



## POLICY BRIEF

# LAND AND THE CONSTITUTION

## Current Land Issues in Afghanistan

By Liz Alden Wily, August 2003

### Putting Land on the Public Agenda

Secure access to land is typically *the* primary concern of populations who depend first and foremost on land to survive. This is doubly the case in Afghanistan where so much land is under dispute and uncertainty. In other countries, such matters are normally a central concern for constitutional debate.

However, this has not been the case in Afghanistan this far. If anything, top Afghan leaders may be keeping land off the public agenda as they battle among themselves as to how land rights should be awarded. This is counter-productive as it wastes an important opportunity to hear what Afghans have to say on this critical issue, and misses opportunity to achieve a broad agenda for resolving conflict over land. This could be a major contributor to restoring order, reconciliation and recovery.

It is timely and appropriate to use the constitution-making process as a route to establishing the most general of principles for property relations in supreme law and with public knowledge and support. Below is an overview of land tenure issues in Afghanistan today, suggestions for moving forward on policy and legal issues and detailed suggestions for two articles on land to be incorporated in the new Afghan constitution.

#### What's inside?

1. An overview of the current situation of land ownership in Afghanistan today.
2. Suggestions for next steps on the land issue.
3. Analysis and suggestions for constitutional language on land.

### I. Land Ownership Today

#### **DISORDER AND INSTABILITY**

⇒ **Instability in land relations is widespread.** For many Afghans, the effects of disorder are being most closely felt in matters of land. They cannot access the land or homes they used to own, or use the pastures they grazed, so communal as well as individual disputes over homes, farms, rain-fed land and

pasture abound and remain unsolved. The result is that possibly millions of homeless and landless farmers have seen no action that suggests their needs are being addressed.

Securing peace without securing peaceful and fair land relations will not bring lasting socio-political order. Conversely, systematic resolution of land conflicts is one strong route to restoring order.

⇒ **Disorder is increasing.** This is most apparent in the urban sphere where land grabbing and illegal production of ownership documents seems to be increasing, making a bad situation worse. Wrongful occupation is increasing in cities and towns

as well as in some rural areas. Ethnic grievances, feeding on a long history of mismanaged tribal relations and unjust land access simmer. These developments will make it even more difficult to bring legality and order to the patterning of land rights in the future. Because profound inequities in land access have not been resolved through the years of disorder, and have become worse with the pressure

of population, class discontent that cuts across political, ethnic and military alliances will continue to fester.

⇒ **Rule of law is minimal.** The land law needs modernising, but more crucially, there is little adherence to the civil and religious law that does exist. The legitimacy of “legal” documents and the integrity of the courts as actors in both land administration and land dispute resolution are questionable.

### ***WEAK LAND LAW AND DISPUTE MECHANISMS***

⇒ **Inadequate legal and procedural guidance.** Despite the fact that a significant proportion of court cases revolve around land disputes, judges lack the level of legal guidance needed to deal with current complexities. Court procedures are out-dated and do not provide the transparency, the thoroughness of process or the public accountability required for justice to be done. There is little public confidence that courts are or will be able to deliver justice and are able to resist corruption. The handling of cases is unduly slow and access to the court system is largely limited to those with means. Many of the documents on which courts adjudge rightful ownership are either missing, never existed or have been corrupted to a level that makes it difficult to sort out rightful owners. While reform of the judicial system is being tackled by the independent Judicial Reform Commission, reform of land law is not.

⇒ **A problematic Land Disputes Court system-** The creation of a new Land Disputes Court was a good idea but has had limited success and lacks public credibility. There are constitutional concerns around the fact that there are no provisions for a realistic recourse to appeal. The court has not been provided with proper operational guidance, consistency in rulings is incidental and public access to the reasoning of rulings is limited. The court has also not been given the logistical and technical support required to make significant inroads into the abundance of disputes, or to operate outside Kabul. The focus of the court’s attention to date has been on the claims of wealthy returnees or disputants.

⇒ **Reconciliation and compromise vs. lawsuits.** Many disputes will not be satisfactorily removed through the winner-loser approach of the court medium. This is especially so where there are overlapping claimants to the same land, all of whom hold some historical or other legitimate claims. Communal cases involving groups of people fall especially into this area. Restoring land to those who held the land in April 1978 in accordance with the law may only serve to add another layer of perceived injustice to those who have used the disturbances to retrieve lands they consider customarily or historically rightfully theirs. In such cases, public processes of reconciliation and compromise will be needed to remove the conflict once and for all, rather than suppress it for resurgence at a later date.

⇒ **Defining government land.** Many disputes relate to government land because of massive encroachment since the 1980s and the habit of some leaders during the past two decades to claim already allocated land. The definition of “government land” is also unsatisfactory, despite important legal attempts to clarify it. During the 1960s and 1970s, in particular, government claimed a great deal of land that was more rightfully community owned property. Private land has also frequently been appropriated under dubious conditions. Distinctions between land that government holds in its own right as service provider, or in its capacity as land allocator, and land that is more appropriately owned by the nation and regulated by the state (public land), are also unclear. And public accountability mechanisms for these classes of land do not exist.

⇒ **The problem of pasture.** Inter-community conflict over pasture has been promoted through inappropriate land granting policies over the last century. Government runs the risk of entrenching this

through a top-down approach when a localised pasture-by-pasture approach will be required for lasting resolution.

⇒ **Confused land administration systems.** The land administration system is currently unable to meet the requirements for efficiency, transparency and inclusiveness. There is no “Ministry of Lands” to lead, coordinate or monitor. Land administration functions are dispersed among ministries and municipalities. Certain key functions that should be in the hands of publicly accountable administrators are in fact undertaken by the courts (e.g., the issuance of title deeds and transfer documents). This prevents courts from acting neutrally where court-based documents are the source of dispute, a very common occurrence.

An efficient, accessible (to the majority) and incorruptible system for managing land ownership does not exist. There are multiple routes for evidencing ownership each with its own limitations in terms of coverage, the extent to which the records are up-to-date, the accessibility of the method to the majority of Afghans, the integrity of the records and their utility as descriptions of owners and estates. The records that are supposed to be most reliable - title deeds and related documents issued by judges – have been acquired mainly by the wealthy, who are able to afford the fees and have also been most vulnerable to wrongful issue or duplication. Although out-of-date, books of ownership and taxation compiled for rural areas in the 1970s provide a relatively reliable basis upon which current-day re-registration of owners could be undertaken, using local and public adjudication techniques.

### SEEKING PEACE ON THE PASTURES

Decades of inappropriate policies have brought widespread conflict over pasture to the forefront of rural disputes. Contestation focuses on inter-community, settled-pastoral and government-people disputes.

#### Basic Considerations for Moving Forward

- ☆ **Get pasture relations right.** Livestock development is one cornerstone of the economy. Recognising nomadic systems of land use as an ideal use of fragile, high, dry lands is important.
- ☆ **Identify pasture on a local basis.** At the same time, caution must be taken to avoid wholesale definition of dry lands as pasture through national dictate where sound arable potential exists. This is especially important given the local context of acute shortage of farmland. In addition, most pastures have multiple uses and functions that need to be taken into account.
- ☆ **Clarify ownership of pasture.** Defining all pasture as belonging to the state is unhelpful when a main source of conflict is the longstanding failure to recognise local ownership of community-adjacent pastures.
- ☆ **Develop local-level management systems.** Environmental and tenurial crises on the pasture point to the need for concrete management regimes. These will only be effective and lasting if they are locally based.
- ☆ **Manage access rights.** The critical element of pasture management is the definition, ordering and monitoring of access rights and the management of conflicts arising from competing access interests.
- ☆ **Adopt a localised approach.** Solving problems through new law or enforcement will make little difference and could exacerbate problems through over-generalisation. Bringing pasture interest groups together on the ground and helping them to agree on the use of specific pasture lands will help resolve disputes. Properly facilitated, this process will enable them to agree on where private and public pasture begins, where rain-fed farming may and may not take place and to distinguish between pasture-focused problems and those that relate to the money-lending and land acquisition of non-residents. In this way, interest groups can agree on compromises and rules and potentially establish a joint committee to regulate users.

**Written evidence of land ownership**

1. Customary documentation;
2. Record of the cadastre;
3. Compiled area books of ownership & taxation;
4. Taxation records & receipts; and
5. Court issued title deeds.

**WEAK POLICY DEVELOPMENT**

⇒ **A low profile on land matters.** The Karzai Administration has expressed deep concern about disorder in land relations, but it has not yet determined how to constructively move forward. The international community has, until recently, shied away from the complexities and failed to assist the

Administration to deal with the fact that factionalism of the past and present is often driven by territorial grievances. There is also weak acknowledgement that the agricultural economy cannot be modernised without modernisation of land labour relations.

⇒ **No land policy.** Thus far, only an uncertain and incomplete vision of the way forward exists. There is not yet consensus among leading policy makers on land policy and the formulation of a concrete set of principles as to how to secure order and justice in land relations has not yet been undertaken.

⇒ **No concrete plan.** There is no overall developmental plan of action for land in the National Development Framework (NDF). What does exist reflects a vague idea that a new land titling regime will solve the problem, despite the fact that recording land titles and other technical issues are not those driving tenure insecurity and are not the most critical issues. Any public (or foreign) investment into the development of new titling systems needs to be founded on a new and publicly acceptable order of land rights on the one hand, and resolution of persistent overlapping land rights on the other.

⇒ **No judicial plan of action.** Beyond the problematic establishment of a land court in Kabul, there is no judicial plan of action to systematically restore wrongfully occupied property or to set up an improved regime for handling land disputes.

⇒ **No institutional focus.** There is no mandated institution to focus planning and action.

**Some of the issues that need public debate ...**

- ◆ Whether land should be restored to 1978 owners/descendants and if so on what basis?
- ◆ How to ensure a transparent, accessible and sustainable land ownership administration system?
- ◆ How to resolve routine land disputes in a lasting manner? What procedures are needed?
- ◆ How can the State increase access to land for the majority poor (for production and housing)?

## II. Suggestions for Moving Forward

### Put land ownership issues on the public, planning and action agendas

- Make land a constitutional matter. Go beyond the 1964 Constitution platitudes with precise statements of principles and process, written in such a way that a new administration is legally and publicly bound to take action to meet constitutional objectives.
- Develop a provisional plan of action for implementation and funding to help get priority actions underway.

### Commit to a community-based land strategy from the outset

- Adopting a localised, incremental and “learning by doing” approach to new land relations and their management will be developmentally more sound than top-down approaches. This approach will also help bypass corrupt actors, the current absence of rule of law in some areas and the paralysis dogging consensus and action at the national level. Community-based approaches will increase the involvement of those with the greatest stakes in the issues: landholders and the land-dependent. It will also increase the opportunity to focus on the interests of the majority poor (urban and rural).

### Work at the district level

- In practice, a community-based approach means working at the district level and below. This allows the provinces and central government to operate as facilitators, coordinators and monitors.

### Use developments at the centre to promote local level change

- Given the current policy vacuum, action and funding, a certain amount of starter policy development will be needed to catalyse and support change (see below).

### Create an institutional focus

- Form a unit within government with responsibility to mobilise policy and legal development, support institutional development and in particular, action at the local level. Local-level action should be undertaken in a focused manner, beginning in a selected number of pilot urban and rural districts, and gradually expanding. It may be useful to work closely with the Provincial Reconstruction Teams (PRTs) and Disarmament, Demobilisation and Reintegration (DDR) focal points on such projects reinforce change.

### Commence policy and legal development on land matters

- Under the aegis of the above unit, or perhaps as a preliminary step, form a Task Force on Land Tenure to draft a framework programme of action. This should include plans for developing an evolutionary national land policy, a new, comprehensive land law and new institutional regimes for land administration, which take into account differing rural and urban requirements. These development of these policies should be informed by participatory processes that ultimately involve all 355 district communities. The evolution of these systems should be structured to allow for “learning by doing” through such activities as those listed below.

### Investigate urban property issues

- Immediately conduct a high profile investigation of urban property issues and markets. This should be done through a public and community-based approach, working urban district by urban district, especially in Kabul. The land ownership situation, problems, systems and blockages relating to recordation, failures in the

system and openings for corruption should all be identified and publicly reported. A principle aim should be to put in place a new design for land administration and regulation that has the potential to be decentralised to the urban district level.

#### **Get to grips with resolving land conflicts**

- Develop a clear code of legal principles and procedures for dealing with land disputes which can be used by both the formal courts and by alternative dispute resolution bodies (see below).
- Consider abandoning the Land Disputes Court approach and build up existing district and provincial civil court capacity to deal with land disputes rigorously, fairly and transparently. Put in place new public accountability measures (reporting publicly on cases and how decisions are made, enabling public inspection of findings, etc.) and commence training.

#### **Launch reconciliation bodies at district level**

- More immediately, promote alternative dispute resolution by creating district-level land reconciliation bodies to deal with communal disputes. This should build on the idea of creating community elected “peacekeeping jirgas” as tentatively proposed by the Judicial Reform Commission. These bodies will need substantial technical, logistical and monitoring support.

#### **Tackle the pasture issue**

- Ensure that a new law recognises both common property pastures (private pasture) and public land pastures.
- Adopt a local area-based approach to resolving access problems; involve local and seasonal users in mediation/compromise sessions designed to draw up and agree upon rules for usage and access (see Box X).

#### **Pilot land registration techniques**

- Begin an immediate exploratory registration of owners in five urban districts and five rural districts. Adopt different techniques for re-registering all current owners, testing different sources of ownership information. Register land through on-site public adjudication processes.

#### **Target the poor (homeless and landless)**

- Take a clear position on whether or not the government of Afghanistan will adopt pro-poor strategies. If so, identify and test strategies to relieve homelessness and unstable land access, and improve poor labour returns in the agricultural sector. This will include revisiting strategies that were adopted in the past, noting the causes for their abandonment, and reshaping these to modern conditions. Given the difficulty of enforcing such policies, adoption of persuasive and incentive-based measures is likely to be more productive.

#### **Possible Pro-Poor Tenure Actions**

- ★ Use property tax to discourage worsening inequities in land ownership:
  - Adopt a rigorously progressive regime in accordance with total land size;
  - Place additional high levies on property that lies unused or undeveloped; and
  - Place additional high levies on owners who are absentee landlords.
- ★ Establish a ceiling above which owners may sell excess lands to the state for attractive prices;
- ★ Establish a land fund that may be used by government to acquire such private properties for redistribution to landless farmer applicants;

- ★ Reconsider introduction of land ceilings for certain classes of land and compulsory acquisition by the state for redistribution;
- ★ Invest seriously in rehabilitation of damaged settlement and irrigation schemes and open new areas for allocation to landless farmers;
- ★ Encourage and consider enforcement of restoration of community commons where these have been privatised to enable landless farmers to establish/increase livestock farming;
- ★ Provide no-interest loans for rural and urban house construction for homeless;
- ★ Give priority in urban areas to low cost housing developments and leave middle-income developments to the private sector;
- ★ Design, test and disseminate a farm labour code that establishes fair returns for farm workers, sharecropping and tenancy agreements. Reduce taxes for those landowners whose employees certify they have followed the code the previous year;
- ★ Establish an official position that opposes high rates of dowry payment (one cause of indebtedness and land loss) and conduct advocacy campaigns on this issue;
- ★ Establish and publicise a code for land pawning that limits repayment through crop shares that exceed the value of the original loan beyond an established percentage. Campaign for all land mortgaging and pawning agreements to be registered with district offices. Provide mediation services to help limit foreclosure; and
- ★ Make micro-credit widely available in the rural sector.

### III. SUGGESTIONS FOR A CHAPTER ON LAND IN THE NEW CONSTITUTION

#### Land Article 1

**Background:** The aim of Article 1 is to lay down a constitutional commitment that will be binding on new administrations to act to restore and improve land security. This requires the government to do more than pass new laws. It requires the formulation of a clear strategy (national land policy) and action programmes to implement policies.

**Suggested constitutional content:** *Afghanistan is an agrarian state in which access to land is the cornerstone of society and the economy. Fair and secure access to land is essential to stability, justice and economic growth. In order to promote tenure security, the State will, within two years of this Constitution coming into effect, establish a national land policy, supporting legislation and action programmes designed to...*

#### Article 1.1 Informal land dispute resolution machinery

It necessary to begin by launching a process of reconciliation that deals with those communal land conflicts that are not typically resolved in a lasting way through the winner-loser approach of formal courts. Conflicts of this type include those among settled and nomadic people over pastures and disputes where one ethnic group has occupied land previously held by another ethnic group. The common characteristic of such disputes is that all parties involved believe their claim to be legitimate, either by history, custom or through grants of land made by previous administrations. There are also cases where administrations have granted the same land twice. Compromise, including agreement to compromise, may be the only way to remove the dispute altogether. The constitution should commit to this reconciliation process. To be effective this needs to operate at district level or below, although with provincial or national level supervision and support. Three to five people could be appointed and should receive training in conflict resolution techniques. All proceedings should be recorded and final agreements signed by all parties.

**Suggested constitutional content:** *Restore stability to land ownership, through a programme of land conflict reconciliation to be systematically implemented on a district-by-district basis by locally appointed bodies at a district level.*

#### Article 1.2 Support for the courts to tackle land disputes

The second sub-article refers to the fact that there is widespread loss of public confidence in the capacity and integrity of the courts. A Land Disputes Court currently exists but does not have the manpower or means to work beyond Kabul; questions have also been raised about the way it is making decisions. A post-constitution administration has two choices: to expand the dedicated land court to provinces and districts, or to improve the capacity of existing district and provincial courts to deal with land disputes. Both options require new legal guidance given to courts with stringent operating procedures that improve transparency. This sub-article seeks to make a constitutional commitment to this.

**Suggested constitutional content:** *Improve the capacity of the courts to resolve formal land disputes in a timely, efficient and transparent manner through establishment of new substantive guidelines and operational procedures including transparency and public accountability measures and provision of manpower and operational support.*

#### Article 1.3 New systems for land administration

Land administration functions are currently diffused among several ministries and certain functions are inappropriately undertaken by courts. This produces a conflict of interest where courts are also required to resolve disputes that arise from improperly prepared land ownership documents. This sub-article seeks to bind the state to developing a new, simpler and more localised system for land administration including the removal of all



administrative functions from the courts, allowing them to focus on their proper realm, the resolution of (land) disputes. Experience worldwide shows that the closer a land registry and administrator is located to landholders, the more people are able to use the system, the easier and cheaper it is to update change of ownership and the more chance the system has of being accountable to landholders (e.g. the register may be open for public inspection once a week, no changes may be made to the register without on-site checking of the change of ownership, very high penalties for officials found to have processed incorrect information, etc.).

**Suggested constitutional content:** *Bring land administration functions, including the certification and registration of land ownership, under publicly accountable bodies at the district level, and establish a focal point at national level to provide technical support and monitoring.*

#### **Article 1.4 New adjudication of ownership and system for safe record keeping**

Five main sources of evidence of land ownership exist, each of which has shortfalls. The cadastral record is accurate only for the 1960s and covers only one quarter of landowners of that time. Tax receipts and records have wider coverage (but mainly only up to 1977) but they and the Books of Ownership and Taxation are based upon unsubstantiated self-reporting on land ownership. Court records are mainly applicable to wealthier land owners and increasingly show duplication of owners of the same parcels of land. It will ultimately be necessary to re-identify land owners. This will be most reliably carried out through on-site adjudication that involves obtaining fully consistent testimony from neighbours, elders and the public community as to the exact identity of owners and the precise boundaries of the land they own. An ample period for contrary claims to the land must be provided. Formal survey and mapping of parcels is highly expensive and time-consuming and will not be necessary in rural areas and where boundaries are well described and recorded.

**Suggested constitutional content:** *Establish incorruptible means through which land ownership may be accurately and securely recorded and evidenced, and locate these systems at district level to facilitate client-accountability and sustainability.*

#### **Article 1.5 Launch a special initiative to house the urban homeless**

This relates to the need for the Afghan State to decide whether or not it plans to adopt pro-poor strategies. If so, then it should focus on the needs of the landless and homeless poor (who may together now constitute almost the majority). In the urban sphere, the state should require municipalities to focus on home provision for the destitute, landless, homeless and to back this up financially. Failure to meet the needs of this growing sector could provoke unrest as the poor observe the advantages being taken by wealthier classes.

**Suggested constitutional content:** *Launch a special initiative to assist landless urban poor to secure permanent homes.*

#### **Article 1.6 Actions to limit increase in rural landlessness**

The ratio of available arable land to population is so poor that landlessness will remain a feature of the rural economy. What's needed is actions to limit its increase and turn the tide. This sub-article commits the State to act on this. Some such actions have been tried in the past. Others are new, most notably action to limit absentee landlordism in the subsistence sector. This does not affect commercial enterprises. Many thousands of farms are owned by residents of Kabul or other urban areas, and significant benefits are siphoned off by these owners in the form of crop-shares. This severely curtails the ability of farmers to survive and seriously inhibits growth. Enfranchisement of longstanding tenants should be encouraged, with schemes to enable sitting tenants to buy out absentee owners.

**Suggested constitutional content:** *In order to help alleviate landlessness in the rural sector, invest significantly in new agricultural settlement developments targeted to landless*

*farmers, establish a Land Fund to acquire private property for redistribution to landless, introduce rigorous progressive taxation on landholding to limit land hoarding, institute development conditions to prevent scarce land lying idle and limit absentee landlordism in the subsistence farming sector.*

#### **Article 1.7 Improve the conditions and rights of farm workers**

Afghanistan's farm economy depends heavily upon landless labour. In some districts, most farmers are landless workers, tenants or sharecroppers. Most workers are homeless as well as landless and they depend upon landowners for accommodation as well as work. Often the conditions are unstable and exploitative. Although exploitative relations are deeply entrenched, this critical sector needs reform and modernisation to ensure lasting productivity.

Landlessness often occurs when poor farmers pawn their land on inequitable terms that put their livelihood and landownership at unfair risk. This sub-article, therefore, also seeks to force the State to limit mortgaging or pawning of farms below a certain size and to regulate the conditions of repayment in crop-shares.

**Suggested constitutional content:** *Develop and promote a code for the employment of farm workers, rent and sharecropping agreements and the conditions under which farms are mortgaged or pawned in order to enable farmers to receive a stable and fair return for their labour, to limit extortionate practices and to encourage accumulation in the farm labour sector.*

#### **Article 1.8 Protect the land rights of women**

This sub-article seeks to make real in practice the Shari'a principle that women have a right to a share of family land. This needs supreme law support given widespread customary failure to implement this principle.

**Suggested constitutional content:** *Protect the inheritance rights of women, their right to acquire and hold land independently, and their right to an equitable share as family members where land is owned on a family basis.*

#### **Article 1.9 Land ownership by individual, family and community**

Although the holding of property on a family and community basis strongly exists customarily, this has not been fully carried over into state law provisions for the recording of owners. Usually one name is written on the title deed or in the Book of Ownership, and family members are forced to negotiate with the named owner as to their rightful share. Domestic land disputes abound. These may be reduced by providing a clear opportunity for family land to be registered as "family land" and/or for all shareholders in the land to be named in the register and on any resulting ownership document.

There is a similar need for much clearer provision for land held by village members in general or a group of people to be registered as such. With time, weaker members of the group tend otherwise to lose their rights in the land. Pastures are particularly affected by failure to register the land as jointly owned.

**Suggested constitutional content:** *Provide for private property to be held in clear and certifiable ways on an individual, family and community basis.*

#### **Article 1.10 Clarify the ownership of pastures**

Overlapping customary and state-granted rights over the same pastures are a main source of dispute. Many settled communities believe past administrations have ignored their customary rights to pastureland and allocated these lands to others, thereby curtailing their own rights and the opportunity to use those lands periodically for rain-fed agriculture. Many nomads have come to depend heavily upon access to those allocated summer pastures. Often the real cause of inter-community conflict is

not the pasture itself but local resentment that nomads have acquired farmland through trading and collecting debts and rendered original owners their tenants. Attempts to resolve the conflict on a national level or through simply enacting law are unlikely to prove lasting. Opportunities do exist however for resolving pasture conflicts on a local basis, valley by valley or *manteqa* by *manteqa*. Disputing groups of users may be brought together to lay out their grievances, determine on the ground exactly which pastures are locally owned and which are public pastures, and be assisted to reach compromises in each instance. For example, local pasture users may need to agree to limit further expansion of rain-fed agriculture whilst visiting users may need to agree to cease acquiring irrigated land in the area and to make existing irrigated lands they hold as absentee landlords available for sale. At the same time, simple joint management regimes for each individually named and described public pasture may be put in place, involving both local and visiting users.

**Suggested constitutional content:** *Clarify the ownership of each and every pasture in the country through local consultative processes which include representation of all claimants and provide for negotiated agreements by the concerned parties, and which at the same time establish community based systems for managing the pasture and including regulation of its use*

#### **Article 1.11 Market regulation**

**Suggested constitutional content:** *Regulate the market in land to limit speculation, land hoarding, and illegal, unfair and inflationary trading practices.*

### **Land Article 2 General Principles**

This article builds upon the standard general property principles in the 1964 Constitution but refines these for more relevant and local effect. Most provisions are self-explanatory but some need comment. It is necessary for example, to emphasise that properties that have been acquired by illegal means cannot expect protection of the law. Given the importance of inheritance as the main means of land acquisition, and yet the changing conditions of modern life that may encourage people to sell off family property, there is a need to make consent obligatory where the property is the family home or family farm. This will also help reduce domestic land disputes. Given that many injustices have resulted from wealthier non-local people buying up local lands, there is a need to place a caveat upon the conventional constitutional commitment towards the freedom of settlement.

#### **Suggested constitutional content**

*These basic principles in respect of real property apply:*

- *Every person, male and female, has a right to equitable access to housing and land, to acquire and own property either individually or in association with others and to be afforded legal and administrative protection of those properties. The rights recognised and protected under this Article do not cover any property that has been unlawfully acquired.*
- *Every lawful property owner has the right to transfer, sell, gift or otherwise transact land, but where these properties are those upon which the family depends for its housing and livelihood, transfers cannot be made without the written or witnessed support of spouses and those who would in normal circumstances be inheritors of the property.*
- *Neither the State nor any of its organs or representatives may appropriate private property unless this is in the public interest and for a specific public purpose, and its implementation is based upon payment of compensation at current market values and put into effect only after reasonable notice including time within which the owner may have his or her objections heard and considered.*

- *All land in Afghanistan is classified as private, community, government and public land. Private land is property owned by individuals and families. Community land is property owned by communities and equitably available for use by all members of the community, irrespective of their ownership of other properties. Government land is property that has been acquired and registered as belonging to Government and is dedicated to public service provision. Public land is land which belongs to the people of Afghanistan collectively and which may be administered by Government, or an agency established by Government, in the capacity of trustee and to the benefit of the collective community. Public land includes underground resources, waqf land, barren land and forests and pastures that have been established as definitively not privately owned by individuals or communities.*
- *Every Afghan has the right to freely travel, settle and acquire land in any part of Afghanistan, but not to the extent that the existing land rights of local populations are jeopardised. Laws may be passed to limit absentee landlordism in the farming sector.*
- *Foreign nationals are not entitled to own immovable property in Afghanistan but may lease property from private persons or the State and will be assured security of tenure for the duration of the lease. Access by foreigners to land will be regulated through an investment code of practices. Diplomatic missions and international organisations of which Afghanistan is a member are not affected by these conditions and may acquire properties on reciprocal terms.*