

This publication is available in draft form and has not been edited or produced by the AREU communications team. This presentation is being released as a resource to others interested on the topics of land rights in Afghanistan.

Putting Rural Land Registration in Perspective: The Afghanistan Case

**Liz Alden Wily
For Afghanistan Research and Evaluation Unit, Kabul**

April 2004

Paper Presented to Symposium on *Land Administration in Post-Conflict Areas*
Hosted by the International Federation of Surveyors¹
29-30 April, 2004, United Nations, Geneva

SUMMARY

The thrust of land planning by the post-Taliban Administration in Afghanistan is towards the establishment of nationwide registration of property rights. This objective typifies post-conflict strategising, reflecting the combined concerns to bring order to disorderly conditions and to establish the authority of the new post-conflict administration. This paper argues that such approaches risk ignoring the issues that must be tackled for land relations to be secured on a lasting basis and risk entrenching injustices that helped give rise to the conflict in the first instance.

There is no question that written records are later if not sooner an indispensable aid to tenure security in a 21st century world, both agrarian and industrial. What kind of records, how they are arrived at, and what they express, increasingly needs more thoughtful and country-specific consideration than widespread land administration programmes at this time suggest. In post-conflict situations where territorial and property issues are at stake, the need for strategic sensibility is even greater. This is particularly so in agrarian sectors where registrable interests may not necessarily accord with those that exist on the ground, such as for example in respect of the still very poorly developed registrable and legal constructs for communal properties.

In examining the rural Afghanistan case, it is shown that whilst a rich history of deeds registration exists, problems with this system reach well beyond its out-dated and now corrupted procedures. Problems extend more deeply into questions of past policy and law, as to how rights over land have been recognised and acquired, including those which past administrations have awarded themselves. The characteristic failure of 20th century registration systems to properly account for intra-familial and common rights or for the complex access obligations that stem from the privilege of landlordism is shown to have been especially pernicious in the creation of legal norms that possess low local legitimacy and which continue to trigger dispute today. The neutrality

¹ FIG COMMISSION 7 Cadastre & Land Management, The Netherlands.

classically accorded formal procedures and assumptions as to the sanctity of title deeds are also challenged. For many rural Afghans, paper entitlements to especially pasture represents less evidence of due right than evidence of an intolerable oppression, and resistance to which has been integral to the conflicts of the last quarter century up until the present.

In short, the search for peace and acceptable tenure are inextricably linked and unlikely to be well-served by rigid perseverance with bureaucratic procedure, the resulting illusion of increased order notwithstanding. A fresh approach is required and which is able to absorb the lessons of local history on the one hand, and able to work around the realities posed by limited rule of law or confidence in the courts to uphold rights fairly.

To this end a community based approach is suggested. This would facilitate trial establishment of locally run mechanisms for resolving conflicts over pasture with all concerned actors and establishing community based land ownership regulation and management. Atypically, the approach would need to begin, not end, with common rather than individually-held properties like the farm and house. For it is the commons – and mainly pastures – which generate the most contentious and inflammatory communal conflicts at this time. It also in relation to pasture that state, common and private interests so heatedly battle for space and meaning and require unpacking and reordering towards more acceptable norms, and where the current legal paradigm in which Government positions itself as owner of all pasture, is contested. Face-to-face reconciliation in respect of specific pastures could begin by setting aside the question as to who owns pasture with a focus upon rationalising the use, access and regulation of the pasture, and towards establishing the mechanisms for sustaining the norms agreed. It is these agreements and procedures (or rights and rules) that would first be recorded, laying the foundation for a local *land access register* and locally-administered *land governance system* in respect of pastures and other non-individually used or held estates. Such pilot developments, targeting a systematic range of disputed pastures, will provide practical building blocks towards the definition of new rural land policy and law. This will include clarification of workable distinctions between state, private and common properties, and workable procedures for localised land administration in general. Genuinely local ownership of the process and subsequent institutional developments, will greatly advance the workability and sustainability of new tenure administration.

Key Words: communal conflict, pastoral rights, common property, community based land administration

1. THE SITUATION

1.1. The State

The modern state of Afghanistan began to take shape in the 18th century in the founding of the Durrani Empire, an alliance of Pushtun tribes south of the Hindu Kush mountain range who appointed an Amir (King) to coordinate their interests.² A century later (1892) Amir Abdur al Rahman of Kabul had conquered areas around and

² Olesen 1995. Pushtun tribes in Afghanistan broadly divide into Durrani and Ghilzai.

beyond the Hindu Kush, broadly reflected in the international boundaries of today.³ This he achieved only with the encouragement and assistance of the British, whose interests lay in the creation of a loyal buffer between their Indian colony and expansionist Tzarist Russia.⁴ To the great cost of peace and stability since, the British turned a blind eye to the immense cruelty and land theft through which this ‘Great Game’ was played and won.⁵

With a brief Tajik interregnum (1929), modern Afghanistan was to be ruled by Durrani Pushtun Kings up until the establishment of the First Republic in July 1973. This was established by Da’ud Khan, himself a cousin to the last King. Following his murder in April 1978, communist Second and Third Republics were instituted (1978-1992), initially sustained by Soviet occupation (1979-1989). Resistance flourished in the form of mainly ethnically distinct groups (Mujahiddin), often coloured by religious fundamentalism.⁶ Following intense civil war after Soviet departure, an alliance of resistance leaders declared an Islamic State in 1992, within months to be headed by a Tajik religious scholar, Rabbani, until his ousting from Kabul in September 1996 by the Taliban, a largely Pushtun fundamentalist group led by Mullah Omar. With some help from Pakistan and Arab fighters funded by Osama bin Laden and other sources, the Taliban eventually secured most of the country by 1998, the first to do so since 1978.

The US-led coalition forces, assisted by primarily non-Pushtun militia, defeated the Taliban in November 2001. Following agreement among key factions in Bonn, an internationally-defined Interim Administration was put in place in Kabul, headed by Hamid Karzai. This has given way as planned to a Transitional Administration preparing for democratic elections in 2004 under the terms of a provisional new Constitution (2004), that is noticeably little different from the ‘new democracy’ Constitution promulgated by King Zahir Shah forty years earlier.

More than two years after the Bonn Agreement, peace cannot be said to have been restored in Afghanistan, any more than the Karzai Administration has succeeded in extending its authority beyond Kabul and environs, sustained in that domain largely by the presence of 5,000 international troops.⁷ Despite another 13,000 mainly US soldiers fighting the war against Taliban and al-Qaeda, a third of the country is unsafe due to spreading Taliban insurgency and into which little development aid (or voter registration) may proceed. Inter-factional violence sporadically breaks out elsewhere.⁸ Factions combine political and military objectives, sometimes with Mujahiddin origins and leadership (‘warlords’). These are noticeably powered by ethnic divisions and economic control of custom revenues, minerals, gas fields and increasingly, narcotics.⁹ Less than half the civil governors and military commanders are formally

³ Lee 1996 selects this date to mark the final collapse of the semi-autonomous Uzbek Balkh, for centuries previously the southern appanage of the Chingizid Empire to the north.

⁴ See Lee op cit for arguably the most meticulous research on this period.

⁵ See Lee op cit. and Allan 2001.

⁶ Magnus & Naby 2002, Rubin 1995.

⁷ International Security Assistance Force (ISAF), currently under NATO command. Only 200 of these (a German contingent) are outside Kabul, in Kunduz.

⁸ Most recently in Faryab Province, March 2004.

⁹ Poppy production is at forty times the level existing in the late Taliban period (4,210 acres at the lowest point, now 200,000 acres as reported by the UN and US (Reuters November 28 2003). This is however under 1% of the total irrigated land (7.9 million ha or 19.5 million acres).

approved by the central Administration, itself factionalised from the very top with several cabinet ministers believed to command the support of 45,000 armed men. Disarmament of a known 100,000 fighters is barely underway. Confidence in the neutrality of courts is low, rule of law limited and despite steady issue of new decrees by Karzai, enforcement minimal.¹⁰

In these sorry conditions, the Government's plan for rehabilitation and reconstruction formalised in a framework strategy in 2002 has faced difficulty being implemented.¹¹ Despite a recent pledge from the international community of \$8.2 billion towards execution of a new work plan,¹² these difficulties are expected to continue for as long as insecurity continues. Dealing with the core drivers of conflict (as well as those like poppy production now fuelling it) is imperative. Among these, it is certain that issues of property play a crucial role, although typically attention has focused thus far upon the *effects* of conflict upon property (destruction and corruption of records, wrongful occupation, etc.) rather than problems that helped drive conflict in the first place.

It is a basic thesis of this paper that the most flammable land conflicts today are inter-ethnic or communal in nature, have significant historical origins in policies of the last century and are profoundly linked to the outstanding fission between Pashtun and non-Pashtun interests. These in turn have loose but visible ties to Taliban/non-Taliban support. Failure to attend to the rooted land concerns of different ethnic groups and particularly in those spheres where these interests collide, can only delay real peace. Conversely, concrete attention to these will open an important route to the lasting peace sought. In the process, new tenure and administration norms may be required.

1.2 Land and Land Relations

Afghanistan is predominantly high and dry with limited fertile land, with five percent of the land area under irrigation and another seven percent available for rainfed farming every two, three or more years.¹³ Whilst urbanisation accelerates, the main economy remains agrarian, founded on both livestock-raising and crop production.¹⁴ Competition between the two land uses is one source of land conflict as outlined below. Land agro-ecologically classed as rangeland covers 45 percent of the country, with a share of another 37 percent of land categorised as 'barren' also usable as pasture on a seasonal basis. Among the estimated 16 million rural dwellers, one million or more are nomadic livestock keepers ('Kuchi') of mainly Pushtun descent. Most live in the south and east, over the last century moving more and more deeply into the centre-west and north for summer pasturing – a source of contestation with local populations.

Agrarian land relations have feudal origins and remain complex and inequitable (although no more so than in neighbouring Pakistan or India¹⁵). Large landlords are relatively few but likely still own around 40 percent of farmland as was the case in the

¹⁰ Mani 2003, HPCR 2003.

¹¹ Government of Afghanistan 2002.

¹² Berlin Declaration 2004.

¹³ FAO 1999.

¹⁴ FAO & WFP 2002, Thomson 2002.

¹⁵ Around one half of households are landless in Pakistan, and more than 50% (85 million households) are landless in India (Bernard 2004).

1981.¹⁶ The greater land area is farmed by smallholders, but with high variations in farm size by region.¹⁷ Rent-seeking absentee landlordism is rife in many areas (another source of conflict with local populations). Around one quarter of the rural population is entirely landless, surviving on the slim pickings of off-farm piecework and/or farm labouring or sharecropping.¹⁸ In some areas over half of all households are entirely landless.¹⁹ Farm labourers generally receive one fifth of the crop as payment and (more skilled) sharecroppers up to one third, in neither case sufficiently to live on.²⁰ Well over half the rural population is below the poverty line.²¹ A large number of rural families are homeless as well as landless, depending upon landlords or relatives for shelter, generation to generation. It is usually this group who form the significant body of mobile farm labour, moving landlord to landlord every one or two years, and whose only capital asset is a small herd of karakul sheep. Although possibly numbering in the hundreds of thousands, these are the poorest of the poor and rarely appear in survey statistics, not being considered a permanent part of (any) community.²²

Indebtedness is very high in the rural population with up to 92% and 57% of sample populations in 2002 borrowing respectively cash and wheat.²³ Up to 36 of landowners²⁴ have their land under a form of mortgage that is to the full advantage of the creditor and typically taken up out of desperation rather than investment (loans are generally to buy food or to cover health or bride price costs).²⁵ Outright land sales by smaller farmers typically soar during great droughts²⁶ or other pressures.²⁷ Land purchases tend to be by those who already own land, suggesting continuing polarisation.²⁸ Those who lose their land find it difficult to re-acquire land and tend to end up in cities as unskilled domestic or market labour. Periodic out-migration in search of work within and beyond Afghanistan (especially to Iran and Pakistan) is a

¹⁶ Sen Gupta 1986 using Soviet and Indian figures and Emadi 1997 using Soviet and pre-Revolution figures.

¹⁷ As shown in the various provincial reports of The Agricultural Survey of Afghanistan between May 1988 and 1992; refer Alden Wily 2003a Appendix D.

¹⁸ A vulnerability analysis in 2002 showed 27% of rural households owned neither irrigated nor rainfed land (WFP 2003) and provisional figures for 2003 show this may have fallen to 26.3% (Pinney 2004).

¹⁹ E.g. 77.8% in Badghis and 66.7% in Ghor in 2003 (Pinney op cit.).

²⁰ This usually provides food for 4-7 months (Alden Wily forthcoming).

²¹ Based on data from 10,505 households, the National Rural Vulnerability Analysis shows 58% of households are poor (cf. East Timor at 44%, Eritrea at 71% and Guatemala at 71%) (MRRD & World Bank, 2004).

²² See Alden Wily 2004a and forthcoming.

²³ WFP 2003.

²⁴ Ibid.

²⁵ Mortgaging (*graw*) gives the creditor temporary ownership of the land and he usually re-employs the owner as a sharecropper and thus takes up to two-thirds of the crop in lieu of interest. Should the owner default on repaying the cash loan in time, foreclosure is automatic, depriving the debtor of the opportunity of selling the land on the open market. The value of the loan is usually greatly less than the value of the land and the value of the crop share far exceeds normal interest rates.

²⁶ For example 1969-1972 and 1999-2002.

²⁷ See Alden Wily 2004a for examples including the case of Khoshkak Village in Shibar District which today is almost entirely owned by a richer village following extractive Taliban dues combined with drought.

²⁸ Alden Wily 2004a and forthcoming.

well-established routine dating back to the 1960s for both the poor and better-off and may inflate or confuse figures of refugees and internally displaced persons (IDPs).²⁹

The stratification of rural society is intense and its socio-cultural mores largely effective in retaining the status quo.³⁰ Despite helpful religious law³¹ around fifty percent of the population (women) are customarily barred from land holding; given the high numbers of widows³² and a large proportion of de facto female-headed households through out-migration of males for work, this is proving more and more constraining.³³ Economic gaps between those referred to as landlords, small farmers, and the landless are large and powerful socio-cultural barriers exist especially between those with and without land; this is strongest in respect of homeless/landless mobile farmers who perceive acquisition of land as not only financially impossible but as getting above their station or 'not permitted'.³⁴ It is unlikely that many of these poor were among the classified landless who benefited from the (short-lived) revolutionary land redistributions of 1978-1984 described below. These people are also widely considered as not having the farming skills needed to manage a farm; farming is rated an artisan skill and the preserve of tenants and sharecroppers. Neither the rich (landlords) nor labourers are referred to as 'farmers'.

1.3 Land Tenure and Law

Particularly since the USAID facilitated Land Survey and Statistics Law 1965, land has been broadly categorised into private, public and religious land.³⁵ Minor provision was made for two or more persons to register private land together, providing a (weak) opportunity for common property registration, used much more widely in registering family house and farm holdings.³⁶ The scope of public land has grown problematically larger over the last half-century as outlined below in relation to pasture.

In practice most rural property is acquired, sustained and transferred customarily, with family holding dominant. Shari'a principles (Islamic law) as understood locally, are widely referred to in dispute resolution. A Civil Law comprising more than 2,000 articles was compiled during the 1970s, drawing mainly on Hannafi (Sunni) jurisprudence and variously issued 'books of law'.³⁷ This includes substantial chapters on land inheritance, tenancy, leases, contracts, sales and mortgages. This compilation serves as the main sourcebook of courts of first and second instance and must apply

²⁹ UNHCR and related NGO support agencies tend to not distinguish between migrants and IDPs (Alden Wily forthcoming).

³⁰ Although inroads into this in especially urban areas is evident, and also seen to a degree in rural areas; Klijn 2002 gives examples of educated returnees refusing to re-enter feudal relations with landlords.

³¹ Islamic law (Surah 4, Al Nisa of the Koran) and the Civil Law 1974 (Articles 1993-2102) founded on Hannafi Sunni jurisprudence provides for widows and daughters to inherit land, although in lesser shares than sons.

³² These could number up to one million; Faryab Province for example, one of 34 provinces, has registered 25,000 widows (Alden Wily forthcoming).

³³ Nawabi 2003, Alden Wily forthcoming.

³⁴ Alden Wily 2004a.

³⁵ And for which only the last has a consistently acknowledged designation (*waqf*) illustrating the uncertainties that surround especially notions of public land. Details on land classes, tenure forms and administration provided in Alden Wily 2003a.

³⁶ Article 5(f) Land Survey and Statistics Law.

³⁷ Sunni Muslims comprise approximately 74%, Shi'a 24% and Ismaili 2%.

over Shari'a (Article 1). The Civil Law is in turn subject to statutory law which is in turn predictably subject to constitutional law. A plethora of statutes on land matters also exist. Eight of these passed through parliaments during the 1960s and 1970s and those on land registration (1965 and 1976), pasture (1970), land taxation (1976) and distribution (1975) provide subject foundation for the steady issue of some fifty or more presidential decrees since.³⁸ Many represent modified versions of earlier decrees that remained un-repealed resulting in a complicated and unclear body of formal national law. Their status is today uncertain given that most accord broadly with the 1964 Constitution as required by the Bonn Agreement³⁹ and now the 2004 Constitution but many judges refer to especially decrees issued by the Taliban as suspended. Taliban Edicts issued on land in 1999 and 2000 are particularly pertinent given their substantial coverage of issues of restitution, land classification and distribution of Government lands.⁴⁰

The clearest source of law is constitutional and within which property has been variously addressed since 1923.⁴¹ The new Constitution avoids addressing land issues beyond classical supreme law limitations upon State appropriation of property without payment of compensation or entry into private properties, freedom of settlement anywhere in the country and so on. These were already in place in 1964 or earlier.⁴² For investors, the important innovation in 2004 is that foreigners may now lease land (Article 41). Also of note is that only mines, underground resources and archaeological artefacts are definitively made properties of State (Articles 9 & 15). This leaves the door open for clarification as to the distinctions between public, State and private lands.

Resolving refugee/IDP land disputes

Four new land decrees have been issued by the Karzai Administration. Two relate to land disputes arising during the absence of owners since 27 April 1978 (i.e. refugees and IDPs). The first established a single Property Disputes Resolution Court in Kabul in 2002, now replaced with a two tier system providing at last for appeals. The second law also provides two courts, one for to deal with disputes within Kabul Province and one for outside Kabul.⁴³ Cases where Government is one of the disputants may not be heard by these courts. This is problematic in rural areas where Government's claim to lands (variously defined as public land or Government land) is central to the problem.

Entrenching the State as majority land owner

Another new decree is designed to facilitate access to property by investors, providing for the definition of surplus land belonging to the State and its transfer and registration at market rates to investors.⁴⁴ This law declares 'all real property in the possession, custody or use of Ministries or other Government organs' as State Land (Article 1). This could render more than 85 percent of the land area Government or State Land. A final decree (and the formal status of which is unclear) additionally

³⁸ Refer Alden Wily 2003a Appendix F for list.

³⁹ Decree No. 66 on the abolishing of all decrees and legal documents enacted before 22 December 2002, issued 2001.

⁴⁰ Refer Alden Wily 2003a Annex K for texts.

⁴¹ Refer Alden Wily 2003a Annex G for texts.

⁴² See Alden Wily 2003b. Property articles include 9, 14-15, 38-41 & 137-154.

⁴³ Decree 136 (19/6/1381) 2002 in Gazette 804, now replaced with Decree 89 (9/9/1382) 2003 Regarding the Creation of a Special Property Disputes Resolution Court.

⁴⁴ Legal Decree for Transfer of Government Property (8/1382) 2003.

renders to the State any property under its control for more than 37 years.⁴⁵ The law also permits the State to use properties ‘that neither the State nor individuals own’ for public welfare (Article 6). Properties that have been distributed by administrations since 1978 may be retained by their occupants in certain conditions (Article 11) whilst private properties acquired by use of force of threat are to be punished (Article 14). The law begs many more questions than it answers. It also repeals an important Taliban Decree which provided clearer guidance as to classes of property (see below).⁴⁶

1.4 Land Policy

Comprehensive land policy has not yet been formulated but the content of the above and related laws together with development plans do suggest a strategy of sorts. Broadly, these commit to restitution of private properties; a clear purpose of much of the Taliban Edict of 2000 (of uncertain status)⁴⁷ and reflected in Karzai’s more recent commitment to help refugees regain ‘land, houses, markets, shops, *sarai*, apartments etc.’⁴⁸ and sought primarily through the courts described above. Recovery of *Government* property is as visibly a prime objective of the Administration, although with insufficient clarity as to how Government Land is defined.

Planning action around these and other elements is nonetheless extremely weakly developed in the reconstruction agenda. In the first National Development Framework this was mildly expressed as the need ‘*to produce a nationwide land registry and to settlement disputes between individuals and groups over land*’ with the added conventional observation that ‘*Such a registry would allow for the use of land as collateral for entrepreneurial activities*’⁴⁹ – hardly the main concern of the majority smallholding poor who borrow cash mainly to feed themselves, let alone to that substantial group of rural landless and homeless. The subsequent National Development Budget (October 2002) and following Public Investment Programme of (March 2003) make fleeting reference to ‘inequalities in access to productive assets’ and tenure as an issue but does give more emphasis to land conflict resolution under the Rule of Law programme.⁵⁰ The recent Government/International Agency Report prepared for the Berlin Conference makes equally passing reference to tenure concerns as does the Berlin Declaration (1 April 2004) and its annexed Work Plan of the Afghan Government.⁵¹

Certain relevant activities are nonetheless under planning, in the intentions of the Ministry of Agriculture to formulate rural land policy, plans to create a land commission under the President’s Office, and planned donor projects in the urban sphere (essentially Kabul) by respectively UN-Habitat, USAID and The World Bank.⁵² UNHCR is shortly to field a legal review of law as affecting lost properties

⁴⁵ Article 2, Decree with Regard to Properties (undated).

⁴⁶ Edict No. 26 About Land issued in Gazette 788 6/5/1420 (1999). For text see Alden Wily 2003a; 123-126.

⁴⁷ Law on Agricultural Land, under Decree No. 57 published in Gazette No. 795.

⁴⁸ Decree on the Dignified Return of Refugees, No. 297, 13/3/1380 (2002).

⁴⁹ Government of Afghanistan 2002.

⁵⁰ Government of Afghanistan 2002 & 2003.

⁵¹ Government/International Agencies op cit, Berlin Declaration op cit.

⁵² Habitat is interested to sponsor squatter upgrading in Kabul City, USAID wishes to develop the land registry and The World Bank is planning research for development in a cluster of urban property related issues, from markets to systems.

and conflicts with a view to facilitating restitution. A range of NGOs are also working to this end.⁵³

Explicitly defined as such or not, past policy has had powerful influence over the current status of land relations and conflicts that surround them. Elsewhere I have shown how these fell into four main strategies;⁵⁴ first was so-called *Pushtunisation* which saw leader after leader up over the entire last century empower loyal Pushtun with land rights not equitably available to other ethnic groups. *Settlement schemes* to open up dry areas for cultivation characterised efforts from the late 1940s, including the landmark US-funded Helmand Scheme of 1946-1979, which opened up 100,000 ha of land (and among whom Pushtun were again the favoured 'eligible applicants'⁵⁵). A third initiative followed in which the State sought to bring all landholding under its control, encouraged and assisted by a USAID *survey and registration* programme beginning in 1963.⁵⁶

Finally, during the 1970, attempts were made by the First Republic to *limit gross inequities in rural land holding* mainly through rigorously progressive taxation which even took into account the productivity of the hectareage with seven classes of arable land defined,⁵⁷ and the imposition of (generous) ceilings, above which the State would compulsorily acquire the excess and redistribute it to landless households (including nomads).⁵⁸ This moderate land reform was followed promptly in 1978 by the Revolutionary Land Decree, which sharply lowered the ceiling, did away with compensation and embarked upon vigorous implementation.⁵⁹ Resistance to this and sister revolutionary Decrees in 1978 triggered mass uprising, leading to Soviet occupation in 1979 to bolster the Communist Government.⁶⁰ The land reform was scaled back with a growing focus again on opening land claimed by Government for distribution and the development of large scale commercial farms, employing landless labour. Shortly before the Soviets began to depart, a new Decree restored the land ceiling to the level of the 1975 law and was finally done away with in 1991. In total around 700,000 ha of land had been distributed, mainly deriving from land under Government control, not private holdings.⁶¹ Benefits to the landless poor are believed to have been limited.⁶²

1.5 Land Administration and Registration

No Ministry of Lands has ever been created and administration has been broadly under the aegis of the Ministry of Agriculture (Amlak Department) and municipal authorities for respectively rural and urban properties. The main task of both has been to manage Government properties including distribution of rights to these. Property taxation has always been the singular objective of tenure administration, with origins

⁵³ E.g. The International Rescue Committee has hired a property lawyer.

⁵⁴ Alden Wily 2003a; 39ff.

⁵⁵ Majrooh. & Elmi 1986, Cullather 2002.

⁵⁶ Details in Alden Wily 2003a; 41-2.

⁵⁷ As laid out in the Land Tax Law No. 338 (1976).

⁵⁸ As laid out in the Land Reform Law (1975).

⁵⁹ Details in Alden Wily 2003a; 42ff.

⁶⁰ The revolutionary reforms of 1978 included the Land Reform Decree (No. 8), Decree No. 6 which sought to limit unfair land mortgaging practices, No. 7 which banned child marriages and bride price payments and No. 9 which made female attendance at school compulsory.

⁶¹ Alden Wily 2003a; 47-49.

⁶² Alden Wily 2004a and forthcoming.

in the 1880s, and the establishment of systematic records from 1930. Records in the Ministry of Finance, and the receipts held by owners are considered important evidence of tenure (Box 1) but payment of tax has often been used in rural areas to *establish* ownership over lands rather than a reflection of reality, holders arguing that their lands must comprise x area because this is the tax they have paid. Conversely, those who have been unable to pay tax or contribute tax to common properties have tended to lose ownership. Corruption in the tax collection process on the ground has at times been rife.

The launching of a cadastral exercise in the 1960s improved the system to a limited degree, especially in rural areas where coverage was limited.⁶³ Although on-the-ground survey produced accurate plot sizes and grades by productivity, ownership was often unconfirmed and transactions since have been unevenly recorded, if at all in most cases. Rural plots are numbered but not mapped. Subsequent compilation of books of ownership over wider areas amounted to rapid appraisal, based upon submissions by Government-appointed leaders in the community. For larger, wealthier owners (landlords), legal documentation of transactions is sought, and for this sector, the courts serve as the land administrators, and their offices as land deed registries, with thousands of deeds archived. Whilst the primitiveness of document management is a bureaucratic concern, the integrity of the system is a greater concern, long considered corruptible, and the records widely corrupted, including widespread production of counterfeit documents.

Box One: Sources of Accepted Legal Evidence of Land Ownership

Customary Documents: (*orfi*) witnessed by relatives, neighbours or local leaders. Include bills of sale and purchase, pawn agreements, wills, subdivision documents, etc. Usually limited in description.

Legal Documents (Deeds): (*Wasayeq Shari' a*) copies in Court Registries in the form of:

Qabalae Qatae:	Land Ownership Deeds
Qabalae Jayezi:	Warranty Deeds
Wakalat Khat:	Power of Attorney
Taraka Khat:	Distribution of Inherited Property among Heirs
Hasre Werasat:	Identification of Legal Heir
Taqsim Khat:	Division of Property (during lifetime of owner)
Tamlik Khat:	Letter of Conveyance
Ejara Khat:	Lease Agreement
Wasayat Khat:	Last Will and Testament
Eslah Khat:	Mediation Finding

Ferman: Land grants by kings and presidents in the form of decrees, legal letters, etc.

The Cadastre: Survey undertaken 1966-1971 with USAID funds and training but with limited coverage due to costs (1/5th of the cultivated land area and 30% of owners) and minimal mapping (early plans gave way to 'simple inventory' due to high costs). The main innovation was on the ground survey to identify real size of land. The Register comprises cards indicating owner, how the land was acquired and plot size. Most owners registered as "possible owners," as landlords often absent or their documents could not be found or confirmed. Copies in zonal and provincial offices (some destroyed) with a base set in Central Archive in Kabul (Cadastral Department under Afghan Geodesy and Cartography Department).

The Books of Integrated Land Size and Progressive Taxation: Carried out 1971-1977 with higher coverage (5,502 tax areas (mostly villages or wards) but low accuracy, based upon self-reporting

⁶³ See Alden Wily 2003a; 41-2 & Appendix I.

through forms filled by local leaders and landlords, compiled via Districts to Provincial Land Offices under Ministry of Finance (Amlak, now under Ministry of Agriculture). One copy retained, one sent back to District and one to Kabul. These records include details of grades of land and tax paid. Owners often listed as extended family name only.

Tax Receipts: Property taxation has existed from 1880s, with formalisation in 1930. Records for 1930-1958 are intact in Ministry of Finance archives, thereafter records held at provincial level. These list the family owning the land, the area and tax due. From the outset the larger the land area, the higher the tax paid, at a fixed rate per *jerib* (0.2 ha), with gradations by class of land from 1960s. Annual tax collection ceased in 1978 but restarted briefly by the Taliban. There were also grazing taxes on pasture, receipts of which have been often interpreted as evidence of pastoral ownership, not access rights.

At the community level, larger land owners tend to hold witnessed evidence of transfers including distribution at inheritance, variously referred to as customary or *shari'a* deeds. Such records are rarely held by the majority small plot owner. Finally, there are a large number of land grant deeds, many of which are in the hands of Pushtun nomads and others who have consistently been the main recipient group of such allocations, from the 1880s until the 1970s. The older the document the more limited the land description, with sometimes only the district indicated and the size of the land area granted indicated.

Thus, whilst a relatively rich history of land ownership documentation and registration exists, its reliability and utility is questionable – and save customary records (relatively few) the documents themselves are frequently highly contested. As registrars, the courts cannot provide truly independent assessment. Judges and clerks are deeply implicated in malpractice, with some judges having issued the same title deed three or more times, either by will or coercion (e.g. from warlords, corrupt officials).⁶⁴ Ministers in the current Administration have been implicated.⁶⁵

1.6 Land Conflicts

The type and number of disputes reaching the courts do not reflect reality on the ground where these readily spill over into violence, sacking of villages and murder. Those recorded tend to focus on routine boundary and domestic disputes, such as relating to inheritance of shares and mortgaging by one family member.⁶⁶ Poorer people have not typically had the means to access the courts (or the right result) and conflicts which involve warlords, officials, or Government as a party, or which have an ethnic or communal character do not generally reach the courts, or when they do, lie unresolved.⁶⁷ Pushtun in the north for example consider it futile to bring restitution of property claims to Uzbek dominated courts.⁶⁸ Complaints are more often submitted to UN representatives but who have limited power to act.⁶⁹ As well as only recently extending outside Kabul (to another city, Mazar), the special land court has a reputation for limiting its attention to house and business claims and dealing almost exclusively with the better-off claimant.⁷⁰ Corruption is also widely alleged. Enforcement of decisions has been low and often only achieved through 'private'

⁶⁴ See d'Hellencourt et al. 2003 for urban examples and Alden Wily forthcoming for rural examples.

⁶⁵ For example, in a Report by UN Envoy Kotari, September 2003.

⁶⁶ See Alden Wily 2003a; Appendix E.

⁶⁷ UNHCR 2003a, 2004a, Alden Wily 2004a & forthcoming.

⁶⁸ UNHCR 2004b, Alden Wily forthcoming.

⁶⁹ As above.

⁷⁰ Alden Wily 2003a.

force.⁷¹ Confidence in the courts as a whole, including the land disputes court, is low with high assumptions of corruption and ethnic bias.⁷² Whilst commitment to building a new justice system, ending impunity and reinstating the rule of law are urgent public concerns on paper⁷³ change on the ground is limited. Formalising more localised and alternative dispute resolution seems inevitable.⁷⁴

Case involving individual properties such as houses, shops, and farms, do seem potentially more resolvable than those where communal interests are involved. This has been seen for example in Bamyan Province where strong Governor(s) have involved themselves.⁷⁵ Even where there is no law and order (such as currently in Faryab Province), and families have fled and fear to return for as long as ethnic tensions and warlordism remain, their tenure over houses (often destroyed) and farms appears respected, with current farmers serving as sharecroppers in the interim, sending or setting aside the owner's share.⁷⁶ The much more threatening cases concern communal properties, and where inter-village, Government-people, and inter-ethnic conflict conjoin, sometimes inflamed by warlords who promote their own land access interests. Pastures are indisputably at the centre of this gathering storm. Below, the case is examining in more detail.

2. THE PASTURES: THE CENTRE-GROUND OF RURAL CONFLICT

Complex elements fuel battles over pasture. These include the facts that 'abundant' pasture exists in an environment of acute shortage of arable land, that the definition of pasture is ambivalent and that the matter is deeply tied up with a history of rampant land grabbing by the State and not unrelated policies of ethnic favouritism. In addition, capital transformation over the last century has seen typical strengthening of private versus communal interests, particularly difficult to constrain where the legacy if not the practice of feudal landlordism remains vibrant and within which the land access rights of the majority have been easy to manipulate. The ways and means whereby tenure has been formally defined and registered have also played their part. Finally, the chronic disorder of especially the last decade has unleashed not only bitter ethnic concerns as to past land-related injustices but abandonment of many of the customary and statutory constraints as to land use and environmental stability. The indisputable trigger to conflict at this time is increasing cultivation of the pasture. The conflicts this launches are themselves complex, often with overlapping arable-pastoral, settler-nomad, inter-ethnic, intra and inter-community and people-Government interests at stake. Elaboration of these elements is given below.

2.1 What is pasture?

Although agro-economically defined as embracing 45 percent of Afghanistan's land area,⁷⁷ some of this rangeland is useable for rain fed farming, and has been used

⁷¹ Ibid.

⁷² International Crisis Group 2003, HPCR op cit, Mani op cit.

⁷³ Government of Afghanistan 2002 & 2003, Government/International Agencies op cit, Berlin Declaration op cit.

⁷⁴ Wardak 2003.

⁷⁵ Alden Wily 2004a.

⁷⁶ Alden Wily forthcoming.

⁷⁷ 29 million ha (FAO op cit).

customarily for this purpose, although frequently suppressed by Government policy as described below. Moreover, some part of an additional 37 percent of area classified as wasteland may also provide pasture, and does so, on a periodic and short seasonal basis.

Legal definition of pasture is oblique and potentially extends well beyond the core 45 percent of land area above. Pasture was first described in the USAID-facilitated land registration law of 1965 as *'any land used for grazing in the past and present'*.⁷⁸ The subsequent Law of Pasture Lands 1970 was just as expansive; pasture comprised *'the plains, hills, mountains, the skirts of the mountains, marshlands, the banks of rivers and forest areas which are covered with grass and other places that grow wild and could be used as fodder for cattle'* (Article 2). This definition has been retained, both in an un-repealed Taliban Law on Pasture⁷⁹ and in its currently proposed redraft.⁸⁰ Of note is the fact that *'conversion of pasture to arable use'* has consistently been prohibited in law.⁸¹

2.2 Who owns pasture?

The ownership of pasture is just as uncertain. In the 1965 registration law, pasture was held to be un-owned land, *'open to the public'*, available for use on a licensing basis controlled by government, and explicitly not permitted to pass into private ownership (Article 65). Moreover, pasture was noticeably excluded from the description of Government Land in that law. The 1970 Pasture Law also described pasture as *'public property'* (Article 3). President Daoud's short-lived Constitution (1977) defined public property as lands owned by the people but administered by the State on their behalf (Article 13), helpfully clarifying and formalising the distinction between Government/State Land and Public Land. By 1987 this distinction had been abandoned; pasture and forests became simply *'State Property'* (1987 Constitution, Article 20).

Constitutional law as it currently stands (2004) defines neither Government Land nor Public Land and only designates mines and underground resources as *'properties of the State'* (Article 9) – and which could be interpreted as either. The law in force on pasture, decreed by Mullah Omar in 2000, introduced an important new distinction between private and public pasture. As described, private pasture does not gain status as individual private property but as local common property as distinct from national common property (Public Land) (Articles 2-4). That is, whilst *'public pasture may be used by anyone'*, private pasture may be used only *'by residents of the adjacent communities'* (Article 3). Buying or selling of pasture in either case remains prohibited (Article 6). This Taliban innovation accords with many local perceptions as to distinctions between local and public pasture. Notably, proposals towards a redraft of this law return however to blanket declaration introduced formally during Soviet occupation (1987) that *'all pasture is the property of the State'*. Access is to be limited to use rights, issued by the Ministry of Agriculture (Articles 14, 16) but at the same time, existing rights granted officially or customarily are to be respected (Article 15).

⁷⁸ Article 63 of Law on Land Survey and Statistics. Provincial Governors were enjoined to ensure pastures were delimited and surveyed and to supervise their use (Article 64).

⁷⁹ Law on Pasture and Public Lands under Decree 57, Gazette 795 (2000).

⁸⁰ Mainly emerging from the Ministry of Tribal Affairs.

⁸¹ Articles 64 & 67 of the 1965 Law and Articles 8-11 of the 1970 Law.

The important Karzai Decree with Regard to Properties (2003) cited earlier does not throw more light on the matter.⁸² The upshot is that very limited legal guidance is provided (even should the law be able to be upheld and enforced, highly doubtful at this point). Many and perhaps all pastures fall under competing classes which may secure support from one or other legal provision; as land claimed by individuals, groups, communities and Government, or as ‘public land’ – owned by no one and available to all. The ethnic colouring of these conflicts intensifies the heat of these conflicts, much sharpened by active warlordism, often self-interested but also usually ethnically-defined.

2.3 The Ethnic Foundation of Contested Pastoral Rights

To understand this we need to look at inter-ethnic land relations, and as primarily engineered by public policy. The roots of this lie in the establishment of the modern Afghan State described earlier. At the risk of over-simplification, non-Pushtun had to be conquered and suppressed to achieve this and, not unusually, land theft and colonisation were prominent tools.⁸³ In terms of ruthlessness, virtual genocide and enslavement, the non-compliant Hazara in the centre-west of the country, were to be most affected.⁸⁴ Although their valleys and farmlands were not permanently occupied, the Pushtun Amir Rahman handed over their valuable pasture to Pushtun nomads (Kuchi) mainly to reward them for their helpful role in suppressing the Hazara. This was formalised in a decree forbidding Hazara to henceforth use the pastures (1894) and the issue of liberal land grants (*ferman*) to Kuchi clan heads, who extended the reach of their summer migration accordingly.⁸⁵ Over time they were to subdivide these among expanding numbers of household heads.⁸⁶ The pastures remained firmly closed to Hazara thereafter, a failed attempt in the mid 1920s by the reformist monarch Amanullah to ‘reverse this land theft’ notwithstanding.⁸⁷ Active Pushtunisation from the 1930s saw many parts of Hazarajat become the permanent home of Pushtun as many took up settled farming alongside stock-raising, regularised through various avenues of registration during the 1960s and 1970s. Others contented themselves with licensed rights to graze, often over lands which local Hazara considered not only their private property but past or potential rainfed farm land. This was in addition a period when the State itself, as outlined above, was establishing itself as ambivalently the owner/allocator of all pasture in the country, and through which ethnic favouritism was exercised. How far rights issued constituted ownership or access rights is uncertain, given different interpretations at the time and since. Other aspects of Hazara-Kuchi relations added to tensions, including mounting indebtedness and surrender of prime farmland to Kuchi traders, turning many Hazara even in remoter regions into tenant sharecroppers to absentee landlords on what had been their own land.⁸⁸

⁸² This renders properties which have been under the control of the State for more than 37 years to be ‘State-related’ and available for lease through auction and where already occupied, the occupant shall have right of first refusal. Private property will also be recognised should the occupant have valid shari’a or legal documents (Articles 2, 6, 7 & 9).

⁸³ For an elaborated review of this issue, refer Alden Wily 2004b.

⁸⁴ Mousavi 1998, Lee op cit.

⁸⁵ Mousavi op cit. Pedersen 1994.

⁸⁶ Pedersen op cit.

⁸⁷ Poullada 1973.

⁸⁸ Alden Wily 2004a.

Not surprisingly, Soviet occupation and the cessation of Kuchi visits to remoter pastures and significant departure of Pushtun to Pakistan from the 1970s, has fed determination by Hazara to recover their land, and in particular the pastures. Periodic attempts by Kuchi to re-enter Hazarajat with the support of late Soviet and later administrations and especially with the backing of Taliban commanders, have been deeply resented and sometimes rebuffed by armed Hazara. Following the fall of the Taliban, resistance has been especially fierce and for all intents and purposes, the Hazara pastures remain closed to Kuchi today, with mounting tensions on both sides.⁸⁹

Other aspects of conflict over these pastures need note. With the departure of Kuchi guarding 'their' every-expanding pastures, combined with local demise in Government controls, rainfed cultivation expanded during the 1990s causing considerable degradation in some fragile mountainous areas of the Hindu Kush. To some extent this is a reassertion, but at unsustainable levels, of customary rainfed and cold pond (*sarad*) and rainfed farming (*lalmi*). Determination of boundaries between rainfed land and pasture is complex in a multi-use regime but this is beginning to see definition with the reinstatement of customary soil conserving procedures in such areas.⁹⁰ Many sloping rainfed areas fall partly within land defined by Kuchi as their own pasture and which the State defines as variously State Land or Public Land under its own control. Hazara point to their tradition of ownership being defined from valley bottom to upper ridge and argue that just because they were unable in the past to stop Kuchi grazing these areas, this did not signal acceptance of Kuchi claims, only impotence to resist these.

As if these were not challenges enough, another layer of pastoral conflict exists, this time among the Hazara themselves. This stems from the highly stratified (and originally feudal) nature of society where fertile lands or valleys were typically owned by noble families and access to which was beneficially granted to the poor as their tenants and sharecroppers only. Customarily, farmers have been able to gather thorn bushes as fodder for what is usually their only capital asset – small numbers of karakul sheep – and in addition to depasture these on the hills alongside the hundreds of animals of the landlord. Whilst the poor today accept there is no common arable land, they dispute the titular claim of some landlords to areas which they regard as common pasture, available to all members of the local community.⁹¹ Like land trustees in many parts of the world, the weight of privatising trends, aided and abetted by western notions of tenure, has facilitated claims by landlords that this land is solely their own. This has certainly been reflected in the books of ownership established during the 1970s based on their own self-reporting, and backed up before and since by various tax receipts and court-secured documentation. Where landlord and peasant concur is that such pastures belong neither to Kuchi nor the State; these are not, they say, the private lands of nomads nor the public lands of the Government. Public land pastures are limited, they insist, to the upper mountains, well beyond the settlement sphere. For their part, Kuchi land owners and pastoralists correctly point to past land grants as evidence of their entitlement and observe that they have *locus standi* as the main users of the pasture for now nigh on a century.

⁸⁹ See Pedersen op cit. for 1980s, Alden Wily 2004a for 1990s and Alden Wily 2003a.

⁹⁰ Alden Wily 2004a.

⁹¹ Defined usually in socio-spatial terms as a cluster of villages or *manteqa*

Inter-ethnic land conflicts over most of the north of the country stem from a similar history, where a more formal policy of ‘Afghanisation’ (Pushtun being known as Afghans) was launched at the behest of the British on 1 November 1885, with some 80,000 Pushtun forcibly relocated to the north along with their livestock over the next few years.⁹² In this case, occupation was designed to be permanent and settlers were assisted to take up agriculture. Prime settlement and farming areas as well as pastures were appropriated.

Nor did this colonisation end with the death of the Iron Amir Rahman in 1901. Periodic waves of coerced and voluntary Pushtun relocation followed and again well supported by the State, right up until the 1970s.⁹³ Inequitable class and debt relations similar to those in Hazarajat were well established by the fifties, but with little seasonal relief. Through various means, including extensive usage, many local and remote pastures were again registered as the private pastures of Kuchi communities. In addition, Pushtun who remained in the south increasingly extended their seasonal movement into the north, dominating the most valuable pastures, including the vast Dasht-i-Laili Desert, in due course to gain notoriety as the graveyard of the Taliban.⁹⁴

A crucial element of conflict not well understood even today has been that, as in Hazarajat, Pushtun notions and organisation of space and ‘home area’ (*watan*) did not accord well with local paradigms, and which included shared rights among neighbourhood residents (*manteqa*, or *mohallah* among Uzbek). These operate in respect to both immediate commons and more remote seasonal pastures, and were accessible to new *manteqa* residents like Pashtun. Such common property pastures were understood (or wilfully interpreted) by the immigrants as either within the generally unspecified terms of land grants or licences they had received, or un-owned lands ripe for privatisation by themselves. Again such positions were well-supported by public policy, particularly during the modernisation years of the 1960-70s, which granted, licensed or registered these lands as private pastures accordingly. Outbreaks of ethnic violence on the pasture were common.

In circumstances of such bitter resource related tensions, it was unsurprising that some of the first acts of Mujahiddin on the departure of Soviet troops were not against the communist Government but local Pushtun landlords.⁹⁵ As in Hazarajat, nomads were widely advised by local Mujahiddin not to return. Some of the more violent warlords set about appropriating Pushtun homes, lands and livestock and one or two of the more notorious ‘indulged in killing Pushtun’.⁹⁶ These events precipitated a cycle of open inter-ethnic hatred and violence, in which at different times Uzbek, Tajik and Hazara variously looted and destroyed every village named ‘Afghania’ and were themselves at the receiving end of this treatment under the Taliban. A similar cycle of revenge followed the fall of the Taliban with livestock theft and looting once

⁹² Lee op cit, Tapper 1991 and see review in Alden Wily forthcoming.

⁹³ Tapper op cit.

⁹⁴ Alden Wily 2004b and forthcoming.

⁹⁵ For example in Faryab Province, Tajik and Uzbek Mujahiddin in 1979/80 did not attack the communist held capital of the province (Maimana) but expelled a number of Pashtun Khans (Lee pers. comm.).

⁹⁶ The case with the Rasul Pahlwan of Faryab Province; refer Alden Wily forthcoming.

again wrecked upon Pushtun. In 2003, 42 percent of all registered IDPs in Afghanistan were Pushtun from the north.⁹⁷

Restoration of homes and farms is slowly occurring voluntarily, Uzbek, Arab or other farmers cultivating Pushtun estates on behalf of the absentee owners, often much as they did in the past but sometimes on slightly better terms.⁹⁸ The situation is a good deal more contested in respect of pastures. A review of pastures in one district in Faryab Province for example, shows that every one is under heated dispute save the remote, vast and infertile pasture bordering Turkmenistan known as Charmagah Chasma.⁹⁹ This is accepted by Pushtun, Uzbek and Arabs alike as ‘public land’, available to them all on equal terms. The status of the also very large Dasht-i-Laili Desert is more disputed. Local Uzbek claim this was wrongfully appropriated by the State and allocated to Pushtun for seasonal use. Government itself began cultivation of Dasht-i-Laili during Soviet occupation, for its own income benefit.¹⁰⁰ The 600 ha they cultivated has now expanded to 1,600 ha, mainly at the hand of powerful warlords and their supporters, using tractors. Loss of topsoil is evident.¹⁰¹ Pushtun nomads are forbidden entry.

Smaller pastures are similarly affected, with ownership disputed along Pushtun-non-Pushtun lines.¹⁰² Even those not subject to this dispute face internal conflict among Uzbek as to the wisdom of permitting arable conversion. Notably, even those against cultivation do not consider the fact that they are supported in this by law an irrelevance, and in any event, unenforceable. Most people within the community believe that the needs of land-short farmers do need to be balanced with those of the generally wealthier large livestock-keepers and that compromises among themselves can be reached. Many pastures in central Faryab do indeed comprise the rich soils of the loess dunes (*chul*) and potentially safely sustain periodic rainfed cultivation. There are other instances where the dispute has class dimensions. Lilihab pasture is a case in point.¹⁰³ This has fallen within the domain of the largest Uzbek landlord for several centuries. Like their Pushtun counterparts, the current generation claim ‘legal documents’ testifying to their tenure. With the sharp decline of their herd since the 1999-2002 drought the family has cultivated half the area for wheat and melons, retaining the remainder as pasture - accessible to all members of the local community. Those who dispute the right of the owners to farm the pasture query the meaning of this ownership. They argue that although the family may be recognised as the owner, it has an ancient customary obligation to share pastures with their dependents, those small farmers, tenants, sharecroppers and workers who live in their shadow. These landless correctly detect curtailment of these rights through conversion to agriculture.

The same manner of dispute rages with sporadic violence a few miles to the south, between adjacent Arab and Uzbek inhabited *manteqa*, the large landlords of each community using the evidence of ‘legal documents’ acquired from courts under

⁹⁷ Although organised return has been widely facilitated around 5,000 Pushtun families remain outside Faryab Province today (UNHCR 2004).

⁹⁸ Alden Wily forthcoming.

⁹⁹ Shirin Tagab District, Alden Wily forthcoming.

¹⁰⁰ Favre 2003.

¹⁰¹ Ibid.

¹⁰² See Alden Wily forthcoming for examples from Sirin Tagab and Kwaja Sabz Posh Districts.

¹⁰³ This is associated with the largely Uzbek *manteqa* of Turkul-Baluch in Shirin Tagab District; Alden Wily forthcoming.

different regimes as proof of ownership. Prior to cultivation being started in the pasture in 1998, each permitted the other grazing access relatively peaceably.¹⁰⁴ In these and the many other cases in this district, neither Government nor courts are trusted to rule fairly. As the (unapproved) Governor of the Province offers, 'how may a case be ended when warlords supported by the central Administration control the decisions, documents are fabricated, officials are bribed, and the case is to be decided by a judge who was the very one who issued the fake documents in the first place? We cannot help people reach agreement when documents are in the way.'¹⁰⁵

3. CONCLUSION: IS REGISTRATION THE ANSWER?

Many conclusions may be drawn from the conditions described above, not the least of which is that conflicts over land appear to have had a much profounder role in the generation of civil conflict over the last quarter century than internationally-engendered agreements or early planning by the Administration appear to acknowledge. Moreover, the failure to tackle these continues to help promote conflict right up until the present. It is also evident that conflicts over land are deeply embedded in a century-long history and within which the policies of the State may also now be perceived as less benign than assumed or construed. In bringing conflicts to a close in a lasting manner, history does seem to matter and its story and lessons are ignored at peril.

Certain strategic implications also come to light. It seems the case, for example, that it will be necessary to pay attention to that upper dimension of land relations beyond private rights – territory - at least as it occurs at the local level. By 'lasting' is meant not merely laying upon the current chaos yet another patina of order, leaving conflicts smouldering for later activation at what is likely to be slight provocation. By territory at the local level is meant communal rather than private land relations, those interests that stem from community membership, and raise notions of 'our land', 'our place'. These, we have seen, are probably the most contentiously in conflict at this time, and this paper has suggested, most activated in the rural sphere in relation to pasture. Achieving local level ethnic reconciliation in this single domain could significantly remove one of the fuels to wider inter-ethnic strife.

The limitations of classical responses to post-conflict land matters also appear. A common strategy advocated is simply to restore land ownership to those patterns that existed prior to the conflict, mainly through restoring the condition and integrity of land registers, and conducting thereafter new or confirmatory registration.¹⁰⁶ Although unimplemented thus far, current policy in Afghanistan concurs with this positioning; this is evident in the slim offering of strategies cited earlier, towards a nationwide registration process, and in the terms of slowly emerging new law. The latter in particular suggests a primary concern to restore Government Land to its owner (Government), and which could be interpreted as embracing 86 percent of the total land area, rangeland included.

¹⁰⁴ The Qala Shaikhi-Sara Qala dispute; Alden Wily forthcoming.

¹⁰⁵ Cited in Alden Wily forthcoming.

¹⁰⁶ For example, Fitzpatrick 2001 for East Timor, Dinechin 2004 for El Salvador, Sovann & Zimmermann 2004 for Cambodia.

Nor will retreat into new formal registration processes render the relief needed; the history of land rights recordation to date in Afghanistan painfully illustrates that, far from being neutral, registration may create rather than record, reality, and not necessarily with justice or fair practice (and restoration of social justice is perhaps beginning to be recognised as a precondition or instrument to lasting peace, not a luxury that may be attended to at a later date¹⁰⁷). Whilst recordation of rights has a highly useful function in the medium to longer term process of achieving stability in land relations, clarification and agreement as to what constitutes acceptable land relations and how this will be determined, seem more urgent considerations.

3.1 Adopting Localised Approaches to Move Forward Nationally

To this end, a more incremental, localised and participatory approach to conflict and order in land relations suggests itself. This eschews conventional top-down approaches of beginning at the centre with new policy and legal formulations, which we have seen in any event, have little opportunity currently for application or enforcement. More significantly, a bottom-up approach would allow policy and legal paradigms to be more freshly and innovatively arrived at, and through practical working through of real-case scenarios. Moreover, a whole cluster of concerns may be addressed at once and in holistic fashion, ranging from environmental concerns, to determination of workable indicators for distinguishing between land areas that are appropriately classified as public lands, community lands and individually owned estates. Above all, a community based approach which involves disputants and their community representatives could, within a single process, integrate conflict resolution and the formulation of rules and procedures for sustaining the agreements arrived at, and moreover at the local level. In short, the foundation for a devolved regime of land administration could be put in place, and in integration with land use management concerns. The cornerstone of such an approach would be that it would begin, not end, with pastures, as the sphere which appears to hold the greatest threat to peaceful land relations, and that tricky interface of private, public and community interests.

It goes without saying that such an approach could, and would need to, set aside the paradigms of the past and its outputs in the form of nefarious ‘legal documents’ that hold so little legitimacy and which patently obstruct arrival at compromise and peace. For in such a community based approach, the starting point could be negotiation among disputants including representatives of seasonal users, as to the optimal use of the area and how access to the area in future should be regulated and managed. That is, issues of ownership could in the first instance be set aside in favour of matters of land use management and regulation, and upon which the ordering or tenurial rights could be significantly less heatedly agreed.

In such a framework, distinctions and agreement on the ground between public and local pasture and between local and private pastures and the implications for access of each could be more easily teased out and agreed. In effect a simple management plan for each pasture could be formulated, the rules subjected to community-wide approval and public record. Agreement as to the limits of cultivation, procedures for handling crop damage disputes and potentially, fee paying by seasonal users would be prime points of compromise to be reached. Creation of pasture management committees would be a natural corollary, with agreed seasonal users represented to their

¹⁰⁷ Cf. Mani op cit.

satisfaction. As desired, active land committees could in due course extend their activity to record the current owners of arable lands, as again publicly agreed and endorsed by the community, and with boundaries described in detail (features singularly missing from existing and often contested land records). Whilst these consensus registers would be provisional-approved legal documents, they would form the basis of a new legal platform of rights recognition, to be formally endorsed by such reformed courts or land administrators as eventually put in place at supra community levels.

By laying a practical foundation of agreement as to the pattern of acceptable access use and thence rights in the locality, this process offers more than conflict resolution. It attempts to lay the basis for reform in the way in which land rights are articulated, recorded, protected and managed, and crucially, through empowering landholders themselves. Implementation of this approach could fairly readily begin and build incrementally within selected districts, a handful of early pilots providing first guidelines of process. Such areas would ideally be chosen with corollary demilitarisation efforts in mind. Ideally, administrative and court reforms in at least the posting of untainted staff would also concur. Success would hardly be uniform, but a gathering number of working cases could offer powerful example and have the advantage of going well beyond declamatory policy and decrees that have proved too remote to be enforceable and too contradictory, general or one-sided to be of much use or adopted.

The establishment of such community based rural land administration systems is not an idea that land reformers are unfamiliar with today. A growing number of third world land policies and legislation provide for this, although rarely do these offer more than classical adjudication and registration of individual farms and houses, albeit through localised *fora*.¹⁰⁸ Implementation of such approaches has also been slight thus far, deeply constrained by their usual design at and by the centre and characteristic over-costing, heavy institution-building, tortuous delays and lack of local ownership of process that results. The last has proven especially debilitating to the swift and cost-effective uptake of new norms, landholders feeling that this is just yet another burden being imposed upon them from the top.¹⁰⁹ The luxuries of vast expenditure, time and inaction that have characterised these and related reforms cannot be afforded in Afghanistan, a case that illustrates so powerfully why devolutionary approaches do not just have merit in themselves but may be the only practical way forward in conflict situations. In such an approach, there is also a better chance for recordation of rights to find its right place, safely and usefully evidencing and protecting rights in land, not creating them.

CITED REFERENCES

Alden Wily, L. 2003a. Land Rights in Crisis: Restoring Tenure Security in Afghanistan .March 2003. Afghanistan Research and Evaluation Unit, Kabul.

¹⁰⁸ Alden Wily 2003c.

¹⁰⁹ Ibid.

----- 2003b. Governance and Land Relations A Review of Decentralization of Land Administration and Management in Africa. Land Tenure and Resources Series. International Institute for Environment and Development [IIED] London.

----- 2004a. Land Relations in Bamyan Province Findings from a 15 village case study. Case Study Series. Afghanistan Research and Evaluation Unit, Kabul

----- 2004b. Land Conflict and Peace in Afghanistan. Paper presented to Conference on Land Policy, Translating Principles into Action: Lessons and Challenges, The World Bank, OECD and USAID, Washington 4-5 March 2004. Afghanistan Research and Evaluation Unit, Kabul.

----- Forthcoming. Land Relations in Faryab Province. Findings from an 11 village case study. Case Study Series. Afghanistan Research and Evaluation Unit, Kabul.

Allan, N. 2001. Defining Place and People in Afghanistan. In Post-Soviet Geography and Economics. Vol. 42 No. 8; 545-560.

Berlin Declaration, The. 1 April 2004. With Annex I: The Way Ahead The Workplan of the Afghan Government and Annex II: Progress Report The Implementation of the Bonn Agreement. International Afghanistan Conference, Berlin March 31-1 April 2004.

Bernard, C. 2004. Land in South Asia. A Major Instrument for Social and Economic Transformation. Paper presented to Conference on Land Policy, Translating Principles into Action: Lessons and Challenges, The World Bank, OECD and USAID, Washington 4-5 March 2004.

Bonn Agreement, The. 5 December 2001. Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions and the 1964 Constitution.

Cullather, N. 2002. Damming Afghanistan: Modernization in a Buffer State in Journal of American History, September 2002; 312-537.

D'Hellencourt, N., S. Rajabov, A. Stanikza & A. Salam. March 2003. Preliminary Study of Land Tenure Related Issues in Urban Afghanistan with Special Reference to Kabul City. UN-HABITAT. Kabul.

E. Dinechin, 2004. Translation Principles into Action. The Case of El Salvador. Paper presented to Conference on Land Policy, Translating Principles into Action: Lessons and Challenges, The World Bank, OECD and USAID, Washington 4-5 March 2004.

Emadi, H. 1997. State, Revolution, and Superpowers in Afghanistan. Royal Book Company, Karachi.

FAO, 1999. Provincial Land Cover Atlas of Islamic State of Afghanistan. Kabul

FAO/WFP, 2002. Special Report. Crop and Food Supply Assessment Mission to Afghanistan

Favre, Raphy. 2003. Grazing Land Encroachment. Joint Helicopter Mission to Dasht-e Laili 25-27 March 2003. FAO Afghanistan.

Fitzpatrick, D. 2001. Land Policy in Post-Conflict Circumstances: Some Lessons from East Timor. Australian National University.

Government of Afghanistan. 1983. Report on the Socio-Economic Situation and Development Strategy Assistance Needs. Prepared for the Asia-Pacific Round Table Meeting Concerning Implementation of the Substantial New Programme of Action for the Least Developed Countries, Geneva.

----- 2002. National Development Framework. Afghanistan Assistance Coordination Agency, Kabul.

----- 2003a. National Development Budget for the SY 1382-1384. Kabul.

----- 2003b. National Investment Programme. Kabul.

Government/International Agencies. March 17 2004. Securing Afghanistan's Future: Accomplishments and the Strategic Path Forward. Prepared for Afghanistan International Conference, Berlin March 31-1 April 2004.

HPCR (Harvard Program on Humanitarian Policy and Conflict Research). 2003. Afghan Legal Reform: Challenges and Opportunities. HPCR Central Asia.

International Crisis Group. 2003. Afghanistan: Judicial Reform and Transitional Justice. Summary and Recommendations.

Klijn, F. June 2002. Water Supply and Water Collection Patterns in Rural Afghanistan - An Anthropological Study. DACAAR, Kabul.

Lee, J. 1996. The 'Ancient Supremacy' Bukhara, Afghanistan and the Battle for Balkh, 1731-1901. Brill, Leiden & New York.

Magnus, R.H. & Eden Naby. 2002. Afghanistan: Mullah, Marx and Mujahid. Westview Press, Massachusetts.

Majrooh, S.B. & S.M. Elmi. 1986. The Sovietisation of Afghanistan Lessons Drawn from History and The Way Out of the Present Conflict. Frontier Limited, Peshawar.

Male, B. 1986. Revolutionary Afghanistan A Reappraisal. Groom Helm, London & Canberra.

Mani, R. 2003. Ending Impunity and Building Justice in Afghanistan. Afghanistan Research and Evaluation Unit, Kabul.

Ministry of Rural Rehabilitation and Development, Afghanistan and The World Bank. February 2004. Rural Poverty in Afghanistan: Initial Insights from the National Rural Vulnerability Assessment, 2003. Kabul.

Mousavi, S. 1998. The Hazaras of Afghanistan. An Historical, Cultural, Economic and Political History. Curzon Press, Surrey.

Nawabi, M. 2003. Women's Rights in the New Constitution of Afghanistan. In Afghanistan: Towards a New Constitution. Centre on International Cooperation, New York University.

Olesen, A. 1995. Islam and Politics in Afghanistan. Nordic Institute of Asian Studies. Monograph Series No. 67. Curzon Press.

Pedersen, G. 1994. Afghan Nomads in Transition: A Century of Change among the Zala Khan Khel. The Carlsberg Foundation's Nomad Research Project. Thames & Hudson, USA.

Pinney, A. 2004. Preliminary Land Tenure Analysis from NRVA Household Data 2003 for Rural Afghanistan. Vulnerability Analysis Unit, Ministry of Rural Rehabilitation & Development.

Poullada, L. 1973. Reform and Rebellion in Afghanistan, 1919-1929. King Amanullah's Failure to Modernize a Tribal Society. Ithaca University Press, Ithaca and New York.

Rubin, B.R. 1995. The Search for Peace in Afghanistan From Buffer State to Failed State. Yale University Press.

SCA (Swedish Committee for Agriculture). 1990. The Agricultural Survey of Afghanistan. Sixth Report 1988 and 1989 Surveys.

Sen Gupta, B. 1986. Afghanistan. Politics, Economics and Society. Revolution, Resistance, Intervention. Frances Pinter, London.

Sovann, S. & W. Zimmermann, 2004. Cambodia: Approaching Land Issues in a Post-Conflict Setting. GTZ and Cambodian Ministry of Land. Paper presented to Conference on Land Policy, Translating Principles into Action: Lessons and Challenges, The World Bank, OECD and USAID, Washington 4-5 March 2004.

Thomson, E. August 2002. Needs Assessment on Feeds, Livestock and Rangelands in Afghanistan International Center for Agricultural Research in the Dry Areas ICARDA, Aleppo, Syria.

UNHCR, 2003. Land Issues within the Repatriation Process of Afghan Refugees, Kabul.

-----, 2004a. Monitoring Report.

-----, 2004b. Approaching Returns to North-Western Afghanistan. An Implementation Strategy.

Wardak, A. 2003. Building a Post War Justice System in Afghanistan. Paper presented to Symposium on 'State Reconstruction and International Engagement in Afghanistan' May 30-June 1 2003, Bonn.

WFP/VAM. 2003. Afghanistan Countrywide Food Needs Assessment of Rural Settled Populations 2002-2003. WFP Vulnerability Analysis Mapping Unit and Partners.

BIOGRAPHICAL NOTES

Liz Alden Wily is a land tenure specialist who works as an independent consultant for third world governments and donor assistance agencies. She gained her PhD in political economy from the University of East Anglia, England. Since 1974 she has worked mostly in Africa, providing natural resource and land tenure policy guidance and project development in Ghana, Botswana, Uganda, Kenya and Tanzania and working on shorter assignments in a number of other states. Alden Wily has also worked in Nepal, Pakistan and Indonesia and is currently providing recurrent technical advice on tenure concerns to leaders of the three contested regions in Sudan. Alden Wily has published extensively on respectively forest management reform, land reform and communal property issues. These include for example, a volume entitled *Land, People and Forests in Eastern and Southern Africa* (IUCN 2001) and *Governance and Land Relations: A Review of Decentralization of Land Administration and Management in Africa* (IIED 2003). Since 2002 Alden Wily has carried out periodic investigations for the Afghanistan Research & Evaluation Unit on land tenure matters.

The Afghanistan Research and Evaluation Unit (AREU) is an independent research organization in Kabul which conducts action-oriented research to inform policy and practice. AREU was established by the assistance community working in Afghanistan and has a board of directors with representation from the UN, donors and non-government agencies.

CONTACTS

Liz Alden Wily
 Wisteria House
 1 Cullompton Hill
 Bradninch
 Devon EX5 4NP
 United Kingdom
 Tel: +44 1392 881 533
 Fax: +44 1392 882 133
 Email: lizaldenwily@clara.co.uk

Afghanistan Research and Evaluation Unit [AREU]
 Charahi Ansari
 Shar-e-Naw
 Kabul
 Afghanistan
 Tel: +93 70 276 637
 Email: areu:@areu.org.pk
 Web: www.areu.org.af