distributed to a person, the exchanged land shall be returned to their real owners.
3. Where establishments are constructed on the exchanged land, or a person whose land has been exchanged with the land of another person has brought changes in the exchanged land, the landowner shall have the right to appropriate the land or the price thereof.

Article 34:

A person who is recognized to be a landowner on the basis of the injunction of the Islamic *Shari'a* as well as on the basis of valid documents, but in whose absence restoring the appropriated land to him is not possible, shall, in order to protect his interests and property, appoint a custodian competent court (attorney of the absent), which shall, in consultation with the general land management department, take appropriate action to protect the property of the absent.

Article 35:

Where the landholding area of persons or the Emirate (State) is distributed to persons based on the then enforced laws and contrary to the principles of the Islamic *Shari'a*, or the land is possessed by persons arbitrarily, the following actions shall be complied with:

1. Where the land is part of the property of persons, it shall be restored to the real owner, his legal deputy or to his inheritors.
2. Where the land is part of the Emirate (State) properties, or the real owner stipulated under clause (1) of the present law has left no inheritors eligible to inherit his property, the land shall be recorded in the total properties of the Islamic Emirate.
3. Under circumstances stipulated in clauses (1 & 2) of the present article, a person whose possession of the land is contrary to the injunctions of the Islamic *Shari'a* and law, shall have no right to claim compensation of loss.

CHAPTER 5

ELIGIBLE

Article 36:

A person fulfilling the following qualifications shall be deemed eligible for land distribution:

1. Citizenship of the Islamic Emirate of Afghanistan.
2. Completion of 18 years of age.
3. A farmer without land or a farmer with less land, agricultural contractual worker, retired employee and hapless nomad.
4. A person who undertakes to cultivate, improve and safeguard the land distributed to him.

Article 37:

To confirm and categorize the eligible on the basis of quota form by the clarification commission, shall take place upon conformation by three influential village elders, village headman and the *mullah imam* (a *mullah* who leads prayers), as well upon ratification by the provincial commission.

Article 38:

The eligible, after his quota is confirmed, shall:

1. Fill the land quota form within (15) days of the receipt thereof, and shall submit it to the clarification commission.
2. Cultivate and improve the land after taking possession thereof.
3. Pay installment of the land price as well as the lawful revenues (taxes) in due time.

Article 39:

Priority of an eligible person in the distribution of land, who fulfills qualifications stipulated under article (36), shall be determined as follow:

(1) 1st priority eligible:

1. A landless farmer with an extended family.
2. A landless farmer who cultivates a land which is possessed by the Emirate (State) for the sake public interests.

(2) 2nd priority eligible:

A landless farmer and a contractual agriculture worker in a village or in a place where there is land for distribution.

(3) 3rd priority eligible:

A farmer with a small land and a retired employee of the Islamic Emirate with small or no land at all, who has rendered the service for (25) years at minimum, and who is distributed land in lieu of retirement pension. In this case, a (14) years service in the communist regime shall not be calculated.

(4) 4th priority eligible:

A hapless nomad who normally tarries for a certain time of the year in a district where there is land for distribution, as well as other nomads.

Article 40:

(1) Tribes, ethnic groups and hapless nomads who are displaced from one place and are settled in another place or province by the Islamic Emirate, shall complete the legal document of landlessness in the relevant court of their location. The general land management department shall distribute a land plot to them as priority four eligible provided that land is available for distribution.

(2) Ministries of agriculture & livestock, water & power, education, public health, telecommunications as well as the department of rural rehabilitation & development are obligated to perform their respective tasks.

Article 41:

Where the eligible passes away, the following provisions shall be complied with in regard to the distributed land:

1. The eligible heirs can make use of the land by paying installments of the price of the distributed land. After paying the entire installments of the land price, the inheritors shall be granted the right to inherit the land which shall be irrevocably transferred to them
2. Where the heirs are minors and female, or the eligible is not in a position to cultivate the land on health grounds, they can give the land to another farmer or can lease it.
3. Where the eligible or his heirs do not want to continue use of the distributed land after enforcement of the present law, they can return the land to the Islamic Emirate. In such case the paid installments shall be reimbursed from the Emirate budget.

Article 42:

A married eligible or bread earner of a family shall have right of priority in land distribution as compared to the unmarried eligible falling under the same category.

CHAPTER 6

LAND DISTRIBUTION

Article 43:

The following lands can be distributed provided they are not needed for the establishment of a farm or a project thereon:

1. Lands donated to the Islamic Emirate of Afghanistan with the proviso that they are not donated for a specific purpose.
2. Agricultural lands of the Emirate or the grazing lands, which are recently being prepared for cultivation.

Article 44:

(1) Distribution of land to an eligible shall take place in compliance with the provisions of the present law, through the recommendations of the ministry of agriculture & livestock and upon approval by the *Amir al-Mo'minin* against a just price and on 10-year installments. Unless the entire installments are paid, the land shall be deemed as a trust under the custody of the eligible.

(2) The price of the land to be distributed shall be determined in conformity with the locally prevailing price at the time of land distribution by the high commission appointed by the *Amir al-Mo'minin*.

(3) Time for payment of installments of the land price distributed after enforcement of the present law shall be one year after the date of land distribution.

Article 45:

For clarification, property confirmation and distribution purposes the land shall be divided into three grades and seven categories, and while adjusting categories into first category, the following coefficients shall be complied with:

First grade: (Irrigated land covered with orchards, vineyards and producing double crops).

Category one land: (Orchard or vineyard), coefficient (1.00).

Category two land: (double crops, irrigated), coefficient (0.85).

Second grade: (Single crop, irrigated):

Category three land: A single crop irrigated land, of which 50 per cent or more than that is cultivated or irrigated annually, coefficient (0.67).

Category four land: A single crop irrigated land, 15 to 50 per cent of which is cultivated or irrigated annually, coefficient (0.40).

Third grade: (Less irrigated and rain-fed).

Category Five land: A single crop irrigated land less than 15 per cent of which is cultivated and irrigated annually, as well as rain-fed land which is cultivated every two alternate years, coefficient (0.20).

Category six land: Rain-fed land, which is cultivated every three alternate years, coefficient (0.15).

Category seven land: Rain-fed land, which is cultivated for more than two alternate years, coefficient (0.10).

Article 46:

The land measuring scale unit is *jirib* corresponding to (2000) m² or one-fifth of a hectare. At the time of distribution to the eligible, the land shall not be calculated if it is half a *jirib* or less than that, and the land in excess of half *jirib* shall be calculated one *jirib*.

Article 47:

The land shall be distributed to the eligible in one of the following categories:

1. Category one land: (Orchard or vineyard), 2 hectares, equivalent to (10) *jiribs*.
2. Category two land: (double crop, irrigated), (12) *jiribs*.
3. Category three land: (single crop, irrigated), (15) *jiribs*.
4. Category four land: (single crop, irrigated), (25) *jiribs*.
5. Category five land: (single crop, irrigated, and rain-fed land cultivated in one season, (50) *jiribs*.
6. Category six land: (rain-fed land cultivated in two seasons alternately, (66) *jiribs*.
7. Category seven land: (rain-fed land cultivated for more than two alternate years, (100) *jiribs*.

Article 48:

The average annual output of one *jirib* of land in various locations shall be determined by the agriculture, irrigation, land mapping & registration (cadastre) and land management departments.

Article 49:

Where there are more eligible persons in each category in respect of the land to be distributed, the land shall be distributed in the presence of the majority of the eligible persons on the basis of drawing lots.

Article 50:

(1) Tiny and dispersed land lots remaining at the end of distribution, shall, first of all, be distributed to the farmer possessing less land next to the remaining lots, then to the landowner whose land is next to the above remaining plot, or shall, otherwise, be distributed to the landowner possessing minimum land in the location, against current price. In this case the landowner shall pay the land price in lump sum.

(2) Where landowners under clause (1) of the present article do not wish to purchase, the land shall be sold on auction.

Article 51:

The ministry of water & power (?) shall hand over a constructed agricultural project, provided it is not needed for the construction of Emirate (State) farm, to the general land management department for distribution to eligible persons.

CHAPTER 7

LAND TRANSFERS AND ALTERATIONS

Article 52:

(1) The owner has the right to transfer his property irrevocably or temporarily.

(2) An eligible person and a settler after paying the entire installments of the land price and after obtaining the legal deed, as well as heirs of the eligible person with their shares having being confirmed, shall have the right to transfer their lands.

Article 53:

Irrevocable transfer of landed property as well as that of immovable installations and equipments existing in the landholding area shall take place on the basis of a legal deed.

Article 54:

Transfer of landed property shall take place by the relevant court of the place where immovable property is situated through the land management department. Registration of land transfers in principal land registration book, in the book of lawful Emirate (State) revenues (taxes) as well as in the book of land transferring actions without charge. The relevant court of the place where the immovable property is situated shall collect the transferring fees in accordance with the provisions of law.

Article 55:

Qualitative and quantitative alterations in the land shall be registered in the principal land registration books as well as in the lawful revenues (tax) book on the basis of written information provided by the landowner with the approval of local agriculture department after clarification.

Article 56:

Transfer of the Emirate (State) lands to Emirate (State) departments and institutions shall take place on the basis of an agreement between the general land management department of the ministry of agriculture & livestock and the end-user department after approval by *Amir al-Mo'minin*.

Article 57:

A person in possession of land plots in several locations can exchange his respective plots with the Emirate (State) lands taking into consideration the category and price of the land, in a district or a province where he owns lands with the proviso that the lands which would be exchanged are not farm land or is not under a project.

Article 58:

Exchange of individual lands shall take place upon observing the legal deed and through mutual agreement between the parties by the court in the location of immovable property through land management department.

Article 59:

Regarding agricultural lands which were formerly distributed to non-Emirate cooperatives, institutions and companies during the communist regime after 7 *Saur*, 1357 till 8 *Saur*, S.H. 1371, shall be subject to the following actions:

1. Where such cooperatives and institutions are active, they shall pay the land price to the Emirate (State) in installments over a period of 5 years.
2. Where such cooperatives and institutions are inactive, the land shall be appropriated by the Emirate (State) without compensation of loss.

Article 60:

Transfers made contrary to the provisions of the present law shall be invalid.

CHAPTER 8

LAND LEASING

Article 61:

(1) Emirate (State) and private lands shall be leased on the basis of a written agreement between lessor and lessee in accordance with injunctions of the *Shari'a*.

(2) Parties to an agreement shall have legal capability.

Article 62:

The lease document shall contain the following terms in addition to personal introduction of the parties to the agreement and the witnesses:

1. Description of the characteristics of land plot (s) under lease.

2. Rent of legal obligations of the parties to the agreement.
3. Definition of kind of plant and the manner of cultivation and agriculture.
4. Confirming the lease period, the amount of rent with its due date and payment methodology in accordance with the provisions of law.
5. Circumstances for annulment of the agreement.

Article 63:

The lessee has the following obligations:

1. To safeguard the soil, irrigation network, equipments and establishments existing on the land which are essential for the benefits of land under lease.
2. To keep clean stream, under ground canal, fountain and well related to the land under lease.
3. To cultivate the land in accordance with the lawful terms of lease.
4. To pay lease rent to the lessor in accordance with the agreement.

If the lessee wants to pay rent in cash in lieu of instead of in kind payment, with mutual agreement of the parties, he shall pay on the basis of the material's current value without delay.

5. To undertake partial repairs of equipments and fixtures of the land under lease in accordance with *Shari'a*.
6. To compensate loss to lessor in case he (the lessee) exceeds in use from permissible *Shari'a* limits and caused harm to lessor.
7. Other obligations as might have been foreseen in the law in accordance with *Shari'a*.

Article 64:

The lessee is obligated to inform the lessor of any kind of intervention by individuals, which might interrupt the lease.

Article 65:

The lessee cannot use the right to irrigation in respect of the land under lease for purposes other than those stipulated in the agreement.

Article 66:

The lessee can not take action in regard to transfer or in regard to give the land under lease as guarantee.

Article 67:

Where the lessee brings some developments to the land under lease, the expenses thereof shall only be paid to him provided the lessor has agreed in writing to pay them to the lessee.

Article 68:

The lessor has the following obligations:

1. To handover the land leased to the lessee together with the entire equipments and fixtures as stipulated in the lease agreement on specified time.
2. To give a written receipt to the lessee for rent received.
3. To undertake general and essential repairs on establishments and fixtures of the land in accordance with the local custom.
4. Other responsibilities foreseen in the law in accordance with the *Shari'a*.

Article 69:

(1) Lest the lessee should claim the ownership of the Emirate (State) immovable property under lease, the Emirate (State) departments, and the Ministry of Agriculture & Livestock, in particular, can not lease the land for more than three years, and commercial warehouses and shops for more than one year.

(2) The lessor can not sublease the land under lease to another person until the end of lease period or until the annulment of the agreement.

(3) Annulment of lease shall take place in accordance with the provisions of *Shari'a*.

Without legal permission no department shall be allowed to annul the lease agreement.

Article 70:

Whenever the land, irrigation establishments, fixtures and equipments as well as trees are damaged or destroyed as a result of natural disasters and *force majeure*, the lessee shall not be obliged to pay compensation to the lessor.

Article 71:

The lessee can annul the lease agreement under one of the following circumstances:

1. Illness or reduction in the number of his family members.
2. Occurrence of disasters resulting from *force majeure*, which may compel the lessee to leave the location or to cause to be the land under lease uncultivable.
3. Land to be distributed to him by the Emirate (State).
4. Circumstances foreseen in the lease agreement.
5. Other circumstances foreseen in the law and in the *Shari'a*.

Article 72:

When the lessee wants to annul the lease before the end of the lease period, he shall inform the issue at least three months in advance to the land management department and to the lessor.

Article 73:

Where the lessee dies or disappears, his family can carry on the lease in accordance with provisions of the *Shari'a*.

Article 74:

The lease period of the land, taking into consideration the provision stipulated under article (69) of this law, shall depend on agreement of the parties.

Article 75:

(1) Putting the Emirate (State) lands on auction for leasing shall be brought to the public notice by the provincial land management department through radio, newspapers and through local mass media.

(2) The public notice shall contain information such as land characteristics, period of lease, place and time for the submission of application.

(3) The public notice shall be published through mass media two months prior to concluding the lease agreement and cultivating agricultural plants.

Article 76:

In determining rent of the Emirate (State) land, amount of products of the land next to the Emirate (State) land, and the standard of products of local lands shall be taken into account.

Article 77:

Leasing Emirate (State) lands to natural and legal persons shall take place on the basis of auction and on the basis of calling a meeting for bidding. In order to carry on the meeting, a commission composing from representatives of agriculture & irrigation, finance, mapping & registration (cadastre) and land management departments, chaired by the provincial representative, shall be assigned to the provincial or district center. Results of lease bidding shall, in agreement with the governor, be submitted through the general land management department to the minister for approval.

Article 78:

Lessee of the Emirate (State) lands is obligated to provide guarantee in regard to payment of rent as follows:

1. If the land under lease is five *jiribs* corresponding to 1st grade or less than that, one property holder guarantor, and if the land under lease is in excess of five *jiribs* corresponding to 1st grade, two property holder guarantors.

2. In case of a leasehold more than 20 *jiribs* land corresponding to 1st grade, a legal guaranty letter equivalent to or more than the leasehold shall be prepared.

Article 79:

When Emirate (State) lands under lease sustain losses as a result of agriculture pestilence the lessee shall be obligated to communicate the issue to the land management department. The amount of losses shall be determined by a commission composing from representatives of agriculture, land management, irrigation and tax departments of the area. Recommendations of the commission concerning the losses shall be final after being confirmed by the governor and approval of the Minister.

Article 80:

When the Emirate (State) needed taking back its lands entirely or partially to meet public demands, following actions shall be taken in this regard:

1. In case the land under lease is taken back after harvesting time, the agreement shall be annulled and the lessee shall be obligated to pay rent in accordance with the lease agreement.
2. In case the land under lease is taken back before harvesting time, and if the lessee has made expenditures on land, such expenditures shall be reimbursed to him in accordance with the local custom and the lease agreement shall be annulled.
3. In case a portion of the land is taken back before harvesting and another portion is taken back after that, the amount of rent shall be determined in proportion to the taken land, and in regard to the remaining land, in case of agreement of both parties, the agreement will remain the same.

Article 81:

Lease deed in respect of non-Emirate (State) lands shall be registered in the lease book of the local land management department after going through necessary formalities. A certified copy of the lease deed in respect of Emirate (State) lands shall be sent to the central land management department.

Article 82:

In respect of lease transactions of non-Emirate (State) lands, the lessor shall pay Afghanis 5000 per *jirib* of the basic land area, as price of the registration form.

Article 83:

Land lease-related disputes, if not settled by local branches of the land management department, shall be referred to the court.

CHAPTER 9

PASTURES AND ENDOWED LANDS

Article 84:

(1) Pastures are public property. Neither individuals nor Emarat can possess pasture lands in manner of ownership, unless otherwise stipulated by the *Shari'a*.

(2) Pastures shall be kept unoccupied for the sake of public requirements of the villagers (for cattle grazing, graveyard, threshing ground, etc.).

Article 85:

If a person possesses pasture land in manner of ownership, however long his possession of pasture land might be, and in case it is legally confirmed to be pasture land, the person shall be dispossessed and the pasture land shall no longer remain under his possession.

Article 86:

(1) Property or land that is endowed shall no longer remain under the ownership or possession of the owner.

- (2) Selling, giving in gift, transferring or inheriting endowed properties or lands is not permitted.
- (3) The interests of the endowed property, for whatever purpose it might have been endowed, shall be utilized for the same purpose.

CHAPTER 10

DISTRIBUTION OF VIRGIN AND BARREN (MAWAT) LANDS

Article 87:

- (1) No person can possess virgin and barren lands in a manner of ownership, unless authorized by permission of (*Amir al-Mo'minin*).
- (2) When a person possesses Mawat properties (*land*) chaotically and where no permission granted by the *Amir al-Mo'minin* or his deputy existed, by merely chaotic possession, such properties (lands) shall not be deemed personal. Only the *Amir al-Mo'minin* has the authority to allow possession of such lands.
- (3) Distribution of virgin and barren (*Mawat*) lands to individuals, agriculture & livestock institutions, private and joint domestic companies by the general land management department of the ministry of agriculture & livestock, shall take place on the basis of auction after approval of the *Amir al-Mo'minin*.
- (4) Virgin and barren lands shall be put at the disposal of the user after going through approval formalities in exchange of a just price based on a contract between the general department of land management and the buyer for reclamation of virgin and barren lands. Former possessor shall be granted the right of priority.
- (5) The price of virgin and barren lands shall be determined in the site by a commission hereinafter referred to 'evaluation and land submission commission', composed of representatives of agriculture, land management, irrigation, mines & industries and tax departments as well as of the representative of the general mapping & land registration (cadastre) department. In case the price is deemed unfair by the general department of land management, it can be reviewed. The determined price shall be submitted for confirmation by the council of ministers and for approval by the *Amir al-Mo'minin*.
- (6) The price of virgin and barren lands shall be equally received in 5 annual instalments.

Article 88:

- (1) Lands that are to be specified for distribution shall be virgin and barren lands which shall be the pure property of the Emirate (State) and shall not be under Emirate projects, municipal master plan, forests, pastures and mines. Pasture lands and personal properties cannot be distributed.
- (2) A pre-distribution assessment of the virgin and barren lands shall be conducted by the technical commission composed of representatives stipulated under subsection 5 of article 87 of this law, for the accomplishment of the following objectives:
1. Having capability of development and cultivation.
 - 2- Conducting study (survey) of the area concerned.

3- Identifying and confirming water resources and digging-up deep wells from the point of view of availability of subterranean and surface waters and capacity of them.

4- Observing the rights of neighboring landowners for development of the land from the point of view of right of irrigation and other necessary aspects.

5- Rehabilitation and construction of dams and streams in order to bring the relevant area under irrigation.

Article 89:

Determination of distribution standard of virgin and barren (*Mawat*) lands for the purpose of establishing agricultural farms, domestic private and joint companies by using mechanized agricultural machinery and equipments shall take place according to the following categories:

1. To individuals, up to (20) hectares.
2. To agricultural companies, up to (100) hectares.
3. To joint companies, up to (500) hectares.

Article 90:

(1). A person asking for virgin and barren land shall submit his application for receiving land to the central or provincial land management department. The application shall be reviewed by the evaluation and land submission commission within one month and shall be sent to the general department of land management. Actions shall be taken in regard to land distribution through the general department of land management in accordance with the provision of this law.

(2). Time for land reclamation, if the land is up to (500) hectares, cannot be more than three years.

(3). Confirmation of the date of work commencement on virgin and barren lands shall be informed by the provincial land management department to the general department of land management.

Article 91:

(1) Simultaneously with work commencement on virgin and barren (*Mawat*) lands the land management department shall provide a temporary document to the user and upon payment of the entire installments of the land price he shall be granted the legal document.

(2) If it is proved as a result of evaluation that the user does not proceed with the land reclamation work in accordance with the concluded agreement, the land shall be returned to the Emirate (State) and the temporary document shall be deemed annulled. In this case only the paid installments shall be disbursed.

Article 92:

The user shall be exempted from payment of lawful revenues (taxes) for a period of five years from the date of collecting the first harvest.

Article 93:

Ministries of agriculture & livestock, water & power, mines & industries, agricultural development bank and other relevant administrations shall have the following obligations:

- 1- Conduct surveys in respect of agricultural farms.
- 2- Repair, rehabilitate and construct water dam and streams the maintenance of which is looked after by the Emirate (State).
- 3- Grant credits in accordance with legal banking regulations for construction of irrigation networks, improvement and construction of farm as well as construction of its relevant establishments.
- 4- Provide facilities in the preparation of agricultural machinery, fertilisers, improved seeds, improved type of cattle and birds, pesticides, veterinary and zoo-technical services, as well as improvement and repair of inter-property irrigation networks.
- 5- Provide professional and technical consultations on production and economic activities of the farm.
- 6- Provide assistance in fair domestic and foreign marketing for the supply and sale of agricultural products.

Article 94:

Virgin and barren (*Mawat*) lands distribution contract containing land characteristics and obligations of both parties shall be prepared in three copies.

Article 95:

(1). Evaluation of progress and continuation of reclamation work on virgin and barren (*Mawat*)lands shall be conducted by a commission which is sent to the relevant provinces once in each quarter of the year by the central department upon observance of the agreement concluded between the general department of land management and the user.

(2) The evaluation commission shall prepare its work report and shall send one copy each thereof to the governor's office and to the general department of land management.

Article 96:

Amount of agricultural products of developed lands shall be included in the annual socio-economic development plan.

Article 97:

The user has the following obligations:

1. Reclaim and exploit virgin and barren (*Mawat*) lands within the specified time and in accordance with the agreement.
2. Make maximum use of latest consultations and guidance in regard to cultivating grains, cereals, plants, vegetables, fruits, fructiferous trees and other fruit-bearing trees in order to derive maximum benefits from the land.
3. Cultivate particular plants with the exception of hashish, opium poppy and other drug plants, according to circumstances and recommendation by the ministry of agriculture & livestock on the basis of agreement.

Article 98:

(1) Area of personal properties, which form the bed of irrigation stream and river used for irrigating virgin and barren (*Mawat*) lands, shall be purchased by the user with the agreement of the owner on the basis of the day rate.

(2) Making use of the Emirate (State) agricultural lands, which are located in the bed of irrigation stream and river, shall be in accordance with the rules and regulations of the ministry of agriculture & livestock.

Article 99:

(1) Transfer and sale of arable virgin and barren (*Mawat*) lands shall take place after obtaining the legal document.

(2) In case of a user's death, his heirs, in compliance with responsibilities of the deceased user, can make use of the land in accordance with the provisions of this law and can acquire the legal document of the land.

Article 100:

If disputes arising from developing virgin and barren (*Mawat*) lands could not be settled by the general department of land management, they shall be referred to the court.

CHAPTER 11

PENAL PROVISIONS

Article 101:

Where the owner, his family members and/or his legal attorney do not appear in the landholding area without legal excuse until the end of work of the clarification commission after receiving notification, they shall be subject to legal prosecution and punishment.

Article 102:

A person who intentionally destroys irrigation installations or buildings and equipments related to the fragment of distributable land shall be subject to legal prosecution in addition to compensating the losses sustained by the Emirate (State).

Article 103:

A landowner who intentionally distorts information provided to the land management department on new changes and alterations brought in the land shall be subject to legal prosecution and punishment.

Article 104:

A person who confiscates the land belonging to another person, or falsely introduces himself as the landowner, he shall be dispossessed and the issue of compensating the real owner for the losses and the legal prosecution shall be referred to the legal court.

Article 105:

(1) Where the eligible person or his family members do not start cultivating and reclaiming the land within one year of the land distribution, or do not pay three consecutive installments, the land shall be taken back from him.

(2) Where the eligible person makes illegal or non-agriculture use of the distributed land prior to issuance of the legal deed, he shall be obligated to compensate losses to the Emirate in addition to restitution of the land.

CHAPTER 12

FINAL PROVISIONS

Article 106:

Where an error has taken place in measuring the landholding area of a person, or the land of a person is erroneously registered in the title deed of another person, the clarification commission shall investigate the issue and shall take action for the correction thereof through the court.

Article 107:

Construction of roads, buildings and establishments, and non-agriculture activities are not allowed on agriculture lands. In exceptional cases the users are required to obtain in advance agreement of the ministry of agriculture & livestock and approval by the *Amir al-Mo'minin*.

Article 108:

A fragment of virgin and arid land belonging to a landowner possessing land next to a landowner who possesses minimum land can be converged against payment of its value under the following conditions:

1- It is not under a project.

2- It can be made arable and has irrigation resources and shall not encroach on the right to irrigation water of other lands.

3- It shall not cause nuisance to landowners possessing lands next to it.

4- The land reclamation form has been filled in respect thereof, and has gone through all formalities in accordance with rules and regulations.

Article 109:

In regard to lands belonging to absent, missing, renegade, outlaw persons and *dhimmis* (protected non-Muslim minorities) actions shall be taken in accordance with the provisions of the law on protection of properties of absent, missing, renegade, outlaw persons and *dhimmis* (protected non-Muslim religious minorities).

Article 110:

At the end of work of the clarification commission on the site, the clarification documents shall be kept in the provincial archives of land documents related to the land management department.

Article 111:

For a sound application of provisions of the present law the ministry of agriculture & livestock can adopt a separate procedure.

Article 112:

After enforcement of the present law the Emirate (State) can neither confiscate nor can sequester the lands belonging to persons.

Article 113:

The present law after being approved shall be published in the official gazette, and with the enforcement thereof provisions of the following legal documents shall be abolished:

1-Land survey, clarification and registration law published in the official gazette # 46, dated 31/05/1355 (S.H.).

2- Regulation on provincial agriculture & land reform department published in the official gazette # 597, dated 30/09/1364 (S.H.).

3- Land relationship management law published in the official gazette # 658, dated 15/11/1366 (S.H.).

4- Regulation on land lease published in the official gazette # 659, dated 30/11/1366 (S.H.).

5- Private investment law on reclamation of State virgin and arid lands published in the official gazette # 700, dated 30/06/1368 S.H.

6- Decree # (609), dated 07/10/1372 S.H. published in the official gazette # 769, dated 16/07/1373 S.H. and other provisions, which may happen to be in contradiction with the provisions of the present law shall be deemed repealed.

Annex 3: THE LAW ON PASTURE LAND [2000]

CHAPTER 1

GENERAL PROVISIONS

Article 1:

This law is enacted for the protection of pastures and for the better utilization thereof for cattle grazing.

Article 2:

1. All types of land including hills, deserts, mountains, mountainsides, marshy lands on both sides of a river and woodlands covered with herbaceous plants and natural shrubs and jungles and which can be used as animal fodder are known as pasture.

There are two kinds of pasture:

1: Private pasture: Includes maraa (local public land) and land on the edges of cities and villages.

2- Public pasture, including barren lands (mawaat), which in accordance with sub-article (9) of article 2 of the land management law does not fall within bounds of villages or towns.

Article 3:

- (1) The right to use a pasture shall be limited to animal grazing.
- (2) Private pasture may be used by residents of the adjacent villages.
- (3) Public pasture may be used by anyone.

CHAPTER 2

PRIVATE PASTURE

Article 4:

- (1) Private pasture is pasture where government or individuals cannot prove ownership legally.
- (2) The local community can make use of the pasture to feed their animals in accordance with the provisions of this law.

The right to use a pasture shall not be bought or sold.

Article 5:

- (1) The area and size of a pasture shall be defined and marked by a commission in accordance with the injunction of the *Shari'a*.
- (2) Where the area and size of a pasture has not been defined prior to enforcement of this law, the Council of Minister shall appoint a commission to every province within six months to carry out the provision of sub article 1.

Article 6:

Buying, selling and leasing a pasture shall be prohibited.

Article 7:

The area of a specific pasture shall not be sold or leased for expansion of agricultural activities or for other purposes. Establishments of the Emirate public utility development (projects) are exceptions to this rule.

Article 8:

The Council of Ministers, in order to protect a private pasture shall, in accordance with the provisions of the Shari'a and the land management law, expropriate private agricultural lands, their right of irrigation, and streams inside or nearby the pasture, which are required for the public use.

CHAPTER 3
PUBLIC PASTURE

Article 9:

The public pasture (mawaat) is for public use, and its purchase sale, or lease may only be undertaken with the permission of the head of the Emirate.

Article 10:

Grazing goats and camels on pastures inside woodlands shall not be allowed on account of public interest.

Article 11:

The Council of Ministers shall adopt necessary measures to protect and improve the conditions of pastures.

CHAPTER 4
MISCELLANEOUS PROVISIONS

Article 12:

(1) Trespass on a pasture as well as changing thereof into agricultural land by an individual shall not be permitted. Where it is found that an individual has changed the area of a pasture into agricultural land, the respective area shall be expropriated from the individual in accordance with the provisions of the present law and shall be considered a pasture as before.

Article 13:

Setting fire to a pasture is not permitted. Where a fire takes place on a pasture the people living in the neighborhood or afar as well as the Emirate (State) departments shall be obliged to extinguish the fire by whatever means possible.

Article 14:

No one can destroy the cattle tracks, their herding and watering places, or use them for other purposes.

Article 15:

Cattle tracks and their herding places having being destroyed or used for other purposes prior to enforcement of the present law, shall again be used as cattle tracks and their herding places unless stipulated otherwise by the *Shari'a*.

Article 16:

(1) The Council of Ministers shall be authorized to create the requisite staff for the protection and growth of pasture.

(2) The Council of Ministers shall adopt necessary rules to ensure and facilitate implementation of the provisions of the present law.

Article 17:

Settlement of problems and adjudication on lawsuits resulting from defining the limits of pastures shall take place in accordance with the provisions of the *Shari'a* and enforced rules and regulations.

Article 18:

(1) The following individuals shall be subject to legal prosecution in addition to penalties foreseen hereunder:

1- An individual involved in buying and selling a pasture, or changes it into agricultural land. Such areas shall be expropriated.

2- An individual who destroys livestock herding places or uses them for other purposes shall be dispossessed thereof.

3- Cattle tracks being destroyed or used for other purposes by an individual shall be expropriated.

4- A State employee who sells pasture lands or leases them, the same areas shall be expropriated.

(2) The issue of restoring the produce stipulated under the sub-clauses of clause ((1) of the present article shall be referred to the *Shari'a* court.

(3) A person who intentionally burns a pasture shall be subject to punishment prescribed by the *Shari'a*.

(4) A person who takes his goats and camels for grazing on a pasture inside forest shall be subject to assure that he will not do so in the future.

Article 19:

The Ministry of Agriculture & Livestock shall be obligated to carry out the provisions of the present law with cooperation of the provincial security department.

Article 20:

This law shall come into effect beginning with the date on which it is passed and shall be published in the official gazette, and with the enforcement thereof the pasture law published in the official gazette # (180), dated 19/12/1349 S.H. (10 March 1971), and decree # (172) published in the official gazette # (771), dated 15/08/1373 S.H. (06/11/1994) shall be deemed repealed.

Annex 4: OFFICIAL GAZETTE # 816, 05 JANUARY 2004 - PRESIDENTIAL DECREE OF THE ISLAMIC TRANSITIONAL STATE OF AFGHANISTAN ON IMMOVABLE PROPERTY

NO.: 83
DATED: 18/08/1382 (09/11/2003)

In order for the state departments to carry out their responsibilities in regard to properties across the country in a uniform and integrated manner, and in order to overcome the problems faced by individuals and state departments in this connection, I approve the following procedures:

Article 1

Lands that were not and which have previously been registered and shown as state lands in government documents and principal registration books shall be deemed as state owned lands and the mentioned documents and registration books shall be deemed valid.

Article 2

A property possessed by the state for more than 37 years shall be deemed state property. All claims related to such properties shall not be heard.

Article 3

Underground water canal (*kariz*), whether damaged or otherwise, streams and lands irrigated thereby and other lands in respect of which individual ownership could not be legally proved shall be deemed as state-owned lands.

Article 4

1. The lands and land plots allotted to persons by municipalities and other relevant administrative bodies, but on which houses have not been constructed within the legally specified time without legal excuse; such lands and land plots shall be taken back and shall be deemed state lands.
2. Lands or land plots that have been distributed under sub-article 1 of this article in lieu of expropriated properties shall be an exception to the rule laid down by the provisions of sub-article 1.

Article 5

1. Individual claims in respect of such properties as might have been expropriated by the former governments in accordance with the expropriation law, and expropriation documents existing in respect thereof shall not be heard.
2. Properties expropriated by the former governments and over which public utility projects such as (roads, buildings and other establishments) have been constructed and in respect of which the state does not have expropriation documents shall be deemed state properties, the issue shall not be investigated notwithstanding the fact that the contending party be in possession of legal ownership documents in respect thereof.
3. Properties which have been expropriated by previous governments and the documents indicating the allotment of substitution in lieu thereof are lost, but witnesses to the

allotment of substitution did exist shall be deemed as state lands regardless of the fact whether or not the state has taken possession of the land.

Article 6

Pastures are those lands which neither the state nor individuals can own unless otherwise utilized by the state for public welfare.

Article 7

(1) Private lands are those in respect of which individual ownership has been proved legally and in accordance with the *Shari'a*.

(2) Private ownership shall be proved through valid legal and *Shari'a* documents with the proviso that no invalidating document exists in respect thereof.

Article 8

(1) Collection of taxes shall be deferred in respect of those lands which are being claimed by the state until such a time as the ownership thereof is finally established.

(2) Lands which are claimed both by the state and persons shall remain under the custody of the state until finally decided by the court.

(3) The state cannot bring changes in lands mentioned under sub-article such as construction of buildings, digging of well, installation of well-wheels, plantation or cutting of siblings.

Article 9

(1) Properties belonging to state departments such as agricultural lands, apartments and so on shall be leased or rented through tenders and bidding in accordance with rules and regulations.

(2) With the exception of revenues accruing from properties belonging to state departments and enterprises in respect of which a separate bank account shall have legally been opened, the revenues accruing from properties mentioned under sub-article 1 shall be deposited into the state revenue account.

Article 10

Lands mentioned under paragraphs 1 and 2 of article 87 of the land management law are possessed by individuals after 7th Saur 1357 (27 April 1978) shall be leased through bidding and the former occupant shall have the right of priority in this regard.

Article 11

Immovable state properties that have been distributed to natural or legal persons after 7th Saur 1357 (27 April 1978), until the coming into effect of this decree shall be dealt with as follows:

1- Where lands, inter alia, virgin and arid, ruined, and elevated as well as dead lands have been distributed for development thereof, the provisions of the relevant law and rules shall be observed.

2- Where the mentioned lands are part of lands allocated for farms, parks, agricultural lands or lands under other state projects are paid for and possessed by an individual, the current land price prevailing shall be returned to him and the land shall be given in the possession of the relevant state department to be used for the above projects. Under such circumstances the person may take possession of his used materials and other articles.

3- Where the distributed lands are located within maps and any person has possessed them in accordance with the map and plan the property shall be deemed his lawful ownership provided that he has paid the land price according to the fixed rate otherwise the difference in price shall be calculated according to the prevailing rate and shall be collected from him. Where the person has erected buildings or has brought changes therein contrary to the urban plan and map, such land shall be expropriated as and when it is allocated for construction of building for public use in the map and plan and the price thereof shall be returned according to the current purchase price whereupon the person shall be entitled to take materials and articles used in the building on his property.

And where the land is not allocated for public welfare, the person shall be obligated to bring necessary changes in the above mentioned building according to the finalized map and plan. If under such circumstances there be a difference in the price the possessor shall be obligated to pay such a difference according to the price prevailing on the settlement date.

4- Where the allotted lands happen to fall under urban maps and plans, but the person having not constructed there on until enforcement of the present decree, and where the person is found to be entitled thereto on the basis of fixed criteria, he shall be made to undertake construction work thereon within the specified time and according to formal map taking into consideration the difference or non-difference in the price thereof otherwise the land shall be expropriated. And where the person is found to be not entitled or has possessed above his entitlement, the entire or the amount in excess of his entitlement shall be expropriated accordingly.

Article 12

State properties having been irrevocably sold by the municipalities or by other state departments to companies, institutions or under other titles, and where no consent by the head of state could be found concerning irrevocable sale thereof, such transactions shall not be valid from the *Shari'ah* and legal points of view.

Article 13

A person to whom state properties are leased or rented cannot lease or rent them to a third person.

Article 14

(1) No person can possess a forest, elevated and other state lands under the name of reclaiming the dead lands, or under any other name, or construct a deep well or other establishments thereon. The violator shall be punished in accordance with the provisions of law.

(2) State officials or individuals having possessed lands belonging to others through use of personal power and influence, intimidation, or through the use of arms, such officials and individuals shall be punished accordingly in accordance with the provisions of law in addition to lands to be expropriated from them.

Article 15

(1) No fresh surveying and topographical mapping without the written instructions by the head of the state and without being undertaken by the relevant organizations shall be permitted.

(2) Bringing decrease, increase or any other changes in the cadastral map is not permitted unless based of valid *Shari'ah* documents. In case of violation, the violator shall be subject to legal prosecution.

(3) Providing information to individuals on state properties is not permitted.

(4) Departments of properties, cadastre, mapping and other departments are obligated to render necessary cooperation to the department of state litigations in providing information on and distinguishing state properties.

Article 16

Where the state litigations departments specify state properties at a location having been possessed by individuals or other state departments illegally and where the relevant departments have not taken action in connection thereof, the state litigations departments may follow up the issue in order to protect public rights in accordance with the provisions of law and shall hand over such lands to the relevant organization after being confirmed.

Article 17

Other issues which have not been foreseen in the present decree concerning properties shall be dealt with in accordance with the provisions of the relevant legal documents.

Article 18

The entire relevant state departments shall be obligated to carry out the provisions of the present decree.

Article 19

The present decree shall come into effect beginning with the date on which it is passed and shall be published in the official gazette, and with the enforcement thereof the decree # (26), dated 13/4/1420 L.H. (26/07/1999), published in the official gazette # (788) dated 06/05/1420 (17/08/1999) shall be repealed.

Hamid Karzai
President of the Islamic Transitional State of Afghanistan

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Legislation

See the legislation indicated in Annex 1.