



Land, People, and the State in Afghanistan: 2002 - 2012

Liz Alden Wily



Case Study Series

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About the Afghanistan Research and Evaluation Unit

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Acronyms

AGCHO	Afghanistan Geodesy and Cartography Head Office
AMLAK	Department of Land Affairs
ANDS	Afghanistan National Development Strategy
ALA/ARAZI	Afghanistan Land Administration
AREU	Afghanistan Research and Evaluation Unit
CDC	Community Development Council
CPAU	Cooperation for Peace and Unity
DACAAR	Danish Committee for Aid to Afghan Refugees
DoA	Department of Agriculture, Irrigation and Livestock (District)
DoRR	Department of Refugees and Repatriation
FAO	(United Nations) Food and Agriculture Organisation
GoA	Government of Afghanistan
Ha	Hectares
ICLA	Information Counselling and Legal Assistance of NRC
IDP	Internally Displaced Person
IFC	International Finance Corporation
INGO	International Non-Governmental Organisation
JSSP	Justice Sector Support Program
LAC	Land Allocation Commission
LARA	Land Reform in Afghanistan
LAMP	Land Administration and Management Programme
LAS	Land Allocation Scheme
LTERRA	Land Titling and Economic Restructuring in Afghanistan Project, 2004-2009
MAIL	Ministry of Agriculture, Irrigation and Livestock
MACCA	Mine Action Coordination Centre of Afghanistan
MoF	Ministry of Finance
MoJ	Ministry of Justice
MoLSAMD	Ministry of Labour, Social Affairs, Martyrs and Disabled
MRRD	Ministry of Rehabilitation and Rural Development
MoRR	Ministry of Refugees and Repatriation
MoUDA	Ministry of Urban Development Affairs
MoWA	Ministry of Women's Affairs
MP	Member of Parliament
NDF	National Development Framework
NEPA	National Environmental Protection Agency
NGO	Non-Governmental Organisation
NRC	Norwegian Refugee Council
NSP	National Solidarity Programme
NRVA	National Risk and Vulnerability Assessment
RAMP	USAID-funded Rebuilding Agricultural Markets Program
RLAP	Rural Land Administration Project
SCA	Swedish Committee for Afghanistan
TLO	The Liaison Office
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan

UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UN-HABITAT	United Nations Human Settlements Programme
UNHCR	United Nations High Commissioner for Refugees
USAID	United States Agency for International Development
USSR	Union of Soviet Socialist Republics
WFP/VAM	World Food Programme/Vulnerability Analysis Mapping

Glossary

<i>Amir</i>	king, leader
<i>Ejara</i>	lease
<i>Firman</i>	land grant document from kings
<i>Gozar</i>	urban neighbourhood
<i>Graw</i>	leasing of farms
<i>Haqaba</i>	water rights documents
<i>Jerib</i>	local unit of land measurement equivalent to 2,000 square metres or one fifth of a hectare
<i>Jihadi</i>	mujahaddin
<i>Jirga</i>	ad-hoc council convened to resolve a specific dispute
<i>Khel</i>	sub-tribe/clan
<i>Kuchi</i>	nomadic people group
<i>Loya Jirga</i>	a "grand assembly" comprised of regional leaders and tribal chiefs
<i>Maldar</i>	herder
<i>Malik</i>	state-appointed village leaders
<i>Manteqa</i>	local territory or area
<i>Markzhan</i>	court archives
<i>Mara'a</i>	public land
<i>Maylati</i>	tax receipts
<i>Mir</i>	head of a community or village
<i>Mullah</i>	mosque leader
<i>Orfi</i>	customary law
<i>Powinda</i>	herders
<i>Qabala'e Qatae</i>	court-prepared land ownership deeds
<i>Qaum</i>	tribe
<i>Sayed</i>	descendent of Prophet Muhammad
<i>Sharak</i>	townships or housing estates
<i>Sharia</i>	Islamic law
<i>Shura</i>	community council
<i>Tasfeya</i>	variously referred to in the law clarification, settlement, or land rights identification
<i>Wasayeq Shari'a</i>	court documents

Executive Summary

This paper reviews the formal treatment of land rights in Afghanistan over the post-Bonn decade (2002 - 2012). The objective is to document the developments in the recent past to better understand present and possible future trends.

Land rights refer to the possession of interests over land, the most comprehensive of which is absolute ownership. Lesser rights of lease, access and use of lands owned by others (including by the Afghan Government) are also important. Land governance refers to the systems, rules and procedures that are constructed to regulate rights and transfers. These tend to be either pro-majority and pro-poor, or focused on procedures which only better-off citizens have the means to use. Tribal, community or other non-state systems (customary tenure) and in Islamic societies, religious regimes, typically exist in agrarian economies. These principles often clash with each other, and particularly with the norms of overriding national laws (statutory tenure). This conflict usually centres on contested definitions of property rights and the rightful owner of off-farm resources, such as forests, rangelands and wetlands.

Land as a source of conflict

Despite the complexities, the principal findings of this review can be easily summarised. First, any account of land relations and governance in Afghanistan is implicitly an account of conflict. This ranges from interpersonal conflicts to more serious inter-communal conflicts over large land areas. Rights to and control over lands are frequently and violently contested. While this is not unusual in post-conflict states, in Afghanistan this is more common in 2012 than in 2002. Even more worrying is the fact that the issues in dispute seem less resolvable or at least more flammable. Clearly, the post-Bonn Administrations have failed to remove the drivers of land conflict.

The reasons for this are interrelated. Land capture has become more, not less, intertwined with broadly contested relations among communities, ethnicities, political movements and insurgencies, or simply economic classes. This has been facilitated by weak rule of law and an authoritarian, but practically weak, central state that has uneven control over land and populations.

Even if these conditions did not exist, the dramatic social transformation since Bonn would predispose land relations to a host of tensions. These range from land grabbing to gain political and economic power and speculative profiting from the sharp rise in land values occurring after conflicts. Difficulty in acknowledging and managing confusing social transformation is also a factor. Rapid urbanization and the challenge this poses to land governance is a symptom of this transformation. A related driver is the classical class conflict that blossomed from a long history of feudal inequity and in which individual accumulation of land assets is placed above public good and social harmony.

Afghan state policies have themselves played a role in sustaining conflicted land and property relations. These include resistance by post-Bonn Administrations to remove historical grievances borne by significant proportions of the population where this interferes with the land-capturing interests of the state and with personal interests of individuals in the administration.

The conditions described above are not uncommon in capitalist transformation and which is typically accelerated following major conflicts, such as was experienced in Afghanistan between 1978 and 2001. The relationship between transformation and undeveloped state governance has fascinated political economists for a long time. Until recently, this was most thoroughly explored in African states where conditions have been dire since the 1950s. Analysis is now applied more widely including to transforming economies in Central Asia. Sometimes the symptoms are so dominated by greedy capture of resources and wealth by elites in close alliance with political leaders that this is characterized as the "politics of the belly."¹

¹ Jean-Francois Bayart, *The State in Africa: The Politics of the Belly* (Cambridge: Polity Press, 2010).

In such cases, accountability to the people is undeveloped and conditions are uncertain, encouraging elites and leaders to grab what they can while “the going is good.” In other cases, the elite-state relationship has been analysed as neo-patrimonial; a new phase in earlier feudal relations where securing patronage through land and other grants evolves into a more sophisticated form.² More broadly, such conditions are indicative of the pre-modern and pre-democratic state where it is not yet in the interest of the private sector to be regulated by a strictly impartial state administration in order to thrive.³

Irrespective of their political framework, these analyses share the conclusion that patterns of property relations fundamentally underwrite social relations, and that grievances, disorder and violence are indicative of these transitions. In agrarian economies where these transformations are most active, control over land is the easiest and cheapest route to private wealth accumulation.⁴ Insecurity compounds this. In troubled times, investment in land seems most secure and can be readily militarised where arms abound.

In these conditions it is not surprising that land grabbing is so central in Afghanistan today, and not just by individuals but also by the State itself as an interested wealth-creator. Nor is it surprising that land relations are a prominent source of local dispute and violence as different interest groups battle over the increasingly scarce and lucrative resource.

Nor, given the history of Afghanistan, is it puzzling that so many disputes are clothed in ethnic, tribal or settler-nomad divisions with ethnic dimensions. As long as rural communities live in socio-spatial and land-dependent formations such as villages or clan areas, threat to their control and use of lands logically prompts land-based solidarity and social cohesion against outsiders, whether threats derive from competing neighbours or from the state. This can reinforce territorial and ethnic notions of “our land.”

It is also the case that opposing forces can contradict these socio-spatial alliances. Communities are rarely homogenous, and vertical political or wealth-based interests can overtake these alliances. Factionalism and shifting allegiances over land and control over territory can be fluid, confusing traditional assumptions about land rights and claims.⁵

Analysing the causes of disorder and violence in land relations is one thing, finding a solution is another. The specific task of this paper is to examine how the post-Bonn State has dealt with these complex circumstances. A couple of preliminary findings are worth noting.

First, it is not easy for a modern government to pick its way through competing land interests even in the best of times. It does not willingly inflame rivalries. It cannot be seen to favour one group over another and avoidance of this often stymies action. When private interests of decision-makers influence policy development, inaction can be obstructive and undermine confidence in the institutions of state and the rule of law.

Second, the rising division between landlessness and homelessness at the one extreme and large (and lucrative) holdings that have risen after Bonn at the other is not easily containable. Many leaders share with their neoliberal donors the view that the polarization in ownership of

2 Patrick Chabal and Jena-Pascal Daloz, *Africa Works: Disorder as a Political Instrument* (Bloomington and Indianapolis, USA: Oxford and Indiana University Press, 1999).

3 Douglas C. North, John Joseph Wallis, Barry R. Weingast, *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* (Cambridge: Cambridge University Press, 2009); Francis Fukuyama, *The Origins of Political Order, From Prehuman Times to the French Revolution* (London: Profile Books, 2011); Daron Acemoglu, and James A. Robinson, *Why Nations Fail The Origins of Power, Prosperity and Poverty* (London: Profile Books, 2012).

4 Robert H. Bates, *Prosperity and Violence: The Political Economy of Development* (New York and London: Norton & Company, Second Edition, 2010); Henry Bernstein, *Class Dynamics of Agrarian Change* (Sterling, VA, USA: Fernwood Publishing, Halifax and Kumarin Press, 2010).

5 Good examples of this are provided by Alessandro Monsutti’s analysis of relations in Southern Hazarajat. See Alessandro Monsutti, “The Impact of War on Social, Political and Economic Organisation in Southern Hazarajat,” in *Le monde turco-Iranian en question, Institut de hautes études internationales et de développement*, ed. M.R. Djalili, A. Monsutti and A. Neubauer, (Paris, 2008) 195-209; Antonio Guistozzi and Christoph Reuter, “The Northern Front, The Afghan insurgency spreading beyond the Pashtuns” (Kabul: Afghanistan Analysts Network, 2010).

land assets is an inevitable cost of economic growth. The argument runs that while a majority of people may find their land rights squeezed even more than it is historically the case, lost lands will be replaced by the benefits of cash-earning employment in due course. This assumes that modernization will occur along the classical lines of industrialisation as in the 18th and 19th centuries. It is not yet clear whether this is likely in Afghanistan.

Finally, governments are not monolithic in their positions. The State is made up of officials, politicians and judges who consciously or otherwise promote and pursue different paths. The post-Bonn Administration has not been without land reformers. What follows in this study is a story of competing ideas as to the way forward. The review centres on what a proposed new land management law will, or will not, prescribe in 2013.

While the following analysis delves frankly into the failings of the post-Bonn State, the new legal proposal could provide the opportunity to reposition the failures of the decade as preliminary jostling of competing concerns ahead of the advancement on a focused path of reform. Alternatively, proposed legal changes may not be adopted or furthered, and a new decade of failed promises could begin. This uncertainty underpins this analysis.

Less change than needed

Legal reforms over land rights have been disappointing over the Bonn decade. While the zeal for improvements existed from 2002, enthusiasm for fundamental reform was and remains low with one exception. In 2001, leading ministers wanted to make land freely available to foreign investors to kick-start the economy. This has been achieved. Tellingly, this was also the single innovation on land and property matters introduced in the new Constitution in 2004.

The absence of reform would be of a lesser concern if it were not for the fact that the symptoms of a corrupt, unjust and ineffective system of land governance evident at Bonn are more prevalent today.

Revisionism not reform as the objective

This study concludes that the intentions to reform never existed. Instead, the objective after Bonn was to return to the land and property norms of the period before the revolution (1978-79). Even this has not been achieved.

It also concludes that the drive for reform is not home grown but derives from the donor community. In short, land and property reform was not a local project but “an international project.”⁶ This is not to say the population would not have welcomed reforms, but that the idea of reform was externally driven.

Centralism not devolution

Within the state, strengthening central power over landholding has removed the popular involvement that normally prompts reform. On paper, the state was the *de jure* or *de facto* owner of more than 80 percent of the country in 2001. Implementation of national laws recognising private property depended upon its institutions, which perform poorly and have limited reach. Decrees through the decade have consistently sought to consolidate - not democratize - state powers and systems. This has been justified as being necessary for the peace project. The fact that centralisation has added to land grievances, not added to peace, has not yet penetrated political consciousness.

This paper will show that ownership of off-farm lands has fallen to the State especially since the 1960s. Instead of questioning the role this dispossession (of usually customary rights) may have played on civil conflict since the late 1970s, the Karzai Administration issued decree after decree reinforcing this capture. Recovering what it called the “stolen lands” since 1979 became a moral

⁶ Astri Suhrki, *When More is Less The International Project in Afghanistan* (London: Hurst and Company, 2011).

crusade for the affronted Administration. While genuine cases of wrongful occupation of state lands abundantly existed, this sidestepped the bigger concern of injustice in classifying so much of Afghanistan as state property in the first place.

Centralisation also contradicted the reality that the state did not have the capacity to regulate land relations and did not develop the mechanisms needed to do so fairly. Instead of strengthening the state and the rule of law, post-Bonn handling of land rights and governance has deepened already shaky confidence in the state as a just and effective administrator of rights.

Shahrak as the tip of the iceberg

The most visible evidence of injustice for ordinary Afghans has been in the flourishing creation of housing estates in virtually all towns and cities. These *shahrak* or little cities as they are known, are private enterprise developments authorised by politicians and governmental officials, often through dubious legal means. This in turn reinforces the idea of affected lands as either government property or public lands over which the state - not the citizenry - has control despite their customary rights. Although *shahrak* have absorbed a tiny proportion of the national estate (urban areas as a whole remain less than two percent of the country area), they symbolise the frustrations, ills and injustices of land governance.

The challenge to the rights of the majority has been serious. Despite half a century of initiatives to expand formal recognition of dwelling and farming properties, most Afghans (more than 90 percent in Panjsher and Paktya, for example) do not possess the documentation required by national laws in the Bonn decade to prove ownership. Failure to compensate the owners who do not have documents when their lands are taken for genuine public purposes is one result. Simply crushing the rights of those with weak or no documentation by militarily-strong or politically-connected entrepreneurs is another result.

Changes on paper

It would be wrong to imply that post-Bonn Afghanistan has been entirely inattentive to the land interests of the majority. On the contrary, there has been a great deal of activity around land and property issues. The prominent output was a new National Land Policy in 2007. This should have set property norms and land governance on an entirely new and workable course. The fact that it did not is explored in this paper. This is not only because the policy was not publicly disseminated after its formal approval by the Cabinet of Ministers or made directly available to citizens in other ways. It is also because civil servants and members of parliament (MPs) were not informed of the policy's content. Most damagingly, its terms were ignored while amending Afghanistan's most basic land law in 2008 (the Land Management Law), and again when new amendments were proposed in December 2011. Only recently (December 2012) have the policy's directives been brought to attention and helped shape a new set of legal proposals.

The causes for the lack of progress may be traced to faint local ownership of the proposed reforms, which was limited to a handful of foreign and local actors who in due course left their posts. Weak institutional memory then played its role. This mirrors developments on a range of strategies and policies, which have failed to be implemented over the decade. Lack of application has also affected other land strategies even when they more formally embraced than the national land policy. Lack of a political will, broad-based participation by the officials, and the public are recurrently identifiable factors. Quiet resistance to internationally crafted changes has also contributed. In practice, legal powers have been frequently curtailed on paper (such as of corrupt municipalities) but not been replaced with working systems to advance the strengthening of state authority. This has repeatedly left gaping opportunities for business as usual to continue.

Flirting with democratisation

On a positive note, the post-Bonn Administration considered a modern community-based approach to land administration as the way forward to maximising access and relevance to the population. A successful first-stage test in several parts of the country followed this. Community-

based land administration would have enabled each village and urban neighbourhood to create its own community-approved land ownership record (register). In the process, they would have been incrementally empowered to resolve interpersonal and inter-communal disputes. These ambitious ideas actually entered the Afghanistan National Development Strategy (ANDS, 2008-2013). ANDS bore the hallmark of having been drafted by foreign advisors, and although routinely cited it has never been disseminated to the public at large.

The community-based land governance paradigm was taken up by the draft Sub National Local Government Policy (2009). Needless to say, this policy also languishes.

Early on after Bonn, the Ministry of Agriculture, Irrigation and Livestock (MAIL) was also excited by the community-based approach to transfer the ownership of immense pasturelands under open access to the adjacent rural communities. A policy for this was approved in 2006. In redrafting forest and pasture laws, the Ministry briefly acknowledged that recognising communities as owners of these pastures (without rights to sell these lands) would provide them the incentive to halt dangerous degradation and overuse. The Afghan government eventually settled for the weakest model of community-based natural resource management. This is reflected in the 2012 revisions proposed to the Rangeland Law, which intends to transfer some pastures to local user groups with strict state supervision and limited powers. As well as potentially dividing rich and poor in the communities by favouring large stock owners as the user group, this approach does not require the state to divest itself of pastures which are most local to communities and customarily in their ownership.

Resisting recognition of collective tenure

Recapture of pastures by local communities who believed the state had wrongfully allocated these customary properties to outsiders has been rife since 1979. This has been most pronounced in the central highlands of Hazarajat. Recapture of "our lands" was a prominent theme in the emergence of Hazaras during the civil war as a sociopolitical and military force. By 2001, contradictory positions had surfaced in customary and national laws, as well as in the state's co-option of off-farm lands as un-owned and un-ownable, except through sales or grants by the state.

As the Bonn decade evolved, wartime physical expansions of farmlands into rangelands, including by warlords further challenged the state's presumption of ownership and governance rights. Government-endorsed conversions of public lands also accelerated, for example to companies and wealthy individuals for speculative purposes. Such trends made the reassessment of laws governing rangeland inevitable.

Concessions to customary rights of off-farm resources began to be made only towards the end of the decade. This came in the form of proposals to allow rural communities to apply for recognition of ownership of the pastures in their vicinity. These ideas are not well developed and contain restraints that will limit uptake. Collective tenure rights will also not be substantial and communities will not receive compensation when the government reallocates land to mining or other public enterprises. This proposal has not entered the law yet. Nevertheless, this is one of the very few shifts that could open up paths to reforms in favour of the majority. Given that contestation over rights to such resources repeatedly result in bloodshed, these reforms cannot come early enough.

Tinkering with procedures

If tenure reform has not materialized over the Bonn decade, it has been just as absent in the technical and organisational matters of formal land administration. There have been minor improvements in land surveys and formal registration of property ownership. Applicants for the latter, for example, have to visit fewer offices to secure recognized title (although 100 or more steps are still required in most districts and provinces). Forms are easier to understand and consistent. Non-commercial property tax has been lowered. Thousands of ownership and other land deeds have been archived in the courts more systematically. However, this makes little difference to the majority of Afghans who do not have the knowledge, funds or connections needed to secure such documents.

While the path for integration of diverse and competing land services by state agencies has been laid out, action has not followed. The civil land administration, AMLAK, renamed ALA (and nicknamed ARAZI) and rehoused in an expensive new office block. More significantly, it has been moved beyond the jurisdiction of one ministry (MAIL) to an agency, which reports to an inter-ministerial board. This has not delivered integration of urban and rural planning and procedures. Clashes between municipalities and the Ministry of Urban Development Affairs (MoUDA) have worsened over the decade impeding the development of urgently needed new systems of governance, including how burgeoning informal settlements can be regularized, and land grabbing curtailed. ARAZI still has no control over the cadastre. The courts resist changes to their roles and powers more strongly than they did in 2002, despite, or because of, blatant conflict of interest and (alleged) rampant corruption in their ranks.

Neither the common sense democratisation measures presented above, such as community-based land governance, nor steps to decentralize authority to district levels have been pursued. Even the identification of local land ownership requires special task forces and expenses that limit these exercises to a handful every year.

Land relations in 2012

What are the consequences of these shortfalls? Confidence in the state as a fair land allocator, administrator, and arbitrator of rights is low. Forgery of documentation has produced a parallel administration that makes the formal institutions and systems irrelevant in areas where local militias or self-appointed notables hold sway, and where protection of local ownership depends on political whim.

Public accountability is scant to non-existent. The public's knowledge of and access to formal norms and procedures is limited, rendering them vulnerable to arbitrary land losses. Rural landless, the land-poor, female-headed households, disabled, returnees, displaced persons, poor nomads and millions of other informal settlers in urban areas are most threatened with eviction through legal and extra-legal means. Confidence in the ability of the government to limit this is slight because the integrity and impartiality of leaders, including the President, is now doubted, and arguably more intensely so than was the case before Bonn.

The urban and rural poor are cumulatively the majority. Their numbers will only increase, whether by predicted return of several million refugees, or by consequence of rising economic stratification and class formation. While thousands scurry to find protection through local or national notables, political parties, and militias, there is enough evidence to suggest that Afghans will find themselves increasingly divided along class lines, in which the land-poor majority will see themselves as deprived.

Looking ahead

Land dispute and conflict thrives in post-Bonn Afghanistan. This can be expected to grow, even without the threat of growing insecurity and armed conflict that hangs over the country in 2012. Ordinary citizens and officials are responding by creating more forums to resolve these disputes. However, key drivers of these disputes – unsound tenure norms, and unworkable, unaccountable and inaccessible land governance – remain virtually untouched. Resigned *laissez-faire* is also apparent in a discernible tendency to let the market take care of land and property changes. The social agenda to make land available to the needy has proven lacklustre, and good intentions have been hijacked by a combination of bad planning, weak execution, and corruption. More significantly, local communities affected by these schemes have rejected allocations of lands to outsiders which they believe are customarily their own. While this has not derailed the state's conviction of its ownership of all but a tiny sector of private lands, these disputes reflect growing contention and chaos.

Commodification and an unregulated land market have expanded. Land values went up by more than 1000 percent in main urban areas since Bonn, along with grabbing, hoarding, and speculating. However, national surveys on landholding from 2005 and 2007-08 do not suggest a sharp rise in

concentration of property in the peasant landholding sector, only continuing reduction in farm sizes. Polarisation is most apparent in urban areas and in the distribution of lands to a small but growing private sector that is benefiting significantly from the Presidential prerogative over off-farm lands. Widespread restructuring of the household as urban and rural-based may also conceal rising landlessness and livelihood stress. Longitudinal studies suggest that declining land access and quality of livelihood are very real for the already poor and borderline poor. Whether rising numbers of jobs will compensate for rising stress is an open question.

State policy, action, or inaction cannot be entirely blamed for the sustained uncertainty and disorder in land relations. Even without the insurgency, livelihood and land use have been rapidly changing in Afghanistan. Populations have multiplied, aspirations have changed, and the young labour force flees to the cities. Farming in some areas is becoming more commercial and rapacious in its grasp of local lands. Livestock raising is polarising, with a new commercial sector run by wealthy nomads that truck their animals to pastures for summer fattening of animals. Poor settled communities are also less willing in 2012 than in 2002 to move their families to higher pastures in the summer if this means taking their children out of school. Expanding poppy production has produced a whole new pattern of land relations in some districts suggesting that the land market is becoming more exploitative, adding new sources of land grievance for the future.

It may be argued that a decade is too short for real change to flourish in land management in a post-conflict state. At the same time, the window of opportunity which post-conflict conditions provide is rapidly closing. New pressures on rights to resources are mounting. Planned oil and mining developments alone will remove thousands of hectares from the peasant agro-pastoral sector, on terms that are currently far from just.

A scramble for land in Afghanistan is expected to accelerate in the next decade, including by the elites who have the means to acquire, hoard, speculate, and with whom national and local leaders are variously associated. Communities seeking democratic reforms, including to customary land claims, could find themselves overwhelmed by the more powerful demands of this state-supported sector.

As usual, the nature of land disputes will be the barometer. In 2003 domestic boundary and inheritance disputes dominated the land issue as returnees and displaced persons tried to recover lands and houses taken during the war. Communal and ethnically-shaped competition for lands hovered in the background. These have surfaced since and multiplied. Militant, insurgent, political, and economic interests find it easy to piggyback on local grievances, reshaping them to their own ends. Meanwhile, the majority of poor Afghans have become less compliant. War changes people and societies in empowering ways. Demand for equitable respect for traditional possession has not left the popular agenda. With or without rising insecurity, land relations are headed towards turbulent times.

1. Introduction

This is the second of two papers produced by the Afghanistan Research and Evaluation Unit (AREU) on land issues with funding from the United States Institute of Peace (USIP) in 2012. The first paper critiqued proposed changes to the Land Management Law, the primary land statute of Afghanistan.⁷ This paper takes a broader view. It assesses the changes that have and have not occurred in the sector since the Bonn Agreement.

1.1 Purpose

This paper has two purposes: AREU is a research agency and its first aim is to document and critically analyse how land and property rights have been handled in the last decade. This is intended to be useful for the record, and for “keeping the record straight,” in an environment where studies are frequently derivative and make orthodoxies of findings that may have slight factual basis. To be fair, this may also result from difficulties experienced by researchers in Afghanistan getting to the field.

As this paper will demonstrate, there has also been a problem of weak institutional memory on the subject of land rights among both state and non-state actors. This paper should also help overcome this.

Why bother going over the past? This leads to the second objective of this exercise, to consider where land relations are headed in Afghanistan. Projections have to be modest. Readers are aware of the volatility in Afghanistan at this time, particularly in respect to the contested space that lies between ordinary citizens and interest groups, and the citizenry and an unstable state. A long and still unresolved history of using violence to secure political and economic ends has exacerbated land tensions and promoted territorialism and land grabbing. In these conditions, land relations could tumble into deeper disarray just as easily as they could in fact become more regulated. This paper examines whether this path will be fair to the majority.

1.2 Bias and Focus

No research is without bias. In this case, a bias arises from a foreigner’s lack of nuanced understanding of the complex socio-cultural, religious, and language heritage. At the same time, not being a local has advantages. Tenure and state governance norms are never as unique as each polity presumes. Global experience can also help distinguish local specificities from wider trends and more easily predict trajectories.

A personal bias must also be acknowledged. AREU asked this author to write this review because the author have been intermittently involved with the subject since Bonn in active capacities for various organisations as well as a researcher for AREU. The cost of this is that past analyses written by the author feature unduly as a source on the subject. It also means that the author is not neutral, having been an advocate for reforms towards a popular system of land tenure and its governance since Bonn.

Other limitations are more generic. The study focuses primarily (but not exclusively) on rural as compared to urban land issues (as Afghan law and policies have themselves done to date). There is also a focus on state policy rather than on land relations themselves. Intimations of how these are changing are given but as the exercise did not allow for substantial fieldwork statistics on changing relations is limited. Finally, the bias of the review is upon impacts to the poor, and who happen to constitute the majority. As will become evident, on matters of land and property, non-poor and elites tend to be fairly well off.

⁷ Liz Alden Wily, “Land Governance at the Crossroads: A Review of Afghanistan’s Proposed New Land Management Law” (Kabul: AREU, 2012). A briefer but updated review of proposed changes to the law is provided in this paper, see Section 4.5.

At the same time, as this review will illustrate, distinction between poor and non-poor Afghans can be a false dichotomy. Other distinctions can be as important, as those between the centre and periphery, rural and urban, and cultural and tribal alliances. Who owns, controls, and produces goods from land (including for poppy and housing) is profoundly central to every social and economic action in which Afghans are engaged, and immense competition and tension exists around this. In this context, state policy can be an irrelevant leaf in the wind, deliberately or unwittingly supportive of inequity, or a superimposed force to be reckoned with. In this sense, the land policy journey of the last decade is a microcosm of the still struggling (post) conflict state.

The AREU context

AREU was established around the time of the Bonn Agreement in December 2001. Its mandate is to research issues to guide policy-making. One of its first tasks in 2002 was to assess whether land relations required special attention. The answer was a resounding “yes.” The research paper “Land Rights in Crisis: Restoring Tenure Security in Afghanistan” (March 2003) identified a host of shortcomings, prominently including inter-ethnic land grievances, brought to the surface by years of war and in need of quick resolution:

The question facing the new administration is whether to ignore disturbed land relations and hope that they will resolve themselves, or to deal with the issues directly.

A focus on the potential for conflict

The 2003 paper also described how a great deal of violence over the preceding decades had been driven by or compounded by land-related grievances. AREU was concerned that violence could erupt again, and not only in terms of competing and contested claims to lands. Indeed, the government’s handling of tenure and its governance of land issues were identified as contributing to dangerous injustices. Urgent, but incremental, reform was recommended, building upon the learning-by-doing exploratory pilot programmes with local populations.

The first analysis also recommended that AREU maintain a watching brief on land issues. AREU has since done this, as indicated by main land publications as listed in Annex A. At least 30 other AREU publications have touched upon land issues.

Presentation

Chapter 2 places the status of land issues in 2001 in historical context by examining developments since the 1960s. Chapter 3 tracks the land agenda as it evolved in the early post-Bonn years (2002-2004). Chapters 4, 5, 6 and 7 look at changes between 2005 and 2012. Chapter 8 provides concluding analysis.

2. Land Relations in 2001

The Bonn Agreement of 5 December 2001 created the post-Taliban interim administration led by Hamid Karzai, the preferred candidate of the United States. After confirmation by the first *Loya Jirga* of the decade, this became the transition administration, governing the country until the first elections in 2004.⁸ This chapter provides an overview of the land resource and its governance at the time of Bonn.

2.1 The land resource

An agrarian economy

In 2001 the Afghan population and economy was thoroughly land-dependent. Land was substantial on a per capita basis, but often constituted a dry and unusable resource, in a bitterly cold environment for half of the year.⁹ Despite the impressive diversity of edible crops and half a century of foreign investment in irrigation, most Afghans barely made a living from the land. Better-off families supplemented production with processing and trading. Contributions from urban employment were also important.¹⁰

Geographically, the country was most distinctively marked by a range of high mountains extending 1,000 km from the far northeast to the southwest, dividing the country in two, and referred to, inaccurately, as the Hindu Kush.¹¹ Most of the land south of these central highlands was desert.

A mainly dry and barren resource

The United Nations Food and Agriculture Organisation (FAO) classified the major land resources in the early 1990s as predominantly rangelands/pasturelands (45.2 percent) and barren lands (37.3 percent). Nearly three percent of the country was permanently covered in snow.¹²

Permanent surface water was limited, with seasonal snowmelt as the main source of water, distributed among 41 watersheds in five river basins.¹³ Webs of traditional irrigation channels aided dispersion, including through ancient underground tunnels (*karez*). Despite the construction of dams and irrigation schemes in the Helmand Valley since the 1950s, less than five percent of the country was irrigated in 2001. The dams and irrigation schemes had added three million hectares of land to wheat and cotton farming in 1979. That area had shrunk to 1.5 million hectares by 2001 and most of it was under poppy production.¹⁴ Rain-fed farming was viable in only seven percent of the country. Not surprisingly, wheat farming had not expanded significantly during the conflict (1978-2001).¹⁵

8 The 2004 constitution promulgated by the *Loya Jirga*, a "grand assembly" comprised of regional leaders and tribal chiefs in December 2003 declared Afghanistan as the Islamic Republic of Afghanistan.

9 Landlocked Afghanistan is among the 50 largest countries of the world with a low population density of 57 persons per square kilometre.

10 Early AREU studies by John Goodhand, Sue Lautze, and in particular, Adam Pain who has continued to study livelihood through the post-Bonn decade picked up on the diversity of rural livelihood. This was also reflected in the reports of prominent NGOs, such as the Aga Khan Foundation, DACAAR, Care, Solidarités and Oxfam. FAO crop and food supply assessments also suggested that rural livelihood was diverse by region. For a review of these refer to Liz Alden Wily, "Land Rights in Crisis: Restoring Tenure Security in Afghanistan" (Kabul: AREU, 2003). Also, see Hector Maletta, "Arable Land Tenure in Afghanistan in the Early Post-Taliban Era," in *African and Asian Studies* 6, no. 1-2 (2007): 13-52.

11 Altitude averages at 1,200 m. This rises to 6,100 m in the northeast.

12 See Figure 13 in "Afghanistan 1993 Land cover/Land use Statistics" (Rome: FAO, 1993) and FAO Afghanistan Land Cover Atlas, 1990-1993 (Rome: FAO, 1999).

13 Golam M. Kamal, "River Basins and Watersheds of Afghanistan," (Kabul: AIMS, 2004). There are only five permanent rivers and these too depend upon snowmelt.

14 The development of the Helmand Valley began in 1946 with the Arghandab Dam completed in 1952 and the Kajaki Dam in 1953, constructed by Morrison Knudsen Company, the American builders of the Hoover Dam. This resulted in the world's largest desert irrigation scheme. Over half the costs of the development until 1979 were borne by the American Government. For more on this, see Rajiv Chandreskaran, *Little America: The war within the war for Afghanistan* (New York: Alfred A. Knopf, 2012).

15 For an excellent update of all farming statistics available, see Abdul Rahman Ghafoori, Ghulam Rabani Haqiqatpal,

Village domains as the framework for rural livelihood and land use

Landholding patterns largely followed ethnic lines. A local territory or area (*manteqa*) represented the operating division; each traditionally dominated by a tribe or sub-tribe/clan (*khe*). To generalise, Pashtun tribes and clans dominated the south and east, Hazara tribes and clans dominated the central highlands, and Uzbek and other Turkic peoples dominated the northern third of the country. District and provincial boundaries sometimes coincided with clusters of these *manteqas*. In practice, a district could be ethnically mixed, courtesy of a long history of migration and ethnic mingling, accompanied by purposeful colonisation by Pashtun in pursuit of state-making since the 1890s. This has led ethnologists to warn against treating any ethnicity in Afghanistan as socio-culturally distinct.¹⁶

Nevertheless, ethnicity certainly exerted (and still exerts) force, producing distinct alliances and loyalties that often have a geographical territorial basis. Mansfield illustrates this in his description of how clans jostle over precious resources in pursuit of lucrative poppy production today.¹⁷ Monsutti reminds us that competing interests within superficially homogenous and harmonious communities can be rife.¹⁸

A mainly agro-pastoral farming system

The rural economy was not based on crops alone. Raising livestock was historically a main producer of rural revenue (including for wool rugs and carpets) and continued to maintain its value despite periodic droughts, such as was being experienced at the time of the Bonn Agreement.

In fact, the economy of many communities was built on agro-pastoralism. This included communities who moved their animals to *ailoq*, remoter or higher pastures in the summers, often with their families in tow. Some took animals sufficiently far away (such as two to three weeks walk) and have been described as pastoralists even though their economy was equally dependent on farming. These *powinda* or *maldar* (herders)¹⁹ are distinct from pastoralists who live almost entirely by migrating with animals, dividing their time between summer, spring, autumn, and winter grazing lands. The majority of these nomadic pastoralists are of Pashtun ethnicity. They too do not exist as distinct clans, but as the poorer and more traditional elements of a group that also include sedentary farming families and urban dwellers. Nomads in some of these clans in the east of the country have always identified themselves as Kuchis, meaning those who migrate with animals. As explored by Tapper, the term Kuchi is now widely and even officially applied in reference to all nomadic pastoralists irrespective of their ethnicity.²⁰ However, most citizens use the term Kuchi to refer to Pashtun nomads.²¹

and Nasharullah Bakhtani, "Present State of Food and Agricultural Statistics in Afghanistan" (country paper presentation, Asia and Pacific Commission on Agricultural Statistics, Siem Reap, Cambodia, 26-30 April 2010).

16 Robert Canfield, "Ethnic, Regional and Sectarian Alignments in Afghanistan," in *The State, Religion and Ethnic Politics Pakistan, Iran and Afghanistan*, ed. Ali Banuazizi and Myron Weiner (Syracuse, NY: Syracuse University Press, 1986); Pierre Centlivres and Micheline Centlivres-Demont, "State, National Awareness and Levels of Identity in Afghanistan from Monarchy to Islamic State," in *Central Asian Survey* 19, no. 3-4 (2000): 419-428; Bernd Glatzer, "War and Boundaries in Afghanistan: Significance and Relativity of Local and Social Boundaries," in *Welt des Islams* 41, no. 3 (2001): 379-399; Nigel Allan, "Defining Place and People in Afghanistan," in *Post-Soviet Geography and Economics* 42, no. 8 (2001): 545-560.

17 David Mansfield, "All Bets are Off! The Prospects for (B)reaching Agreements and Drug Control in Helmand and Nangarhar in the run up to Transition," (Kabul: AREU, 2013)

18 Monsutti, "Impact of War," 195-209.

19 Nancy Tapper, "The advent of Pashtun *maldars* in northwestern Afghanistan," in *The Bulletin of the School of Orientation and African Studies*, XXXVI (1973): 55-79; Richard Tapper, "Who are the Kuchi? Nomad self-identities in Afghanistan," in *Journal of the Royal Anthropological Institute*, 14, no.1 (2008): 97-116.

20 Richard Tapper, "Who are the Kuchi?"

21 In contrast, local populations in the Northeast refer to Pashtun, Uzbek, and other smaller groups of nomads entering their areas in the summer as Kuchi; Mervyn Patterson, "The Shiwa Pastures, 1978-2003: Land Tenure Changes and Conflict in Northeastern Badakhshan" (Kabul: AREU, 2004); Hermann Kreutzmann and Stefan Shutte, "Contested Commons - Multiple Insecurities of Pastoralists in Northeastern Afghanistan," in *Erdkunde* 65, no.2 (2011): 99 - 119.

Pastoralists as a small but influential minority

Despite being a tiny sector of the population (less than five percent),²² Kuchis were singled out for their notoriety and their poverty by 2001. The former resulted from the role which some Kuchis played as foot soldiers in Taliban-led atrocities and invasions, including the destruction of vineyards and irrigation canals of the Shomali Plains to the west of Kabul, known as the breadbasket of Afghanistan. The use of the poor and mobile groups as frontline soldiers is not uncommon in social history.²³ This was also not the first time that nomads in Afghanistan were armed to suppress target populations. One historical incident had surfaced as a source of tension at the end of the civil war. This referred to the armed conquest of Hazarajat in the 1890s by mainly Pashtun nomads working for the Amir, the subsequent award of Hazara pastures to these nomads, and the recovery of these pastures by the Hazaras a century later. Although involving a very small proportion of the population, this incident will reappear in this analysis due to the violence it now engenders and to its relevance to questions of pasture tenure.

Urbanisation as a growing challenge in land rights

Urban occupation and livelihood also featured in the discussions in 2001. Kabul had grown dramatically over the 1990s through periodic bouts of returning refugees. Urban dwellers accounted for about a quarter of the total population, estimated to be 22 million people in 2002.²⁴ Seven or so million other Afghans lived in Pakistan and Iran. Most would return and settle in towns over the following decade. Kabul already had a long and colourful history as a multi-ethnic city, and this would remain the case.

Although it would take a decade to become apparent to demographers, patterns of “rurbanization” had already begun to settle in. Families were increasingly divided among town and country, and were dependent upon both farm and urban incomes for survival. For some families this was not new. Rural elites had long maintained homes and businesses in town. Additionally, absentee landlordism was a well-entrenched phenomenon.

Conditions during the long war had encouraged urbanisation even though cities and towns were not particularly safer than villages. Important inter-mujahaddin and then Taliban battles had been fought in cities since 1992. Commanders and their supporters would come to control neighbourhoods in Kabul, as well in other cities and towns. Declaration of peace in 2001 did not end this trend but it did shift its purpose towards a more private enterprise model of land grabbing for speculation and lucrative housing construction, still dangerously backed by armed supporters. Even without this, local notables or newcomers seeking those lands could use violence to secure the deals they wanted. Interestingly, battles over neighbourhoods in peri-urban Kabul have often featured groups of the same ethnicity, between different Pashtun clans for example, with different levels of political support. Such cases had been reported during the Taliban era in Deh Sabz and Khak-e Jabbar areas of outer Kabul. With rising numbers of returnees and rapidly growing international community after 2001, the renting out of old and new houses in Kabul, Herat, Jalalabad, and Mazar-i-Sharif also opened another channel through which a thriving urban property market would evolve.

Post-Bonn focus on rural lands

As influential and problematic as they would prove to be over the coming decade, urban land relations were not the immediate focus of the post-Bonn policy and programme agenda. The urban domain was tiny, at less than 0.1 percent of the total country area. Most of the population was still rural in 2001 and livelihood still firmly land-based. Post-Bonn rehabilitation and development would focus principally on agriculture. Afghanistan’s mineral, gas and oil potential had been well known since the

22 Counted as 2.4 million people in early 2005, in Frauke de Weijer, *National Multi Sectoral Assessment on Kuchi*, (Kabul: MRRD, 2005).

23 For example, San Bushmen were routinely “employed” as frontline foot soldiers in the South African Army’s decade-long war against Namibian independence. Pastoral Masai in Kenya and Tanzania, and Misseriya in Sudan were used by state administrations in similar ways.

24 Urban area population was 3.38 million people in 2002 as estimated by UNFPA, including 183,000 returnees since 1999. Kabul’s population increased by 44 percent during that period.

1950s, but exploration intentions were also remote in 2001. This would change dramatically by 2008, and bring with it new challenges to rural land rights.

2.2 Farm distribution

Continuing inequity and exploitation

Distribution of rural land was not equitable in 2001. Most farms were too small to provide enough food for the family, especially in alpine areas where it was difficult to crop wheat more than once a year.

The exact dimensions of farm sizes in 2001 were uncertain given the high level of displacement. Surveys were conducted in the 1990s but had produced variant data.²⁵ This was mainly because differences among areas were too extreme to render a meaningful national average.²⁶ These differences were geographic and ethnic as well as stemming from different systems of land use and differing degrees of feudalism.

Comparison with pre-war years was also not easy. Statistics produced during the 1960s, 1970s, and 1980s were dissonant but broadly told a story of mass landlessness. This was possibly exaggerated by the communist regimes from 1978.²⁷ However, an earlier official survey (1967-68) documented landlessness as not less than 20.6 percent (Paktiya Province) and up to 81.4 percent (Nimroz Province).

Feudalism varied in intensity among tribes

These distinctions were often a function of different intensity of feudal relations embedded in Afghanistan over several centuries, as was the case throughout Asia.²⁸ For example, some researchers and surveys from 1950-1979 suggest that owner-operated farms were dominant in the fertile parts of eastern Afghanistan. In contrast, extreme levels of landlessness and exploitation of sharecroppers, tenants, and workers existed in other parts. In the central highlands and the north, where a traditional *beg* (someone in charge), *mir*, or *sayed* could own an entire valley or several valleys, ordinary people served as bonded labour and their children were vulnerable to being sold into slavery.²⁹

It is also known that the worst excesses of feudal relations were curtailed by the mid-20th century, not through land reforms but through the suppression of powerful local aristocracies by the central state.³⁰ A comparative analysis of landlessness and bonded labour in the 1960s suggests these were less prominent in Afghanistan than in its South Asian neighbours, particularly Pakistan.³¹

Nevertheless, landlessness and exploitation of labour were evident during the reign of the last *Amir*, Mohammad Zahir Shah (1933-73). His Prime Minister, Mohammad Daoud Khan, who later became the first President of Afghanistan (1973-1978), participated in the redistributive farm reforms ("land to the tiller") that were being promoted by the United Nations and donor agencies in the 1960s and

25 The Swedish Committee for Afghanistan (SCA) carried out agricultural surveys in various provinces in 1987, 1988, 1989, 1990, and in five other provinces in 1992. See Alden Wily, "Land Rights in Crisis," 85-89.

26 Liz Alden Wily, "Looking for Peace on the Pastures, Rural Land Relations in Conflict: A Way Forward," (Kabul: AREU, 2004), 90. Appendix B compared landlessness by region in 1967, 2002, and 2003. In 2002 this ranged from four percent in Khost to 42 percent in Faryab.

27 Russian scientists produced figures showing 70 percent of households were landless and six percent of owned households and 10 percent owned land. For more, see Hafizullah Emadi, *State, Revolution, and Superpowers in Afghanistan* (Karachi: Royal Book Company, 1997).

28 For a summary, see Liz Alden Wily, Devendra Chapagain and Shiva Sharma, "Land Reform in the Global Context," in *Land Reform in Nepal, Where is it coming from and where is it going?*, (Kathmandu: DFID, 2008).

29 Hasan Kakar, *A political and diplomatic history of Afghanistan 1863-1901*, (Leiden, Boston: Brill, 2006).

30 Hazara in the central highlands were particularly affected during the 1890s, many were forced into exile or relocated to Kabul; Kakar, *Political and diplomatic history of Afghanistan*; Sayed Askar Mousavi, *The Hazaras of Afghanistan: An Historical, Cultural, Economic and Political Study* (New York: St. Martin's Press, 1997); John Lee, "The History of Maimana in Northwestern Afghanistan 1731-1893," in *Iran Journal of Persian Studies* 25, (1987): 107-124; John Lee, *The Ancient Supremacy: Bukhara, Afghanistan and the Battle for Balkh, 1731-1901* (Leiden, Boston: Brill, 1996).

31 Comparative information is provided in Annex A, in Alden Wily et al., "Land Reform in the Global Context."

1970s. During that era, new policies, laws and programmes were designed in at least 50 Asian and Latin American states to make rural farm holdings more equitable.³²

Uncertain effects of reforms

Such efforts appear to have had ambivalent effect. Significant landlessness and indebtedness still existed in Afghanistan, according to surveys conducted after Bonn. Landlessness had risen to 31 percent of households in Paktiya for example, but fallen to 60 percent in Nimroz. Still, the overall average for the country was down to 26 percent from 35 percent in 1971,³³ and the 70 percent reported in the late 1970s.³⁴ As previously noted, the enormous disparity from one area to the next makes it difficult to use national averages as more than indicative. For example, an early AREU study in Badakhshan found that landlessness ranged between two percent and 59 percent among its 15 districts.³⁵

However, post-Bonn surveys suggest that landlessness was less pervasive and the largest farms were smaller than in the past.³⁶ Anecdotally, many landlords today claim that they abandoned their farms and migrated to towns leaving these to their tenants during the period of revolutionary reform in 1979. These former landlords claim they have not sought to recapture those lands. Among the three percent of rural households surveyed in 2002-03, land renting was certainly more limited than in the past.³⁷ Sharecropping was undertaken by only seven percent of households, also remarkably less than in the 1960s and 1970s. There were also signs that some workers were now receiving cash instead of food shares for their labour.³⁸

Most rural Afghans did not have land to live on in 2001

Farm size continued to matter in 2001, different quintiles within this narrowed range correlating strongly with wealth.³⁹ Moreover, despite the past reforms, most rural families in 2002-03 still had too little land to live on. This included 36 percent of farm owners with half a hectare or less farmland, and the 24 percent with no land at all.⁴⁰ Many were beginning to be visibly food-insecure: returnees, internally-displaced people (IDPs), female-headed households, families with physically disabled members and poorer Kuchis who had lost most of their livestock in the 1999-2001 drought.⁴¹

Farm sizes were modest at the time.⁴² The average size of irrigated farms was 3.3 *jeribs*, and 2.2 *jeribs* for rain-fed farms (one *jerib* is equivalent to 2,000 square metres, or one-fifth of a hectare). It is significant that formal cadastral surveys from 1964-1968 had found a mean holding size of 17.5 *jeribs* (or 3.5 ha), more than three times the average farm size of 2003.⁴³ Population growth, rather than land reform, was the major factor in the decreasing land holding per capita, for reasons described later.

Indebtedness also remained high at the time of Bonn. Fifty-seven percent of households were surviving by borrowing wheat and 92 percent by borrowing cash. Meanwhile, formal and traditional mortgaging of farms (*graw*) was low in 2002-03 at four percent.⁴⁴ Dispossession through this means was a major

32 For an overview of the redistributive land reform movement in Asia, see Alden Wily et al., "Land Reform in the Global Context."

33 Based on 11,000 households surveyed, in "Afghanistan countrywide food needs assessment of rural settled population 2002-2003" (World Food Program-Vulnerability Analysis Mapping Unit, 2003).

34 For provincial data for 1967-68, 2002 and 2003, see Alden Wily, "Land Rights in Crisis," 90.

35 SMU, "Strategic Monitoring Report of Badakhshan" (Kabul: SMU, 2001). AREU was established as the SMU.

36 Alden Wily, "Looking for Peace on the Pastures," 14.

37 WFP/VAM, "Afghanistan countrywide food needs assessment for rural settled populations" (Kabul: WFP Vulnerability Analysis and Mapping Unit and Partners, July - September 2002).

38 Alden Wily, "Looking for Peace on the Pastures," 23.

39 Alden Wily, "Looking for Peace on the Pastures," 13, 19 and 21.

40 Alden Wily, "Looking for Peace on the Pastures," 4.

41 Alden Wily, "Looking for Peace on the Pastures," 10, Table 2.

42 WFP-VAM, "Afghanistan countrywide food needs assessment."

43 Alden Wily, "Land Rights in Crisis."

44 Alden Wily, "Looking for Peace on the Pastures," 23-24.

factor leading to radical reform in 1978 and had included a law cancelling rural loans and mortgages. It could be because this law had not taken effect, or because the disturbances of the 1980s and 1990s rendered many debts irrecoverable, the post-Bonn surveys found indebtedness still pernicious throughout the country.⁴⁵

In addition to indebtedness, crop shares that tenants, sharecroppers and landless families could earn by working had not altered for the better. These remained exploitative with most retaining only a quarter or one-fifth of the crop. Sharecroppers and labourers were forced to borrow the deficit wheat from the landlords as had been customary prior to the civil war. Homelessness was also high. Fifteen percent of households surveyed in 2003 had no houses of their own. Large groups of farmers were itinerant, working for a few years with one landlord and moving on to another with their sole assets: a few sheep and goats.⁴⁶

While smaller studies found that high proportions of households had absentee members mainly seeking work in towns, the larger survey of 11,000 households in 2003 did not include this question. It was presumed by agencies that displacement and rural-urban mobility would settle down as people returned to their rural homes.

Declining tolerance for exploitation

At the same time, war had changed attitudes. The gross inequalities that continued to exist had less to do with the feudal tradition than with new forms of class-based inequality. It was apparent from early studies carried out by the Danish Committee for Aid to Afghan Refugees (DACAAR) and AREU in 2002-04 that the landless and poor were loathe to return home to conditions of deprivation and indebtedness. Those who had lived outside the country were particularly wary of re-entering relationships, which could put their last *jeribs* at risk. As one Hazara landlord complained to the author in 2002, his former sharecroppers had become literate in Iran while his own sons who stayed at home to protect his estate had remained uneducated.⁴⁷ He knew of others who were now specialists in carpet production and would not return to farming. A wealthier Pashtun landlord in Ghazni made a similar observation, although in his case he could not see how his college graduate sons in London could return to rural life. In any case, the remittance he sent from London was too important for this to be encouraged.⁴⁸ It was also observed in Panjab District in Bamyan Province that groups of farm workers were bargaining with landlords in 2002 and felt freer to move on to other valleys if their terms were not met.⁴⁹

2.3 Land administration

Forty years of failed land governance reform

Land administration was less than functional in 2001. Land or property relations were administered in a fragmentary and ad hoc manner. Even the main task of classical land administration, officially recording private properties and transfers affecting these, was in abeyance. Western investments in the 1960s and 1970s to modernise the system had also failed.

Up until 1960 an indigenous multi-track system had evolved along with the consolidation of the state within which distinction was made between state and private property and imposition of state-run systems to tax the latter. From early on, judges were prominent actors preparing documents that described a purchase, sale, loan, gift, mortgage, division of property, and other transactions relating to a house or a farm. It could be argued that courts acquired their power in the 20th century because of their property certification functions.⁵⁰

45 For detail, see Alden Wily, "Land Rights in Crisis," 91.

46 AREU's Bamyan study echoed this finding; Liz Alden Wily, "Land Relations in Bamyan Province: Findings from a 15 Village Case Study" (Kabul: AREU, 2004).

47 Alden Wily, "Land Relations in Bamyan."

48 Alden Wily, "Land Rights in Crisis."

49 Alden Wily, "Land Relations in Bamyan."

50 On this, refer to Vertan Gregorian, "The Emergence of Modern Afghanistan," in *Politics of Reform and Modernization 1880-*

From the 1920s, the state had periodically issued land grants, sales or use rights to individuals and clan heads. This built upon the more erratic issue of entitlements by early kings as far back as 1893. From the early 1930s, the Ministry of Finance (MoF) had begun taxing properties and in the process, a record of properties had evolved. Farmers also held receipts for the property taxes paid. These were insubstantial slips of paper, listing only the name of the payee, the year, the village and the number of *jeribs* for which the tax had been paid. There were also testimonies written by elders, *mullahs* (mosque leaders), or *maliks* (state-appointed leaders) as witnesses of transactions made by landlords who could afford the charges.⁵¹

The practices resulted in different types of documented tenure categorised as customary, religious, legal or administrative depending upon the issuing authority: the elders, *mullahs*, courts, *maliks*, government offices etc. (See Box 1).

Box 1: Summary of legally valid documents of ownership in 2001

Wasayeq Shari'a, court documents, including deeds issued by a court or certified by a court, and thereafter entered in the large file on the area (Konda) and kept in both District and Kabul Court Archives (Makhzan).¹

Firman, state decrees or other official documents issued by competent organisations, such as the Council of Ministers, valid so long as no other deed supersedes it and so long as the property was entered into the tax book if it was a private property.

Maylati, tax payment documents, provided there was no superseding deed or decree, and the property was registered in the Book of Ownership and Taxation as held by the local AMLAK Office.

Haqaba, water rights documents, with similar conditions as above.

Orfi, customary deeds prepared by local elders and presumed in line with Shari'a conditions, so long as the deed was prepared prior to 1975 and for which a Declaration Form had been prepared for the land and its details entered in the Book of Ownership and Taxation by 1978. However, where Declaration Forms had not been distributed and/or where the books were lost, neighbours could confirm ownership should no other person make claim to the land and if the local AMLAK office endorsed this, the claim was to be accepted.

Qabalaе Qataе, formal title deeds or land documents issued after a legal settlement of the land, as in settlement schemes or following cadastral survey, also entered in the local Book of Ownership and Taxation and providing that no other justifiable claim to the same land exists.

1 There are at least 28 different kinds of deeds registered by the courts. Some of these include: Qabalaе Qataе (Land ownership deeds), Qabalaе Jayеzi (Warranty deeds), Wakalat Khat (Deeds awarding power of attorney on land and other matters), Taraka Khat (Deeds describing distribution of property among heirs), Hasre Werasat (Document identifying a legal heir); Taqsim Khat (Document describing division of property during the owner's lifetime), Tamlik Khat (Letter of Sale or Purchase), Ejara Khat (Lease agreement), Wasayat Khat (Last will and testament) and Eslah Khat (Mediation finding). For a list of other legal documents as found in the court archives see Safar, "Property Rights Administration."

Source: Chapter 2, Articles 4-5 of the Land Management Law, also known as the Law on Land of the Islamic Emirate of Afghanistan, issued with other resource laws in Taliban Decree no. 57, 2000 (SY 1379).

1946, (Stanford: Stanford University Press, 1969); Barnett R. Rubin, *The Fragmentation of Afghanistan: State Formation and Collapse in the International System* (New Haven: Yale University Press, 2002).

51 Details of the land administration system is provided in the following: Alden Wily, "Land Rights in Crisis"; Alden Wily, "Looking for Peace on the Pastures"; Alec McEwen and Sharna Nolan, "Water Management, Livestock and the Opium Economy: Options for Land Registration," (Kabul: AREU, 2007); Yohannes Gebremedhin, "Land Tenure and Administration in rural Afghanistan: Legal Aspects" (ADB/DFID, 2007); David Stanfield and Yasin Safar, "A Study of the General Directorate of Land Management and AMLAK of the Ministry of Agriculture, Livestock and Irrigation," (Kabul: ADB/DFID, April 2007); Yasin Safar, "Property Rights Administration," (Kabul: USAID-OTI-Bearing Point, December 2003); Yasin Safar, "Land tenure administration and property rights management in Afghanistan" (Kabul: USAID-OTI, May 2012).

In practice, the system in 2001 was less fragmented than what the various sources suggest. To secure a legal transfer, valuation, taxation and endorsement by several offices, including the property office at the Department of Land Affairs (AMLAK), were required. This brought these agencies together into what, at least in theory, could be described as a single system.

The most detailed records were those prepared for and by the courts, and stored in their archives (*Markzhan*). As noted earlier, fee collection for preparation of these deeds was an important source of official, and less official, revenue for the judges. Moves to curtail the role of the court in land documentation were resisted from the 1920s.⁵² Court-prepared deeds of ownership or transactions were held in most esteem, including (unsurprisingly) by judges when hearing disputes.

Despite multiple sources of documentation, most rural holdings had no documentation at all between 1961 and 2001. Most landowners and tenants held and used their land on trust, under customary norms. These norms were community-based and sustained arrangements, which had evolved over time. These drew upon various customary or religious (Shari'a) norms. The shared conventions agreed that a certain field or house was owned by a certain family. In the case of off-farm resources such as rangelands, the community's possession extended to a particular spot as had previously been agreed (and periodically negotiated after disputes) with neighbouring communities.

Around 1960, King Zahir Shah determined to make documentation the cornerstone of property rights to facilitate tax collection. This was not a new objective. In the 1920s, King Amanullah had promoted privatisation of lands for tax collection as part of his modernisation campaign. It was subsequently launched by his successor and continued by Zahir Shah in the 1930s.⁵³ The difference in the 1960s would be the growing influence of western systems in the paradigm by which property was defined.

Initially, Zahir Shah established a dedicated land department mentioned above as AMLAK situated in the Ministry of Finance.⁵⁴ Its task was to manage state lands and to record the allocation of state lands to private persons. Initially, AMLAK also had responsibilities for allocating lands in settlement schemes, and reported this to a unit known as the Resident and Relocated Persons Department at the Ministry of Interior.⁵⁵ A Directorate of Land Measurers was also established within AMLAK. As in the past, registration of ownership was limited to recording sales or grants of land made by the state to private persons. Production of court-drafted deeds was as integral part of this procedure.

From a deed to title system

Under the influence of the United States Agency for International Development (USAID), it was decided to record all private holdings irrespective of their origins, and to pursue this through a modern map-based process.⁵⁶ This would not only identify the owner but link this information to a map of the holding. A title deed would be issued to every owner. Future transactions affecting that property would be legal only if these were sanctioned and recorded by the courts and the information attached to a unique file established for that property. These intentions were entrenched in the Survey and Statistics Law of 1965.⁵⁷ Over 640 surveyors were trained in an institute in Kandahar funded by USAID in 1963. USAID also provided more than 400 vehicles for surveys. The surveys began in 1966 under the aegis of a new Cadastral Survey Directorate, still located at AMLAK.

⁵² Gregorian, "Emergence of Modern Afghanistan."

⁵³ Rubin, *Fragmentation of Afghanistan*.

⁵⁴ Mohammad Yasin Safar and David Stanfield, "Cadastral Survey in Afghanistan, Capacity Building for Land Policy and Administration Reform," (Kabul: ADB/DFID, August 2007).

⁵⁵ Stanfield and Safar, "Study of the General Directorate."

⁵⁶ For useful explanation of a cadastre and differences in deeds and title registration systems, see Alec Ewen and Brendan Whitty, "Water Management, Livestock and the Opium Economy - Land Tenure" (Kabul: AREU, 2006). See also McEwen and Nolan, "Options for Land Registration."

⁵⁷ The law may have been drafted by USAID advisers.

USAID was not the only agency promoting this modern (western) approach. FAO and United Nations Development Programme (UNDP) were also facilitating this in many Asian and African states. One of the objectives was to strengthen government control over landholding to facilitate property tax collection, centralized land use planning, to private sector development, and to bring order to seemingly independent and wayward land relations. This *modus operandi* remains the dominant policy today.

In the case of Afghanistan there was also a specific and benign purpose to these plans. Landless and land-poor families could be identified for resettlement in the USAID-backed irrigation schemes of Helmand. A comprehensive database of properties that could be taxed would also emerge. Through the issue of title deeds, farmers would have the confidence to invest more in their farms.⁵⁸ Lands over which individual ownership was not so clear could be logged in and mapped as government property.⁵⁹

Failed and dispossessory titling

Unfortunately, the great land administration modernisation project did not work out as intended in Afghanistan or elsewhere.⁶⁰ By 1968, the mass survey and titling initiative in Afghanistan had dwindled for lack of funds. The programme was vastly more expensive and time-consuming than had been anticipated. The cadastral survey was downgraded to a simple inventory of legal owners and location of their lands, as had been the case before 1965. Maps carefully drawn by trained surveyors failed to provide geographic coordinates through which those parcels could be located. The exceptions were the provinces of Kabul, Helmand and Kandahar, where detailed cadastral mapping was almost complete. In most other provinces only minor sample surveys were undertaken. Over the 1970s, redistributive reform would displace the focus of formal survey further. Redistribution became the main purpose of AMLAK in 1975 leading to its renaming as the Department for the Administration of Land Reform.

The result was that from 1963-1978 only 30 percent (about two million hectares) of private farmlands had been surveyed.⁶¹ In the process, the State had also recorded more than three million hectares of farmlands and barren lands as its own property. This occurred either because communities were not asked to identify their collective off-farm assets, or because they could not pay the taxes for these larger lands. It also reflected the thinking of the donors who had sponsored the survey. USAID reinforced the idea that off-farm lands logically belonged to the state because there no provisions in European law for such collectively-held properties. By the late 1980s, cadastral survey would include identification of pasture and forest lands to secure such assets for the government.

No title deeds were ever issued to private owners as had been the original intention. Even the list of owners produced bore the description "probable owners," as adjudication of ownership by community members was not applied as part of the process.⁶² Nevertheless, the records were systemised in 5,379 areas or "tax units" that broadly corresponded with the rural settlement clusters covered in the survey.

58 Stanfield and Safar, "Study of the General Directorate" cites a 1966 USAID report that presented the titling project as a key to agricultural commercialisation and growth. This was a typical strategy of international donors at the time, most formally embedded in the World Bank's influential land policy statements of 1975, and still maintained in many quarters.

59 M.R. El-Ghonemy, "Land reform development challenges of 1963-2003 continue into the 21st century," in *Land Reform, Land Settlement and Cooperatives 2*, (Rome: FAO, 2003), 32-43.

60 As example, mass titling initiatives were launched around the same time in Kenya, Uganda, Somalia, and Sierra Leone, with even more desultory results. Even after 60 years of the programme, only 30 percent of Kenya is subject to cadastral registration and entitlement. Less than 10 percent of Subsaharan Africa as a whole is "titled" and most of this is related to the former white-owned farms of South Africa, Zimbabwe and Namibia. For more on this, see Liz Alden Wily, "The Law is to Blame, Taking a Hard Look at the Vulnerable Status of Customary Land Rights in Africa," in *Development and Change* 42, no.3, (May 2011).

61 As listed by provinces in Appendix I in Alden Wily, "Land Rights in Crisis," 101-02; Safar, "Property Rights Administration."

62 Local surveyors had been trained to know this was an essential part of the process following survey.

The value of this information would rise in the coming decades and would be both used and abused. During the radical land reform period of 1978-89 the records were utilised to pinpoint large landlords whose lands could be taken. In subsequent years politicians and mujahaddin leaders altered individual records. The records were kept in Provincial Cadastre Offices, with copies sent to the Provincial AMLAK Office and the Central Archive of the Cadastre in Kabul. This last record remains in existence.⁶³

Moving to self-reporting of lands for taxation

As cadastral survey floundered, the necessity of taxation for the less than wealthy Afghan Treasury saw submission of information on private properties made compulsory during 1976-78. Larger owners and local leaders usually filled the land declaration forms for illiterate farmers. Collective assets like pastures were not recorded at all unless a wealthy landlord claimed these as his personal property. In AREU surveys of 2002-04 there were reports that some owners did indeed do this.⁶⁴ Poorer farmers could not afford the tax implications of reporting more than a couple of *jeribs* as their property.⁶⁵ Significant losses to the poor could occur in this manner, a familiar effect of mass recording at the time.⁶⁶

Creating a non-cadastral land register

By 1978 the results were tangible in Ownership and Taxation Books maintained at the district and provincial levels.⁶⁷ Although these had nothing to do with the survey records and maps did not accompany submissions, the resulting books probably match the survey records for those tax units or village clusters. A copy of each book was sent to AMLAK in Kabul. These records are today referred to as "the Principal Books" or "Basic Books," and into which updated information on owners has since been erratically entered. These books are the definitive land register, since many district and provincial copies were destroyed by disgruntled tenants, landlords, or militias during the conflict years.⁶⁸ Tenants and sharecroppers destroyed records of the properties whose ownership they disputed. Influential community members destroyed records to grab more land, particularly during the Mujahidin era of the 1990s.

Neither cadastral survey nor self-reporting of properties was promoted in urban areas. Municipalities had long undertaken the survey, allocation and registration of urban plots or housing in areas under their aegis, also known as City Plan Areas or Master Plan Areas. Municipal records were also lost during the war, as were those of the cadastre and the courts.⁶⁹ This was sometimes inadvertent, but mostly reported as being destroyed deliberately.⁷⁰

Trust in land administration was shaky at the time of the Bonn Agreement. Manipulation of records was by then a major concern. Duplication and inconsistency of records under different

63 Alden Wily, "Land Rights in Crisis," 41-42; Safar, "Property Rights Administration."

64 Alden Wily, "Land Rights in Crisis"; Alden Wily, "Land Relations in Bamyan"; Liz Alden Wily, "Land Conflict and Peace in Afghanistan," Paper presented on behalf of AREU to The World Bank Land Thematic Group ESSD Week Land Sessions in Washington DC, April 2004; Patterson, "Shiwa Pastures, 1978-2003."

65 Alden Wily, "Land Rights in Crisis"; Alden Wily, "Land Relations in Bamyan Province"; Alden Wily, "Land Conflict and Peace"; Patterson, "Shiwa Pastures, 1978-2003."

66 Around the same time this was also being experienced in Kenya, Somalia, Senegal and Uganda. For more on this, see *Searching for Land Tenure Security in Africa*, ed. John Bruce and Shem Migot-Adholla, (Dubuque, Iowa: Kendall/Hunt, 1994).

67 These Books of Integrated Land Size and Progressive Taxation (Books of Ownership) include lists of owners, village and size of their properties under five grades of land to erratically cultivable rain-fed land. The information was based on the self-reported Land Tax Forms filed by owners, endorsed by village leaders, and submitted to District AMLAK Offices. Information includes the name of the owner, his ID number, name of his father, name of forefather who paid tax, tax payment number under the 1970s system, and amount of taxes paid. Each parcel was also given a land number. No maps accompanied these submissions.

68 For example, this was found to be the case in all districts of Bamyan Province in 2003. For more on this, see Alden Wily, "Land Relations in Bamyan."

69 Yasin Safar found that court records were deliberately burned in Kandahar during the war. For more on this see Safar, "Property Rights Administration."

70 This has been the general finding of most reports on land matters, and was confirmed to the author in May 2012 by the Survey Department and an ARAZI official.

systems, limited coverage by a system, the lack of a survey-based register, and the construction of thousands of new properties since the civil war (1978-79) were other drawbacks. Few new property owners had the court documents that had come to represent the gold standard in property ownership. Court-prepared documents were believed to cover at most 10 percent of rural properties and 30 percent of urban properties.⁷¹ Even then, the transactions endorsed by judges were not widely trusted by the people.

Land institutions

Four institutions were principally involved in land administration in 2001: AMLAK, municipalities, the Survey Office and the courts. AMLAK lingered on in MAIL although it had been shorn of its settlement scheme, taxation and redistributive land reform functions in 1990. The Cadastral Survey Directorate had been moved into the Afghanistan Geodesy and Cartography Head Office (AGCHO) under the Office of the Prime Minister in 1970. It was also starved of funds and staff. Initial intentions for this to evolve into a single land survey and registration service had long been set aside. Municipalities were variously held in fear or contempt by urban dwellers, most of who lived beyond the Master Plan boundaries and helped themselves to land needed for housing.

Reforming courts but not their functions

The court reform became the main issue to be addressed in post-conflict rehabilitation, as the integrity of the judiciary was considered one of the most important foundations for recovery. It is clear from early judicial sector reform programmes that advisors were only tangentially aware of their strong role in property security. This is despite the fact that the sanctity of legal land documents had clearly declined. Even prior to the war, judges and courts were described as placing themselves “above the law,” “ignorant of national legislation,” and “prone to rent-seeking” in land matters.⁷²

Afghans without means did not find the courts useful.⁷³ Other than tax payments, most still had no documentations of their land or house ownership. Property tax collection had ceased in 1979 and many had lost their receipts in the interim period. Land offices (AMLAK) still existed in 2001 at provincial levels and in most districts, but their role was more of a keeper of records than that of land administrators. Municipalities had erratic jurisdiction over land matters. Governors and commanders were usually those making decisions.

The years of conflict had not helped. First, decisions on land ownership and allocation of public property had changed with each administration. This was worst during the chaotic Mujahidin era of 1992-96 during which commander control of urban neighbourhoods and rural districts saw different versions of property rights emerge. Traditional agreements had also collapsed in many areas as ordinary families occupied vacant houses and farms, and extended rain-fed farming into areas previously forbidden. Control over rangelands (pastures) also changed hands. This was mainly to the disadvantage of Kuchis who had enjoyed nearly a century of dominance over the high summer pastures of the central highlands and the north but had found this curtailed during the war.

When they secured control of Kabul in 1996, the Taliban were concerned with bringing order to land relations. They had reviewed and amended key land laws in 1996, 1999 and 2000 producing new versions of old laws with few changes other than bearing the new stamp of Mullah Omar.

71 David Stanfield, Yasin Safar and Jennifer Brick, and RLAP Team, “Community-State Administration of Private Property Records in Rural Afghanistan,” (Kabul: ADB/MAIL, 2007).

72 Ali Wardak, “Building a Post-War Justice System in Afghanistan” (presentation, Symposium on State Reconstruction and International Engagement in Afghanistan, Bonn, May-June 2004).

73 Wardak, “Building a Post-War Justice System in Afghanistan”; Liz Alden Wily, “Land Relations in Faryab Province: Findings from an 11 village case study” (Kabul: AREU, June 2004).”

2.4 Land law

A mixed bag of legal guidance

The land law in 2001 protected the rights of many Afghans inadequately. For example, the system did not allow long-term tenants, sharecroppers and farm workers to record their land access rights. Rain-fed lands were ambivalently included in the documents creating uncertainty as to whether the field was privately owned or a temporary usufruct of village land.

The private land sector was extremely small, limited to houses and farms, described earlier as five to 12 percent of the country depending upon whether rain-fed lands are included and if any of these lands were backed up with documentation. Over time and sealed by laws in the 1960s and 1970s, the state had become the *de jure* or *de facto* owner of most of the country. Legal constructs that gave communities ownership over off-farm lands within their village, village cluster, clan area or other self-defined domain (*manteqa*) were not promoted. Unfarmed lands, rangeland or barren lands were generically classified as state, government or public property. Un-owned and un-ownable land was placed under the authority of the Government and routinely allocated to favoured groups on open-ended terms.

The plurality of the legal base complicated matters. This comprised customary, religious, civil, statutory and constitutional law (respectively *Orf*, *Shari'a*, *Qanun-e Madani*, *Qanun* and *Qanun-e Asasi*).⁷⁴

Customary land law

Traditionally land ownership was guaranteed through community-based means, with elders endorsing the rights of a family. Sometimes written documents resulted out of transfers and transactions, and were witnessed by elders, state-appointed headmen (*maliks*) or *mullahs* (religious leaders). The norms governing the rights and wrongs varied among tribes. Pashtunwali, the traditional code of Pashtun tribes, was transferred orally but well documented. Tajik, Hazara, Turkmen and Uzbek rules were unwritten.⁷⁵ Customary law therefore depends upon community-made norms that may change over time. Its application also depends upon mediation and arbitration to reach consensus. In the process the practices and rules may alter.

Shari'a land law

Protection of property is a major objective of the Islamic law and its jurisprudence is comprehensive on the matter.⁷⁶ Shia and Sunni interpretation is not as divergent on property matters as it is in some other aspects.⁷⁷ Complications can arise because rules concerning land rights do not exist in isolation from other branches of Islamic law like family, public and financial rules, and are exercised only in accordance with founding Islamic principles.⁷⁸ The end result is that Shari'a positions on property are not quite as fixed as many presume.

Civil land law

While secularisation of the law began in the 1920s, the role of Islamic jurisprudence, the authority of *Ulamas* (Islamic scholars) and religious judges remain embedded in Afghan national

74 Constitutional law is normally classified as statutory or national law, but is noted distinctly in this case as it has had special importance since the 1930s. Additionally, the constitution could be interpreted as making Shari'a - not its own terms - the supreme law, in that it requires all law to be in accordance with this religious law.

75 Lutz Rzehak, "Doing Pashto, Pashtunwali as the ideal of honourable behaviour and tribal life among the Pashtuns" (Kabul: Afghanistan Analysts Network, 2011).

76 Siraj Sait, "The Relevance of Islamic Land Law for Policy and Project Design" (presentation, Conference on Challenges for Land Policy and Administration, The World Bank, Washington DC, 14 February 2008).

77 Nouchine D'Hellencourt, Shuhrat Rajabov, Masrollah Stanikza, and Abdul Salam, "Preliminary Study of Land Tenure Related Issues in Urban Afghanistan With Special Reference to Kabul City" (Kabul: UN-HABITAT, March 2003), 15.

78 Sait, "Relevance of Islamic Land Law."

law to the present.⁷⁹ An attempt to bring Shari'a into formal statutory law was made through the Civil Code compiled in the 1970s.⁸⁰ This drew upon the Hannafi School of Sunni jurisprudence. The Code comprises of 2,416 articles, 1,000 of which are directives relevant to land and property such as inheritance (*matruka*), mortgage (*rahn*), leasing (*ejara*), and rental (*keraya, sarqof*).

The consistency in customary and religious law in matters of property is not straightforward. In most ways the two are similar in their precepts simply because religion fashions society at the local level and vice versa. It also depends on the religious knowledge of the local *mullah* when brought in to witness transactions. This has given rise to a plethora of Shari'a-based documents in land administration.

At other times, customary law is tangibly antithetical to both Shari'a and statutory law.⁸¹ For example, building on Shari'a, the Civil Code directs that "one daughter shall be entitled to half the patrimony" (Article 2008), and that "where new land comes into being through receding floods, the new land shall be considered the property of the state" (Article 2198). Villages rarely adopt either one of these codes into their community-based norms.

The importance of the Civil Code or civil law (*qanun-e madani*) to land matters cannot be overstated. At Bonn, most judges had been trained in Shari'a only through this Code. They had no training in statutory land laws, nor did they receive training in customary land laws. The court system was weak in other ways. It had no mechanisms to establish precedents based on court rulings. Court reporting was erratic or non-existent in 2001. Major laws, decrees, Taliban edicts, and other legal documents were not available in many provincial-level courts.

Statutory land law

The national land law was complex in 2001. Beside the constitutional law (*Qanun-e Asasi*),⁸² more than 70 laws, edicts (*layeh*) and decrees (*muquarrarat*) existed on the subject along with orders (*firman*) and administrative decisions.⁸³

Many of the laws were just slightly amended versions of the same law, but without clear indication if the original law had been repealed or not. The main subjects covered were: land classification for tax purposes, land entitlement, compulsory acquisition of land, pasture management, distribution of public lands by the state, management of government and public properties in urban areas under the Master Plans and laws that originated origins in the revolutionary 1978-1989 era. The substance of the laws is reviewed later.

2.5 Land policy

The legacy of past policies was pronounced in 2001. Although a national land policy per se had never been formulated, programmes had been organised in the previous half-century with the following related objectives:

- (i) To limit expansion of farming in fragile rangelands and limit overharvesting of bushes from the rangelands
- (ii) To expand the irrigated land area for private farming and export production of wheat, cotton and other crops, including supplanting the historically pervasive production of opium poppy

79 Wardak, "Building a Post-War Justice System."

80 Much as the Criminal Code was formally compiled by King Amanullah in the late 1920s.

81 A commonly cited difference in treatment of women in *Pashtunwali*, for example, allows women to be handed over to other communities as settlement of disputes. Few customary laws give women the same rights of property inheritance embedded in *Sharia*. A recent description of *Pashtunwali* is found in Rzehak, "Doing Pashto."

82 The Bonn Agreement established that the 1964 constitution applied. The Taliban had not adopted the draft eighth constitution of 1992 and referred to Hannafi Shari'a as the governing constitutional jurisprudence, which included the establishment of a pure Islamic State for the Hejab to be enforced for women, a religious police force to operate, an Islamic Army to be formed, and the state economy to be transformed into an Islamic economy.

83 For the listing see Alden Wily, "Land Rights in Crisis," 91-93.

- (iii) To green the desert through dams and irrigation
- (iv) To provide land to the landless through settlement schemes
- (v) To settle nomads, including a 1950s plan to create "a Pashtun homeland from Kabul to Kandahar as a buffer against agitating landless to bring them within the reach of modernisation programmes"⁸⁴
- (vi) To survey and title rural lands in a modern system, mainly to aid property tax collection
- (vii) To bring land use and property relations under firm state control
- (viii) To bring order to urban settlement through the instrument of effective master planning.

Forty years of failed strategies

All of the above had failed to one degree or another. The years of war had seen an expansion of rain-fed farming and settlement into the rangelands, including steep hillsides, to an extent the Provincial and District Agricultural Officers were barely able to contain. Dam building and irrigation schemes had continued on and off from the 1940s, but the major schemes in the south were in disarray, abandoned or were dominated by revitalised poppy production despite the Taliban ban.⁸⁵ Pashtun nomads and other Pashtun had repeatedly been given opportunities to settle and farm since 1929, but had reverted to migratory herding as soon as conditions were right, stock was available, or until farming proved too difficult in the schemes.⁸⁶ The plan to survey and title all rural holdings had petered out long ago. Master plans in the cities were not upheld, as they had failed to cope with the influx of homeless families or expanded their reach to accommodate informal settlements beyond their official boundaries. In any case, municipalities were significantly corrupt and uninterested in regulation or support of arrivals. Property tax had not been collected since 1979 except in an erratic manner in a few areas. The state was determined to be the controlling authority over land allocation but held limited sway. People helped themselves to land, and acquired legal titles through extra-legal and illegal means.⁸⁷

The redistributive farmland reforms

Looking back to the pre-Bonn decades and their legacy by 2000, the most important policy was the redistributive reform, particularly in view of continuing landlessness today. This became the flagship policy from the early 1970s when officials concluded "absentee landlordism and exploitative sharecropping were the causes of low production".⁸⁸ Students were flocking to the cities from the late 1960s as educational opportunities expanded and radical social movements found fertile ground.⁸⁹ Press freedom had grown in the late 1960s and royal elitism was being challenged. This eventually resulted in the overthrow of the King by his Prime Minister-cousin in 1973 with the help of the Soviet-trained army.

However, redistributive farmland reform was not the preserve of socialism. As noted earlier, UN agencies were also actively encouraging redistribution to promote growth, as did the United States, which had driven the successful redistribution reforms of East Asia after World War II (South Korea, Japan, Taiwan), as a means of pre-empting the spread of communism from China.⁹⁰

Therefore, both Soviet and American advisors encouraged the new President Daoud to pursue redistribution of larger estates to landless tenants and workers. He chose a moderate approach,

84 Nick Cullather, "Damning Afghanistan: Modernization in a Buffer State", *Journal of American History*, (2002): 312-537.

85 S. Majrooh and S. Elmi, *The Sovietisation of Afghanistan Lessons Drawn from History and the Way Out of the Present Conflict* (Peshawar, Pakistan: Frontier Limited, 1986).

86 The first attempt to settle Kuchi was in the 1950s, with plans to settle 20,000 families on 15 acre plots in Ghazni. See Cullather, "Damning Afghanistan."

87 Examination of literature arriving at these conclusions is provided in Alden Wily, "Land Rights in Crisis"; Alden Wily, "Looking for Peace on the Pastures."

88 "Survey of Progress 1970-1971 Department of Statistics" (Kabul: Government of Afghanistan, 1971).

89 Peter Marsden, *The Taliban War and Religion in Afghanistan*, (London: Zed Books Ltd, 2002).

90 Refer to Annex A for an overview of redistributive reform globally in Alden Wily et al., "Land Reform in the Global Context."

fearful of alienating conservative rural opinion. The programme was announced in an 18-point national policy for the First Seven Year Economic and Social Development Plan Period of 1976-83. A new Land Reform Law, laying out principles and procedure, was enacted in 1975. Daoud's new Constitution of 1977 backed up these policies.⁹¹

Generous ceilings on permitted farm size were set at 100 *jeribs* of irrigated land (20 ha) and 200 *jeribs* of rain-fed land (40 ha). Landlords with land above this amount were directed to sell their land privately or to pass it over to the Afghan government in return for modest compensation to be paid in instalments over 25 years. The surplus was to be distributed to local landless farmers, nomads and graduates of farming schools. A land tax reform was also introduced in 1976, exempting those with five *jeribs* (one ha) or less from taxes but progressively taxing others according to seven rankings; orchards and gardens claimed the highest tax and rain-fed land the least.⁹² Cooperatives were set up and other laws promised to regulate farm and factory workers' rights.

From moderate to radical redistribution

Following the murder of President Daoud in 1978, the communist regime introduced four key revolutionary decrees, including one against usury and indebtedness, as well as a radical agrarian reform.⁹³ This lowered the ceiling on permitted farms from 20 ha to six ha. This was still quite high and not many private farms were above this size. Compensation for lands seized above this amount was suspended. Land was also to be distributed to landless farmers, nomads and farmers owning less than half a hectare. Allocation would be through public lottery in the area and beneficiaries would not have to pay for the land, as was the case in Daoud's reform. Viable farming was emphasised with a balance of different grades of land within each farm. Division at inheritance could not reduce farms to less than five *jeribs* (one ha) of irrigated land.

It was also compulsory to register land ownership, through the self-reporting system of 1978 described earlier. If a person were found to have given inaccurate information to more than 20 percent of the questions, he forfeited his holding in proportion to the degree of inaccuracy.

Two hundred and fifty thousand families had been given 600,000 ha of land by the end of 1979 but assisted with tools and seeds to farm the land only much later. Uptake in some areas was extremely low because of this reason, and also due to fears of retribution by angry landlords.⁹⁴ Under Soviet guidance in the early 1980s, the agrarian reform was reconstructed to be more workable.⁹⁵ The most significant change was that after recognising that large private estates were not as many as presumed, the state looked to its own lands for distribution to the landless and land-poor.

From redistribution to settlement schemes

This returned Afghanistan to its traditional mode of land distribution that ranged from forced relocation of selected populations to colonise remote areas (for example the 40,000 Pashtun forced to settle in the far north in the 1890s)⁹⁶ to voluntary settlement in new irrigation developments (beginning in 1929 around Butkhak, Ghazni and Khawar/Logar dams). Up to 100,000 landless, nomads, and others were settled in the southern Helmand schemes mostly from the crowded eastern provinces. In 1960 USSR projects had opened the Darunta/Nangarhar Project and two vast commercial farms in Jalalabad Valley employed 9,000 landless farmers were added to these in the 1980s.

91 For details see Alden Wily, "Land Rights in Crisis," 43, 95.

92 *Land Tax Law (Official Gazette no. 338) 1976 (SY 1355)*.

93 Alden Wily, "Land Rights in Crisis," 44-47.

94 Emadi, *State, Revolution, and Superpowers*.

95 D.B. Edwards, "Origins of the Anti-Soviet Jihad" in *Afghan Resistance The Politics of Survival*, ed. G.M. Farr and J.G. Merriam (Lahore, Pakistan: Vanguard Books, 1988); Barnett R. Rubin, *The Search for Peace in Afghanistan From Buffer State to Failed State* (New Haven: Yale University Press, 1995).

96 Lee, *The Ancient Supremacy*; Nancy Tapper, "Advent of Pashtun Maldars," 55-79.

Redistribution and settlement schemes provided much land to landless families, but there is mixed data as to how many remained on these allocations. It is likely that only a few landless moved to the parcels that were taken from their landlords due to fear. In contrast, it can be assumed that allocations made from State lands were more welcome but in practice the lands were often too remote or infertile to encourage poor farmers to remain on those sites.

Abandoning equity

President Najibullah (1986-1992) reversed the land reforms following the ousting of President Karmal in 1986. He restored the permitted holding size to 20 ha and the right of the children to automatically inherit houses and land (1987). Decrees introduced during 1989-1994 ordered the restitution of agricultural lands taken without compensation to their original owners and the return of houses and apartments that had been forcibly taken by previous regimes.⁹⁷ At the same time Najibullah sought to halt expansion of private farming into rangelands.

Following the chaos and land grabbing of the Mujahidin years, Taliban land policy then reinforced rather than departed from these positions. Through fifteen or so edicts handed down by Mullah Omar between 1996 and 2000, the regime ordered restitution of lands taken without payment of compensation since 1978, cessation of private farming expansion into rangelands and recapture of public lands and government properties, particularly in towns.⁹⁸ In addition, Mullah Omar introduced harsh punishments for officials who misused their powers in land matters.⁹⁹

The scope of the government's property was also clarified, drawing a distinction between government and public lands.¹⁰⁰ The public nature of pasture/rangelands was reinforced through reissue of the Pasture Law in 2000. These lands were considered un-owned lands that only the government could grant or allocate. The customary ownership by communities to these lands was denied. The right of the Taliban Supreme Leader to sell pastures on a case-by-case basis was also re-emphasised. Most significantly, a new category of pastureland was introduced and referred to as private pasture but reserved for use by adjacent communities.¹⁰¹ This was later referred to as Special *Mara'a* or Village Pastures. Otherwise, pastures were freely available, especially to Kuchis.

Back to pre-reform policy

The Bonn Agreement of 5 December 2001 established that the overarching framework for peace would be the 1964 Constitution until a new constitution was enacted (except for articles on the monarchy, executive and legislature). On land matters this took Afghanistan back to pre-reform articles because the 1964 Constitution pre-dated even the modest land reforms of President Daoud. It was as if nearly forty years of land reforms had never happened. Even ceilings on the size of permitted farms were dropped.

Relevant articles in 2001 provided for prior and fair compensation for lands required for public purposes and protected the sanctity of private property rendering land grabbing by warlords illegal. Courts were to refer to Shari'a (of the Hannafi School) only where statutory law did not cover a subject.¹⁰²

Existing laws and regulations were to apply provided they were not inconsistent with the Agreement or the Constitution. The Interim Administration was given the right to repeal or amend these laws. This was put into law in February 2002. President Karzai ordered all government ministries to study relevant legislation and to bring forward amendments, just as Mullah Omar had directed in the 1990s.

97 Details of the laws in Alden Wily, "Land Rights in Crisis," 92.

98 Taliban era land laws are listed in Alden Wily, "Land Rights in Crisis," 93.

99 For example, Article 22 of *Law on Land Management* (Official Gazette no. 795) 2000 (SY 1373).

100 For a description see Alden Wily, "Land Rights in Crisis," 55-56.

101 *Law on Pasture and Ma'raa*, Taliban Decree no. 57, (Official Gazette no. 795) 2000 (SY 1373).

102 Alden Wily, "Land Rights in Crisis," 51-52, 94-95.

2.6 Land conflict in 2001

No surveys of land conflicts were conducted around the time of Bonn or immediately thereafter. In any event, it would have been difficult to distinguish land-based disputes from the plethora of armed conflicts and disturbances going on during 2001.

At the same time, UN-Habitat and AREU respectively looking at urban and rural land matters in 2002, noted the enormous potential for land conflicts that prevailed. AREU was particularly conscious of the fact that land grievances had been a crucial factor, if not the cause, of civil conflicts since 1978. The conflict had taken disparate forms; militant rejection by landlords, *mullahs*, and elites of the communist redistributive reforms along with other socialist measures; redrawing of new militia-backed territorial control among ethnicities and clans especially during the Mujahidin years; violent refusal of the central highland and northern communities to allow Pashtun agro-pastoral settlers to return to their homelands or re-establish dominance over alpine pastures. UN-Habitat and AREU also remarked that failure to make the land administration accountable would generate more dispute and conflict.¹⁰³ Land grabbing in particular needed to be promptly stopped.

It is fair to say that researchers, donors, UNAMA and the new Administration itself were all broadly confident that conflicts of all kinds would be curtailed through restoration of peace and rehabilitation.

103 D'Hellencourt et al., "Preliminary Study of Land Tenure Related Issues"; Alden Wily, "Land Rights in Crisis."

3. The Early Years: 2002-2004

Chaos reigned and the ills of the 1990s were not challenged

In hindsight, the depth of land-related grievances during the conflict was not taken seriously after Bonn. In fact, land was not on the agenda at all, much less land reform in any shape or form.¹⁰⁴

This was despite the 23 years in which ownership of many territories, farms, and houses had changed once, twice, or thrice, depending upon who controlled the area. It was not uncommon for out-of-favour ethnicities or sub-groups to flee their homes. For example, an AREU study of Faryab found villages where mass flight and evictions had taken place each time control had passed between Turkmen, Uzbek and Pashtun.¹⁰⁵ Some villages in Bamyan Province had oscillated between Ismaili and other Shia commanders.¹⁰⁶ Nomad control of prime alpine pastures had been militantly rejected since 1979.¹⁰⁷ Farmers who had acquired land through irrigation schemes or through redistribution of their former landlords' lands were also uncertain of their rights as policies had changed several times by 2001. Millions more were still landless. A new generation of Afghans born outside the country were also in the need of land.

Tension along ethnic lines in land relations came to the forefront in rural areas with a discernible Pashtun and non-Pashtun split, and which would prove difficult to retrench over the coming decade. Many displaced Pashtun could not return to the north. Returnees from Pakistan and Iran found it difficult to recover houses and farms abandoned decades ago. Others found their homes damaged or destroyed.¹⁰⁸ Tensions within ethnicities, clans, and wealth groups continued as the scramble for land advanced after Bonn.

Urban areas had also been in chaos since the early 1990s with successive warlords or regimes taking and retaking neighbourhoods, buildings, public lands, houses and apartment blocks. Bonn did not change this. In 2002 most of the 9,600 apartments in the Russian-built Macrorayan estate in Kabul were still not occupied by their original owners.¹⁰⁹ The apartments had been reallocated to others when the instalments stopped being paid. Apartments and houses were co-opted by mujahaddin leaders or occupied by individuals helping themselves. The subsequent sale of the houses not owned by the seller complicated the ownership further. Some parts of cities were occupied by the supporters of a particular commander, while unplanned settlements multiplied around the edges of cities and in public areas within them, barely controllable by straitened municipalities.¹¹⁰ Property relations in Kabul were full of disputes and were rising in number as refugees returned.¹¹¹ This was exacerbated by outsiders settling at the periphery of the city.

An important feature of land relations by 2001 was that a large number of transactions were conducted unofficially, without court or AMLAK approval. The judges and officials were persuaded with bribes to issue fake deeds. Where legitimacy was questioned, uncertainty compounded a slide into corruption. Deeds had ceased to be sacrosanct.

The signs of post-conflict land market inflation were also evident, mainly in the rapidly rising price of city properties during 2002-03. This would rise and rise thereafter. By 2012, one *jerib*

104 Alden Wily, "Land Rights in Crisis," 50-51.

105 Alden Wily, "Looking for Peace on the Pastures."

106 Alden Wily, "Land Relations in Bamyan Province."

107 Patterson, "Shiwa Pastures, 1978-2003."

108 UNHCR reported in September 2002 that this was the case for 83.4 percent of returnees.

109 The World Bank South Asia Energy and Infrastructure Unit at the World Bank, "Kabul Urban Land Crisis: A summary of issues and recommendations," in *Kabul urban policy note series 1*, (Kabul: The World Bank, May 2005).

110 Kabul Municipality reported in mid 2002 that at least 600 properties were wrongfully occupied under fake entitlements. For more on this, see Alden Wily, "Land Rights in Crisis," 99.

111 The World Bank South Asia Energy and Infrastructure Unit, "Kabul urban land crisis."

of land in prime Kabul neighbourhoods such as Wazir Akbar Khan would fetch \$1.8 million dollars, up from \$50,000 in the 1990s, already a hefty price in 2001.¹¹²

Disinterest in reforms

Despite these runaway trends in which the poor majority inevitably lost out to power-holders and those with means, post-Bonn planning focused on humanitarian relief and securing sufficient food aid. Revitalisation of agriculture and post-drought recovery of the national livestock herd were early objectives. Wheat production was rising in 2002 but was afflicted by Moroccan locust infestation and floods.¹¹³

Land matters were not prioritised at all in the National Development Framework (NDF) compiled by the Afghan Interim Authority (AIA) and donors in 2002. The resurgence of poppy production in 2002 after some years of (partial) Taliban suppression did not alert planners to the land grabbing this would trigger.

The chaotic state of land records was mentioned, and for which, on the advice of donors, formal survey and titling was trotted out as a remedy. Planners seemed unaware of the financial and logistical difficulties that this had faced in the 1960s, despite massive USAID funding. Creation of a national cadastre-based registry was described as essential “to enable the private sector to secure title and individuals to use their registered property as collateral.”¹¹⁴ This linked to the founding objective of the NDF, which looked to the private sector and international investment as the engine of growth. The new Minister of Finance, a former World Bank economist, promoted this strategy. This was hardly new but had a chequered history in Afghanistan. Since the 1920s, Afghan administration had looked to international capital to fund its development, to the extent of being defined as a “rentier state.”¹¹⁵

The NDF did mention the fate of returnees from Iran and Pakistan, and the displacement of Pashtuns from the north.¹¹⁶ It also observed with concern that Kuchis were being prevented from grazing alpine pastures and that this threatened their livelihood, without observing the impact that promoting their return to the highlands would have on local non-Kuchi populations. As a nomadic minority, Kuchis commanded renewed attention from the international anthropological community, and proactive analyses of their plight began to emerge from 2002.

Annex B provides a selection of research in this regard over the decades.

3.1 Restitution as focal strategy

Returnees and displaced persons

Although there was no formal policy on land and property matters, priorities did emerge. Returning displaced people’s homes was high on the agenda. At the urging of UNHCR, one of President Karzai’s first decrees was to commit to restitution of lost properties (2002, SY 1381).¹¹⁷ Returnees had found that they could not just walk in and retake their original houses and farms. New occupants often held supporting ‘legal’ documents. Establishing laws and procedures to facilitate restitution had been necessary before as refugees returned in 1989

112 Professor Kabir Ranjbar, Senior Legal Adviser of Afghanistan Investment Support Agency (AISA), pers. comm., 28 May 2012.

113 FAO/WFP, “Crop and Food Supply Assessment Mission to Afghanistan” (Rome: FAO/WFP, August 2002).

114 Afghan Assistance Coordination Authority, “The National Development Framework” (Kabul: Afghan Assistance Coordination Authority, 2002).

115 Rubin, *Fragmentation of Afghanistan*.

116 Around 40,000 Pashtun were forcibly moved to the north to secure the northern frontier by the “Iron Amir” Abdul Rahman during the 1890s, with more voluntary migration north of central highlands during the 1910s and 1920s. A description of these migrations is found in Nancy Tapper’s “Advent of Pashtun Maldars.” Another worthy source is Lee, *The Ancient Supremacy*.

117 Decree on the *Dignified Return of Refugees* no. 297, 2002 (SY 1380).

after the departure of the Russians, and again when the Taliban took control in 1996. Both events had sent a wave of optimism through the refugee and international community that it was safe to go home. This was revitalized in 2001.¹¹⁸

The need to facilitate property recovery was felt early after Bonn. Disputes between occupants and original owners raged, the courts were not coping and complaints from influential returnees were loud. Karzai appointed a special Land and Property Disputes Court to deal with this (September 2002).¹¹⁹ A civil commission working at the Civil Law Department (*Hoqooq*) was to study the claims, and then advise the court.¹²⁰ The decisions made by the courts could be appealed.

The Court performed poorly and could not enforce its decisions. It was replaced by a two court system in 2003, one of which dealt with property cases brought from other provinces.¹²¹ Applicants still had to register their complaint with *Hoqooq* first. Following criticism by the United Nations High Commissioner for Refugees (UNHCR), the right of appeal was re-introduced (*Makamae Nehayee*). An additional Presidential Order required ministries to give the Special Court funds and training. Special Forces were to help them ensure their decisions were implemented.¹²² Cases brought to the Court would receive a decision within two months. Persons found to be using fake deeds would be referred to the police. Returnees still could not bring claims against the Government, even though previous administrations had frequently been instrumental in redistributing their vacant properties and the Government itself had become the owner of a number of estates.

Helping Kuchis re-enter the highlands

Kuchis were also to benefit from restitution. Many had drifted to towns, either as a result of livestock loss during the drought (1999-2001) or because they were no longer able to access spring and summer grazing lands in the central highlands and in the north. The latter was due to the mass recapture of these pastures by local Hazara, Uzbek, Turkmen and Arab populations who had during the civil war recovered control of pastures they considered rightfully their own and believed was wrongly given to Pashtun *maldar* (agro-pastoralists) and Kuchis from the 1890s.

The limitation to Kuchis' access to alpine rangelands was serious. While local access to pastures had risen,¹²³ Kuchis, especially of Pashtun ethnicity, were unable to move far with animals beyond their winter grounds.¹²⁴ Vulnerability assessments in 2002-03 found that only 38 of 614 of Kuchi groups (6.2 percent) were able to access spring and summer pastures that they claimed to be using up until the civil war (1978).¹²⁵ While most of these pastures were in the central highlands and areas to the north, some of the now-inaccessible pastures were located in traditional wintering areas of Kuchis in the east: Nangarhar, Kunar, Nuristan and Khost. Although they usually shared the same Pashtun ethnicity, Kuchi and the more settled and wealthier Pashtun were increasingly coming to blows over land access during this era.¹²⁶

118 The first decrees encouraging return of refugees were issued in 1988 (SY 1367), removing tax obligations on properties during the period refugees had been out of the country (Decree no. 637, 1988 (SY 1367); a *Decree Authorising Distribution of Land to Returnees* no. 642, 1988 (SY 1367); a first restitution law in the *Decree on the Return of Properties of Returnees*, 1991 (SY 1369).

119 Decree on the *Establishment of Land and Property Disputes Court*, 2002, Circulate Letter No. 4035 of 1381, amended by Decree no. 161, 2002 (SY 1381) which extended the time the court had to consider cases.

120 This comprised representatives of the Ministry of Justice, Ministry of Interior, the Attorney-General's Office, and the State Affairs Department.

121 Decree on the *Creation of a Special Property Disputes Resolution Court* no. 89, 2003, (SY 1382).

122 Presidential Order Concerning the Special Land Disputes Resolution Court, 2003 (SY 1382).

123 In 2003 the National Vulnerability Assessment Survey in 1,853 villages found that local access to pasture had increased or remained the same for nearly 60 percent of rural communities since 1978, although this had declined to 20 percent from 2002 as refugees and displaced persons returned and expanded rain-fed farming into pasturelands.

124 While many Kuchis are of Pashtun ethnicity, some may be of other ethnicity, for example, Baluch.

125 Alden Wily, "Looking for Peace on the Pastures," 98-102.

126 Fabrizio Foschini, "Land Grabs in Afghanistan (1): Nangarhar, the disputed rangelands" (Kabul: Afghanistan Analysts

The same vulnerability surveys (2002 and 2003) identified Kuchi as one of the poorer groups of the population. An inter-ministerial commission on Kuchi was established in October 2002. A Kuchi Vulnerability Working Group was established by the Ministry of Rehabilitation and Rural Development (MRRD). Means for nomads to have special political representation was mooted.

Retrieving State Lands

For the new Administration, securing control over the country was paramount and within this, recovery of lands that it believed had been wrongfully occupied or formally allocated to private persons by previous administrations. MAIL, still in charge of AMLAK, was especially aggrieved that people had settled on its expansive rural lands. Lists of lands to be recovered were compiled in 2002, including 2.357 million *jerib* (471,400 ha) of arable land, some of which was used for Ministry projects before the war. Municipalities also got busy listing buildings and parcels they wanted to recover, including those used by mounting numbers of poor families with nowhere else to go.

3.2 Asserting presidential control

For some observers, like AREU, presidential control on land matters raised troubling questions as to what constituted state property. This had varied over the years, including in National Constitutions. Provisions in land laws were also ambiguous including the main laws in force, the Taliban Decree No. 26 concerning Land (2000, SY 1379) and the Law on Land (2000, SY 1379).¹²⁷

As President Karzai issued new decrees, it became clear that distinction between government property (such as public buildings and roads) and public lands (such as rangelands) was becoming even more opaque than was the case under the Taliban and previous regimes. Blanket declamation in the Taliban versions of the land laws that government land included “all lands which have been under the control of the government since 1965” and “all lands in which Shari’a proves the right of the government” suggested blatant land grabbing by the state. Definition of off-farm lands as virgin lands (never farmed but with farming potential if water was developed), barren lands (without water) and rangelands/pastures (used for grazing) reinforced the position of the laws that all but privately farmed lands and houses belonged to the government.

Karzai’s issue of the Decree on Immovable Property (Decree No. 83, 2003 (SY 1382) brought matters to a head. This repealed the Taliban law on land but developed its provisions in matters of restitution. In the process, the law declared that any land for which ownership by individuals could not be proven was state land (Article 3). Everything about the law was designed to forcefully assert presidential control over land deals.

At the time, the origins of the law had good intentions to the extent that it was intended to stem land grabbing and disorder in the land market. In practice, the law reduced private property to a minimum covering only houses and farms for which individuals held provable titles. The majority of Afghans could lose security of occupancy to their houses and farms, without formal titles. The law was not clear as to whether local verbal testimony would be accepted as evidence of ownership. In urban areas, only those who had formally received entitlements and built houses or offices in accordance with the (outdated) planning regulations were safe from reversion to the state.

The Decree also established that government property included any land or buildings that had been under its custody for 37 years. Appeals against this were disallowed (Article 2). Those whose lands had been taken since 1978 for public purposes could not claim compensation (Article 5(2)). Those who had been granted parcels in settlement schemes but for whom the formalities had not been completed and those who had not yet fully paid for those lands were also to lose their lands.

Network, 16 June 2012).

127 *Law on Land*, Decree No. 26, 1999 (SY 1378); Refer to Alden Wily, “Land Rights in Crisis,” 55-56 for details of content.

On the other hand, ministries were encouraged to dispose of their substantial holdings to the highest bidder (Article 9).¹²⁸ This suggested that yet more lands and buildings would pass into the hands of wealthy individuals. An earlier decree on Non-Distribution of Intact and Uncultivated State-Owned Land (Decree No. 99, 2002 (SY 1381) had sought to limit this by halting distribution of unutilised or intact government property by ministries.¹²⁹ Now, with the permission from the President, they could do so.

The Decree also halted survey and mapping by the Survey Department of the Cadastre Agency previously carried out under the order of municipalities, government departments and politicians. Karzai allowed the survey department to conduct surveys only on his specific say-so (Article 15 (1)). Nor was the agency to make any survey information public, or to alter any cadastral records in any way (Article 15 (2)). This (legally) met complaints that survey offices were making records available to elite persons who then used the information to reconstruct ownership in their favour. The practice did not necessarily stop. This restriction also added to the extreme gathering of power over land matters in the hands of the President.

Other laws focused on the troubled urban sphere where land grabbing was rife. Presidential Order Against Allocation of Government Property Contrary to the City Master Plan forbade the Kabul Municipality to allocate government land within the Master Plan Area contrary to standing regulations.¹³⁰ When this failed to halt unapproved allocations, a new decree (2003, SY 1382) removed planning and allocation authority from Kabul Municipality, placing this in the hands of a High Commission for City Development created for the purpose.¹³¹ This law also required the Vice President to “refrain from issuing orders in response to official applications” for land and other matters, responding to complaints over his personal involvement in land grabbing, indicating that this had become an irritant to Karzai.¹³²

By 2004 Karzai was issuing decrees ordering the restoration of areas stolen through false documentation. In July 2004 he ordered the Ministry for Urban Development to identify and recover grabbed lands in Deh Sabz District of Kabul Province and to plan the reallocation of these lands to returnees and homeless families.¹³³

Strong words, and little effect

In practice, there was little sign of a decrease in land grabbing or manipulated allocations of government lands for private purposes, and Karzai’s influence over his ministers was doubtful. A widely talked about case was that of Marshall Fahim, his first Minister of Defence and the former Northern Alliance warlord, whom the American-led coalition had forced Karzai to bring into his administration. Through 2002, Fahim was arranging lands for his supporters in Kabul at a considerable profit to himself and his commanders, notably in Zone 3 of Karte Pansher. Many of the beneficiaries would sell these again in the following years for a profit.¹³⁴ Fahim also ordered occupants to return all of Ministry of Defence lands (in Decree No. 17, 2003 (SY 1382), which he then quickly reallocated for purposes that were far from public.¹³⁵

Marshall Fahim was not alone in such actions. Although UN-Habitat, the World Bank, and urban analysts were unwilling to tackle the subject directly, their urban reports reflected increasing

128 This included half a million hectares of arable land registered to the Ministry of Agriculture during the survey of 1966-78, and probably several times that amount in the areas where a formal survey had not been undertaken.

129 Decree on *Prohibition of Distribution of Government Unutilised and Intact Lands* No. 99, 2002 (SY 1381).

130 Decree No. 830, 2002 (SY 1381).

131 Decree No. 3860, 2003 (SY 1382).

132 Vice Presidents were also ordered “not to appoint, remove or upgrade officials relating to the distribution of land, housing and high-rise buildings during the absence of the President” (Article 5).

133 *Order on the Identification of Grabbed State Land in Deh Sabz District and its Registration to an Urban Project for Distribution to Homeless People*, Order 21, 2004 (SY 1383)

134 The World Bank, “Urban Land in Crisis,” 39-42.

135 The World Bank, “Urban Land in Crisis.”

awareness that urban land grabbing was not ending.¹³⁶ Reports from rural areas suggested land grabbing by notables, commanders, governors and poppy producers was also escalating.¹³⁷ Still in the early post-Bonn years, both donors and the Administration held the position that restitution of the rule of law along with consolidation of a strong central state would curtail this trend, and seemed not particularly disturbed.

3.3 Making land available to investors

On this matter, Karzai first issued a law in 2002 encouraging domestic and foreign investment, permitting foreigners to lease land for 10, 20, and 30 years for the first time and guaranteeing compensation at open market values should those lands be required for public purposes.¹³⁸

A subsequent 2003 Decree defined surplus state property as lands not being used by the ministry or agency to which it had been allocated.¹³⁹ Such lands were to be re-allocated to the High Commission for Investment for allocation to domestic and foreign investors for development purposes.

Again, it was necessary to remind officials that they could not independently dispose off lands under their control by sale, lease, mortgage or other means. No transfers by the Commission would be valid until registered with the Ministry of Finance along with copies of relevant deeds of lease, mortgage, easement or other conditions (Article 6). Nor was any court permitted to grant or record deeds relating to government properties. This placed the Ministry of Finance in an unusual position undercutting the court and AMLAK registries in this respect.

The High Commission on Investment was established under the Private Investment Law (2003).¹⁴⁰ Joint ventures between the Government of Afghanistan and private investors, and between local and foreign companies were encouraged. Foreigners could only invest in an enterprise approved by the Commission. Approved enterprises could deduct losses from taxable income, could transfer the aggregate value of its investment out of Afghanistan along with dividends and be exempt from export duties for its products. Lease terms were extended to 50 years (Article 21). Holders could sell all or part of their interests to other investors after settling debts (Article 25). Disputes could be settled by local or international arbitration.

These provisions were designed to encourage investors. Little thought was given to resulting speculation or to the effects of depriving generations of customary users of their lands when these lands were wrongfully presumed to belong to the government or thought of as un-owned public lands. Investigations of rights prior to lease to investors was flimsy, so the likelihood of local lands being allocated to investors was quite high.

This situation was not unique to Afghanistan. The International Finance Corporation (IFC), the private sector arm of the World Bank, had been promoting similar investment laws throughout the developing world - since the 1990s. This had begun as handmaiden to the last phase of structural adjustment policies for World Bank loans. A country-by-country Doing Business Index was part of the programme within which ease of access to land for international investors and protection of their leases were prominent indicators. The food and fuel crisis of 2008 has since accelerated debate around the issue of presumed state lands provided to investors, both local and foreign. Several hundred million hectares of rural lands in Africa and Asia have been allocated to international capital since 2008 alone.¹⁴¹ Mechanised production of food,

136 The World Bank, "Urban Land in Crisis."

137 Ian Cristoplos, "Out of Step? Agricultural Policy and Afghan Livelihoods" (Kabul: AREU, May 2004); Alden Wily, "Land Relations in Bamyan"; Alden Wily, "Land Conflict and Peace."

138 Decree No. 134, 2002 (SY 1381).

139 Decree on *Legal Decree Concerning Transfer of Government Property*, no. 89, 2003 (SY 1382).

140 Decree on *The Private Investment Law*, (Official Gazette no. 869) 2003 (SY 1382). This law repealed the earlier *Law on Domestic and Foreign Private Investment in Afghanistan* (Official Gazette no. 803) 2002 (SY 1381).

141 Ward Anseeuw, Liz Alden Wily, Lorenzo Cotula and Michael Taylor, *Land Rights and the Rush for Land Findings of the*

fibre, feed and fuel crops for the international market are stated purposes, although leasing for speculation is also a driver. A surge in land allocations for mining, hydrocarbon, water and dam construction is also growing. As with many countries where leases are not made publicly available, it is difficult to get the measure of foreign land acquisition in Afghanistan. What is known is that the trend began very quickly after Bonn, although not necessarily one over which the Administration had much grasp.

3.4 Looking back, not forward

It is difficult to conclude that leaders of the interim and transition administrations had a clear vision of the way forward on land matters. The overall objective was to get things back to the way they had been before the civil war (1978). Civil servants who had kept government going through the Russian, mujahaddin and Taliban years, and grown old with it spoke of the 1970s under President Daoud as a golden age.

Revisionism was visible in the lack of innovation. Despite each ministry being given a free hand to recommend wholesale changes, the changes offered were often minor. This was the case in respect of the Land Management Law and the Pasture Law. Response was muted to the suggestions that land governance needed a new strategy, and donors were not active in offering ideas. While there was understandable reluctance to re-launch redistributive reform, concentration of landholding was rising. This did not concern officials or politicians after Bonn. Inequitable land relations were left unattended, along with tolerance to enlargement of private holdings, mass absenteeism by rural landlords, and multiple opportunities for scarce arable land to be subject to speculative hoarding. It also meant tolerance for growing disparity in house ownership in cities and towns.

The second fiddle to de facto policy of the immediate post-Bonn era was described above as strengthening of the central state control over lands and land allocation. Bringing order to state and private ownership records was predictably a part of this agenda. AMLAK wanted assistance to update its Ownership Books. The Survey Department wanted to re-launch the cadastral survey. The courts asked for help to reorganise their deeds archives. The Ministry of Urban Development Affairs (MoUDA) tried to claw back jurisdiction from corrupt municipalities, and in the process raised eyebrows as to its own objectives and transparency. The Ministry of Tribal and Frontier Affairs focused its attention on assisting Kuchis to regain the pastures they had controlled until the 1970s.

In short, everyone wanted to do what they had been doing before the war. The complications of overlapping land functions among ministries and departments, the fact that AMLAK had ended up from 1978 in MAIL despite a burgeoning urban population and the conundrums of court involvement were not up for discussion.

Settling directions with the new Constitution

Debates around the land content of the new constitution reflected this revisionism. The new constitution came into force on 26 January 2004.

In 2003, The Asia Foundation and AREU were among agencies that saw the new constitution as an opportunity to lay the basis for a thorough, but not radical, reform of land tenure and land governance. Both wrote a possible draft land chapter as an example for the Commissioners to consider and appeared before the Constitutional Commission to make the case.¹⁴² At least one international constitutional expert supported their views, observing to the Commission that bringing land relations into fairer and transparent order was crucial to sustaining peace.¹⁴³

Global Commercial Pressures on Land Research Project (Rome: International Land Coalition, 2012).

142 Liz Alden Wily, "Land and the Constitution Current Land Issues in Afghanistan" (Kabul: AREU, 2003).

143 Professor Yash Pal Ghai, Professor of Constitutional Law, Hong Kong University.

The Commission rejected these submissions. The new constitution did little more than reiterate the provisions of the pre-reform 1964 constitution. As was characteristic in the constitutions drafted in the 1960s, the new constitution accordingly provided only for:

- (i) Classical protection of the right of citizens to settle freely in any part of the country (problematic at the time in Afghanistan)
- (ii) Protection of private property against invasion (but without defining private property)
- (iii) State obligation to pay for private properties which it acquired for public purposes (without defining the limits of public purpose)
- (iv) Assurance that personal indebtedness (such as endured by many tenants and workers) could not be used as grounds to deny them other human rights, potentially protecting them from arbitrary eviction¹⁴⁴
- (v) State responsibility for improving the livelihood of farmers, herders, and settlers, as well as the nomads, and providing housing and distributing public lands to deserving citizens in accordance with the law and financial availability.¹⁴⁵

The one innovation concerned foreign access to land, already advanced by Karzai in the decrees of 2002 and 2003. Article 41 of the new Constitution confirmed the right of foreigners and foreign companies to lease land in Afghanistan and Article 10 pledged to “encourage and protect private capital investments and enterprises based on the market economy.” This embedded the policy of hastened commodification of land and the integration of Afghanistan into a globalised economy. In fact, this had much in common with the liberalisation policies which President Daoud had favoured, and which had been so violently challenged in 1978.

3.5 External influence

USAID comes again to the fore

As shown earlier, American and Soviet influence on land policies had been strong from the 1950s to 1989. To recap, American influence began with its mega-irrigation schemes in Helmand and then guided the reform approach to land administration from 1961, funding the truncated national cadastral survey and guiding the content of the new land laws of 1965 and 1975. Soviet influence during the 1980s was strongest in the redistribution of farmland by placing ceilings on private estates and creating new settlement schemes, and by launching middle-income housing schemes in Kabul for civil servants and with intentions to extend this to poorer households (unfulfilled before their departure in 1989). Earlier Soviet aid during 1962-72 had funded farming schemes such as those based on the development of the Nangarhar Canal, irrigating 25,000 hectares west of Jalalabad city. Government retained 14,000 hectares for a state farm and allocated the remainder to local families. Other Soviet schemes were developed during the 1980s.

After Bonn, United Nations Assistance Mission in Afghanistan (UNAMA) and bilateral donor influence in land matters was limited. During conversations with donors in 2002-03, this author found them unaware of the level of land grievance that existed outside the capital and mystified by how land issues were organised in this ancient and Islamic society. The importance of seizing opportunities to reform land norms after major conflicts were also just entering the paradigmatic consciousness of agencies such as the UNHCR, UNDP, and FAO.¹⁴⁶ There was also no awareness in the international community that urban growth would continue to surge for at least a decade after the end of war. This would trigger a massive growth in the urban and peri-urban land market and regulation was critical to limit land grabbing and wrongful occupancy, which would be almost impossible to reverse in the future.¹⁴⁷

144 Relevant articles in the 2004 constitution are Articles 9, 10, 14, 15, 32, 38, 39, 40 and 41.

145 Article 14 of the 2004 Constitution.

146 “Proceedings: Land Administration in Post Conflict Areas” ed. Paul van der Molen and Christiaan Lemmen (Denmark: International Federation of Surveyors, 2004).

147 Practical Action, “Uncharted Territory: Land, Conflict and Humanitarian Action” ed. Sara Pantuliano, (Rugby, UK:

Neoliberal persuasion

The international community, which mainly represented western interests, also had its own default positions, reflected mainly by the World Bank and USAID who led donors in reconstruction. These agencies favoured active foreign investor access to kick-start the economy and to restart property taxation to fill the empty coffers of the Treasury. This fitted well with the inclinations of the influential post-Bonn Ministry of Finance. Donors also shared the view that a strong central administration was key to creating the rule of law and peace needed to nurture land-based investment and growth.

Letting things go for the sake of a strong centre

The last took its toll in the land sector as in other areas, as best analysed by Astri Suhrki in her ground-breaking study of donor roles in Afghanistan.¹⁴⁸ Misuse of the law did not receive the prompt and harsh punishments needed to establish to deal with chronic collusion, rent-seeking, and malfeasance in property dealings. State inaction stemmed from a mix of corruption, political protection, weak bureaucracy, fear of reprisal, and the difficulty of challenging strongmen.¹⁴⁹

The focus on the strong central government in Kabul also widened the gap between what Kabul wanted and what actually happened in rest of the country. Governors and ministries in provincial capitals were left to their own devices and district departments languished with no support. Expansion of rain-fed farming into rangeland areas, land grabbing, settlement expansion and other similar practices multiplied annually without redress.

Abandonment of a social agenda

Preoccupation with restoring order without reform also affected the social agenda. Commitment to the land needs of the poor had plummeted since 1989, with the abandonment of redistribution and cessation of support for settlement schemes. The early Karzai Administration showed no inclination to tackle landlessness, homelessness and the mass indebtedness of sharecroppers, tenants and mortgagers. It stressed the importance of preventing informal settlements expanding on the unsafe hillsides in Kabul but took no action. There was a presumption that the needs of the poor would work themselves out through a free market economy and would diminish once returnees were settled and society re-stabilised.

NGOs and researchers working on the ground were less confident, as were the findings of the early AREU and UN-Habitat studies.¹⁵⁰ The World Bank recognised that its urban upgrading plans needed to be linked to tenure and governance changes.¹⁵¹ USAID began to discuss projects designed to foster a free market in land. By 2003, UNHCR was unpleasantly surprised that many returning refugees never had homes or farms to return to in the first place and were facing acute tenure insecurity in the urban areas where they settled.¹⁵² The Norwegian Refugee Council (NRC) also began to note the high proportion of land conflicts among the many cases it was helping returnees to resolve.¹⁵³ Demining agencies were also getting conscious of the need to establish ownership before demining as it could open a way for land-grabbing and conflicts.¹⁵⁴

Still, by 2004, very little action was underway on the ground.

Practical Action Publishing Ltd, 2009).

148 Suhrki, *When More is Less*.

149 Foschini, "Land Grabs in Afghanistan (1)".

150 D'Hellencourt et al., "Preliminary Study of Land Tenure Related Issues".

151 World Bank South Asia Energy and Infrastructure Unit. "Kabul Urban Land Crisis."

152 Its figures suggested that 41 percent of returnees were homeless and landless, and another 26 percent had owned farms or houses in the past but found these destroyed or damaged beyond repair on their return; Reem Asalem, "Land Issues Within the Repatriation Process of Afghan Refugees" (Kabul: UNCHR, 2003).

153 Norwegian Refugee Council, "A Report on Afghanistan's Special Property Disputes Resolution Court," (2005); Sheila Reed and Conor Foley, "Land and Property: Challenges and Opportunities for Returnees and Internally Displaced Persons in Afghanistan" (Oslo: Norwegian Refugee Council, June 2009).

154 Mahammad Sediq Rashid (Chief of Operations, Mine Action Coordination Centre of Afghanistan), pers. comm., 16 May, 2012.

4. Towards Reform: 2005-2012

4.1 Donor-driven Change

Officially, 2005 marked the end of the Bonn era. The Bonn process formally came to an end with the drafting of the new constitution in 2004, its approval by the *Loya Jirga* and the first elections of Afghanistan in September 2005.

The donor-state relationship altered from one in which the international community had laid down conditions for creation of a legitimate post-war government to one of cooperation. This was embedded in the Afghan Compact agreed in London on 31 January 2006. The ANDS, in interim forms until 2008, would henceforth provide the policies, parameters and programmes to which international actors could provide inputs. In reality, donor-funded advisors significantly influenced the content of ANDS, and with empty coffers the government could do little on its own.

The year 2005 did mark a new stage in governance in Afghanistan, including in land rights and administration.

Activities shaped around donor funding and were influenced by international rather than local priorities. By late 2004 a handful of projects were underway. These included: the USAID-funded 2004-2009 Land Titling and Registration Project (LTERA) followed by the 2009-2013 Land Reform in Afghanistan (LARA) project, early urban-focused UN-Habitat projects such as Kabul Solidarity Programme, now also operating in Herat and Kandahar and a World Bank-funded Kabul Urban Reconstruction Programme (KURP) that operated until 2012. These were followed in 2006-08 by a rangeland tenure and management project under FAO's Sustainable Agriculture and Livestock Development in Eastern Hazarajat (SALEH) in Bamyān Province. With Department for International Development (DFID) funding, the Asian Development Bank (ADB) implemented a Rural Land Administration Project (RLAP), which also tackled rangeland tenure issues (2006-07).

All of the projects were undertaken in partnership with the Afghan government. The key partner was MAIL and the Afghanistan Land Authority (ALA) also known as ARAZI, which replaced AMLAK in 2010. The Cadastral Survey Department and the Rangeland Department of MAIL were partners. Partners in the urban sector included MoUDA and the municipalities where the projects operated such as Kabul, Kandahar and Nangarhar.

Other entities were also involved in land governance development. These include the USAID-funded Rebuilding Agricultural Markets Program (RAMP), which briefly focused on Kuchi land security (2005-06), and a USAID-funded Pastoral Engagement, Adaption and Capacity Enhancement (PEACE) project which provides land conflict resolution assistance to Kuchi communities. United Nations Environment Programme (UNEP) has assisted in the drafting of an Environmental Management Law and a new Pasture Law in 2006, and developed a strategy for the resolution of land rights conflicts between Kuchi and Hazara within MAIL in 2008-2009. A number of INGOs worked on these initiatives and continue to field projects independently. This is the case with the Aga Khan Foundation and the French INGO Solidarités.

4.2 Keeping track

Research and reporting on land issues have also expanded since 2005 and now include agencies such as the NRC, The Liaison Office (TLO), Afghanistan Watch, Afghanistan Analysts Network, Samuel Hall, and the Afghanistan Independent Human Rights Commission (AIHRC). AREU has conducted periodic analysis of land issues through the decade particularly on gender and conflict under its natural resource management programme focusing on water, livestock and the opium economy. Since 2005, land ownership and access questions have been have been

formally integrated into National Rural Vulnerability Assessments (NRVA) conducted by the Central Statistics Organisation.¹⁵⁵

In short, the last decade has seen attention to land matters increase even if this has not been a priority and has received a miniscule percentage of the billions of international aid invested in Afghanistan. Whether this investment has amounted to reform is examined below. New policies and laws are discussed in this chapter while land administration and other matters are covered in Chapters 5, 6, and 7.

4.3 New National Land Policy

A sorry tale of limited local ownership

The first development of note must be the National Land Policy, eventually signed into effect by the Cabinet of Ministers on 3 September 2007.¹⁵⁶

Progress towards this was slow. Although discussions began in 2002, it took until December 2004 for the ADB to extract a commitment from President Karzai to draft a new policy as a condition to the ADB loan made to the agriculture and natural resource sector.¹⁵⁷ Six months later, ADB consultants laid out concrete proposals for a new policy in a moderate tone but comprehensive in their scope.¹⁵⁸

With responsibility for land matters under its wing through AMLAK, MAIL was encouraged to form an inter-ministerial Land Commission to discuss rural land policy changes.¹⁵⁹ MoUDA felt it should have an equal role and the Commission was eventually placed under the chairmanship of the Ministry of Justice, where a Justice Sector Land Law Working Group was also being formed.

The Commission has both advisory and decision-making roles. It included donor representatives, most notably from USAID, as well as senior representatives from six ministries.¹⁶⁰ Meetings were held over the next eighteen months. No public consultation was planned or undertaken.¹⁶¹ Land projects presented findings and lobbied for these to be taken into account. Some escorted the Commissioners to their field projects.¹⁶² All projects pushed for recognition of informal settlement rights of the poor in towns and cities, action to tackle land grabbing, and restructuring of land classification to enable rangelands to be acknowledged as community properties. Several international study tours and conferences were funded by USAID to expose the Commissioners to 'modern' (western) land administration practices.

Not all recommendations brought to the Commission were adopted. As Gebremedhin, the main facilitator on behalf of the USAID-funded LTERA project records: "The idea of giving official recognition to customary property rights, regularising informal property rights, and establishing a community-based adjudication process were particularly contentious."¹⁶³ None

155 Central Statistics Organisation, "Bamiyan Socio-Demographic and Economic Survey Highlights of the Results" (Kabul, 2 May 2012).

156 Councils of Ministers Resolution no. 22, 2007 (SY 1386).

157 The Asian Development Bank, "Technical Assistance to the Islamic Republic of Afghanistan for Capacity Building in Land Policy and Administration Reform" (December 2004).

158 The Asian Development Bank and Islamic Government of Afghanistan, "Land Policy and Its Implementation in Afghanistan Issues and Proposals Draft for Discussion," (Kabul: June 2005).

159 Liz Alden Wily, "Afghanistan Land Reform Process" (Independent Policy Note, USAID, RAMP Programme, Ministry of Agriculture, Kabul, 29 November 2005).

160 Technical Working Group on Land-Related Issues, Justice Sector Consultative Group (Meeting notes, 20 November 2005).

161 In a review of the land policy making process Gebremedhin rather glosses over this, referring to public consultation but which rarely extended beyond discussions with officialdom or selected groups, and some field visits, not public consultation in the true sense of the word. Refer to Yohannes Gebremedhin, "The Challenges of Formulating a Land Policy in a Post Conflict Context: The Case of Afghanistan" (Discussion Paper, Oslo Governance Centre, June 2008).

162 For example from the SALEH programme; Liz Alden Wily, "A First Note on Policy and Legal Implications on Pasture Piloting by SALEH Project in Bamiyan Province" (Saleh Project, Bamiyan Province, December 2006).

163 Gebremedhin, "Challenges of Formulating a Land Policy," 9.

of the recommendations were radical and advisors were able to present plenty of examples showing how other agrarian states facing similar constraints were restructuring policies and laws in these areas.¹⁶⁴

The National Land Policy which eventually emerged was principally drafted by the USAID-funded LTERA project, with inputs from other donor-funded projects. Ministers of MAIL, MoUDA, and MoJ approved the policy in January 2007. They nursed its approval through the Economic Committee of the Council of Ministers. President Karzai, chairing the meeting, ratified the policy and directed the three key ministers “to supervise drafting of new laws and regulations to apply the policy.”¹⁶⁵

The Presidentially-approved Policy comprised five objectives, fourteen policy principles and twenty policy directives, with sub directives. Some of these broke new ground. One of these committed to reclassification of state and private land as public, private, state and community lands. The community-based approach to adjudication of rights for formalisation was also made policy. Customary land rights were not addressed directly but gained more status as interests, which had to be taken into account. Most of the senior Afghan and foreign land specialists were pleased with the policy, agreeing that it resonated with best international practices and had taken on board the findings of pilot field projects operating at the time.

Institutional failure

However, once the chief facilitator of the USAID-funded LTERA project left the country in 2009, knowledge of the policy faded, and the development of a new urban land policy also came to a halt. By mid-2012 senior officials in the three lead ministries and the representatives of USAID who succeeded the LTERA project could not recall the policy. As a result, its terms were ignored entirely when the pivotal Land Management Law came up for redraft in 2011-12.

It was brought back to attention in September 2012 when following complaints by this author and the World Bank that the National Land Policy was being ignored, a copy of the policy signed by the President and members of the Economic Committee of the Council of Ministers was found. This complaint was lodged in a critical review of USAID-facilitated proposed amendments to the Land Management Law of 31 December 2011.¹⁶⁶

Follow-up found that neither the MAIL nor MoUDA had circulated the policy in 2007. Few, if any, of their provincial and district staff were aware of the National Land Policy’s existence or content, let alone ordinary citizens.

Several factors could have led to this. The policy was donor-driven, highly dependent upon the will of specific individuals within and outside government, but not of their institutions. It was developed at ministerial level and once those ministers moved to other ministries, their commitment to follow through on the policy was lost. This demonstrated extremely narrow local ownership of the policy. The minimal involvement of AMLAK officials was also a factor. It could also be that the politicians and officials who were aware of the policy were reluctant to adopt it because it created more work and accountability demands. Officials may have found the directives also too radical for Afghanistan. Additionally, there was no local champion for the policy. It was only through much later open-minded leadership in ARAZI (Afghan Land Authority) that the implications of the missing policy were taken on board, and its directives read again and absorbed (2012). Even then, there has been marked hesitancy. Moreover, this restructured agency is itself dependent upon the commitment of only a handful of individuals, and should they leave the agency, development and follow-up of the policy principles and directives will be weak.

164 Liz Alden Wily, “The Tragedy of Public Lands: Understanding the Fate of the Commons under Global Commercial Pressure,” (Rome: International Land Coalition, 2011).

165 Resolution no. 22, 2007 (SY 1386), which ratified the policy.

166 Liz Alden Wily, “The Land Management Law, 2008 A Social Assessment” (Kabul: The World Bank, 5 July 2012).

4.4 New land law

Table 1 lists the current body of land-related legislation. Only half of the laws were drafted after 2001. These include five new laws, and ten new decrees and presidential orders. Three of the new laws are concerned with water, mining and environmental management. Two are geared to the private sector. These reflect the overall orientation of new land legislation to the commercial sector.¹⁶⁷

Table 1: The land laws applicable in September 2012

	LAW	SOURCE
1	Decree Amending Article 69 of Land Management Law, 2001 (SY 1380) Land Management Law, 2008 (SY 1388) <i>Old Law (1965), under amendment</i>	Gazette No. 595
2	Law on Expropriation, 2000 (SY 1379) amended 2005, 2010 Decree Amending Law on Land Expropriation <i>Old Law (1935), under amendment</i>	Gazette No. 794 of 2000 (SY 1371) Gazette No. 849 of 2005 (SY 1384). Gazette of 2010 (SY 1389)
3	Decree on Properties, 2005 (SY 1384) <i>New decree</i>	Gazette No. 816 of 2005 (SY 1384)
4	Decree Regarding the Transfer of Government Property, 2001 (SY 1380) <i>New decree</i>	Decree No. 89 of 2003 (SY 1382)
5	Decree Forbidding Distribution of Unutilised and Intact Government Lands, 2002 (SY 1381) <i>New decree</i>	Decree No. 99 of 2002 (SY 1381)
6	Decree with Regard to Properties, 2003 (SY 1382) published in 2004 <i>New decree</i>	Decree 83 of Gazette No. 816 of 2004 (SY 1383)
7	Geodesy and Cartography Act, 1982 (SY 1361), amended 1988 and Presidential Decree of 2007 <i>Old law amended</i>	Gazette No. 674 of 1988 (SY 1637)
8	Law on Property Dealers, 1999 (SY 1378) Decree amending Law on Property Dealers, 2004 <i>Old law amended</i>	Gazette No. 786 of 1999 (SY 1378) Gazette No. 837 of 2004 (SY 1383)
9	The Law on Pasture and Public Land, 2000 (SY 1379) <i>Old law (1970), under amendment</i>	Gazette No. 795 of 2000 (SY 1379)
10	Forest Law, Before Parliament in 2012 (SY1391) <i>Old law amended</i>	
11	Minerals Law, 2010 (SY 1389) <i>New law</i>	Decree No. 14 of 2010 (SY 1389)
12	Petroleum Law <i>Under amendment 2012</i>	
12	Water Law, 2009 (SY 1388) <i>New law</i>	Gazette No. 980 of 2009 (SY 1388)
13	Environmental Management Act, 2006 (SY 1385) <i>New law</i>	2006 (SY 1384)
14	Municipalities Law, 2000 (SY 1379) <i>Standing old law</i>	Gazetted in 2000 (SY 1379)
15	Law on the Organisation and Authority of the Courts, 2005 (SY 1383) <i>Amended old law</i>	
16	Private Investment Law, 2003 (SY 1382) <i>New law</i>	Gazette No. 869 of 2003 (SY 1382)

¹⁶⁷ Including, for example, the Income Tax Law (2009), the Customs Law (2005), and the Procurement Law (2009).

17	Commercial Arbitration Law, 2007 (SY 1386) <i>Amended old law (1995)</i>	Originally 1995
18	Commercial Mediation Law, 2007 (SY 1386) <i>Amended old law (1995)</i>	Originally 1995
19	Law on Mortgage of Immovable Property in Banking Transactions, 2009 (SY 1388) <i>New law</i>	
20	Decree on Housing Affairs under Urban Project of Kabul Master Plan, 2000 (SY 1379) <i>Old decree</i>	Gazette No. 794 of 2000 (SY 1329)
21	Regulation on the Distribution and Sale of Residential, Commercial and State-Owned High Rise Buildings in Kabul City, 2000 (SY 1379) <i>Old regulation</i>	Gazette No. 794 of 2000 (SY 1379)
22	Regulation on Distribution and Sale of State-owned Residential Apartments, 2000 (SY 1379) <i>Old regulation</i>	Gazette No. 798 of 2001 (1380)
23	Regulation on the Implementation of the Kabul Master Plan, 2000 (SY 1379) <i>Old regulation</i>	Gazette No. 794 of 2000 (SY 1379)
24	Decree on the Ban of Distribution of State Owned Property in Violation of the Kabul Master Plan, 2002 (SY 1381) <i>New decree</i>	Decree No. 830 of 2002 (SY 1381)
25	Presidential Order on Distribution of Barren Land for Kuchi Settlements, 2008 (SY 1387) <i>New decree</i>	Presidential Order No. 7266 of 2008 (SY 1387)
26	Decree on the Dignified Return of Refugees, 2002 (SY 1381) <i>New decree</i>	Decree No. 297 of 2001 (SY 1380)
27	Decree On Abolishing of Decrees and Legal Documents before 22 December 2002 (SY 1381) <i>New decree</i>	Decree No. 66 of 2001 (SY 1380)
28	Presidential Decree on Revising Judgments and Rulings of the Special Property Court, 2005 (SY 1384) <i>New decree</i>	No. 112 of 2003 (SY 1382)
29	Decree Approving the ARAZI Establishment Strategy, 2009 (SY 1388)	Decree No. 24 of 2009 (SY 1388)
30	Decree Concerning the Establishment of a Board of Restitution of Grabbed Lands, 2010 (S& 1389)	Decree No. 638 of 2010 (SY 1389)
31	Decree Merging the Land Department of Ministry of Agriculture (AMLAK) with the Board of Restitution of Grabbed Lands, 2010 (SY 1389) <i>New decree</i>	Decree No. 23 of 2010 (SY 1389)
32	Order Concerning the Assessment of Township (Shahrak) Construction and Land Grabbing in the Centre and in Provinces of the Country, 2012 (SY 1391) <i>New decree</i>	No. 2232 of 2012 (SY 1391)
33	Decree on the Execution of Content of the Historical Speech of June 21 2012 in the Special Session of the National Assembly <i>New decree</i>	2012 (SY 1391)
34	Decree 103 on State Owned Enterprises, 2005 (SY 1384) <i>Old law, amended (20 May 1994)</i>	2005 (SY 1384)

Questionable democratic legal processes

A word on legal process is needed here. The constitution¹⁶⁸ and several procedural laws¹⁶⁹ guide law-making process. The Supreme Court, the Government and the National Assembly may propose new laws. All are subject to presidential approval.¹⁷⁰ The President may also reject a law approved by the National Assembly, returning it for reconsideration.¹⁷¹ These are normal powers. The vague definition of what constitutes an administrative or operational law does however allow an undue loophole enabling the President to issue a law without reference to the Parliament.¹⁷² Karzai has made enormous use of this power. In the land sector, Presidential decrees have changed the law or the status of rights to land to a degree which suggests that parliamentary approval should have been necessary.

A good example of this is the passage of the 2003 Decree on Immovable Property, described earlier, and which remains in force as of December 2012.¹⁷³ As shown then, this law endorses state capture of most of the land area undermining customary land interests and over-concentrates land allocation powers in the hands of the President. Human rights are also interfered with as the law prevents legal appeal against decisions or actions of the President. The constitutionality of this decree is questionable. Much will depend on how proposed amendments to the Land Management Law handle these matters.

4.5 The Land Management Law

The Land Management Law is the most important land law in Afghanistan. It has origins in a 1960s law and has been amended many times since, most recently in 2008. Changes in 2008 were solely to facilitate investor access to land, particularly by foreigners. Leases were extended from 50 to 90-year terms. Even the objectives of the law were restated to include private sector land investment.

The grasp of the State over untitled lands also intensified after the 2008 amendment, entrenching the odious provisions of Decree No. 83 further. Those without legal documents or whose lands had not been recorded in the Books of Ownership and Taxation in the 1970s may now, in effect, only secure recognition if they have held the land since 1973.¹⁷⁴ This invalidates land acquisitions that were held without documentation since that date. Although intended to limit land grabbing, this deprives millions of landholders of the potential to be deemed owners, even in reasonable circumstances.

In 2011 the new Afghanistan Land Authority (ALA, or ARAZI) decided to review the Land Management Law. This was at the urging of the USAID-funded LARA programme, which was designed to promote private land investment but was by 2011 wary of the long lease periods instituted by the 2008 amendment. Following the passage of the law in 2008 many local notables with powerful connections had managed to secure leases of 90 years over state lands or acquire other presumed un-owned public lands in absolute ownership. A good example is described by Foschini (2012) in the rapid sale of the 14,000 hectares of state land around the Nangarhar Canal to private persons, not for wheat or citrus production as was traditionally the case, but for the construction of housing estates. Five individual citizens are named as the beneficiaries, together awarded up to 10,000 hectares.

168 Specifically, Articles 79, 88, 90, 94, 95, 97 and 100 of the 2004 Afghan constitution.

169 *Law on Publication and Enforcement of Legislative Documents (Official Gazette no. 787) 1999 (SY 1378)*, and *Regulation on the Procedures for Preparation and Proposal of Legal Documents (Official Gazette no. 787) 1999 (SY 1378)*.

170 Mark Hamilton, "Legislative Process in Afghanistan," (USAID-Afghanistan Rule of Law Project, 7 February 2007).

171 Powers of Parliament are laid out in Article 90 of the constitution. If a certain percentage of an amended law is altered, this must be presented to the Parliament.

172 This is frequently seen in civil law systems, where critical elements of Afghanistan's law may derive from Turkish law.

173 The Decree was neither absorbed nor repealed by the amendments to the 2008 Land Management Law.

174 As in Article 8 of the 2008 law, as compared to Article 9 (1) of the 2000 Taliban Law, which provides no historical timeline, therefore enabling land under visible possession to be deemed as the property of the holder.

Draft proposals to improve the Land Management Law were produced in mid-2011. Suggestions made by the World Bank in August 2011 included precise recommendations on three crucial matters: how identification and adjudication of rights could be carried out, how informal settlements could be regularised within an urban upgrading context, and, how a single, centralised registry of land documents could be established.¹⁷⁵ These recommendations were ignored in the new draft prepared on 31 December 2011, again mainly by the USAID LARA project working with ARAZI staff.

ARAZI did agree to the subsequent World Bank suggestion that the draft be submitted for public consultation. This was carried out in seven cities between July and September 2012.¹⁷⁶ In practice, meetings included invited officials, politicians, entrepreneurs, and local leaders - not the ordinary public. Participants broadly supported the proposed reduction in lease periods for investors, but countered this with a proposal that the renewal of leases be automatic. They also urged that farm owners who have been on the land without documents for a long time be acknowledged as owners. They proposed that this should include recognition of ownership for up to ten *jeribs* (two ha) of expanded cultivation beyond old lands, taking into account the expansion of family farms that had occurred since 1978 due to population growth. They also wanted more local involvement in clarification of land interests (*tasfeya*), and harsher punishments for land grabbers. Court representatives who were consulted disagreed with this, saying the determination of punishments was for the judges to determine, and should not be specified in the law.¹⁷⁷

ARAZI also took up the offer of the World Bank to conduct a social impact assessment of the proposed changes.¹⁷⁸ The assessment found that most of the proposed changes to the law were cosmetic except for the new chapter on land grabbing. The assessment was critical of the following:

- i. The strong orientation of the law towards those with documentation even though up to 90 percent of Afghans have no documentation for their holdings
- ii. Failure to specify the conditions in which an undocumented right would be protected and recognised as ownership
- iii. Weak or no real provision for collectively-owned lands, which in conjunction with state claims to all rangelands would defeat the customary tenure rights of thousands of communities to traditional pastures
- iv. Weak or no positive measures to address tenure insecurities endured by women, tenants, sharecroppers, traditional land mortgagers, IDPs and returnees forced to occupy public lands for a lack of alternative housing or lands
- v. Unfair imbalance in making state lands easily available to investors while failing to bind the state to allocate state lands to needy individuals and communities
- vi. Lack of provisions to ensure that investigation of exiting rights precede allocation of lands to investors
- vii. Failure to reconstruct the definition of state lands to take into account the fact that presumed un-owned public lands are in fact already owned under customary systems
- viii. Failure to remove the overlaps in definition of arid (barren lands), virgin lands (never farmed) and rangelands, and provision to make arid and virgin lands available to investors while protecting rangelands against this, producing a contradiction and, conflicts between communities and investors
- ix. Sustained over-centralisation of land authority without a plan to delegate functions to district and community levels; including excessive presidential prerogative as to land allocation
- x. Failure to establish a simple and cost-free mechanism for all properties to be identified and recorded by local actors at community and district level, even though elected district and community councils were proposed to have such land governance functions; without this, the assessment argued, formalisation of rights would remain the privilege of elites who could access courts to provide legal documentation

175 Patrick McAuslan, "Land Management Law of the Islamic Republic of Afghanistan: A Commentary," (Kabul: The World Bank, 2011). Patrick McAuslan was the World Bank Legal Consultant to the Afghanistan Land Authority.

176 Herat, Kandahar, Paktia, and Jalalabad in July 2012. Kunduz, Mazar, and Kabul in September 2012.

177 Head of Afghanistan Land Authority, pers. comm., September 2012.

178 Alden Wily, "The Land Management Law."

- xi. Lack of provisions to protect lawful land occupants from arbitrary eviction
- xii. Reinforcement, rather than reduction, of the conflict of interests generated by the State as the owner of most of the country and as the neutral regulator of land tenure issues
- xiii. Failure to tackle the conflict of interest which continued to exist in the courts, as both an issuer of entitlements and a judge in title disputes
- xiv. Undue bias towards rural tenure and administration, with assumptions that municipalities will set their own rules under equally inadequate Municipalities Law
- xv. Ample but hard-to-implement provisions to rein in land grabbing. The assessment acknowledged that attempts to limit land grabbing depended upon political will to apply the law.

As recorded above, the social assessment also found that the proposed amendments did not take into account the principles and directives of the National Land Policy. As a result, the status of the Policy was formally investigated by ALA.¹⁷⁹

The proposed amendments also had not taken any note of the substantial directives on land administration that had been given in ANDS in 2008.¹⁸⁰ An outstanding directive of ANDS was for “modern and community-based land administration system.” This was entirely ignored in the amendments to the Land Management Law. Ideally, a full new chapter in the law should have been drafted to lay out exactly how this would be accomplished.

Stepping back to reconsider

It is to the credit of the new Afghan Land Authority (ALA/ARAZI) that it did not balk at these criticisms, and on the contrary showed significant willingness to take these up in a new draft of the Land Management Law. For this the ALA created a special task force with a consultant to be provided by the World Bank (in fact, this author). Eight main problem areas were identified for review, covering most of the above concerns.¹⁸¹

Focusing on a problem affecting almost all rural communities

A main area of review was how far the law should enable rural communities to secure ownership of neighbouring and traditionally-possessed pasturelands, as proposed by the National Land Policy in its provision for community lands as a class of tenure. The ALA sought examples from other countries.¹⁸² Another main discussion point was to what extent the procedure of *tasfeya* (identifying land owners and recording the results in legally-binding records) could be restructured to enable communities to conduct first-stage identification themselves. This would facilitate nationwide uptake of formalised documentation of rights as opposed to the expensive and failed formal surveys. Concerns were also raised that the proposed amendments failed to introduce transparency and accountability measures into the ALA itself or its branches in the provinces and districts. The amendments of December 2011 also failed to legally bind the ALA to disseminate the law to every affected community.

The ALA has since finalised its draft for submission to the Ministry of Justice, following discussion of the proposed amendments by its inter-ministerial board in November 2012. In practice further changes were relatively limited. However, two recent changes to the draft are especially worthy of note:

1. Provisions are made for local communities to immediately secure local grazing, forests and other communal lands as their common property, not just in areas over which they have usage rights. These are described as Special Village Lands.

¹⁷⁹ See Alden Wily, “Land Governance at the Crossroads.”

¹⁸⁰ Islamic Republic of Afghanistan, “Afghanistan National Development Strategy 1387-1391 (2008-2013); A Strategy for Security, Governance, Economic Growth and Poverty Reduction” (Islamic Republic of Afghanistan, 2008).

¹⁸¹ The World Bank, “Revision of the Land Management Law: Summary of Main Problem Areas and Suggestions for Further Revision with Text Inputs” (September, 2012).

¹⁸² The World Bank, “Providing for Secure Rights to Rangelands by Communities in Afghanistan A Snapshot of Provisions in Other Land Laws” (September, 2012).

2. The final draft makes provision to establish a Village Land “Commission” (Committee) in each community.

As reviewed later, neither change is well developed and faces many drawbacks. It is unclear, for example, if the village land bodies will be empowered to make decisions or permitted to perform routine land administration functions such as recording private and communal ownership within the village area. Additionally, these changes are only proposals, and the Ministry of Justice, the Cabinet of Ministers and the Parliament may choose to reject them. No confirmation on this was available by the time this paper went to press.

4.6 The Land Expropriation Law

The post-Bonn decade has also seen the Land Acquisition Law (LAL, also known as the Expropriation Law, LEL) come under review, first in 2005 and then with a minor amendment in 2010.¹⁸³ The LAL/LEL governs how government and its agencies acquire private property for public purposes. The power of eminent domain is a normal constitutional right of governments.

Lawful government interference in private rights occur to provide land for public service developments (roads, dams, sewerage and water pipes etc.) and when new towns or suburbs are planned, as envisioned in the making of New Kabul which will double the size of present-day Kabul and affect at least 42 settlements.¹⁸⁴ Creation of 40 new dams and four new national parks will also lawfully interfere with private lands.¹⁸⁵

The mining case

Most concerns over government interference in local lands relate to proposed mining and oil developments. These include planned land takings for mines, wells and associated infrastructure such as highways, railways, power stations, steel mills and coal-fired electricity installations. The transmission of power and water through proposed resource corridors could also absorb thousands of hectares of rural lands.

An assessment of mineral and hydrocarbon potential in 2005 pointed to a potential trillion dollar asset, more attainable than when it was first identified in the 1950s.¹⁸⁶ Agreements between investors and the Government so far are scheduled to deliver around 15 percent of the national budget by 2016.¹⁸⁷ This will mainly derive from contracts signed with Chinese, Indian, Canadian and British investors for copper, iron ore, oil and gas developments. Agreements for gold, copper and oil drilling rights are in negotiation.¹⁸⁸

183 The 2010 amendment altered only Article 13, adding another sub-article stating that subdivision of parcels into smaller parcels within city plan areas is prohibited. This reflected a problem experienced by municipalities in recent years, which provided smaller parcels than permitted for the plan area, or whereby buyers also subdivided into plots smaller than regulations for that area permit.

184 RECS International, “The Study for the Development of the Master Plan for the Kabul Metropolitan Area in the Islamic Republic of Afghanistan” (Kabul: JICA, Dehsabz City Development Authority and MoUDA, September 2009); Samuel Hall, “A Study of the Kuchi Population in the Kabul New City Area,” (Kabul: JICA, undated).

185 One National Park has been created in Band-i-Mir, Bamyan Province. Four additional National Parks are proposed: Darai Ajar (Bamyan Province), Qoli Ashmal (Kabul Province), Dasht Nawur (Ghazni Province) and Abi-Istada (Nimroz Province). Ghayor Ahmad Ahmadyar (Director of Protected Areas Management, MAIL) pers. comm., May 10 2012.

186 Initially assessed by American, Soviet, and British geologists in the 1950s and 1960s; Khondkar A. Saleque, “An Introduction to Petroleum and Mineral Resources of Afghanistan,” (Kabul: Ministry of Mines, 2012).

187 The World Bank, Ministry of Mines and Australian Aid, “Afghanistan: Resource Corridor Technical Summary” (Tokyo, 8 July 2012). The Government and its partners were sufficiently persuasive for this to be at least one main factor in the pledge made by the international community of US\$16 billion in aid in the July 2012 Tokyo Conference.

188 The World Bank, *Afghanistan in Transition: Looking Beyond 2014, Volume 1: Overview* (May 2012); The World Bank et al., “Resource Corridor Technical Summary”; Saleque, “Introduction to Petroleum and Mineral Resources”; Adam Simpson, “Legal and Regulatory Constructs of Resource Management in Afghanistan and Mongolia. Policy Update” (Calgary: Canadian Defence & Foreign Affairs Institute, 2012); Javed Noorani, “Hajikak: The Jewel of Afghan Mines” (Kabul: Integrity Watch Afghanistan, 2011); Renard Sexton, “Natural Resources and Conflict in Afghanistan: Seven Case Studies, Major Trends, and Implications for the Transition” (Kabul: Afghanistan Watch, 2012).

These investments have been plagued by delays. Discovery of archaeological treasures delayed development of Chinese copper mines, and contractual, security and corruption issues have impeded others.¹⁸⁹ Grave doubts have also been raised as to the viability of exploiting iron ore, due to the immense logistical and cost implications of creating rail links for its export.¹⁹⁰

The Government itself has been hesitant. The Cabinet of Ministers rejected amendments to the July 2012 Mining Law on the grounds that these did not adequately protect Afghan resource from being exploited by foreign companies.¹⁹¹ Investors have their own concerns about the law. New amendments in draft are intended to overcome these,¹⁹² and to clarify obligations of investors to provide employment, infrastructure, and social and environmental protection.¹⁹³ Meanwhile, issues around compensation to local populations for losing lands to commercial investments remain unresolved. This should feature in a yet-to-be amended Land Acquisition Law.

Returning to the problematic definition of private property

Regarding compensation, the Land Acquisition Law is bound by the definition of private property rights. If affected lands are already deemed to be un-owned or to belong to the state, no compensation is given to those who occupy and use those lands, no matter how long they have been there, and irrespective of their customary claims of being the real owners of those lands.

What State lands actually comprise is still debated. Only mines and underground resources are constitutionally declared to be the property of the State (Article 10).¹⁹⁴ The 2010 Minerals Law extends this constitutional provision by specifying that surface (land and watercourses) and subsurface minerals belong to the Afghan Government (Article 4 (1)). Should the State wish to develop its mineral properties (or licence a company to do so) it may acquire the surface land if this is private property, but it is to do so in accordance with the acquisition laws (LAL/LEL). If the licensee already owns the land then he needs to only acquire the appropriate exploration or extraction permit (Article 5). A land rush for mineral-rich land may be expected with buyers aiming to sell their lands to exploration companies or developers at a big profit. Holders may position themselves to receive compensation by securing legal ownership of lands. Obviously only well-off Afghans are in a position to speculate in this manner. In advance of proposed iron ore mining developments in Bamyan Province, villagers reported that non-local visitors were looking to buy lands.¹⁹⁵

A new hydrocarbons law regulating oil and gas extraction is currently being drafted. It can be assumed that similar terms will apply to the issue of compensation.¹⁹⁶ It is uncertain how many rural communities will be affected as the areas that may potentially be open to exploration and extraction is immense. Again, much depends upon the terms of the revised Land Acquisition Law.

189 For example, the key Hajikak iron ore concessions had to be retendered in 2010. Refer to Steven Zyck, "Afghanistan: The Retendering of Hajikak Mining Rights," https://www.cimicweb.org/cmo/afg/Documents/Economic/Hajigak_Mining_Tender_in_Afghanistan.pdf 17 November 2010 (accessed 18 August 2012). Also see Raymond Gilpin and Ashley Pandya, "Improving High-Value Resource Contracting in Afghanistan," in *Peace Brief* 45, (Washington DC: USIP, August 16, 2010).

190 Dion Nissenbaum, "Afghanistan mining wealth thwarted by delays," *The Wall Street Journal*, 14 June 2012; Dion Nissenbaum, "Doubt Cast on Afghan Mining," *The Wall Street Journal*, 3 October 2012.

191 Mathew Rosenberg, "Afghan Cabinet Raises Concern About Mining Legislation, to West's Unease," *The New York Times*, 23 July 2012.

192 The main concern was that those holding exploration permits would have these converted to exploitation or production licences, not currently assured in the 2009 law.

193 Rob Taylor and Hamid Shalizi, "Exxon yet to inspect Afghanistan's biggest oil project: minister" *Business and Financial News*, 30 September 2012; Jessica Donati, "New mining laws up for review within a fortnight," *Reuters*, 20 September 2012.

194 This represents a middle way between the lack of any declaration of state properties up until 1977 (including the constitution of 1964) and quite rapacious state claim to resources by President Daoud (1977) and subsequent communist regimes (1980, 1987, 1987, 1990). This was not modified until the Mujahidin-drafted constitution of 1992 (never formally adopted) which referred ownership to individual laws on underground resources, mines, forests, unclaimed pastures, basic sources of power, historical relics, installations for telecommunications, dams, ports, lines of communication, big industries, radio and television (Article 67).

195 Fieldwork by author in Deh Naw Village in Sydara Valley, Bamyan Province, 20 May 2012.

196 A Petroleum Law exists. The Legal Adviser to the Ministry of Mines detailed the new content of the planned Hydrocarbon Law; Sayed H. Hasemi, "The Petroleum Law under revision," www.mom.af/en/page (accessed 25 November 2012).

The 2009 Water Law is precise in that water belongs to the public but that it is the responsibility of the Government to regulate its protection and management (Article 2).

We have seen earlier that the private land sector is small in Afghanistan. Even with 132 municipalities and cities that have doubled their numbers of neighbourhoods since 2001, urban areas cover less than two percent of the total land area.¹⁹⁷ Although property as lawfully existing in accordance with Shari'a is given legal support, the laws equally presume (in imprecise ways) that all lands other than those occupied by houses or farms are effectively state property. In 1993, settlements and farms including rain-fed fields comprised no more than 12 percent of the total land area.¹⁹⁸ It is believed that this category of land has not expanded significantly since then.¹⁹⁹ Broadly, the rest of the country, an estimated 80 percent, is considered to be state land under the control of the President.

However, the law is not crystal-clear on the status of off-farm lands. To recap, under the current Land Management Law (2008) the term "state lands" encompasses both government properties and public lands as well as lands over which private ownership is not proven.²⁰⁰ The 2003 Decree on Immoveable Property defines "private property" as lands subject to legal proof. That Decree ambivalently indicates that proof could include verbal confirmation by community members. This leaves millions of hectares in uncertain territory.

Ideally, the proposed new Land Management Law should remove ambiguities, although as shown later, it is not entirely successful in this. Forest and pastureland laws are also under amendment (see Section 6.5). On matters of tenure, these must follow the lead of the Land Management Law. The Land Acquisition/Expropriation Law (LAL/LEL) itself depends upon the unspecified definition of private land, community land, government, and public land to determine where it should pay compensation to private owners.

The current land expropriation law

Compensation to legal owners is due

Limitation upon the right of the Afghan government to interfere with private property entered the first modern national constitution in 1923 and has remained in the all constitutions that have followed, except during the communist regime of President Karmal from 1980-1986 when Afghanistan was governed by its fifth constitution. His Constitution eradicated protection for private property by removing constitutional obligation to pay compensation when the Government takes private lands for public purposes. This supported the regime's position at the time that removal of lands above the permitted ceiling to redistribute to long-exploited tenants and workers was fair, and that landlords should not be compensated for their losses.

Compensation must be paid prior to eviction

The Afghan constitution has always provided that compensation must be paid prior to evicting landowners.²⁰¹ In this respect, the Afghan constitution is more just than many other constitutions which have left thousands of evictees waiting for decades for depreciating amount of compensation.²⁰² Nor have Afghan constitutions expanded the meaning of "public" so greatly

197 According to the FAO in 1993, urban area in 1993 constituted only 30,000 ha or 0.05 percent of the total country area.

198 According to the FAO in 1993, this accounted for seven percent rain-fed farming and five percent irrigated farming.

199 There has been expansion through bore well developments, such as in central Helmand Province. In an AREU report David Mansfield explores the areas where poppy-rich settlers backed by *jihadi* and government leaders have "grabbed" *dash*t (desert land) north of the Boghra Canal for poppy production, adding 40,000 ha to the farmland area (Mansfield, "All Bets are Off!"). However, even if several hundred thousand new hectares have been added to the permanent farming estate, it remains a small area overall. Reliable data on current farming areas is still lacking, as noted by Ghafoori et al., "Present State of Food and Agricultural Statistics."

200 Article 3 (8), 2008 Land Management Law.

201 For example, the new Constitution of Kenya (2010) does not make the payment of compensation prior to takings an obligation.

202 In Ghana, for example, the state owes millions of dollars in unpaid compensation, such as USD 65 million owed to

that the State may take any private land for any purpose including those that are, for all intent and purposes, for private uses dressed up as in the public interest. Application of legal terms, including by President Karzai, is of course another matter.

Public purpose is not entirely open-ended

In the original Land Appropriation Law for Public Welfare of 1935 (SY 1314) public purpose was described as: roads, bazaars, water development, mosques, military installations, factories, hospitals, homes for the poor, sanatoriums, orphanages, government offices, water reservoirs for fighting fires, and "all other developments that benefit the public in general," the last opening the way for loose interpretation of public purpose.

In 2000, when the Taliban amended the law,²⁰³ additional public purposes were included: mining, highways, sewage canals and water supply networks. The Taliban edition also made an alarming provision that "vast gardens and vineyards which have economic importance" may be taken from owners in the public interest (Article 3 (3)). However, the open-ended inclusion of "all other developments that benefit the public in general" was helpfully omitted. The Taliban land law of 2000 also retained a 1980s amendment that specified that state lands and lands distributed between 1978 and 1992 would not be paid for if these were taken for public purposes, although the value of buildings and trees that the beneficiaries had invested in would be covered.

The original procedure for acquiring private lands was fairer than today

The original 1935 law had been fair in public acquisition process. Local approval of the public purpose was required. Plans for using the property were to be prepared prior to appropriation. Two to four experts were to evaluate the compensation according to the contemporary value of the property. The value of improvements and inputs such as seeds and labour that had been put into the property that year were also to be paid for by the government. The owner could protest the amount or other aspects of the appropriation to the minister. Payment had to be made directly to the owner and in the presence of a judge. If the property was not used for the purpose intended, the owner could repurchase his property for the same price that had been paid to him. If a tenant was on the property then he was also to be compensated "in accordance with current regulations and customs."²⁰⁴

Karzai's amendments to the law in 2005²⁰⁵ were structured to facilitate the taking of private properties in urban areas to allow for physical upgrading of roads, sewers etc.²⁰⁶ A positive addition was that the owner has to be notified of the planned expropriation three months in advance and can participate in the valuation of the property, although the Council of Ministers is the final arbiter of the value. The negative changes were removal of the right of owners to appeal against expropriation, to receive payment in front of a judge, to buy the property back if the land was not used in the manner intended, and to choose whether to be paid in cash or in kind. This version of the law is still in force. Other identifiable problems in this version are:

evicted private owners in one region alone; Wordsworth Larbi, "Compulsory Land Acquisition and Compensation in Ghana: Searching for Alternative Policies and Strategies" (FIG/FAO/CNG International Seminar on State and Public Sector Land Management, Verona, Italy, September 9-10 2008).

203 Official Gazette no. 794, 2000 (SY 1379).

204 This is supported by Articles 2, 3, 4, 9, 13 and 14.

205 Decree no. 7, 2005 (SY 1384) that came into force in 2009.

206 While the owner retained construction materials and buildings, he was responsible for their demolition (Article 12). Article 13 was amended with a new schedule of the size of land plots due to an evictee in accordance with the size of property he previously owned. Article 16 was modified to clarify that no compensation would be awarded for houses on state lands or those belonging to municipalities or government departments. Article 17 was modified to list the charges that the municipality could make when land was distributed to state departments. Article 22 obligated the expropriating department to collect documentation on ownership of the property and the owner to hand these over when requested. It also provided that the affected person could make no claim whatsoever once he had received substituted property. Article 7 was amended so government officers may review the property on dates agreed with the owner. Article 18 was modified so that if damage to the property resulted, this was to be paid for.

- i. The 2005 LAL/LEL could be unconstitutional in that the constitution establishes that no private property may be taken without a court order (Article 40), and the law does not protect the property rights of those who were lawfully granted land under various distributive reform schemes (Article 40).
- ii. The law is silent on the issue of compensating those who hold properties customarily and/or without documents. As noted many times in this paper, this affects the majority of Afghans. Although this is a responsibility of the Land Management Law, the silence of the Land Expropriation/Acquisition Law is unhelpful.
- iii. The law does not clarify which departments have powers of expropriation or the limits of the powers of implementing officials.
- iv. The value of compensation paid for the lands taken may be unfair in that it is not determined on the basis of open market value. The payment may be insufficient for evictees to acquire new properties and they may also be forced to accept unequal relocation when this occurs.
- v. Arrangements for compensation of parcels do not look equitable, especially when the costs of moving and other inconveniences are taken into account.
- vi. Given that the distribution of land under the land reforms of 1978-1992 was a result of the government policy and law, it is unfair that beneficiaries could be summarily evicted with only compensation for values of improvements made given that they will incur more costs to re-establish livelihood.
- vii. The impact of compulsory acquisition on tenants, sharecroppers and farm workers is unclear, and in the absence of legal limitations, likely to be negative. The 1935 law at least made provision for tenants to receive some compensation.
- viii. The basis of compensation is out-dated; best practice laid out by FAO in 2008 include payments for losses due to disturbance, loss of income, costs of removal of chattels and so on.²⁰⁷ Many countries have moved closer to such international standards.²⁰⁸
- ix. There are no provisions allowing affected persons to appeal against evictions, to be consulted on where they might be relocated or to protest the amount and type of compensation paid.
- x. There are no legally binding provisions to resettle the evicted people.

Donor influence - again

The World Bank in particular has been encouraging the Afghan government to revisit the Land Acquisition Law. This is because the Bank's own rules prevent funding projects where arbitrary eviction occurs. When eviction is to occur, the Bank requires involvement of affected persons from the outset in determining compensation and related matters, and requires actions to restore lost livelihoods, and other needs such as health, education and employment opportunities.²⁰⁹ A World Bank review conducted in June 2007 found the LEL/LAL positive on some counts but wanting in many others.²¹⁰ More protective measures were taken in practical cases than legally required in Bank projects²¹¹ and this appears to be the case wherever the World Bank is the donor.²¹² However, this is not necessarily the case when a wealthy and fussy donor is not involved.

207 FAO, "Compulsory acquisition of land and compensation," in *FAO Land Tenure Studies*, 10 (Rome, 2008).

208 For example, Regulations (2002) under the Tanzania Village Land Act of 1999 cover no fewer than seven heads for compensation, other than paying for the value of the land itself.

209 The World Bank Operation Policy 4.01 and B.P. 4.12 on Involuntary Resettlement, along with Operation Policies 4.01 on Environmental Assessment, 4.04 on Natural Habitats, 4.10 on Indigenous Peoples, and 4.11 on Physical Cultural Resources.

210 Patrick McAuslan, "Land Acquisition in Afghanistan. A Report" (Kabul: The World Bank, 2007); Anisa Ahrar, "Afghan Land Acquisition Law" (Kabul: Ministry of Justice, 2012); Abdul Mohammad Durrani, "The Afghan Legal Framework for Land Acquisition and its Compatibility with World Bank OP 4.12 on Resettlement," (Kabul: The World Bank, May 2012).

211 McAuslan, "Land Acquisition in Afghanistan," reported that regulations passed in Kabul in 2000 helped make the process of compulsory acquisition and eviction more equitable, and participatory (Decree No. 29 City Projects Settlement Rule 25 Year Plan (Design) of Kabul City, 2000 (SY 1379), covering public acquisition of areas under the Kabul City Master Plan). Advance notice is given, affected people are invited to bring their documents, and a negotiated process follows with an effort to reach consensus. Those who will lose their land or houses are part of the decision-making team. The process is not rigid. Compromises can be made. Still, this is not embedded in the law.

212 At a World Bank workshop held in Kabul in May 2012, examples were given of Bank-funded activities such as road-widening, small hydropower development, acquisition of land for wells and road-widening in Kabul, and resettlement planning of those affected by the Aynak copper mine developments which more or less met the Bank's operational policy demands. At the same

Persistence of arbitrary evictions

The occurrences of multiple involuntary and harsh evictions suggest that much stronger protection against arbitrary eviction is urgent.²¹³ The UN Housing, Land, and Property Task Force has proposed the following conditions advising the Government to amend the LAL/LEL to:

- i. Legally commit to identifying alternative living places and conditions for the affected persons
- ii. Avoid evicting people at night and during winter
- iii. Require police to use proportional force during eviction
- iv. Require officials to be present at evictions
- v. Relocate evictees to places where they have real possibilities to earn a living;
- vi. Subject plans for appropriation to judicial and administrative review
- vii. Allow for appeals to decisions as well to the manner in which eviction is been carried out.²¹⁴

Improved practice occurs in a sea of bad practice

Some international agencies accuse the Afghan Government of corruption in the manner in which it has been awarding contracts for gold, gemstone, coal and oil concessions, and then for being unable to regulate how these contractors deal with the local population.²¹⁵ They have also noted concern as to how private land is identified.²¹⁶ The World Bank has been encouraging the Ministry of Mines to improve practices, irrespective of the terms of the LEL/LAL, such as adopting the Extractive Industries Transparency Initiative (EITI) principles for transparency and accountability.²¹⁷ More than 200 contracts are currently published on the Ministry of Mines website (mainly for gravel and marble but also for gold, iron ore and copper).²¹⁸ To manage this, a social policy to mitigate negative impacts of mining on local communities has been developed, in addition to a detailed resettlement plan developed for the high-profile Chinese Aynak copper mine development.²¹⁹

The Aynak resettlement plan is an example of improved practice, the failure to improve the acquisition law aside. The plan evolved over several years of consultations with the residents by the donor-advised Ministry of Mines and a survey of land ownership conducted by the new ALA/ARAZI. All affected families have been temporarily relocated. NGOs and Civil Society Organisations (CSOs) have been involved in assisting them to restart farming or take up vocational training. A grievance redress mechanism has been created. Those who have formal titles to their land are to be compensated as per present-day values. Those without titles, but whose customary occupation is confirmed by local leaders and the Community Development Councils (CDC) will also be compensated with the allocation of 10 *jeribs* (two ha) of farmland and a place to live. Those who have migrated out of the area but lost lands will receive parcels, though it will be smaller. Cash compensation will also to be given for lost masonry work and for the loss of wells.

time, very few people were involved, and the time taken to meet project demands were massive. One example described the months involved in respect of nine affected families in a case of just 1.69 ha. Yasin Noori, "Abbreviated RAP for Baharak Small Hydropower Plant and Mini-Grid," (MLARR Workshop, The World Bank, Kabul, May 2012) and Yasin Noori, "Planning Sequence and Duration of Land Acquisition," (MLARR Workshop, The World Bank, Kabul, May 2012).

213 The Norwegian Refugee Council reports these among other complaints brought to it to for resolution, see "Achievements of ICLA and BPRM Programmes for Period 1 January 2011 to 31 December 2011 (Legal Section)," in *NRC Annual Statistics Report* (Kabul, 2012).

214 "Proposed Requirements for Guidelines for Mitigating Harm and Suffering in Situations of Forced Evictions" (Afghanistan Protection Cluster, Housing, Land and Property Task Force chaired by UNHCR 2012).

215 Noorani reports on "flagrant violations of Afghan sovereignty by many foreign mining entities that have established contracts with regional warlords, powerful men, and political parties to carry out their wishes in political and military matters" See Noorani, "Hajikak: The Jewel of Afghan Mines."

216 Noorani, "Hajikak: The Jewel of Afghan Mines."

217 For example, as in the Extractive Industries Transparency Initiative, signed up to by Afghanistan. Refer to "EITI Rules including the Validation Guide," (Oslo: The EITI International Secretariat, 2011).

218 See www.mom.af/en/page (accessed October 15, 2012).

219 Harjot Kaur, "Overview of Aynak Resettlement Action Plan" (Kabul: Ministry of Mines, 2012); Asta Olesen, "Aynak Resettlement Action Plan," (MLARR Workshop, The World Bank, Kabul, May 2012).

Schools, roads, sewage pipes, a clinic, drinking water supply and a mosque will be provided at the relocation site, known as Ashab Baba.

As of December 2012, evictees had not in fact been resettled in the new site despite several years having passed after the eviction and the number of household to be resettled being quite low at 117 households. A local leader complained about this to the international press in June 2012 but added that he had received US\$10,000 in compensation, he was actively employed at the site, and his children were attending school for the first time.²²⁰

Such schemes expose the government to improved practice, and which will become more and more important as more commercial mining and land developments accrue. However, the time and financial costs of this model have been immense, taking up to 120 weeks to work through the procedures even without the added time which court appeals would add. Standards are likely to slip. Countries with substantial mining interests, such as China and India, may also discourage adoption of such laborious conditions.

By the end of 2012, progress on the revised LEL/LAL has stalled. The Cabinet of Ministers was taken aback in mid-2012 when the Minister of Justice presented his own proposal for amendments. The proposal did not take social, environmental or internationally-binding considerations into account, and was not adopted. Still, there has been no action since. Nobody ministry body has been designated to take the lead. The World Bank has hinted that it may make a radically improved LEL/LAL a pre-condition to financing to keep the post-2014 administration afloat for four years.

220 Nissenbaum, "Afghanistan mining wealth thwarted."

5. Governing Land

By 2004, a couple of donors had warmed to the idea of being involved in land administration although it was complicated and corrupt. As shown earlier, USAID was the driving force behind the 1960s land survey. The effort was intended to lead to a survey-based title deeds system covering every *jerib* of Afghanistan, identified as either private or state property. While legal documents were to feed into the post-survey process of confirmation of owners, their importance would diminish once formal titles were issued. The stated justification for this expensive initiative was to give landholders the documented security needed to enable them to raise loans for farm improvements and commercialisation. Despite spending millions of dollars, the survey had failed, no Title Deeds Registry was created, and no cadastral titles were issued. In 2001, legal ownership was still mainly demonstrated through court deeds.

5.1 A focus on the commercial land sector

Forty-five years later, USAID has again become the main (and sometimes only) donor investing in the land sector.²²¹ Although there was no appetite for re-launching a national survey, adjudication and titling, USAID remained focused on supporting commercial interests and changing related law and procedures. Its first aim, under the LTERA programme of 2004-09, was to help the Afghan Government to privatise 65 State Owned Enterprises (SOE) and large agricultural estates under the MAIL.²²² On a smaller level, it also tested localised methods to help the document-less urban poor secure formal deeds of ownership. The follow-up LARA programme (2009-2012/13) sustained the commercial focus, funding the transition of AMLAK into ARAZI, with a prominent new department established to promote commercial lease of state lands and to fast-track investor requests.²²³

Initially, creation of one-stop shops for land services was a core activity in support of commercialisation. These were intended to combine services, or at least streamline links between AMLAK, court, cadastre, tax office and municipalities through a shared land information system, and to eliminate unnecessary steps in private acquisition and the transfer of houses and land parcels. The capacity of the cadastre was to be upgraded, a land title database established, court records reorganised, and laws amended to legalise the new regime. The one-stop shop was tested in Ghazni City. The capacity of private sector providers (surveyors etc.) was to be enhanced.

Most of these plans were only partially delivered. USAID found enthusiasm for privatisation of state agencies less than promised, liquidation plans for only 23 SOEs were advanced, and privatisation of three state-owned banks and one state-owned corporation was achieved.²²⁴ With the assistance of the Harakat Foundation, set up with British Government funds in Afghanistan, LTERA created an NGO known as Afghan Land Consulting Organization (ALCO), which complains of not being utilised.²²⁵ Revenue collection by the new ARAZI from commercial leases was successful, largely through the introduction of the Minimum Lease Fee.²²⁶ Newer leases related to Chinese and Indian contracts to develop the Aynak copper mine and iron ore mines have been particularly lucrative.²²⁷

221 Due to the persuasion of one of its contractors, Rob Hager, who had assisted in the English translation of the Civil Code in the late 1970s a small study of the records system was funded; Safar, "Property Rights Administration."

222 "Land Privatization and Land Titling in Afghanistan. Evaluation of the Land Component of the USAID-funded Afghanistan State Owned Enterprise Privatization, Excess Land Privatization and Land Titling Activity," Un-named review agency for USAID, (2006).

223 Tetra Tech ARD, "Land Reform in Afghanistan (LARA), CLIR/BizCLIR Property Assessment," (Kabul: USAID, 2011).

224 Audit Report of the Inspector General, USAID, June 8 2009, revealed USAID review of the programme found the project's investment in privatisation as only partially successful.

225 Ziaullah Astana (Executive Director, Afghan Land Consulting Organization), pers. comm., 14 May 2012.

226 From lease of 155,000 *jeribs* (31,000 ha) generating 25 million Afghanis (US\$500,000) between 1382-89 (2003-10) followed by the lease of 26,000 *jeribs* yielding 225 million Afghanis (US\$4.5 million) since August 2010-May 2012. Jawad Peikar, "Land Management, Land Rights Identification, Survey and Disputes," (Kabul: ALA, May 2012).

227 US\$ 2 million was paid to the Government of Afghanistan by the Chinese state-private consortium for land for the Aynak copper mine, with some indication the Chinese have also footed the bill for compensation and related developments paid to affected persons (ALA official, pers. comm., 15 May 2012).

As mentioned earlier, legal reforms promoted by the USAID project resulted in an amendment to the Land Management Law in 2008 making land easily available to investors and for leases of up to 90 years, use of those lands by local communities notwithstanding.²²⁸ The follow-up LARA programme assisted ARAZI to amend the law again, as earlier reviewed, and this time with a broader agenda.

The assistance provided to the cadastre to update its methodologies was in principle successful, although too expensive to have been adopted in more than four municipalities, echoing the failures of the 1960s and 1970s.²²⁹ More positively, LTERA helped the cadastre to run training courses for new surveyors and should have trained 100 surveyors by 2013. It is not yet clear how their salaries will be paid given budgetary constraints.

Bringing order to records

The most successful USAID intervention was discrete and non-transformational: the physical reorganisation of the court archive system for title deeds. Twenty-one Provincial *Markzhan* (court archives) had their premises renovated and nearly seven million documents are now reorganised into properly numbered and accessible files. These include 850,000 land deeds, representing 80 percent of the land deeds registered with the courts in Afghanistan.²³⁰

The procedures for formal titling have also been simplified, at least in the transfer of lands within the private sector, with a reduction of steps required from 30 to four steps for land and three steps for buildings as well as a reduction in the number of offices that need to be visited, from a maximum of 10 to just four or five. There was also a reduction in property tax rates from 7/8 percent to 4/5 percent, approved by the Parliament in February 2009.

The process by which a title is acquired in the first place has improved only to the extent that it uses simpler forms which are no longer in Arabic, but in Dari and Pashtu.

These changes fall short of the reform in land governance required to:

- i. Make the administration process simple, cheap and accessible to ordinary citizens.
- ii. Remove the enormous financial and literacy requirements associated with formalising undocumented rights.
- iii. Further protect existing unregistered rights.
- iv. Distribute the massive state lands resource fairly, estimated to be almost 86 percent of the country area.
- v. Reorder courts registries and procedures to noticeably result in increased transparency and accountability in transactions.

In terms of the structure, the interventions also fall short of creating a unified (and civil) system for documenting ownership. Improvements have been specific to institutions, and have not been integrated across institutions. The recognition and protection of private property through these fragmented and elite-centred routes has not been directly challenged. However, as will be outlined shortly, some indirect progress towards this possible eventuality in the long-term has been laid. Before examining these it is necessary to recount the single major institutional change that has occurred in the land sector since Bonn, the reincarnation of AMLAK as ARAZI.

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

229 Yasin Safar, "Land Tenure Administration"; Former Director of the Survey Department of the Cadastre, pers. comm., 15 May 2012.

230 In addition, digitisation of records was also undertaken with half a million records digitised by 2009. A central legal land records registry was established in the Appeal Court in Kabul. Judges and staff received training including on how to use national laws, not only the Civil Code and Shari'a.

5.2 From AMLAK to ARAZI

This institutional transformation saw the recreation of the old AMLAK department as the new Afghanistan Land Authority (ALA, or ARAZI) in 2010. Although the body remains under MAIL, it is now formally responsible to an inter-ministerial board and is described as an executive agency, not a department.²³¹ This development was preceded by the creation of an inter-ministerial Board of Restitution of Grabbed Lands.²³² Among its seven listed tasks is to “increase of national revenue by eliminating corruption through transparent lease procedures”.²³³ As well as the establishment of a department to fast-track leases, a new department of land conflict resolution and restitution of grabbed lands was created.

The loosening of the grip of land administration by MAIL could lay the path for ARAZI to eventually become a genuinely independent body, and one possibly charged with the responsibilities over urban as well as rural land administration. Given the resistance by agencies to surrender their current roles and powers, this could occur only in the long-term. In the immediate future, it is difficult to see the creation of the ALA/ARAZI as anything more than cosmetic, other than the fact that it is supervised by an inter-ministerial board, which gives it more clout than its predecessor AMLAK could garner. There are also intangible benefits in morale brought about by being relocated to an expensive new USAID-funded building, and the employment of new officials, who enjoy salary supplements from foreign aid and who do not carry the baggage of tradition borne by older staff of AMLAK.

Unchanged procedures

Structurally, the ALA has certainly not been able to bring the Cadastral Survey Office nor its Cadastral Document System under its aegis.²³⁴ Nor has any progress been made towards limiting the role of the courts in titling and integrating thousands of ownership and land documents into its own civil records. The reality of one-stop shops providing accessible and affordable services to ordinary citizens is remote. Changes may prove to be temporary. Several informed, but anonymous, observers allege that “the corridors of the new AMLAK are just as clogged as in the old AMLAK by elites seeking information and favours,” and that “the only change is that the bribes are now more expensive in the new building than in the old premises.”

The impact of the institutional change is also not felt outside Kabul, although this might not be the case in the small area where the USAID LARA project operates. Without support from Kabul, some local officials have taken matters into their own hands, as documented by an Adam Smith International study of Balkh in 2011 which shows that active land officials have streamlined procedures for entitlement. The time and fees are cut by not forwarding applications to provincial and central levels.²³⁵ This shortcut could jeopardize the legitimacy of the documents secured but the officials hold the central office in Kabul in poor regard and seemed untroubled by this. In other districts and provinces there is no activity at all in the local ALA/ARAZI office. For instance, only one property was registered with the AMLAK department (as it is still called in the districts) of Yakawlang in Bamyān Province since 2008.

Variation among districts and provinces in their performance of land administration is extreme. Acquiring formal titles can involve anywhere between 17 and 113 steps depending on the district.²³⁶ A minimum of five agencies are involved (AMLAK/ARAZI, the court, cadastre, local

231 Decree No. 23, 2010 (SY 1389) from the Council of Ministers for establishment of ARAZI, merging of Land Management Department of MAIL (AMLAK) and the Board of Restitution of Grabbed Lands.

232 Presidential Decree No. 638, 2010 (SY 1389).

233 Decree No. 24, 2009 (SY 1388) From the Council of Ministers for approval of ARAZI establishment strategy.

234 The Cadastral Document System is under the Land Classification Systems and Statistics Office. Cadastral Survey remains a department under the Afghanistan Geodesy and Cartography Office under the Prime Minister.

235 Adam Smith International and Altai Consulting, “Governance and Accountability Program Consulting Services to Strengthen District Local Accountability and Service Delivery Outcomes in Afghanistan,” (Component 3: Analytical/Final Report for Governance and Accountability Program, 20 August 2011).

236 ASI and Altai Consulting, “Governance and Accountability Program.”

government and the Ministry of Finance) and there are additional committee processes involving further agencies. Fees also vary wildly. The process can take between 136 and 1022 hours to be completed. Waiting times are extensive. Opportunities for rent-seeking still exist at all stages. The processes cost time and money, even without formal mapping.

Limited change

Shortfalls in the amendments of the Land Management Law as drafted in December 2011 were listed earlier. The proposals have been drafted again (December 2012 (SY 1391)). This still does not meet many of those challenges. For example, the latest draft elaborates adjudication or *tasfeya*²³⁷ to identify owners better, but the procedure remains structured in a way that makes it impossible to apply. *Tasfeya* is still to be applied on an ad hoc basis, as directed by the President, or as required by donor-funded government projects. It will remain an expensive procedure that responds mainly (and possibly only) to demands for issue of commercial leases or purchases of state or public lands for mining, oil extraction, agricultural enterprises and housing estate developments. In this respect, the proposed amendments do not serve the majority.

There is also no indication that a discovery process is compulsory before leasing the land to investors and for periods that can extend to 90 years for “virgin” and “arid” lands.²³⁸ Nor that resettlement of those affects will be a compulsory duty of the state. This is a severe shortcoming as “state lands” still confusingly include those that have been in the legal possession of the state since 1963-64, thereby including most off-farm lands and lands “which are not proven to be private lands in accordance with Shari’a or provisions of Law during land rights identification.”²³⁹

The definition of private property also remains document-based. As laid out in the Civil Code (in effect an iteration of Shari’a land rules), documents are described as either Official Valid Documents or Unofficial (Informal) Valid Documents, such as a locally-witnessed document. Informal documents are distinctive in that they are not produced by a court, *mullah*, government or a tax office. Both unofficial and official land documents are dependent upon historical evidence from the 1970s. A customary deed is only valid if it was prepared before 6 August 1975, and the information recorded in the Books of Ownership and Taxation compiled in 1977-78. If there are real grounds for these not being available, then the community may certify that the owner did hold that property (or presumably, his forefathers did).²⁴⁰ These terms are highly restrictive: most Afghans do not have customary documentation, let alone documentation from courts or government offices. The population has expanded enormously since the 1970s, and the new generation of landowners cannot easily trace these holdings as having existed more than 30 years ago.²⁴¹

The process of identification and clarification of ownership also remains dependent upon prior formal cadastral survey, even though only a small portion of the country was ever subject to formal survey. The composition of the Clarification Task Force and which seems to include the survey, has not altered much, except for an important new provision that a representative of the affected community should be included.²⁴²

In short, the system for recognizing owners and owned lands has barely altered. The recent high profile “best practice” procedure for clarifying ownership ahead of leasing 600 hectares to a Chinese company for the Aynak copper mine is indicative. Without changed paradigms for land ownership and lack of clarity on the types of land that can be owned in the private sector, it is no surprise that only 150 *jeribs* (5 percent) of the affected area was declared to be privately owned and therefore provided compensation. Appointing a local person to the Clarification Task Force will be helpful in the future but does not add up to comprehensive protection of undocumented rights.

237 Various referred to in the law clarification, settlement, or land rights identification.

238 As in Article 69 of the December 2012 version of the proposals for amendment.

239 As in Article 5(1) of proposed amendments of the December 2012 version.

240 These matters are dealt with in the proposed new Article 13.

241 As required by proposed new Article 16.

242 As laid out in proposed Article 22.

Opening up the possibility for some village lands to be earmarked as village rather than national public land, and the possibility that land may be owned communally as proposed in the new amendments, could be more effective. However, this will only occur if affected communities are given full knowledge of this possibility as well as the means to realise it. This will be difficult when the purpose of the clarification exercise is to identify suitable lands for private investors. Moreover, the proposed new law states that when the purpose of the land taking is for a project of national interest (such as mining) community lands will not in any event be eligible for compensation.

The lack of paradigm change also affects the role of mapping in rights identification and registration. New technology has not led the government to reconsider how mapping could be useful and applied at scale, despite some progress being made in donor-funded projects. Since 2001 the area of lands surveyed have risen from 30 to 34 percent of farmland and urban areas, but together comprise of no more than 15 percent of the country area. This increase reflects new surveys in areas for mining and private sector developments. Clarification exercises to identify owners do not routinely precede allocations or leases where the land is uncultivated and considered ownerless.

5.3 Uncertain steps towards devolutionary land governance

Most of the problems identified above can be significantly resolved through a community and neighbourhood-based land administration system. Agreement that this would be advantageous was included in the National Land Policy 2007, and provided for in the ANDS. Such devolved system would make the community or neighbourhood council the primary arbiter and recorder of land interests disallowing any decision (such as allocating land to investors) to occur without the full participation and consent of the communities situated in the land in question. The last-minute inclusion of elected land committees in the proposed amendments to the Land Management Law might just possibly lead in this direction. The law does not list the functions or powers of these proposed community bodies, and they could prove to be token and powerless, formed as a focal point for the state to work with, rather than as an land administration actors in their own rights.

A possible first step towards democratic land governance

Nevertheless, depending upon conditions and developments over the next decade, creation of these bodies at community level could represent first steps toward a more inclusive and democratic land governance system.

While such systems sound utopian to traditional land administrators, they are now common regimes in agrarian economies which have faced the same problems as Afghanistan - to develop land governance which is not exclusively geared to elites, and which are cheap enough to apply at scale across the whole country.²⁴³

In Tanzania, for example, 70 percent of the total land area is absorbed by a mosaic of 12,000 villages, each of which elects a village government, whose duties include the administration of land holding. This includes creation of a Village Land Register to record the location and details of all private and community properties within the village domain. Such development does not simply move centralized control into the hands of traditional leaders but into elected bodies.²⁴⁴ Experience suggests that it takes a decade or more for a community to fully own such

243 Keith Clifford Bell, "Land Administration and Management: The Need for Innovative Approaches to Land Policy and Tenure Security in East Asia" in *Secure Land Tenure: 'New Legal Frameworks and Tools in Asia and the Pacific'*, ed. Paul van der Molen and Christiaan Lemmen (Denmark: International Federation of Surveyors, 2006); Alain Durand-Lasserve, "Can Neo-Customary Land Delivery Systems Provide Land for Low-Incomes in Sub Saharan African Cities?" in *Secure Land Tenure: New Legal Frameworks and Tools in Asia and the Pacific'*, ed. Paul van der Molen and Christiaan Lemmen, (Denmark: International Federation of Surveyors, 2005).

244 Liz Alden Wily, "Community Based Land Tenure Management. Questions and Answers About Tanzania's New Village Land Act, 1999, in *Drylands Issues Paper*, 120 (London: International Institute for Environment and Development, September 2003).

developments, and begin to appoint, elect or endorse leaders on the basis of merit, not status, traditional powers and roles, or landholding size.²⁴⁵ Interest in community-based systems of both land rights and their administration has been particularly advocated and tested in post-conflict states, and is now the formal strategy of Rwanda, Uganda, Mozambique, Ethiopia and South Sudan, among others.²⁴⁶ A review conducted for AREU by McEwen and Nolan of experiences in six post-conflict states also found that low-tech and community-based systems were the most successful.²⁴⁷

Distinguishing between services and empowerment in land governance

A democratically devolved system should not be confused with one-stop shops also recommended by the international land governance community.²⁴⁸ The one-stop shops mean de-concentration from the centre to field offices, along with the unification of their services. While more accessible, the services themselves do not necessarily change or become cheaper. In contrast, a community-based land administration system begins at the village (or urban neighbourhood) and because it is tailored to the local need for tenure security, the nature of the services alters accordingly. Additionally, the role of the State Land Administration changes; instead of being the controller and implementer, the State agency becomes the facilitator, monitor and regulator of local processes. The potential for corruption still remains. However, as decisions and procedures are determined locally there is an increased chance for poorer families to be better informed and gradually become better able to hold those they appoint as administrators accountable to themselves.

Working top down by first empowering provincial and then district offices also does not necessarily result in people-empowered systems, as these bodies are usually structured to report upwards to the central land administration. A citizen-based land governance regime cannot satisfactorily work without beginning at the periphery.

Building upon what exists

The critical tool for this is to accept the existing, usually customary, notions of local land areas as the spatial basis for community governance. In Afghanistan, as in most agrarian societies, such local areas exist abundantly, often described as community land areas, domains, or *manteqa*.²⁴⁹ Frequently, but not always, these are structured as villages areas or village cluster areas. This in turn requires legal acknowledgement that many off-farm areas (notably, barren, arid, and rangeland assets) are part of the local domain. It also requires restructuring of traditional norms that exclude poorer households from having their interests represented. It needs to be genuinely democratic in its decisions, ideally through a popularly elected land council, which reports to the whole community. The system also requires neutral advisory services and a system for appeal when things go wrong. Finally, it requires a state administration that is willing to share powers, functions and lands, which it has traditionally reserved for itself. This can be achieved incrementally over time.

245 John Bruce and Anna Knox, "Structures and Stratagems: Making Decentralization of Authority over Land in Africa Cost-Effective," in *World Development* 37, no. 8 (2009); Liz Alden Wily, "Governance and Land Relations. A Review of Decentralisation of Land Administration and Management in Africa," in *Drylands Issues Paper* (London: International Institute for Environment and Development, 2003); Philippe Lavigne Delville, "Registering and administering customary land rights: Can we deal with complexity?" in *Innovations in Land Rights Recognition, Administration and Governance*, ed. Klaus Deininger, Clarissa Augustinus, Stig Enemark and Paul Munro-Faure (Washington DC: The World Bank, April 2009).

246 See, for example, Simon Norfolk and Christopher Tanner, "Improving Tenure Security for the Rural Poor" (Rome: FAO, 2007). Also, see FAO "Access to rural land and land administration after violent conflicts," in *FAO Land Tenure Studies*, no. 8 (Rome: FAO, 2005).

247 McEwen and Nolan, "Options for Land Registration."

248 Such has been usual in land administration projects designed and funded by The World Bank, such as in Ghana and Thailand. See Tony Burns, "Land Administration Reform: Indicators of Success, Future Challenges," Agriculture and Rural Development Discussion Paper 37 (Washington DC: The World Bank, 2006).

249 Canfield, "Ethnic, Regional and Sectarian Alignments"; Glatzer, "War and Boundaries in Afghanistan"; Allan, "Defining Place and People," among others, address the notion of localised territoriality or *manteqa*.

Surrendering authority is difficult

The reality is that the key land institutions in the post-Bonn decade in Afghanistan have resisted losing powers even for the purposes of unifying different services. A system that devolves authority to communities (even to the district and provincial agencies supposed to represent their interests) is even less acceptable in most government quarters. Reasons given are partly to do with the protection of institutional prerogatives, and partly due to a benign concern that an all-powerful centre is critical to progress. The difficulties the state has experienced in delivering decentralization leaves land governance in disarray, opening the system to the elite-driven exploitation of benefits and corruption, which the President and ARAZI have, in principle, been trying to suppress. Decentralisation as a whole has been caught between these competing factors over the decade. In 2012, the government appears to have reneged on commitments to decentralize authority to community levels, settling for promoting provincial and district governments.

A decade of failed encouragement to devolve land governance

Nevertheless, since Bonn some donors and researchers have encouraged the government to adopt more devolved land governance. AREU was a prominent advocate of devolution, whose logic for the approach was laid in 2002 and confirmed as feasible following field research.²⁵⁰ Additional village-based work in 2005-2006 by McEwen and Whitty²⁵¹ and later by McEwen and Nolan, reiterated its advantages:

Any future system for land registration should be rooted at the community level. The system will be able to draw upon community knowledge, practical understanding of local issues, and tried and tested (if sometimes imperfect) systems to resolve disputes. By directly engaging the community, the system will be viewed as transparent, equitable and legitimate. Also implementation costs can be kept to a minimum and public access to records will be improved.²⁵²

Further support for this approach was evident in 2007 in the directives of the new National Land Policy, which stated:

It is national policy that land ownership may be documented through a process of property clarification and certification conducted at the community level. (Policy 2.2.7)

It is national policy to gradually and as practical establish within the new land administration body a consolidated, simplified and localised system of land registration that is transparent and accessible, to provide less costly, efficient transfers of property, updated changes in ownership, provide greater accountability to landowners, and focus the function of the court on the resolution of land-related disputes. (Policy 3.1.2).

Moving forward based on learning-by-doing

These directives did not come out of thin air or from donor advocacy and research, but directly from the practical experiences of operating land projects since 2004 (see Section 5.5). In hindsight, the tangible examples of working community-based approaches, as well as the involvement of government officials in consultations within municipalities, districts, and from the centre, have been instrumental in creating small shifts seen in the traditional position that all aspects of land governance are the prerogative of state institutions. It is in this context that the otherwise surprising agreement in the final draft of the new Land Management Law (December 2012) is logical.

250 Liz Alden Wily, "Land rights in Crisis: What are the Issues?" (Presentation to the Afghan government and donors, AREU, Kabul, September 2002); Alden Wily, "Land Rights in Crisis"; Alden Wily, "Land and the Constitution Current Land Issues"; Alden Wily, "Land Relations in Bamyan"; Alden Wily, "Land Conflict and Peace"; Alden Wily, "Land Relations in Faryab Province"; Alden Wily, "Looking for Peace on the Pastures."

251 McEwen and Whitty, "Land Tenure."

252 McEwen and Nolan, "Options for Land Registration," 23; Other research favoured devolved approaches, although often through systems, which rely unduly upon expensive and sophisticated computerised techniques that could defeat the purpose of making land administration own-able by ordinary, mainly poor citizens in villages and towns. A good example of this is the report and proposals by Douglas Batson, *Registering the Human Terrain: A Valuation of Cadastre*, (National Defence Intelligence College, 2008).

5.4 Regularisation of informal urban settlements

Rapid urbanisation follows conflicts because informal settlements expand in and around towns, as high proportions of poor households, including returnees, IDPs, demobilised fighters and newcomers with low or no incomes look for a place to live and work. Today, around 70 percent of urban dwellers in Afghanistan live in such informal settlements.²⁵³

The definition of informal settlements is broad. It may mean the dwellers do not possess legal entitlement, that they live in areas banned for occupation such as on steep hillsides,²⁵⁴ or that they live beyond the boundaries of planned zones.²⁵⁵ While most informal settlements are poor, some settlers may be wealthy and their houses served by electricity, water and road services.²⁵⁶ Some informal settlements are discrete neighbourhoods. Others may be pockets within wealthy suburbs. Some may have evolved spontaneously while others may have been developed by entrepreneurs, politicians and militia leaders. Nor are all informal settlements located on public, government or municipality lands. Some are claimed as private lands which developers are accused of wrongfully co-opting.

Acquiring lawful documentation for plots in informal settlements can also be complicated. Unlawfully obtained legal documents or fake documentation abound, and enjoy different levels of tolerance by authorities. In many informal settlements, the lack of lawful documentation is a direct result of poverty. In others, landholders may possess unlawfully or irregularly obtained documents. It has been common for some provincial governors and local strongmen to legitimise unplanned occupation and issue entitlements through extra-legal means, including coercion of local administrators and courts to prepare deeds. For example, the Northern Tajik strongman and the Governor of Balkh since 2004, Atta Mohammad Noor, the Uzbek warlord Abdur Rahsid Dostum, and the Hazara leader Mohammad Mohaqeq are all notorious for creating and endorsing competing informal settlements and *shahrak* in Mazar-i-Sharif. Such developments are common in other Afghan cities as well.²⁵⁷

Acting to regularise poor informal settlements

UN-Habitat began upgrading informal settlements during the Taliban era and this increased after Bonn. In practice, all initiatives have been forced to adopt community-based approaches to make headway. Even when physical upgrading in the form of extending water, sewerage, roads, electricity etc. has been the objective, tenure regularisation has proven a prerequisite. Since 2000, UN-Habitat has pursued upgrading solely on “the principle of community empowerment.”²⁵⁸ It currently operates projects in Kabul, Kandahar, Lashkar Gah and Herat.

253 Although the lack of a national census since 1979 makes computing figures difficult, urbanisation rates in Afghanistan are considered the highest in Asia. The World Bank (2005) considered that Kabul alone had grown by 17 percent annually between 1999 and 2002 (The World Bank, “Urban Land in Crisis.”) Urbanisation now increases at 5.4 percent annually, higher than the national population growth of 3.2 percent annually. For more on this, see Jan Turkstra and Abdul Baqi Popal, “Peace Building in Afghanistan through Settlement Regularisation,” (46th ISOCARP Congress, Nairobi UN-Habitat, 2010); Refer to the World Bank’s, “Urban Land in Crisis.” It is known that the number of neighbourhoods or *Gozars* in Kabul has risen from 473 in 2004 to an estimated 800 in 2012 (Afghanistan Country Management Unit at The World Bank, “Implementation Completion and Results Report, Kabul Urban Reconstruction Project (KURP),” Kabul, June 2012 in draft form).

254 Some informal settlements lack accessible layouts or occupy areas earmarked for public spaces or where erosion and landslides are feared. Many of the latter evolved during the Mujahidin period of 1992-96. A review of hillside settlements is provided in Terra Institute, “An Assessment of Hillside Settlements in Kabul, Afghanistan,” (Kabul: Shelter for Life International, 2010), in association with Afghan Geodesy and Cartography Head Office (AGCHO) and Cooperation for Reconstruction of Afghanistan (CRA).

255 In this aspect, what constitutes an informal settlement is closely tied to difficulties that have also been experienced over the post-Bonn decade in amending the boundaries of city plans. For more on this, see Turkstra and Popal, “Peace Building in Afghanistan.”

256 World Bank, “Urban Land in Crisis”; Turkstra and Popal, “Peace Building in Afghanistan”; Tommaso Giovacchini, “Governance and Representation in the Afghan Urban Transition” (Kabul: AREU, 2011).

257 Dipali Mukhopadhyay, “Disguised Warlordism and Combatantism in Balkh: the Persistence of Informal Power in the Formal Afghan State,” in *Conflict, Security and Development*, 9 (2009).

258 UN-Habitat describes settlement regularisation as “the integration of upgrading through community empowerment and tenure security”; Turkstra and Popal, “Peace Building in Afghanistan.”

Where occupants possess sufficient documentation to acquire formal papers through lawful channels, the UN-Habitat project assists them to obtain these. In Lashkar Gah, for example, the project helped 9,600 parcels to be registered in 2011. Lashkar Gah Municipality benefited by being able to charge property taxes on these legal properties. Where evidence is more difficult to produce, UN-Habitat has developed an interim measure in the form of issuing Sanitation Tax Notebooks (*Safaey*). Over 100,000 parcels have entered the municipal system of Kandahar through this mechanism. While these Notebooks are not ranked as provisional entitlements, the information provided in each Notebook is sufficient in the event that such documents may be accepted as a basis for formal entitlement in the future. Each parcel is awarded a unique number and a map of its location drawn from satellite images of the neighbourhood.²⁵⁹

The 2004-09 USAID-funded LTERA project also carried out upgrading and regularisation of tenure for 59,100 households in Kabul, Mazar-i-Sharif, Kunduz and Tologan. It too facilitated existing routes to legal entitlement, depending upon community-based clarification of rights, followed up by municipal registration of claims, revision of master plans, and court adjudication of claims based on quiet possession.²⁶⁰ LTERA initially piggybacked on the community Shuras created by UN-Habitat in Kabul for this and facilitated the creation of similar bodies elsewhere. The follow-up USAID programme, LARA, works similarly through community based organisations in its two informal settlement sites in Jalalabad. The beneficiaries are all returnees. Occupants will receive provisional occupation permits valid for 35 years. This innovation has been entered into the proposed amendments in the Land Management Law. The Municipal Safaey Notebooks described above are not being awarded this status. It is not clear that ARAZI is aware of their existence.

Lack of donor coordination in initiatives

The lack of coordination among donor projects has proven familiar, but more seriously reflects the hesitant development of policy in respect of informal settlements. Work towards regularization of tenure in these areas began in 2006, as part of the wider process of developing the new National Land Policy. A key objective was to issue occupancy rights, "to afford security and protect tenants against arbitrary and uncompensated eviction."²⁶¹ This was to be achieved through "community based mechanisms for rights identification and dispute resolution." Retrospective possession would be adopted where appropriate, including enabling those on grabbed lands "to secure rights when the original legitimate owner has been compensated." Detailed procedures were laid out.

These proposals, formulated into a comprehensive Draft White Policy Paper on Informal Settlements Regularisation and Upgrading in Kabul, were not formally adopted. This led the World Bank Kabul Urban Reconstruction Project (KURP) to abandon plans in 2010 that had been made for community-based mobilisation, survey and registration in four areas of Kabul in 2004.²⁶²

The failure of the urban regularization policy to mature mirrored the disappearance of the National Land Policy overall, as described earlier. Within the larger national policy, it had been acknowledged that "unlawful occupation in urban areas was in large measure due to the failure of the formal system of land allocation and planning," and pledged to a community-based procedure to overcome this (Policy 2.2.4).

Providing the tool but not the route

While proposed revisions to the Land Management Law have adopted the concept of provisional entitlement, it remains silent on the community-based adjudication needed to mobilise their distribution in functional and fair ways. It is therefore likely that such developments will be limited

259 The current UN-Habitat project in Kabul focuses on developing the organisational basis for community action in neighbourhoods.

260 In Mazar-i-Sharif, private lands that had been grabbed and sold to 3,000 holders went through a process of court arbitration, with compensation provided to the legal owners, and the registration of transfer of ownership. Tenure regularisation in Kunduz involved the sale of government land to 1,800 households (Emerging Markets Group, 2009).

261 "Draft White Policy Paper on Informal Settlements Regularization and Upgrading in Kabul," (Kabul: Ministry of Urban Development Affairs, March 15 2006).

262 World Bank Afghanistan Country Management Unit. "Implementation Completion and Results Report."

to donor-funded projects. These are temporary, operate in limited areas, and cost millions of dollars to implement.²⁶³ Self-help regularisation is likely to continue through legal or extra-legal means.

5.5 Community based land governance in rural areas

Demonstration of community-based approaches to tenure regularisation was not limited to urban areas. This was undertaken by two rural projects, as mentioned earlier, under the DFID-funded FAO project in Bamyan Province known as SALEH, and the ADB project known as RLAP also funded by DFID. Both were short-term initiatives designed to test innovations.

The SALEH initiative

Attention to community-based land tenure and administration development by SALEH was based on an initiative to help nearly 100 villages clarify their claims to off-farm pastures and bring these areas under village-based conservation management. Based upon their success and the fact that no new inter-communal disputes related to possession arose during the following several years, each community was to be assisted to secure legal acknowledgement of their collective ownership of those assets. The right to sell these pastures would not be part of that entitlement, and the terms of ownership would be dependent upon sustainable management and use of those assets.²⁶⁴

Rangelands and pastures were targeted because they were the most substantial and contested land resource, and also the most degraded natural resource of Afghanistan. SALEH concluded that the degradation was the direct result of unsatisfactory national tenure norms. To recap, rural communities were denied recognition of customary ownership of their traditional pasturelands. The result was that such areas were treated as “free for all” resources. Inter-communal competition, disputes and even violent conflicts were the result. With increasing legal presumption from the 1960s that rangelands were un-owned and therefore the property of the State by default, the treatment of pastures as open access resources had entrenched. The State itself had allocated prized pastures selectively to particular groups and communities, or retained the best pastures for use by nomads for decades. The real status of a pasture was normally opaque. Some would claim these pastures as private property. Others considered their rights limited to use only.

The situation in Bamyan Province (as in much of Hazarajat and areas to the north of the central highlands) was particularly contested. This was because the alpine pastures which local Hazara communities claimed as their common properties had been systematically allocated to Pashtun Kuchis since the 1890s, initially for exclusive use. This issue is discussed in the next section as part of the broader land conflicts between settled and nomadic users. However, the immediate intention of the SALEH project was to help settled communities sort out their own pastureland relations, rather than to deal with the Hazara-Kuchi tension, which was in abeyance in Bamyan Province due to the refusal of Hazara to allow Kuchi to re-enter the area.

SALEH set up a part-time pasture tenure facilitation team and the French NGO Solidarités contributed significantly to test the approach developed to bring sample pastures under clear tenure and community-based governance, resolving disputes in the process.²⁶⁵ Solidarités brought 100 sq km of pastures under community management. Formal outputs included satellite-based or hand-drawn maps lodged with the district AMLAK offices and the District Governor’s Office, along with signed inter-community agreements of the boundaries of their respective pastures. The District Governor was party to agreements where discussions among communities were most contested. In addition, each community developed rules for sustainable use of the pastures. The

263 The LARA project costs around US\$40 million, much of which appears to be spent on project personnel and transaction costs.

264 Seventy-three villages or 229 hamlets were assisted. For more on this, see Liz Alden Wily, “The Pasture Story: Trying to Get It Right in Afghanistan. The SALEH Experience” (Kabul: FAO and MAIL, April 2009).

265 David Lety “Community Based Pasture Management Project in Yakawlang District, Bamyan Province, Afghanistan, Final Report, December 2007 (Solidarités); David Lety, “Community Based Pasture Management” November 2009 (Solidarités).

highlight was an agreement to reduce the use of pasture bushes for winter fuel, and to close the most environmentally-damaged areas for several years to allow their recovery. This was built upon a traditional conservation approach in Hazarajat known as *ayghal* but which many communities had abandoned when their pastures were declared to be state property and allocated to outsider Kuchis. The right to exclude outsiders, including commercial bush cutters and non-local herds was deemed critical to reduce the pressure exerted on the pastures.

The Khamaniel cases

While communities ultimately managed to resolve conflicts related to tenure and to establish working regimes for pasture rehabilitation and protection, two large public pastures brought under community management proved more contentious. This was due to unresolved inter-community dispute led by a former commander and reluctance of the Provincial Government to ban commercial harvesting of bushes for sale as fodder and fuel in Bamyan City.²⁶⁶ Senior MAIL officials had agreed to this. However, they were reluctant to take action when presented with the cases of transgression and given the information needed to prosecute the lorry drivers. This was because the employers of the lorry drivers were well connected, some to those same senior officials.

Despite this handicap the pilot project demonstrated that communities customarily owned the pastures. Sometimes a single large landlord family was the owner, when pastures were attached to larger estates. There were also several large pastures in each district, which were customarily owned by clans or tribes, and the use for these was allocated on a village basis. Community-based management of pasturelands by neighbouring communities was also established as logical and viable. This reinforced the paradigms that MAIL had already proposed in its forest and rangeland management strategy of 2005.²⁶⁷ These paradigms also entered into the new National Land Policy (2007) and draft new rangeland law.²⁶⁸

SALEH produced guidelines for community-based pasture management (CBPM) in early 2008.²⁶⁹ Although the project was under the aegis of MAIL and was developed with the Bamyan Provincial Rangeland Officer, MAIL did not formally adopt the guidelines for the following reasons:

- i. The ministry based in Kabul felt that the provincial-based project was not under its control;
- ii. FAO failed to translate the CBPM guidelines into Dari and Pashtu for them to be read within MAIL and other institutions;
- iii. The ministry favoured the ADB RLAP project which operated from the main ministry over the SALEH project;
- iv. Conflicting views within FAO over the focus of the pilot; one technical adviser believed it should have focused on species selection for rangeland rehabilitation, not on governance issues. In contrast, SALEH believed technical solutions would have no traction until the tenure and governance issues were resolved; and
- v. Complaints by Kuchi advocates that community-based pasture management developed in Bamyan Province excluded Kuchi rights, even though specific arrangements for Kuchi to obtain usage rights to specific large pastures in each District was fully developed.

The consequence of these constraints was negative. Without the SALEH guidelines adopted as a strategy, the new Rangeland Management Plan of 2012 speaks of CBPM Guidelines as if to be developed for the first time.

²⁶⁶ Alden Wily, "The Pasture Story."

²⁶⁷ MAIL, "Policy and Strategy for Forest and Rangeland Management Sector" (Kabul: January 2005).

²⁶⁸ Alden Wily, "Policy and Legal Implications of Pasture Piloting."

²⁶⁹ FAO/MAIL, "Guidelines for Facilitators for Community Based Pasture Management (CBPM)," (Kabul: 2008). These Guidelines included simple steps for defining respective pastures through community-based identification, adjudication and conflict resolution, creation of Community Pasture Councils and rules for sustained rehabilitation and use management. Procedures for making the results official were also included.

The issues mentioned above raise relevant concerns of institutional memory and local ownership, as well as the fragile relationship between donor projects and the Afghan State as well as internal disconnects between the centre and provincial and district offices. Ministry staff are also often at odds with each other over the best ways forward, as was experienced in this matter. Officials also often get caught between the competing visions of foreign advisors and projects. Foreign advisors are also not always in agreement with each other. Policy development is far from immune from such scuffle, as was evident when the National Land Policy, the National Development Strategy (ANDS) and National Priority Programmes (NPP) put forward contradictory plans for rangelands. The NPP wanted to set aside pastures for investors and for ministerial plans that focus on technical innovations, paying no attention to the issue of tenure and governance of their customary owners and users.²⁷⁰

The National Land Policy and ANDS focused more on tenure and governance.

Continuing with field action towards pasture rights security

Besides successfully helping around 100 communities to resolve land conflicts and bringing degraded pastures under rehabilitation and sustainable use schemes, SALEH provided guidance to INGOs and NGOs to pursue community-based pasture management independently. As of late 2012 such developments are underway in at least nine provinces and involve around 500 communities.²⁷¹ Larger programmes, such as those arising out of farming system projects or water basin development, have also created Pasture Councils as a mechanism to bring catchment areas under community-based management and rehabilitation.²⁷²

Solidarités has been among those consolidating early work in 2006-08. It has assisted at least 45 villages and village clusters to bring over 600 square kilometres of community pastures under village management in the Yakawlang District of Bamyan Province. Each community has set up Pasture Council to regulate the use and rehabilitation of pastures. Around 60 percent of the villages are now self-sufficient in winter fuel (reducing dependency on pasture forbs).²⁷³ Seventy-eight percent maintain cyclical closed areas (*ayghal*) to allow the most environmentally degraded areas to recover.²⁷⁴ In several cases inter-village conflict over boundaries of pasturelands remains. This is mostly the case where new rules prevent families of one village from using the pasture of another village for extraction of pasture forbs for sale as fuel. Over time, however, the number of these cases decreases.²⁷⁵

Another route to evolving CBPM is provided in UNEP-facilitated programmes by the National Environment Protection Agency (NEPA) and MAIL to develop community-protected areas. A case pursued in Bamyan Province involves 18 villages in 11 valleys in creation of the Koh-i-Baba Conservation Area. The development of this is based on community-based protection of alpine

270 These points were made in different ways by members of the working group on rangeland management (See "Minutes," 7 September 2011) and by the Policy Analysis and Legal Advisory Department (PALAD) of MAIL in December 2011 ("Comments on National Plan for Sustainable Rangeland Management").

271 Some of the main agencies include: the Aga Khan Development Foundation which is working on CBPM in Bamyan, Baghlan, Takhar, Badakhshan and Parwan; Catholic Relief Services in Bamyan; Helvetas in Bamyan; Madera in Behsud; FAO and UNEP in Herat and Bamyan; Wildlife Conservation Services in Bamyan and other provinces; FAO in Herat, Bagdis, and Ghor; and Solidarités in Bamyan. Other agencies such as Irish Concern, Mercy Corps, and Afghan Aid are also believed to be involved in CBPM.

272 In Bamyan Province for example, the New Zealand-funded Provincial Reconstruction Team aid programme has a large component to support efforts of the CBPM; Angus Davidson, pers. comm., 18 May, 2012. The Panju Amu River Basin Project, an extension of the Kunduz River Basin Project, has also adopted CBPM as an essential element of its strategy, with 64 Pasture Councils already established by mid-2012 (Yakawlang, 18 May, 2012, Solidarités.).

273 Largely through enriched planting of alfalfa, some on-farm tree planting, but also in part resulting from widespread adoption of fuel-conserving cooking stoves and winter house protection, facilitated by GERES (Groupe Energies Renouvelables, Environment et Solidarités).

274 A recent survey of 15 Community Pasture Councils found marked multiplication of species, volume and ground coverage, and biodiversity in *ayghals*; Bertrand Noiret, Nabi Didar and Panah Ali Hassan, "Report on Botanical Survey," (Yakawlang, 2012, Solidarités).

275 Fieldwork by author in Sya Dara and Dai Ali Valleys, Yakawlang District, Bamyan Province, May 18-21, 2012.

resources above 2,800 metres.²⁷⁶ Koh-i-Baba follows the International Union for the Conservation of Nature (IUCN) approach to protected area categories. To reduce dependency on external financial and technical support, it proposes to implement measures such as tourism development and linking this to off-farm developments. This initiative, like other CBPM developments tried in Afghanistan, depends upon continuing official support for communities to identify and manage pastures within their spatial and/or customary domains. This, in turn, depends upon appropriate restructuring of land and rangeland laws.

Moving rangelands out of degrading open access

The conservation approach described above represents the shift of rangelands and pastures from having open access to public to consolidation of pastures to the control of the community. This conforms to the customary norms in many parts of Afghanistan, but not to the terms of land and pasture law of the last 50 years. Villages adopting the approach become fiercely protective of their pastures once they agree to the boundaries with neighbouring communities.

Planned changes to the Rangeland Law, as discussed in the next chapter, still fall short of endorsing community rights to the level needed to sustain interest. On the other hand, should the critical new Land Management Law allow communities to be the official owners of pastures the Rangeland Law will be forced to adapt.

The logic of community land councils

An immediate issue is whether the SALEH approach to rangeland conservation builds logically towards community-based land governance.²⁷⁷ SALEH's work with villages revealed that villages or village clusters do indeed have their own distinct community areas, although perimeter boundary conflicts abound.²⁷⁸ Overlaps and contested claims found in SALEH villages were mainly the result of many decades of official assertions that only farms and settlements could be owned and that rangelands were public lands accessible to everyone.

It was also evident that the Pasture Councils established by each village to manage its pastures were competent enough to regulate private landholding within the village area and not just the matters related to shared rangeland resources. In fact, council members already had some experience in land management, witnessing transactions and resolving land disputes because they were also often members of the CDCs. These bodies could, SALEH argued, be equipped to identify, adjudicate and record private landholding in the community, not just the shared off-farm resources.²⁷⁹

With the use of simple guidelines and standardised forms, many communities could relatively easily develop a comprehensive Community Land Register. Crucially, this would occur on the basis of actual landholding pattern in the villages, and not through scrutiny of legal documents in the courts (in any event scarce to non-existent in villages) but on the basis of the actual landholding pattern in the village, as agreed through consensus. The district or provincial ARAZI staff could monitor this process. If necessary, formal mapping could take place at a later date. In the meantime, the community would possess a clear and accessible record of its property detailing both individual and collective ownership.

Creating the spatial framework for community-based land administration

It was not incidental that the process of community-based land administration began with the off-farm resources. The pilot project worked on the logic that a community-based approach requires definition of the area over which the community has jurisdiction. Identification of this

276 Sardar Amiri (Field Operations, UNEP) pers. comm, 17 May 2012.

277 Alden Wily, "Rural Land Relations in Conflict"; Alden Wily, "Looking for Peace on the Pastures."

278 Liz Alden Wily, "A Review of Pasture Ownership and Management in Bamyán Province, Afghanistan" (Kabul: SALEH, FAO, June 2006); Liz Alden Wily, "The SALEH Approach to Pasture Management," (presentation, SALEH/FAO, Kabul, 21 November 2006).

279 Alden Wily, "Review of Pasture Ownership."

domain is only possible if neighbouring communities agree on the respective outer boundaries of each village. Supervised adjudication of boundary agreements was found to be necessary. The identification of perimeter boundaries had to be conducted on site. Once this was achieved, the main questions were if and how the government would formally recognise the villages' boundaries, and what level of powers would be granted to the villagers to regulate outsiders accessing their communal lands.

The RLAP approach

Shortly after the SALEH initiative was launched, another DFID-funded project began to test the creation of community-based land administration (June 2006 -July 2007). This was the output of an earlier commitment made by ADB to support land policy and governance reform. The project designers were free to contribute to land administration and to explore the potential for a community-based system. On the advice of SALEH, the project adopted a learning-by-doing approach, and to focus on contested rangelands. This was because contestation around private houses and farms was less significant. It did so in four sites around the country.²⁸⁰ Through a participatory process, the project helped these villages reach an agreement on the boundaries of 17 local pastures. An additional three agreements were also made regarding access to remoter pastures, used by the villagers on a seasonal basis, but for which those communities made no ownership claims. Altogether 27,000 hectares of rangelands were involved.²⁸¹

ADAMAP²⁸² was developed as the model to define the different stages of community-based land administration. The approach was similar to that developed by SALEH although it focused on mapping rather than on the control and management of the resource.²⁸³ The similarity was not surprising given that both projects worked closely with communities, involving them in the discussions to establish boundary agreements and employing a participatory method to record these agreements.

Both approaches made participatory mapping of the concerned pastures a key step in the process. RLAP had access to up-to-date satellite imagery, so its maps were more sophisticated and also archived with the Cadastral Survey Department. SALEH attached maps based on Russian photography (1980s) and sent these with letters to the District Governor and District AMLAK department. RLAP emphasised that the approach could encompass house and farm properties as well as collective properties within the community land area. SALEH emphasised that inter-community agreement of the boundaries of the pastures lying beyond settlements was key to establishing the boundary of each village land area. Where overlapping claims existed, as was frequently the case, these were resolved through consultation between the competing villages. It often took three or more meetings to secure a compromise. Besides a handful of highly-contested cases, all communities showed that they were capable of compromise and could comply with their commitments over the medium term.

Towards a national plan of action

Like SALEH, RLAP proposed that the pilot programmes be rolled out into national programmes of action. For this, RLAP devised a comprehensive Land Administration and Management Programme (LAMP). LAMP was structured to apply community-based land adjudication and land records development throughout the country.²⁸⁴ Through the programme, rural communities would be assisted to:

280 In Takhar, Herat, and Kunduz provinces.

281 RLAP'S work is also reported in J. David Stanfield, M.Y. Safar, Akram Salam and Jennifer Brick Murtazasvhili, "Rangeland Administration in (Post) Conflict Conditions: The Case of Afghanistan" in *Innovations in Land Rights Recognition, Administration and Governance*, ed. Klaus Deininger, Clarissa Augustinus, Stig Enmark and Paul Munro-Faure, (The World Bank, April 2010), 225-241.

282 ADMAP was abbreviated to mean *Ask* for community cooperation; *Delineate* the boundaries of rangeland parcels; *Agreement* concerning legitimate users; *Meet*, discuss and approve the agreements and delineations; *Archive* the agreements and images; and *Plan* for implementation of improvement of rangeland parcels.

283 FAO and MAIL, "Guidelines for Facilitators for Community Based Pasture Management."

284 RLAP, "A Proposal for Land Administration and Management Programme (LAMP)" (ADB/DFID, 2007).

- i. Identify and agree on the ownership of all properties, including collective assets like pastures
- ii. Prepare and sign simple deeds relating to each property
- iii. Compile a community land register and make this available to government or courts as required.

It was planned that satellite imagery would be used to delineate each and every parcel, including collective pastures. As the record would remain in the village it could be updated easily and cheaply. The *shura* would be trained to maintain the register, or it would elect autonomous Village Land Council. Learning from the SALEH process, the proposed national programme would also help communities to prepare management plans, especially for the collective rangeland resources. The Government would be assisted to revise legislation to allow for community-based land adjudication and recording system. It would also be assisted to develop support mechanisms for community actors involved in the process.

LAMP was not adopted by MAIL nor was it presented to donors for funding. However, the principles and recommendations of the two pilot projects did find their way into the National Land Policy of 2007.

As we have seen, the Government failed to disseminate or apply the National Land Policy or provide the needed legal instruments. This affected the community based land governance plans as much as other policies. Neither AMLAK/ALA nor the US-funded LTERA and LARA programmes considered these community-based principles when redrafting the Land Management Law, in respectively 2008 and 2011-12. The possibility of introducing village level land councils was introduced only after September 2012. The amendments are yet to be approved.

To repeat a point made earlier, provision for Village Land Commissions is also made only in passing in the amendments, without a description of these bodies and their functions and powers.²⁸⁵ Although these committees would be set up to protect off-farm areas, control and monitoring of these special village lands is also stated as the purview of the State.²⁸⁶ Moreover, the draft law is unremitting in granting exclusive powers to ARAZI for land regulation.²⁸⁷ Therefore, it is difficult to be certain that the introduction of Village Land Commission into the law is intended to lay a path to community-based land administration. In this respect, the directives of the National Land Policy are still very far from being followed.

A dichotomy of strategies

In sum, the Afghan State does not have a unified position on land governance. Some ministries and policies have actively taken up the recommendations of the pilot projects discussed above, whereas ARAZI has not.

The Afghan National Development Strategy (ANDS) produced in 2008 directed that:

1. *A modern and community-based land administration system and establishment of a fair system for settlement of land disputes will be established, and*
2. *Village and Gozar boundaries will be verified and mapping exercises will be undertaken.*²⁸⁸

These would initially be defined through community-based negotiation and agreement such as fully outlined in the SALEH and RLAP procedures.

²⁸⁵ The term "elected land commission" is made in reference to protection and management of rangelands, in proposed Article 5 (3) of the December draft proposal for a revised Land Management Law. This term is not defined in the definitions section, bespeaking the hurried last minute entry of this construct.

²⁸⁶ Article 5(3) (2) and 5 (3) (3) of the proposed new version of the Land Management Law, December 2012 (SY 1391).

²⁸⁷ Article 4(1) of proposed new version of the Land Management Law, December 2012 (SY 1391).

²⁸⁸ ANDS, Chapter 6 on Governance, Rule of Law & Human Rights.

A similar plan was later laid out in the Policy on Sub-National Governance, first drafted in 2009 and believed to be in the draft form as of December 2012.²⁸⁹ This document provides this plan:

Government is to undertake a full-scale review of urban and village boundaries, assisting communities to define these on the basis of numbers of households, proximity, irrigation networks, and a history of social identity as under one or other traditional arbab or malik, or simply by building upon the tax units which had been established most latterly in the 1970s for the collection of private property information. This information is to be made available for all local level purposes.²⁹⁰ AGCHO is to map the boundaries in consultation with elected village councils, district governors (wuluswali) and the AMLAK department. Shuras of neighbouring communities are to certify agreement and accuracy of village area boundaries, copies of which are to be left in the village. Digitised copies are to be entered into a national information system of administrative and political boundaries.

This draft local government policy also maintains commitment to community-based registration of land and issue of titles in all administrative units at *gozar* and village levels with registration and issue of land titles. Villages and urban *gozar* councils are:

to be assisted with recording and archiving customary deeds in villages. Civil society organisations are encouraged to assist in the mapping of village and gozar boundaries and to develop community based resource management.²⁹¹ The RLAP model of village land registers is adopted. Villages are to be provided with satellite images to enable them to delineate "pasture, forest, and private agricultural parcels as well as the boundaries of villages, and gozars in urban areas".²⁹² Community-based natural resource management is also integrated into the policy.²⁹³

This draft plan was integral to the devolution of governance in the form of elected provincial, district and village or urban *gozar* councils. Each district governor would be responsible for ensuring that mapping, land registration and measures for environmental protection take place, and this responsibility would be entered into the law governing District Councils.

According to the draft Village Councils Law of 2012, the elected council is mandated to "manage common property resources of the village" and to "assist in land registration and mapping of village boundaries." They are also to promulgate and enforce village by-laws and regulations on these subjects as well as for regulation of land use.²⁹⁴ It is of note that the draft policy observes that "biodiversity can be seen as global commons, national commons, and local commons and still also be private property of individuals and/or communities."²⁹⁵

To support these community-based approaches, AMLAK (now ALA/ARAZI) was directed to create a Land Administration General Directorate, to build "a national technical and financial property information infrastructure as support for the decentralised land records administration at the local level." Functional support for community-based land administration would be provided by a Land Registration and Cadastre Support Department, village *shuras*, *gozar* committees, a Property Tax Department, a Clarification Department, a Planning and Training Department, a Judicial Liaison Department and a Land Inventory Department.²⁹⁶

The Land Inventory Department would assist village elders and leaders to "establish legitimate claims to village and public pasture and forest land using the methods developed under RLAP," "prepare forms and procedures for community property legitimisation programs in urban and rural areas," "establish Support Units for assisting communities to conduct community property legitimisation programmes," and to "prepare cadastral maps and updated AMLAK ledgers and municipal ledgers of property owners for Tax Unit for those villages and districts and *gozars*

289 This was prepared by the Independent Directorate on Local Government (IDLG) established by Presidential Decree in 2007.

290 Draft Policy on Sub National Governance, IDLG, 2012, 45 - 46.

291 Draft Policy on Sub National Governance, IDLG, 2012, 260 - 261.

292 Draft Policy on Sub National Governance, IDLG, 2012, 46.

293 Draft Policy on Sub National Governance, IDLG, 2012, 45.

294 Articles 6 and 10, Draft Village Councils Law, 2012.

295 Draft Policy for Sub National Governance, ILLG, 2012, 298.

296 Draft Sub National Governance Strategy, ILLG, 2012, 304 - 5.

which would participate in community legitimisation of right to agriculture, pasture, and forest lands.”²⁹⁷

While the ALA/ARAZI was established with several new departments including a General Directorate, there is no evidence to support that the aspirations for a community-based approach to land administration has been followed through. In May 2012, a senior official of ARAZI assured this author was that any form of decentralisation of land governance would be firmly eschewed and “the only way to contain land grabbing and to develop capacity for administrative functions is for the centre to retain tight control on all land matters.”²⁹⁸ Similarly, conversations with department heads of ARAZI in September 2012 showed that there was little interest in adopting community-based land administration..

As shown above, the land administration plans developed by ARAZI and the Independent Directorate for Local Government contradict each other. It is not difficult to find causes for this discrepancy. As well as working in isolation from each other, different departments are influenced by various projects and their donor advisers. While the ANDS and the ILDG plans adopted the guidelines provided by the SALEH and RLAP projects, AMLAK/ARAZI has tended to follow advice of the more conservative donor USAID, and/or to not involve outsiders at all in its considerations. Few state agencies engage with anyone other than the most senior actors in the Government. Staff changeover is also a factor, leading to weak institutional memory. The sheer length of the critical analyses and planning documents of the Afghan Government is also problematic for most officials. Limited circulation is also a factor in the uneven absorption of national strategies. It is surprising, for example, that the Sub-national Local Governance Policy has not been shared with the population for consultation since 2008, or been designed into easy Dari and Pashtun briefs for the public. The end result is that political and administrative commitment to decentralised land governance is just as fragmented and uncertain in 2012 as it was in 2002.

297 Draft Sub National Governance Strategy, ILLG, 2012, 304 - 5.

298 Haroon Zareef (Acting Deputy Director, ARAZI), pers. comm., 15 May 2012.

6. The Rangeland Issue

6.1 Rangeland tenure

Rangelands or pastures have appeared repeatedly in this paper. This section now tackles this issue directly. This is because “who owns rangelands/pastures?” has become a progressively focal part of policy debate in Afghanistan and centres many of the sub-debates about tenure and governance. The reasons for this are as follows:

- i. Rangelands and pastures constitute the major natural resource of the country and its agro-pastoral economy.
- ii. As arable land is limited, virtually any aspect of land development involves lands broadly defined as rangelands and pastures, whether these are barren *dashts* (deserts) potentially cultivable through borehole, dams and irrigation developments, or exist on the edge of towns and cities. Land settlement schemes of all kinds derive from these off-farm resources.
- iii. A great deal of contention, and even violent conflict, is characterised by claims to these areas, whether this is among individual families, communities, clans, ethnicities, different types of land users or among wealth groups seeking land purposes like construction of lucrative housing estates. More and more conflicts over land centre upon these off-farm resources.
- iv. Legal definition of land classes and of private rights to land classes has always been complicated and contradictory in Afghanistan. There is enough evidence to indicate that this has been the deliberate tactic of the State to control as many resources as possible. The overlap of definition in categorisation of barren, virgin, and rangeland and pasture land was observed earlier. This has become doubly problematic as virgin and barren lands are officially available to local and international investors, and on long lease terms that are tantamount to absolute possession. Lack of clarity on whether rangelands and pastures are generically un-owned or un-ownable resources, state property, or potentially private and community property help keep these precious resources in uncertain territory that can be taken advantage of by those with authority, power and means.
- v. Issues around pasture ownership touch the state-people relationship as paradigm of private sector and state property changes - what is rightfully in the private sector and what is due to the State remains contested up until the present. The competing Shari’a, customary and state law are also caught up in these uncertainties.
- vi. As large and naturally occurring communal resources, rangelands and pastures (unlike farms and house lands) are directly relevant to territorial claims whether among villages, clans, or ethnicities. As lands and resources become scarcer, conflicts around these grow.

This section examines the formal policy and legal treatment of pastoral tenure. For a very long time, the state has failed to deal with this issue consistently and fairly and is a critical factor in the current violent contention over lands. It has also played out in ways that are familiar in agrarian economies around the world. This is because government appropriation of off-farm resources was a typical feature of 19th and 20th century state formation and capitalist transformation. Emerging states require control over as many lucrative resources as possible without totally denying the right to private property. Resources that are not physically developed, such as by farming or in the form of homesteads, have been historically vulnerable to denial as private property in state laws, even though customary norms regard these unfarmed as communal properties.²⁹⁹ This has produced tensions which has sometimes tipped conflicted societies into civil war.³⁰⁰ Sometimes the focus of dispute is forestlands. At other times it is rangelands/pastures.

299 “The Wealth of the Commons: A World Beyond Market and State,” ed. David Bollier and Silke Helfrich (Massachusetts: Levellers Press, 2012).

300 Liz Alden Wily, “Whose Land is It? Commons and Conflicts States. Why ownership of the commons matters in making and keeping peace,” (Rights and Resources Initiative, 2008). http://www.rightsandresources.org/publication_details.php?publicationID=853 (accessed July 18 2012).

Contested rangeland tenure and conflicts

In Afghanistan, this issue is most focused upon rights to alpine pastures in the central highlands and in the north of the country. Over the last century, contestation over ownership and control of these resources has increasingly taken on ethnic form between Hazara communities and Pashtun nomads (Kuchi). This conflict gained prominence over the years. Although the struggle between Kuchis and Hazaras, and more generally between settled and nomadic groups, is discussed later, it is important to include this factor in discussion about the policy and legal developments around pastoral tenure.

At the same time, it is important to bear in mind that these developments (or lack of developments) impact all aspects of land conflict. While most of these conflicts take an inter-tribal or inter-clan dimension, these are more discernibly built around competition for these resources for commercial, not ethnic ends. They stem from profound grievance by local communities that outsiders, and the State, are not respecting their customary ownership of these off-farm lands. Politicians, armed militias and businessmen can all be involved. Many accounts of land conflicts reflect such overlays of sources and actors. Foschini describes armed clashes between local residents (Arabs) and newcomers (Pashais) over desert land north of Jalalabad, where the Government developed township for state employees and disabled persons.³⁰¹ He also describes a long-running dispute in Rodar District of Nangarhar Province among local residents, a governor-sponsored housing project, immigrants, investors, former *Jihadi* commanders, and nomads who use the affected rangelands in winter. This dispute evolved into an armed clash in 2008. An even bloodier conflict over pasture occurred in Achin District between sub-tribes of the Shinwari, Sepai and Alishirkhel nomads, which eventually involved Taliban and US troops.

Returning to 1970 conditions

What the law says about rangeland and pastoral tenure is therefore critical to peacekeeping. At the time of Bonn in 2001 its status was ambivalent. The early versions of both the Land Management Law and Pasture Law of 1970 had laid down the position that rangelands and pastures were public properties, in the sense of being un-owned and un-ownable but able to be allocated for use.³⁰² At the same time, the State assumed *de facto* ownership of these resources as both controller and allocator, including the right to sell these lands, which contradicted the otherwise un-ownable status of pastures.³⁰³ There was further confusion because the law also provided for allocations that had been made in the past to be respected. Accordingly, there were many Kuchis who had reasonable grounds (and documentation) to claim pastures as their property, showing certificates. These same pastures were claimed by local communities as by ancestral custom, belonging to themselves.

It was not until Taliban revision of the Pasture Law in 2000 that the way was opened for opening the way for communities and local notables to secure exclusive rights to pastures directly adjacent to their settlements. This reflected complex customary arrangements for communal tenure, within which a single dominant landlord tended to "own" the pasture on behalf of community members.³⁰⁴ After Bonn, most officials wanted to remove this concession and to reissue the 1970 law.

By then, many local communities had reclaimed control over pastures that had been granted or sold to Kuchis, particularly in the central highlands (Hazarajat) and in the north of the country. Pashtun agro-pastoralists who had settled in the north or in the fringe districts of Hazarajat fled from these areas in 1979-80, returning during the Taliban era, fleeing again as the Northern Alliance advanced in 2001. By early 2002, these Pashtun settlers constituted a

301 Foschini, "Land Grabs in Afghanistan."

302 The first Land Management Law was known as the Land Survey and Statistics Law, 1965. This and the Land Reform Law, 1975 and the Pasture Law, 1970, all dealt extensively with off-farm tenure matters.

303 Detailed legal analysis of rangeland tenure is provided in Alden Wily, "Looking for Peace on the Pastures."

304 Different versions of this are well reflected in the village research of McEwen and Whitty, "Land Tenure."

major portion of the displaced population. Refusal of indigenous non-Pashtun to allow their return to the central highlands and the north was a pressing concern for UNHCR.³⁰⁵ Local people claimed that allowing Kuchis to return would mean that their competing land rights would be denied again. As described below, Hazara in the central highlands were especially resistant to return of nomads into their districts, having got these back during the 1980s. During the war (1979-2001) major pastures in the north had also been recaptured by local populations, but in reality by Uzbeks and Turkmen warlords, who claimed these for their personal use and for distribution to supporters. Oftentimes these pastures in the north were converted to rain-fed farming lands including for tractor farming.³⁰⁶

In the far northeast, as documented by Patterson for AREU in 2004, Pashtun access to some pastures had continued during the conflict, although with increasing resistance by non-Pashtun agro-pastoralists and indigenous farming communities.³⁰⁷

Fighting back

In response, Kuchis lobbied after Bonn for recognition that the *Amirs* had granted them exclusive rights amounting to ownership of alpine pastures since the 1890s. Most of these pastures had been divided during inheritance or sold to other clans over the years. The Ministry of Tribal and Frontiers Affairs, in charge of nomad affairs at the time, and then the Independent Department of Kuchi Affairs established under the Office of the Prime Minister in 2004, broadly supported their claims. MAIL preferred reclassification of the principal rangelands and pastures as Government land as the means to resolve the issue, and in (somewhat vain) hope that government could re-exert control over rangelands across the country. As a result, the reissue of the 1970 Pasture Law came to an impasse in 2003-06.

MAIL issued a new National Strategy for the Forest and Rangeland Sector in 2005 drafted by a foreign conservation sector consultant with limited experience in Afghanistan. The document presumed state ownership of these resources but promoted community-based management. Rights to manage pastures and forests would be issued through contracts with local communities, and would “as far as possible, confirm traditionally agreed forms of access to land uses.”³⁰⁸ This led to contradiction where traditional forms of access amounted to possession. Curiously, nomads were also not mentioned in the MAIL strategy.³⁰⁹ The Cabinet of Ministers approved the policy in 2006.

MAIL also made good progress in amending the Forest Law using the same paradigm, and approved by Parliament in 2012.³¹⁰ Several versions of the law were rejected for failing to acknowledge that some forests in far eastern provinces, along the border with Pakistan, were traditionally owned by communities, and should not be considered state property. The final draft (2012) acknowledges that public, community, and private forests exist, but does not elaborate on the definition of these categories or define the extent to which property rights are applicable. A new Environmental Management Law (2007) devised with the assistance of UNEP also directed that natural resources be used “in accordance with customary traditions and practices which encourage community-based and sustainable natural resource management” (Article 7 (1)).³¹¹ This law assumes that customary tenure norms amount to no more than use rights on un-owned public and state land. Shortly afterwards, MAIL and the Ministry of Water

305 Daniel Tyler, “Mission Report: Faryab 26 November to 3 December 2002,” in *Northern Return Commission*, (UNHCR, 2002); UNHCR, “Briefing Note on Refugees and IDPs in Bamyan Province” (April 2003).

306 Alden Wily, “Land Relations in Faryab Province.”

307 Patterson, “Shiwa Pastures, 1978-2003.”

308 MAIL Policy 1.4, “Policy and Strategy for Forest and Range Management Sub Sector” (Kabul: MAIL, January 2005).

309 This was most likely the result of the policy and strategy being prepared by ADB and FAO forest and rangeland specialists not entirely aware of the issues.

310 Law on Regulation of Forest Affairs, not yet enacted, and which has gone through numerous iterations since its first draft in 2005.

311 Official Gazette no. 912, 2007 (SY 1386).

and Energy began revising the Water Law, enacted in 2009, to include provisions for local water user associations to be formed to manage (not own) local resources.³¹²

The core conflict between ownership and use rights

Redrafting of the Rangeland Law started in early 2006 with the assistance of legal advisers at UNEP. Several seminars were held in 2006 and 2007 with ministry officials, INGOs, and NGOs involved in rangeland management.³¹³ The draft was revised seven times by May 2008.³¹⁴ The RLAP and SALEH programs strongly influenced the contents of the law. At the time the draft made provisions for rangelands and pastures to be classified as private, community, or public pastures. This categorisation also entered the National Land Policy along with the commitment to introduce community-based management of rangelands.³¹⁵

According to the redraft, private pastures would be acknowledged as private properties and were usually small, attached to local homesteads, and therefore not considered problematic. Public pastures would remain state property. These would cover large pastures around the country, which originally were a part of the domain of indigenous villages, clans or tribes. They were used by many groups of people, including nomads from different parts of the country, and it would be problematic to reverse this. Most districts could identify one or two such areas, often called *dashts* (deserts).

The redraft also agreed that adjacent communities would manage even the largest public pasture on a day-to-day basis. SALEH had explored this successfully in the 50 sq km Khamaniel Pasture in Bamyan Province. Between 1900 and 1980, this pasture had served as a transit area for Kuchis moving into other districts of Bamyan and Sar-i Pul provinces. Some Kuchi groups remained in this pasture throughout the summer. Local populations used outer edges of the vast pasture through arrangements with the dominant and armed Kuchi herders. When armed Hazara groups prevented entry to Kuchis from 1980, Khamaniel, like other major pastures in the central highlands, returned to local community use, sometimes for the first time since 1893. By 2001 large stockowners including officials from Bamyan City also took their animals trekking to Khamaniel. They did not want local communities to refuse them entry, so argued for the pasture to become a provincial public pasture. The situation was complicated by the fact that it represented the boundary between two districts, both of which claimed the pasture as their own. It was these factors, rather than the Kuchi-Hazara contestation over its ownership between 1893 and 1980, which led to the decision that Khamaniel should remain a public rather than a community pasture.³¹⁶ Nevertheless, provincial officials were content to designate local communities as managers of the pasture to limit wrongful use and incursions.

The description of community pastures in the 2008 draft of the Rangeland Law proposed to include all rangelands and pastures agreed by local communities and MAIL as customarily the property of a specific community. Under customary arrangements this meant that most pastures, other than the 100 or so very large pastures retained by the state, would in fact become community pastures.

Who owns Community Pastures?

During the redrafting process there was a heated debate over the tenure of the proposed community pastures. The FAO SALEH project advised that community should be able to register collective properties in undivided shares, although without the right of sale or transfer. This was considered necessary to ensure the community had sufficient authority to make and apply rules of use, and to keep out outsiders. Ownership would also limit the ability of the government to

312 Official Gazette no. 980, 2009 (SY 1388).

313 Including the Workshop on Community Based Pasture Management/Tanzim Alafchar Bawasifa Mustama, Ministry of Agriculture, Kabul, 25-26 April 2007.

314 The Rangeland Law, Version 7.1 of 2008 (SY 1387).

315 Policy No. 2.2.1 of National Land Policy 2007.

316 For the Khamaniel case, see Alden Wily, "The Pasture Story."

reallocate these lands to other communities or users. Should these pastures be required for public purposes, the state would also have to pay fair compensation for such collectively owned property.

SALEH also argued that it would be difficult to place rights of settled and nomadic groups on the same footing unless the priority rights of original and continuing local ownership was acknowledged in some portion of rangelands. Without these sanctuaries for local communities, problems of open access would be reproduced. Kuchis also needed to know exactly where they could bring animals in spring and summer, and on what terms.

The SALEH project as well as other INGOs involved in implementing pasture management were also concerned that piloting had shown granting only use and management rights was not strong enough to empower communities to take the strict measures needed to rehabilitate environmentally degraded pastures. To make their time, investments and sacrifices worth the effort, community managers needed legal and policy assurance that customary possession was acknowledged and protected. Pilot projects had shown that officials or power holders who were erratic in their support undermined the efforts of communities, especially when their private interests were threatened by community decisions.³¹⁷ Such behaviour by officials especially undermined local efforts to halt commercial collection of pasture forbs for sale as fuel. Imposition of limitations on stock from outside the area had also been overturned in several cases. In short, SALEH was concerned that community-based pasture management could not work in the long term if communities were not granted absolute rights.³¹⁸

Members of the RLAP project and key officials of MAIL disagreed with SALEH. They wanted both community and public pastures to remain state property, with only use rights allocated to communities.³¹⁹ They argued that this was the existing law and changing the arrangement would wreck havoc. They also believed that the government had to maintain ownership of all rangelands in order to retain its authority. In this paradigm, communities would manage pastures on behalf of the government. Whether to allow community based natural resource management to be owned, or to limit this to use rights has been a common tug-of-war in the sector, including in Nepal and India where reoccurring state limitations on community rights to control local forests has become progressively contentious. However, senior officials in MAIL had followed this model when drafting the National Strategy on Forest and Rangeland Sector (2005) and in which document ownership was never mentioned.³²⁰

Some officials and advisers were also concerned that communities could be bullied into selling their pastures or would do so voluntarily, even though ownership advocates made it clear that recognition of ownership would not include the right to sell the pasture. Some were of the opinion that Shari'a did not provide for off-farm lands to be owned and that the collective entitlement in the Civil Code only applied to buildings and farms owned by several persons as joint ownership of properties rather than as collective community-based tenure.

Kuchis, and advocacy groups working with Kuchis, oscillated in their lobbying. In some forums they argued for recognition that Kuchi had been given or purchased ownership of the pastures which local communities now claimed as their property. At other times, they argued that pastures should be under the ownership of the government, and that only usage rights to a particular pasture and transit route should be allocated to applicants.³²¹ By mid-2008 drafts

317 Alden Wily, "The Pasture Story."

318 Details of these position are found in Alden Wily, "Whose Land is it?"; Liz Alden Wily, "Recommended Strategy for Conflict Resolution of Competing High Pasture Claims of Settled and Nomadic Communities in Afghanistan" (Kabul: UNEP, 2009); SALEH, "First Note on the Policy and Legal Implications of Pasture Piloting by the SALEH Project" (2006).

319 Director of RLAP, pers. comm. 24 January 2007.

320 K.R. Kanel and B.R. Kandel, "Community Forestry in Nepal: Achievements and Challenges," in *Journal of Forest and Livelihood*, (Kathmandu: Forest Action, 2004); Ashwini Chhatre, "Community Forestry in India: Evaluating the roles of state and community in natural resource management," Harvard University, Kennedy School of Government, (Boston: Center for International Development, 2003).

321 UNEP Meeting Notes of the 4th Informal Coordination Meeting on Rangeland Management, 1 May 2008, UNEP Offices, NEPA; Alden Wily, "Recommended Strategy for Conflict Resolution."

of the Rangeland Law included a construct of custodianship. Local communities would not be recognized as owners of community pastures, but would be recognised as custodians, in effect managers, whose powers included the right to exclude outsiders if the pasture could not handle more than local use. Neither local communities nor nomads were content with this compromise. Officials at MAIL were divided on the topic. A sharp rise in contestation between Hazara and Pashtun Kuchi in Hazarajat saw the development of the law set aside, in favour of a case-by-case negotiation.

Interest in enacting the draft law resurged in 2010, and more changes were made to the draft. At one point community pastures disappeared altogether from the draft. As part of the preparation of the National Plan for Sustainable Rangeland Management, the law was redrafted again in 2011. This is the most current version of the draft.

Closing the door on collective property rights

Any ambivalence towards pasture ownership was removed from the 2011 draft of the National Plan for Sustainable Rangeland Management. The provision of National Land Policy for land to be classified as public, state, private, and community lands was ignored.³²² Community pastures were left but as a class of state-owned rangelands, alongside public pastures (Version 8.0, 2011). Local pastures are defined as those attached to a settlement and extending as far as the voice is carried, revitalising the Taliban definition. Provision is also made for private pastures, where these are shown to be a part of a legally documented private estate.

Community pastures are defined as those located beyond local pastures and can be allocated to a specific community for its use with no hint of ownership. These use areas will be recognized only upon the formation of a Rangeland Association following boundary demarcation with neighbouring communities. Once all the conditions are fulfilled the Association may be granted the right to manage the pasture, as its custodian. To a large extent, the plan adopts the guidelines devised and tested by SALEH in 2006-08 with a critical exceptions. First, the Association is not a village committee but a formal and legally registered body. This is inspired from the Water User Groups to be formed under the new Water Law. These require membership fees and already shows signs of excluding poor members of the community.³²³ The currently proposed Pasture Associations therefore run the risk of excluding poor livestock owners, landless and poor farmers who do not own livestock. As well as being unjust, this will also divide the community, creating the very conflicts which community-based management are supposed to resolve, and obstructing the development of community solidarity needed to sustain conservation efforts. This User Group Association model also removes any possibilities of providing stronger management rights to the community rather than use privileges only.

The draft also says that public rangelands (or public pastures) will be defined by District Governors following local consultation. Usefully, it proposes that these may only be finalised and made available to public use with the consent of adjacent communities.

A major new proposal in this draft of the Rangeland Law is that nomads are defined as communities and as such may be awarded custodianship of a pasture over which they have claims on the basis of custom, law, or by agreement. Such rights would be granted even if they do not reside in the area. This is likely unworkable and may exacerbate rather than resolve contested claims between settled communities and visiting nomads. Inconsistently, the draft law retains the proposal from the 2008 version that Kuchis may apply to use pastures through district and provincial authorities in consultation with affected local communities. Where agreement cannot be reached, the Office of the President will form a commission to make a final decision, inclusive of equal numbers of each community's representatives. The commission's decision will be binding for a decade.

322 Policy 2.2.1 of National Land Policy, 2007.

323 (Panja Amu River Basin Project personnel, Solidarites) pers. comm., May 2012.

6.2 Letting the Kuchi-Hazara issue fester

The Kuchi-Hazara dispute in the central highlands (“Hazarajat”) over the alpine pastures has become progressively heated and violent over the post-Bonn decade. This conflict has strong historic land usage and livelihood dimensions. These are mirrored in other areas but less violently than is the case in Hazarajat.³²⁴

Kakar describes the central highlands as having “little arable land, six-month long winters and vast pastures.” This scarcity makes possession and use of rangelands a chronic source of tension among the different Hazara tribes who traditionally lived there. The identity of Hazara and Hazarajat remains strong even after several centuries of attrition and settlement along the periphery by Pashtun tribes. Hazarajat today spreads from its heartland of Bamyan Province to Wardak, Ghor, Dayakundi, Urugzgan, Ghazni, Sar-i Pul, and Zabul.

The historic source of present-day problems between Kuchi and Hazara lies in the allocation of alpine pastures of Hazarajat to certain Kuchi clans by Amir Abdul Rahman in the 1890s following his conquest of Hazarajat as part of his expanding control over what is now modern Afghanistan. Northern areas were also affected but resulted in less severe dispossession.³²⁵ Despite the conquest and reallocation of their lands to outsiders local Hazara tribes continued to believe that that the pastures were their property owned by the community, Deprivation of the right to use these resources beyond the narrow confines of their settlements also severely undermined their agropastoral livelihood and contributed to their economic and political subordination.³²⁶

The most common action taken by settled communities in the highlands and northern areas after the 1978-79 revolution was to retake pastures from the Kuchi and other outsiders who had settled in their lands. This was reported in the provinces of Faryab, Badakhshan, Ghazni, and Bamyan, among others.³²⁷ During the Taliban rule (1996-2001), many key pastures were taken by Pashtun agro-pastoralists and nomads (Kuchi) who had returned to their former homes in the North but they were evicted again when the Northern Alliance gained ground in late 2001. Similar patterns occurred in the peripheral provinces of the central highlands and the foothills of Wardak, Ghazni and Uruzghan.³²⁸

The issue also has political dimensions. This reflects the changing status of historically marginalised Hazara people over the last 50 years, but who emerged as a significant force from the civil war. Today, Hazara have a political profile that some regard as disproportionately higher than their share of the population which stands at 20 percent.³²⁹ Kuchi are also supported with special assistance programmes as nomads. Interpretation of rights is also highly influenced by wealthy commercial and political forces on both sides that have notoriously used the dispute

324 The history of colonization of the north by Amir Abdul Rahman, and resulting pastureland relations between indigenous Uzbek, Turkmen, Arab and other groups in the north are variously well-covered in Tapper, “Advent of Pashtun Maldars,” 55-79; Lee, *The Ancient Supremacy*; Patterson, “Shiwa Pastures, 1978 - 2003”; and Beverley Male, “Revolutionary Afghanistan: A Reappraisal” (London and Canberra: Groom Helm, 1982).

325 Key sources for the late 19th century developments can be found in key works of Afghan history. See, Kakar, *Political and diplomatic history*; Mousavi, *Hazaras of Afghanistan*; Lee, “The History of Maimana”; Lee, *The Ancient Supremacy*; Klaus Ferdinand, *Afghan Nomads: Caravans, Conflicts and Trade in Afghanistan and British India 1800-1980*. Copenhagen: Carlsberg Foundation, 2006. All used contemporary British archives or local accounts as sources, including as recorded by Abdul Rahman’s own chronicler.

326 Maree Gawecki, “The Hazara Farmers of Central Afghanistan: Some Historical and Contemporary Problems,” in *Ethnologia Polona*, 6 (1980): 163-175; Mousavi, *Hazaras of Afghanistan*.

327 Male, “Revolutionary Afghanistan”; Alden Wily, “Land Relations in Faryab Province”; Alden Wily, “Land Relations in Bamyan”; Patterson, “Shiwa Pastures, 1978 - 2003.”

328 For the case of Nawor and Behsud pastures, see Alden Wily “Recommended Strategy for Conflict Resolution.”

329 Mousavi, *Hazaras of Afghanistan*; Monsutti, “The Impact of War,” 195-209.

for personal land grabbing ends.³³⁰ Mainly due to mismanagement of the dispute as will be traced below, the matter now has important security implications, threatening peace.

Seeking restitution of ancestral lands

In matters of documentation, Hazara do not contest the fact that Kuchi were granted their lands, often with documented grant papers (*firman*) to back this up. What they contest is not the legality of these grants but the legitimacy of the original grant, disputing the right of the State to claim pastures as its own property and to allocate these at will. Since Bonn Hazaras have also contested what they see as a worrying trend of modern groups of Kuchis who have no history of land grants in their areas also making claims to their pastures.³³¹

The Nawor Pilot: Rising temperature around the conflict after Bonn

Kuchi frustration at being denied entry into what had become their traditional spring and summer grazing grounds between 1900-1978 has continued to grow. In 2004, violence erupted around the Nawor Pasture in the eastern highlands of Hazarajat, resulting in the death of many Hazaras and destruction of several Hazara villages. This prompted a pastoralist programme within a USAID-funded project at MAIL to develop and test localised conflict resolution.³³² At a conference held in November 2005 Kuchi leaders acknowledged that they were so desperate to regain the use of central highlands that they would surrender claims of ownership and settle for access rights through consultation with local Hazara communities.³³³ Pashtun agro-pastoralists settled in the north had traditionally settled down with such arrangements, while moving south into Bamyan Province for the summer. In the Nawor pilot, Kuchis coming from the east and south of the country seemed less willing to compromise.

USAID's security concerns halted the initiative well before agreement could be reached. By then it was also clear that the intervention and views of national and provincial officials was limiting resolution of an issue.

As violence and loss of life grew each spring in the eastern and southeast districts of the central highlands, a mountain force made up of ISAF, Afghan Army and the Afghan National Police units was dispatched to keep the peace. Spring opened particularly badly in 2008 with Hazaras accusing Karzai of favouring Kuchis in a bid to win votes in the upcoming elections. A declaration by a Kuchi member of the Parliament proclaiming that only Pashtuns were true Afghans and that Kuchis were the rightful owners of all high pastures made matters worse.³³⁴ Karzai responded by ordering Kuchis to return to their winter areas in the east and south of the country (as they were bound in any event to do in autumn). He also created a high-level Presidential Commission for Resolving Land Disputes Involving Kuchis and Settled People. By then, national political influence was embedded on both sides of the dispute.³³⁵

330 Leonard Milich, "An Analysis and Evaluation of the Behsud Conflicts, 2005-2008 (1384-1387) and a Blueprint to Avoid Further Clashes in 2009 (1388) and Beyond", (Kabul: AREU, 2009); Alden Wily, "Recommended Strategy for Conflict Resolution"; Liz Alden Wily, "Battle over the Pastures: The Hidden War in Afghanistan" in *Guerre et Terre en Afghanistan*, ed. Fariba Adelkah, in *Revue des mondes musulmans et de la Mediterranee* 133 (forthcoming); Renyard Sexton, "Natural Resources and Conflict in Afghanistan," 28-36.

331 Alden Wily, "Recommended Strategy for Conflict Resolution"; Sexton, "Natural Resources and Conflict in Afghanistan."

332 Liz Alden Wily, "Step by Step Guidelines for Facilitating the Negotiation of Pasture Access by Settled and Nomadic Users" (RAMP/USAID, 2005); Frauke De Weijer, "Status Report on the Pasture Access Negotiations in Nawur District," (RAMP/USAID, 2006).

333 Frauke De Weijer, Report on Proceedings of the Conference on Afghan Pastoralists (Kuchi) November 15-15, 2005 (Kabul: RAMP/USAID, January 2006).

334 For more details, see Alden Wily, "Recommended Strategy for Conflict Resolution."

335 Hazara felt they could look for support from Mohammad Mohaqqueq, a leader of the Hazara Hezb-e Wahdat party, and Karim Khalili, the Second Vice President, also a Hazara. Kuchi looked to their extremely wealthy elites, who included various senior officials and politicians and the influential Naim Kuchi who had so actively backed the Taliban and organised militia in their support, including against Hazaras. Naim Kuchi enjoys prominent support from President Karzai, who engineered his release from Guantanamo Bay in 2004.

Public marches in Kabul, especially by Hazaras, have become common. Taliban support for Kuchis raises the stakes further.³³⁶ The Commission has failed to resolve the conflict. The acknowledged payment it makes annually to Kuchi leaders to persuade them to keep out of Hazarajat has limited escalation. However, the payments encourage Kuchis to enter the land again the following year in order to receive the same benefits. The focal points of conflict in Markaz-e Behsud, Hesa Awal-e Behsud and Daymardad Districts have remained the same.

The current focus of the Commission is to appoint Peace Ambassadors to resolve disputes involving Kuchis. This approach was developed by the USAID-funded PEACE Project working with Kuchis on various issues.³³⁷ About 60 Peace Ambassadors in 18 provinces work in Kuchi communities and involve non-Kuchi villagers as needed. Over half the disputes resolved so far (57 percent) concern land matters but only 23 percent relate to rangeland access and only 6 percent to migration route access.³³⁸ The Ambassadors leave the fundamental questions of ownership and access to high pastures to the Commission. Moreover, neither the project nor the Commission send Peace Ambassadors into the critical districts of Wardak and Ghazni where violence erupts annually.³³⁹

Making localized conflict resolution the official strategy

The case-by-case resolution method is also the approach favoured by MAIL. In 2009, it sought assistance from UNEP to formulate a practical strategy.³⁴⁰ This was followed up with a small grant for MAIL to implement the strategy in 2010. MAIL staff were less than enthusiastic and lacked the support needed to implement it successfully. The project tailed off as soon as armed Taliban support for Kuchi made MAIL's trial working areas unsafe, much as had happened to the early MAIL initiative in Nawor in 2006.³⁴¹ On all sides, the government is unclear on how to move forward.

Senior Hazara and Kuchi politicians and notables cannot agree on strategies either. Sexton gives a good example of the two top Hazara political leaders who now run different parties and compete with each other.³⁴² The Kuchi vote is also fragmented with different factions supporting different leaders. Growing militarisation, with both sides allegedly stocking up on heavy armaments, worsens the threat.

Outside the high-profile contested areas of the eastern highland, Hazaras and Kuchis do sometimes come to agreement among themselves. This mainly involves Kuchis who settled in the north (who describe themselves as herders (*maldar*) rather than nomads) and some of whom share the Shia faith with Hazara. The actual mechanism of agreement is illustrative. It comprises of willingness among Kuchis to recognise highland pastures as historically belonging to Hazaras and to buy seasonal access through modest payment of sheep and sweets.³⁴³ In areas under militias, such as in Kunduz Province in the north, Kuchis are also known to pay one sheep per 2,000 animals for pasture access based on verbal agreements made prior to their movement into these areas.³⁴⁴ As the journey to the alpine pastures can take several weeks, settled communities along the routes such as the Shiwa Plateau in Badakhshan also charge transit fees for watering and grazing their animals overnight.³⁴⁵

336 Also see Milich, "An Analysis and Evaluation of the Behsud Conflicts."

337 USAID Afghanistan, "Afghanistan Pastoral Engagement, Adaption and Capacity Enhancement (PEACE) Project, Annual Report," July 2010-June 2011.

338 Michael Jacobs (PEACE Project), pers. comm., 25 May 2012.

339 Afghanistan Independent Human Rights Commission, "Report on Kuchi Conflict with Village people in Dasht-i-Nawor, Nawor District, Ghazni Province" (Kabul: 2011).

340 Alden Wily, "Recommended Strategy for Conflict Resolution."

341 Ghulamastageer Sarwaree (Rangeland Manager, MAIL) pers. comm., 14 May 2012.

342 Renyard Sexton, "Natural Resources and Conflict."

343 Kreutzmann and Schutte, "Contested Commons - Multiple Insecurities."

344 Mohammad Dawood Sherzad (PEACE project) pers. comm., 16 May 2012.

345 Mohammad Dawood Sherzad (PEACE project) pers. comm., 16 May 2012.

However, now that the conflict has been taken out of local community hands by politicians, it is unlikely that the conflicts can be resolved without clear legal guidance and case-by-case resolution on this basis, but which does not look forthcoming at this point.

6.3 Back to sedentarisation

From 2008 the Cabinet of Ministers determined that the solution to the Kuchi problem (as it has become known) lay in settling these nomads down, providing support for sedentary livestock development and fodder production.³⁴⁶ In 2010, the Cabinet issued further decrees making the Ministry of Interior responsible for implementation.³⁴⁷ The measures included compensating those on both sides who had suffered losses and/or have been unable to access pastures due to conflicts.³⁴⁸ MAIL was ordered to start distributing land to Kuchi families within three months.³⁴⁹ Reference was made in the Decree to Article 14 of the Constitution (2004), which requires the state to improve “the settlement and living conditions of nomads.”

As mentioned in chapter two, sedentarisation of nomads is not a new strategy in Afghanistan. Virtually all *Amirs* and presidents have favoured this, settling nomads coercively at times. This was the case for those sent north in the 1890s to aid the colonisation buffer against potential Russian incursion. Between 1952 and 1979, nomads were also a target group for allocation of farms in the irrigation schemes of Helmand and Arghandab Valleys in southern Afghanistan. Throughout the redistributive land reforms of the 1970s and 1980s, nomads were listed in the laws as a priority group to be offered redistributed farmland.

To settle or not to settle

A great deal of literature and an international pastoralist lobby since the 1930s has argued that coerced settlement of nomads is strategically unsound and not a lasting solution. Research among nomads in Afghanistan tends to support this. However, it is also true that many Kuchis have settled successfully and continue to settle through choice as well as changing circumstances.³⁵⁰ As observed by De Weijer in her study of Kuchis in 2003, there is a thin line between those who migrate as the core part of their lifestyle and livelihood and those who settle for part of the year and migrate in the summer only.³⁵¹ Additionally, many Kuchis who migrate with animals are poorer families. Many are members of large clans which include different socio-economic classes, with members who may not have migrated with animals for a century, or who live by urban employment. Some wealthier Kuchi run transport businesses, including trucking animals to desirable pastures for better-off Kuchi.

In response to the Presidential Orders, the survey department recently finally surveyed six areas in Logar Province and a further three areas in the provinces of Nangahar and Laghman to allocate land parcels to Kuchis. These are to provide farms of 10 *jeribs* (2 ha) to 3,000 Kuchi families to be identified by the Independent Department of Kuchi Affairs.³⁵² Local populations

346 Decree No. 366, 2008 (SY 1387), Decree No. 24, 2009 (SY 1388) and Decree No. 1287, 2010 (SY 1389).

347 Decree No. 1278, 2010 (SY 1389).

348 Decree No. 1293, 2010 (SY 1389).

349 Decree No. 10, 2010 (SY 1389).

350 For discussions of mobility, see Frauke de Weijer, “Afghanistan’s Pastoralists: Change and Adaption,” in *Nomadic Peoples* 11, no. 1 (2007), 9-37; Thomas Barfield, “Nomadic Pastoralists in Afghanistan Reconstruction of the Pastoral Economy,” (Boston: Boston University, 2004); Bernt Glatzer, “Processes of Nomadism in West Afghanistan” in *Contemporary Nomadic and Pastoral People: Asia and the North*, ed. P.C. Salzman (Williamsburg, USA: Department of Anthropology, College of William and Mary, 1982); Ferdinand, *Afghan Nomads*; Gorm Pedersen, *Afghan Nomads in Transition: A Century of Change among the Zala Khan Khel* (Copenhagen: Carlsberg Foundation, 1994); Richard Tapper, “Who are the Kuchi?”

351 In 2005 it was also found that 15 percent of Kuchis were settled and another 33 percent migrated to short-range distance limited times. Many of the remaining 52 percent Kuchis who migrated longer distances, including towards the central highlands, leave most family members at home; Frauke de Weijer, *National Multi-sectoral Assessment*.

352 An earlier plan to develop 150,000 *jeribs* (60,000 ha) of government land in Herat Province for Kuchi settlement failed to be carried through because of concerns of its proximity to Iran, which is believed to sympathise with non-Kuchi and especially Shia Hazaras. It was also found that these lands were claimed by local communities as their pastures; Ghumamdstageer Sarwaree (MAIL), pers. comm., 14 May 2012.

have strongly protested that the State is giving out lands to Kuchis while its own landless poor are not being catered for. They also claim that the sites identified are not unclaimed public or government lands but by custom their own community lands. Some Kuchis have also complained to MAIL that those in genuine need are being by-passed in favour of allocations to Kuchi with political access and clout, and some of whom already have substantial land holdings.³⁵³ It can be surmised that these *naqil* (grantees of land) will rent out or sell the allocated lands. It is also doubtful whether the poor and landless Kuchis will remain on allocated parcels and not return to informal settlements on the edges of towns where they can work as casual labourers and send their children to school.³⁵⁴

Because of all the above, MAIL put the planned Kuchi settlements on hold in 2012. Senior officials in the ministry are not so convinced that sedentarisation is the answer. They want to address the conflict more directly, through structuring ownership and access arrangements in ways which meet both the claims of settled communities and the access claims of Kuchi to at least some very large alpine rangelands. In short, it has taken MAIL and other ministries half the decade to arrive at a solution originally posed in 2004. Whether real progress will be made on this is open to doubt.

6.4 Lands for returnees and IDPs

Settlement schemes have also re-emerged as the major strategy for addressing the needs of rural poor and more specifically, returnees and IDPs who cannot return to their home areas. There is an overlap with the Kuchi issue discussed above in that a significant number of IDPs are Kuchis.

In the early post-Bonn era, the original strategy was to focus on getting people home. It was described earlier how a Special Land Disputes Court was set up to help returnees get back their lands and houses. However, by January 2005, the court had dealt with only five percent of cases before it and an astounding 80 percent of its verdicts were being appealed.³⁵⁵ Bribery of judges and clerks was reported to be rife, forged documents were accepted, political influence was exerted, and judges complained of being threatened by armed or influential defendants.³⁵⁶ The Special Court was closed at the end of 2005.

The NRC became the main agency assisting returnees and IDPs resolve many cases following their return. NRC began to observe the high proportion of land cases among this sector, 81 percent between 2004 and 2007. Inter-personal inheritance disputes mainly featured alongside cases involving occupation of lands and houses by powerful people, commanders, and the government.³⁵⁷ Seventy-four percent of the cases in 2004 involved corruption by officials or judges, or land grabbing by commanders.³⁵⁸ Poor people tended to present their grievances collectively, which NRC found to be more meaningfully resolved outside the courts in local *shuras*.³⁵⁹ Interestingly and for reasons not explained by NRC, the share of land and property cases fell to 69 percent in 2008 and 45 percent in 2011. The proportion of cases it has helped resolve through the formal court system has also doubled to 32.5 percent.³⁶⁰

353 Ghumamdastageer Sarwaree (MAIL), pers. comm., 14 May 2012.

354 Partial or full settlement appears to increase annually, although it is uncertain as to how far this is due to changing socioeconomic expectations and demands, and how much is due to limited summer pasture access and polarising stock ownership due to periodic droughts.

355 Despite being staffed by 18 judges, the court was overwhelmed, with registered cases almost doubling every quarter; Liz Alden Wily, "Resolution of Property Rights Disputes in Urban Areas: Rethinking the Orthodoxies" (Kabul: World Bank, March 2005).

356 The World Bank, "What are the Sources of Conflict in Urban Land Tenure?" Kabul Urban Policy Notes, Series No. 4 (2005); NRC, "Report on: Afghanistan's Special Property Disputes Resolution."

357 Colin Deschamps and Alan Roe, "Land Conflict in Afghanistan: Building Capacity to Address Vulnerability" (Kabul: AREU, April 2009).

358 Jo Beall and Daniel Esser, "Shaping Urban Futures: Challenges to Governing and Managing Afghan Cities" (Kabul: AREU, March 2005).

359 15.8 percent were solved in the courts. *Shura/jirgas* were the main source of resolution (47 percent) and mediation (24.5 percent of cases); Statistical Record of NRC caseload for 2008 (NRC, Kabul).

360 Statistical Records of NRC Caseload for 2011 (NRC, Kabul).

Nevertheless, NRC and other agencies continue to report that land and property disputes are a major issue among returnees and IDPs.³⁶¹ They look at weaknesses in laws that discriminate against poor people, administrative failures, corruption in the courts, state failure to tackle blatantly illegal occupation of land by powerful individuals or the government, and continuing disputes over the ownership of rangelands. Returnees and IDPs feature prominently, not least because they comprise a substantial part of the population. Between 2002 and 2011, 5.7 million refugees returned to Afghanistan, mainly from Pakistan and Iran raising the population of Afghanistan by 25 percent in one decade. Renewed armed conflict within Afghanistan from 2007 has seen IDP numbers rise since. Up to one million IDPs currently lack homes, farms, means for livelihood and ready access to public services and water.³⁶² As areas deemed safe decline and areas controlled by militias multiply in 2012, the numbers of IDPs will continue to rise.³⁶³

An unknown number of people also have returned to their rural homes but send family members to towns to earn money and access education and training opportunities.³⁶⁴ Drought has also been a factor prompting migration within the country. Poor harvests afflicted eight of the last 11 years with the 2011 drought leaving three million Afghans without enough food and jobs.³⁶⁵ A significant number of returnees and IDPs therefore do not actually have homes or farms to return to.³⁶⁶

By 2005, UNHCR and related agencies were urging the government to provide land for returnees and IDPs. The source of these lands was to be state lands that the government registered as its own property in the 1960s and 1970s. This included off-farm rangelands, arid lands, and barren lands which the state claimed as its own lands. Repeatedly, Government finds that its claims are not supported by local populations, placing its intentions in jeopardy and conflict. This has been a main experience with all formal land allocation schemes developed since Bonn.

Land Allocation Schemes

Decree No. 104 of 2005 (SY 1384) created provincial commissions chaired by the Ministry of Refugees and Repatriation to help settle returnees and IDPs in these schemes.³⁶⁷ MAIL was charged with finding land "in high altitude and uncultivated sites" (Article 8). Fourteen schemes were started that year and five more in 2006. Together these created 48,320 parcels of between 15-30 *jeribs*, or 3-10 ha.

Returnees and IDPs have proven unenthusiastic applicants. Only 266,276 of the many millions of eligible applicants have filled application forms. Of these, only 63,101 have been selected over the eight years since the first IDP settlement was created. By 2012 only 39,992 had paid for the plots and 33,774 had been allocated specific plots. Only 12,030 families were recorded as actually living on the allocated sites in early 2012. Overall, only one-third of those who had applied had been given a parcel of land.³⁶⁸

361 Reed and Foley, "Land and Property."

362 UNHCR surveys identified 402,484 IDPs in April 2012 but the surveys only covered half the country. There has also been a rise in the numbers of persons seeking asylum outside the country, and a decline in voluntary return by those still in Pakistan, Iran and other countries; UNHCR, "Country operations profile - Afghanistan" (UNHCR, December 2011); UNHCR, "Statistical Summary of Conflict-Induced Internal Displacement in Afghanistan as of 30 April 2012" (UNHCR, Kabul); IRC, "Afghanistan: The perilous road ahead" (Kabul: IRC, June 2012).

363 By 2009 the UN estimated that only 37 percent of the country was low-risk and accessible, and this proportion has declined since. Eleven provinces have since seen militias embedded, taking administrative roles including tax collection. Recent accounts of insecurity and militias include: IRC, "Afghanistan: The perilous road ahead"; Ryan Evans, "The once and future civil war in Afghanistan," *Foreign Policy*, 26 July 2012; Dexter Filkin, "After America: Will civil war hit Afghanistan when the US leaves?" *The New Yorker*, 9 July 2012.

364 Ingrid Macdonald, "Landlessness and Insecurity: Obstacles to Reintegration in Afghanistan" (Middle East Institute - Foundation for Strategic Research, 2011).

365 IRC, "Afghanistan: The perilous road ahead."

366 In 2003 UNHCR had recognised that "landlessness is a serious obstacle to return" (Reem al-Saleem, 2003). In 2008, 90 percent of recent returnees from Pakistan had no claim to property (UNHCR Appeal for Funds, 2008-09).

367 Decree on *Land Distribution for Housing to Eligible Returnees and IDPs*, no. 104, 2005 (SY 1384).

368 Ministry of Refugees and Repatriation, "Figures on Land Allocation Schemes" (Kabul: MoRR, January 2012).

One of the reasons for the failure of the schemes is that selection criteria tend to exclude the poor people who could, in any event, probably not meet the documentation requirements and costs involved. After all, as has always been the case in Afghanistan, land grants by the state eventually have to be paid for. The process has been reported to be slow, ethnically biased, and with reports of corrupt processing of applications, including allocations to some families who are not returnees, IDPs, or landless.³⁶⁹ Delay in finding land has been a key problem with identified sites frequently vetoed by the Ministry of Mines or challenged by local communities who contest the state's ownership.³⁷⁰

The sites that are ultimately selected have been poor. Settlements often end up far from towns with little access to earning opportunities, schools, and health care. Some sites lack clean water. Help with shelter construction has been erratic. Many millions of donor dollars have been invested with intangible results. One widely publicised case is that of the town of AliceGhan, an Australian-funded scheme 50 km north of Kabul. Nearly US\$ 9 million has been spent on this project that began in 2007. To date, it has no permanent water supply or health clinic. The school was built without toilets, and houses were constructed without perimeter walls in a society where privacy is paramount. Also, local communities have disputed the ownership of the area.³⁷¹ A number of those who were allocated land turned out to be fake returnees or IDPs, intending to sell the parcels for profit. Police are alleged to have extracted bribes from contractors building the houses. Some government officials have been accused of fraud and a couple of them have been jailed. Fewer than 200 families have remained in the 1025 houses, most of which are now falling apart. A majority of those who came have since left in search of food and petty jobs in Kabul.

The issue of land ownership repeatedly comes to the fore in the continuing crisis around safe return, creation of settlement schemes on off-farm lands, and the disputes between indigenous communities and the government agencies. These cases bring to the fore the unresolved status of off-farm lands. Additionally, many problems have arisen when settlers who remain try to secure legal tenure.³⁷²

There have been a few near successes in these regards. These are schemes created close to cities, on lands confirmed as not belonging to individuals or communities, and where donor-funded projects directly assist settlers to secure formal titles for their parcels.³⁷³ The USAID LARA programme helping returnees and IDPs secure provisional occupancy permits in two schemes close to Jalalabad is the main case in point. This project ends in 2013 before these permits are actually issued.

Looking back over the decade, both strategies to assist returnees and IDPs—the establishment of special courts to help them recover lands and the settlement schemes—have failed. Mass displacement remains an issue as the post-Bonn decade ends and threatens to worsen if Pakistan sees through its threat to evict several million refugees that remain within its borders. At the heart of failures like corruption and bad planning, and with a more seriously hollow underpinning in government claims that it owns land which turn out almost every time to be claimed by its own citizens as not the land of government to claim or give away.

369 Reed and Foley, "Land and Property"; Macdonald, "Landlessness and Insecurity."

370 This has been the case in Bamyan, where only 27 of 227 selected cave-dwelling households around the Buddhas of Bamyan have actually been settled, while their numbers grow annually. For more on this, see Zia Faiz, Report from the Afghanistan Independent Human Rights Commission, (2012).

371 Jay Fletcher, "Deported Afghan refugees have nowhere to go," *Green Left*, 2 February 2012; Jack Healy, "In Afghanistan, a Village Is a Model of Dashed Hopes," *New York Times*, 8 August 2011.

372 The Liaison Office describes cases where settlers find the legality of their documents disputed, other cases where local communities resist allocation of "their" lands to newcomers, and still other cases where corruption in the procedures limit and de-secure rights; Brookings-Bern Project on Internal Displacement and The Liaison Office, "Beyond the Blanket: Towards more effective protection for internally displaced persons in southern Afghanistan" (May 2010).

373 Reed and Foley, "Land and Property"; Nigel Thompson (LARA/USAID) pers. comm., 24 May 2012.

6.5 Poised for tenure reform

The land problems covered in this chapter return again and again to the core question of “who owns off-farm resources?” Satisfactory resolution of customary ownership of rangelands by some 30,000 settled communities, addressing the needs of nomadic pastoralists to access rangelands, creation of workable norms for natural resource management, and satisfactory provision of lands to the poor including returnees and IDPs, all depend upon the answer. These subjects also directly touch upon the post-Bonn positions regarding where the controlling authority over rangelands and related off-farm resources should be vested. Failures on all these fronts also raise questions around the persisting and pernicious phenomenon of land grabbing as this mostly involves so-called state lands, including those deemed to be public property.

Last minute reprieve for majority land rights

So far, this paper has described the debates surrounding the status of government and public lands. Mid-decade some important progress was made on this issue. To recap, the National Land Policy of 2007 settled land classes which removed the conflation of government and public lands extended by early Karzai decrees (most notably Decree No. 83 of 2003 (SY 1382)). It proposed that Government property would be restricted to public service areas, while public lands would cover off-farm natural resources including barren, virgin and pasturelands. New law would firmly clarify that the state did not own these lands, only administered these. The more important provision was the recognition of community lands as a distinct category. Many pastures which communities considered their property by custom would be candidates for this status.

By falling by the wayside, the opportunity to use the National Land Policy to advance legal resolution was delayed. Through decrees, the President and powerful provincial governors or commanders at the local level have continued to deny local community land claims to off-farm barren lands and rangelands. Prominent beneficiaries have been individual businessmen, strongmen and politicians.

Resistance to changes that might limit the grasp of the Administration over off-farm lands has marked most of the decade. And yet, as the post-Bonn decade ends, there are new windows of opportunity, for example, in the proposed amendments of the Land Management Law. This is in the above-mentioned light provision of the draft amendments that the classification of lands as dictated in the National Land Policy are finally taken up; the draft new law provides four classes of land: state land, private land, public land, and “Special Village Land” (and in fact a fifth category, known as “Endowed Land”). Special Village Lands can be understood as community land. *Mar’aa* Land may be presumed as a major category of public lands.

Box 2 lays out the presented categories in this English translation of the amendment provided to the author by ARAZI in December 2012.

If this plan is adopted into law then vast areas of land presently subsumed under state land will be clearly identified as public land and communal use land (*mar’aa*), primarily used for grazing. More dramatically, communities will be able to secure some of their customary lands as their collective property (described as Special Village Lands). These will be drawn out of public/*mar’aa* Lands.

Box 2: Proposed definitions of land tenure classes

5.1 State Lands

1. All agricultural and non-agricultural land registered in the Principal Book of State-Owned Land
2. Lands in respect of which private ownership is not proven during land rights identification on the basis of Sharia or legal provision
3. Lands which have been in the possession of the State for more than 15 years before 27 December 1979 (SY 6 Jadi 1358)
4. Non-expropriated lands that have been registered and identified in State documents and offices as State Lands before 6 August 1975 (SY 15 Asad 1354)

5.2 Private Land

Plots of land according to legal provisions owned by natural persons or legal non-state entities

5.3 Special Village Land

Lands verified by the Afghanistan Land Authority as located and linked to a village or villages, not owned by the state, and for which the residents may be awarded ownership as a legal person for specific purposes.

1. Special Village Lands may never be bought, sold, donated, bequeathed, exchanged, mortgaged or leased, without the specific agreement of the Minister of Agriculture, Livestock and Irrigation, and the approval of the President.
2. Protection and maintenance of Special Village Lands is the collective responsibility of the residents of the relevant village or villages, and particularly the responsibility of the elected Village Land Commission.
3. The State is responsible for the regulation and monitoring of Special Village Lands.
4. The State has the authority to use Special Village Lands in the public interest without expropriating these.
5. When mines, historical monuments and subterranean resources are discovered on Special Village Lands, the land with all material and spiritual values will be considered to be state lands.
6. Special Village Lands will be identified and created through a verification process by the Afghanistan Land Authority.
7. The verification process shall be defined through a special regulation.

5.4 Public Land

Lands which the public may use in common for its own interest or for specific purposes including for Mar'aa (communal use), for graveyards, harvest sites, and such land is not owned by the State or by private persons.

6. Mar'aa Land¹

All deserts, hills, mountains and their hillsides, marshlands on all sides of waters, and forest areas covered by feed plants, reed beds and natural herbs used for livestock feeding are called Mar'aa Land.

7. General Mar'aa Land

- (1) Lands that all citizens have the right to use in accordance with provisions of the law.
- (2) Special Mar'aa Land

Lands with specific boundaries located and linked to village or villages as per the needs of residents and only those residents have the right to use that land, in accordance with provisions of the law, and such lands are verified and registered as Special Village Lands following verification by the Afghanistan Land Authority (ALA/ARAZI) of the Ministry of Agriculture, Irrigation and Livestock (MAIL).

8. Occupation of Mar'aa Land

When a person occupied Mar'aa Land even for a long period, his right of occupation ceases and the Mar'aa taken out of his possession as soon as the nature of the land as Mar'aa is established in accordance with Shari'a.

9. Endowed Land

- (1) Land that is endowed shall be deducted from the owner and shall not be included in the ownership of the receiver.
- (2) Sale, donation, possession, or inheritance of endowed land is not permitted.
- (3) Any benefit derived from endowed land shall be used for the purpose for which the land was endowed.
- (4) The Endowment Department of the respective province where the land is located is obliged to obtain all legally valid documents from the donator, archive them, and deduct the endowed land from the donator.

¹ Mar'aa land is a sub-category of public land.

Source: *Draft Proposal from Minister of Agriculture to Minister of Justice, December 2012.*

Even if these proposals become the law, implementation will be a challenge. Categorizing a particular piece of land as Special Village Land (or Special *Mar'aa* Land) depends upon case-by-case verification by ARAZI. ARAZI is highly unlikely to undertake the verification procedure without substantial donor support. In absence of such support, the agency would probably apply verification on an ad hoc basis, only be undertaken when the state seeks to allocate lands to investors or private persons. Without mass information dissemination, communities will also not be aware of opportunities to secure their rights to collective tenure. The history of weak rule of law also suggests other impediments to practical application of this legal opportunity.

The limitations of the scope of proposed Special Village Lands should also be noted. A good deal of rangelands which communities might claim remains under the state land sector. This affects all those off-farm lands registered through the cadastral survey of the 1960s as government lands.

There are also limitations on Special Village Lands in viewing them as real property. Communities will not be permitted to lease these to investors, for example, without the approval of the President. The restriction upon selling the land is not necessarily a drawback. Many communities by custom deny themselves that right on the grounds that communal lands belong to the community in perpetuity, not just to the present generation. A more invasive and unfair limitation is that communities will not receive compensation for the loss of these lands should they be identified for mining or other public purpose.

Unresolved overlaps of virgin, barren and rangelands

The proposed amendments also do not remove the overlap between virgin and arid lands with rangelands. Virgin lands continue to be defined as lands that have never been cultivated.³⁷⁴ Barren (arid) lands cover those which “under normal conditions have not been cultivated for a period of more than five successive years and such lands may be brought under cultivation after improvement or construction of a new irrigation system.”³⁷⁵ These are technical definitions not land tenure classes, and should, in theory, not be an impediment to land rights. The reality is that virgin and barren lands are routinely part of the grazing land estate of villages. The current law allows virgin and arid lands to be leased to national and international individuals and organisations for up to 90 years (Article 64, 2008 Land Management Law (SY 1388) and the proposed revised version of the law sustains this.³⁷⁶ Moreover, such leases are permissible for purposes other than agricultural development including for housing estates.³⁷⁷ Although a technical planning commission is to identify areas suitable for investors, this does not necessarily involve a thorough identification and adjudication of local rights.³⁷⁸ As Special Village Lands can only be established following identification, it is probable that allocations to investors will occur before these same lands are recognized as Special Village Lands.

Bright but uncertain possibilities

The turnaround in favour of the majority represented by the recent proposals is encouraging. It is far from clear that this new proposal will meet the approval of the Ministry of Justice, the Cabinet of Ministers or the Parliament. Decisions in 2013 will ultimately determine how far land policies and laws have actually shifted over the decade.

Should the legal amendments be enacted, then this will trigger other changes in law and practice. One such result will be that both draft rangeland and new forest legislation will have to be amended to allow communities to be recognized as legal owners of community pastures and community forests. So far, as described earlier, this has been resisted.

374 Article 3(11) of proposed new Land Management Law, December 2012 (SY 1391).

375 Article 3(12) of proposed new Land Management Law, December 2012 (SY 1391).

376 Article 69(1) of proposed new Land Management Law, December 2012 (SY 1391).

377 Article 64 of current Land Management Law, 2008 (SY 1388) and Article 69(2) of proposed revised Land Management Law, December 2012 (SY 1391).

378 Article 69 of current Land Management Law 2008 (SY 1388) and Article 74 of proposed revised Land Management Law, December 2012 (1391).

7. The State, Land Grabbing, and Land Conflicts

7.1 Use and abuse of power

A great deal of this paper has focused upon the status of untitled, community lands and off-farm resources in particular. This is because a great deal of legal uncertainty and popular conflict centres on these resources. The principal antagonists are people and the State.

The previous chapter described how the post-Bonn decade ended on a positive note in this respect; draft amendments to the Land Management Law have opened a window towards possible recognition that communities will be able to lawfully secure at least some of their shared off-farm resources as their property, not that of the State.

An implicit constraint in the restitution of off-farm commons to communities in Afghanistan is that the process of identifying such lands depends upon the will of the State, or more precisely, ARAZI. Legal recognition of land rights is rarely sufficient on its own to secure land interests. Creation of institutions at accessible levels to identify and uphold those rights is necessary.

In this respect, the Bonn decade flirted with, but did not deliver the necessary the decentralisation of land administration to local levels to apply and uphold legal provisions. This is despite significant commitments in this direction in the ANDS and local government planning documents, as described earlier. Instead, the post-Bonn decade has seen a concentration of land governance powers at the centre. This has been justified as necessary to limit land grabbing although it has become clear to the public that those with powers have dirtied their hands in land grabbing, as passive or active participants and beneficiaries.

7.2 Self-interest and land grabbing

While no government (or president) likes to be accused of land grabbing, this is surprisingly frequent and often reported in the local press in Afghanistan. Most recently MPs alleged that officials at the Presidential Palace consisted of land grabbers.³⁷⁹ Although accused himself of land grabbing, Vice President Mohammed Karim Khalili has questioned why so little is being done to counteract this “cancer” as he refers to it, and in which he acknowledges Afghan State involvement. The intended remedy against land grabbing was to strengthen State powers in Kabul and especially those of the President, delivered in draconian laws of 2002 and 2003. As the decade unfolded, the utility of this has proven unfounded, and the capture of powers by President Karzai have begun to be understood as part of the problem. This has been triggered by awareness of more and more instances suggesting that political leaders including the President himself and his family members and associates are benefitting from overriding land allocation powers in the form of cheap or free acquisition of lands from the government and public land sectors. The public is also dismayed at the unwillingness or inability of officials and courts to challenge these cases.³⁸⁰

It is difficult to tell from official records how much land has been distributed through collusion at high level or through public Presidential Orders. One way would be to examine the decrees that have directed the Cadastral Department of AGCHO to survey an area as prelude to its lawful grant, sale or allocation. The Department received at least 220 orders between 2008 and 2011 affecting up to 124,000 hectares.³⁸¹ Many of these ordered surveys for genuine public purposes

379 Haseeb Maudoodi, “MPs Call for Release of Land Grabber Names,” in *Afghanistan Today*, Kabul, 17 November 2012.

380 According to a senior official who wants to remain anonymous, a brother of Vice President Khalili, who despite making periodic claims against land grabbing as cited earlier, wanted an area in the west of Kabul to create a satellite town. He had the current occupants removed by re-surveying it as government land. In another case, President Karzai is allegedly a shareholder in the town development known as Auomina 1 and 2 in Kandahar involving 10 square kilometres of public land, which has also been “regularised” through presidential decrees for development by one of President Karzai’s brother.

381 Presidential Orders Regarding Land Surveying, Clarification and Land Conflict Resolution, Cadastral Department, AGCHO, May 2012.

such as to clarify ownership of lands around Khost and Kabul airports and lands around the Aynak Copper Mine, or to create the Kuchi and returnee/IDP settlement schemes described earlier.³⁸² Many others appear to have resulted in creation of *shahrak* by elites for private commercial benefit or for speculative land trading. Civil servants say that “relatively few” orders are gazette. The known 220 orders described above cover only 12 provinces, excluding Kabul Province, where the most prolific land grabbing is believed to have occurred.

Records listing lands formally granted or sold to investors are also puzzling. These show that only 46,253 hectares of state or public lands have, in fact, been leased to investors since 2002.³⁸³ This is curiously modest, given the depth of commitment to large-scale land allocation to investors and the revisions made to the Land Management Law in 2008 to ease the lease procedure.

A veneer of legality frequently conceals corrupt practices. A retired senior civil servant described it as common for one of his colleagues or a politician to identify the area he wants, ask the President for his support and then take the resulting order to the cadastre which then surveys the land. The completed survey is then taken to ARAZI for issue of a title deed. The notable then takes this to the MoUDA to provide an acceptable design layout for a new township or housing estate. This is prepared and signed and the *shahrak* developed. Even if the notable only goes so far as to divide the land into 300 square meter parcels, thousands of dollars are made from their sale. The initial cost of the land is minimal, acquired from Government at well below market value. Most costs are for the “fees” paid to smoothen the process at each stage. The more money invested in the *shahrak*, such as for road or water development, the more millions can be made at sale.

Another process described is for an individual – again a person with means and contacts – to identify a site and to claim that it was his property or his father’s property but that the documentation was lost during the war. He completes the circular form from the court. A fee is paid to each of the offices where the form must be submitted and signed. Each signature builds the legitimacy of the claim. When the completed form reaches the court and the original record is not found in the archives, a further payment can be made to ensure that a replacement record appears. Then, the beneficiary develops the land as his own, for sale or for hoarding until land values rise. Such processes suggest technically legal but corrupt practices, which are difficult for honest officials and judges to challenge.

Land loser or land grabber?

It is ironic that the State as a whole continues to present itself as the main victim of land grabbing and actively persist in trying to recover “stolen lands”. The official list of such lands now stands at 4.45 million *jeribs* (890,000 ha).³⁸⁴ Some 18,871 grabbers have been listed by ARAZI although the list has not been announced publicly. ARAZI reports that it has reclaimed five percent of these stolen lands (228,517 *jeribs* or 45,700 ha).

The President periodically admits that the situation is out of control. Most recently, his *Decree on the Execution of Contents of the Historical Speech* of June 21, 2012 in the Special Session of the National Assembly indicated this. The speech was designed to assure donors of progress ahead of the Tokyo Conference in July 2012, which pledged US\$16 billion to Afghanistan through 2015.³⁸⁵

Among the 140 directives to ministries listed, “land usurpation” was to be tackled. MoUDA was charged with the investigating *shahrak*.³⁸⁶ This was followed by a further Presidential Order Concerning the Assessment of Township (*Shahrak*) Construction and Land Grabbing in the Centre and in the Provinces of the Country (27 June 2012).³⁸⁷ This created a commission

382 Presidential Orders 6142, 2061, 2473, and 142.

383 “Land leases between 2002-2012 by the Government of Afghanistan” (Kabul: Afghanistan Land Authority, undated).

384 List of Grabbed Lands and Restituted Lands in 34 Provinces in *Jeribs* (Kabul: Afghanistan Land Authority, June 2012).

385 Ministry of Foreign Affairs of Japan, “The Tokyo Declaration Partnership for Self-Reliance in Afghanistan. From Transition to Transformation,” July 8, 2012.

386 The last of four orders to the Ministry, under the 26th directive.

387 Presidential Order No. 2232, 2012 (SY 1391).

given three months “to determine the legality of documents of all township developments through all cities and towns.” The three months have since passed without result. In any case, the loopholes in the commission’s terms of reference enable developers to regularize developments they have already undertaken.

In the same speech of 21 June 2012, Karzai directed MAIL to:

... collect precise information about the seizure of government and private lands across the country ...

... organise and present a practical achievement report to the Cabinet concerning the use of barren and arable lands within six months in accordance with former guidance and instructions of the Office of the President and Cabinet’s decision. ³⁸⁸

This too has not been delivered (or at least not made public). Meanwhile more paper on the subject is produced. This is prominently in the form of a new chapter in the proposed amendments to the Land Management Law (December 2012). This provides eight articles making identification of “usurpers” a duty of the central government, governors, and district administrators and presents with measures to discourage further land grabbing. Those identified as usurpers are subject to penalties including imprisonment for up to eight years. For as long as civil servants and politicians are involved in land grabbing, it is difficult to see how these provisions will be implemented. There is little real expectation of change.

7.3 A rising tide of grievance and dispute

Routine land disputes

Land is a routine source of dispute in even the most peaceful of agrarian economies. These are usually over inheritance shares, boundaries between houses and farms, transactions, and are mainly between individuals and families. Court data after Bonn showed that 26 percent of cases between March 2003 and March 2004 concerned inheritance and another 20 percent were about contested land sales.³⁸⁹ Inheritance issues constituted 42 percent of land cases which returnees brought before NRC to help resolve between 2002 and 2007.³⁹⁰ This fell to 28 percent in 2009 and to 23 percent in 2010 but rose to 38 percent in 2011.³⁹¹

New sources of dispute

Inevitably, restitution cases formed a large share of formal disputes heard by courts and agencies following the end of civil war in 2002. Eighty-six percent of court cases in Kabul concerned land and property in 2004.³⁹² Nationally, property cases quadrupled between 2002 and 2004 to 63.4 percent of all cases.³⁹³ Wrongful occupation accounted for 24 percent of these land cases.³⁹⁴ We have seen earlier that the surge in cases caused two special courts to be established, hearing 1,711 cases, of which 69 percent concerned wrongful occupation and another 24 percent concerned

388 Item four of the 27th directive to the Ministry of Agriculture and Irrigation. In addition, order number 6 directed high-ranking government officials “to separate themselves from supporting law breakers, criminals, corrupt and guilty individuals. Judicial and law enforcement offices are to take firm legal actions against those who get in the way of justice without considering their official position.” Presidential Order no. 12 mentioned “illegal land confiscation” as one of the results of holding of unlawful weapons.

389 Alden Wily, “Looking for Peace on the Pastures,” 40.

390 Rebecca Gang, “Inception Workshop Report, The AREU-NRC Land Disputes Study” (Kabul: AREU and NRC, 2007).

391 Information from the Annual Statistical Reports of the Legal Section of the Information, Counselling and Legal Assistance (ICLA) department of NRC, 2008, 2009, 2010, and 2011. For years 2010 and 2011 these figures excluded cases relating to Land Allocation Schemes, which were new categories of cases that NRC deals with, and therefore were not comparable with its data for earlier years.

392 World Bank, “What are the Sources of Conflict?”; The World Bank, “Conflicts over property rights and resolution of disputes in Kabul,” Kabul Urban Policy Notes series no. 6 (May 2005).

393 Alden Wily, “Looking for Peace on the Pastures.”

394 Alden Wily, “Looking for Peace on the Pastures,” 40.

“Falsification of Documents or Other Inversions and Trickeries.” By 2010, NRC was assisting returnees to deal with land cases relating to the Land Allocation Schemes, accounting for 60 percent of its caseload that year.

In absence of court data since 2005, it is difficult to ascertain whether land and property disputes have continued to constitute the larger proportion of formal cases. It is even more difficult to be certain that land and property cases dominate the informal dispute resolution sector such as those dealt with in community, district, or tribal *shura*. Where surveys have been conducted, these suggest three trends. A survey by the AIHRC in 2006 and by Oxfam in 2008 found that half or more of all informal disputes were indeed land and property issues.³⁹⁵ Less comprehensive studies agree with this.³⁹⁶ In Takhar and Kunduz, for example, half of the cases tackled by Peace Councils trained by CPAU were about land and property during the last half of the Bonn decade.³⁹⁷ Forty-seven percent of cases solved by the Justice *Shura* in Nangarhar were about land.³⁹⁸ Half of the cases referred to the hybrid formal-informal Justice *Shura* set up in Nimroz Province concerned disputes over land rights between landlords and their tenants.³⁹⁹ Virtually all disputes handled by the provincial Commissions on Conflict Mediation (CCM) set up by The Liaison Office with USIP funding, tackling inter-tribal and state-tribe conflicts, are about contested rights to lands.⁴⁰⁰ The aim is to limit these conflicts ending in bloodshed.⁴⁰¹

Projects and agencies like CPAU and PEACE working with Kuchi have also found that contested land access characterises most of the disputes they help resolve both among Kuchis themselves and with settled communities.⁴⁰² Violent, armed conflicts between Kuchi and Hazara in the Ghazni and Wardak foothills described earlier remain at very high levels every summer including 2012.

As national data on formal and informal land disputes remains scant in 2012, it cannot be said for certain that land disputes and armed conflicts over land are multiplying.⁴⁰³ The massive expansion of informal dispute mechanisms dealing with land conflicts suggests this is likely. These *shura* and *jirga* exist at village, clan, cluster, *manteqa*, tribal, district and even provincial levels.⁴⁰⁴ They differ from courts in terms of who hears and settles the disputes and in their *modus operandi* towards consensus rather than declaring a winner and loser. *Shura* decisions

395 “Economic and Social Rights in Afghanistan,” (Kabul: Afghanistan Independent Human Rights Commission, 2006); Matt Waldman, “Community Peacebuilding in Afghanistan The Case for a National Strategy,” (Kabul: Oxfam International, February 2008).

396 Christian Dennys and Idrees Zaman, “Trends in Local Afghan Conflicts A Synthesis Paper” (Kabul: Cooperation for Peace and Unity, June 2009); Rene El Saman, “Linking formal and informal conflict resolution mechanisms in Afghanistan: A survey of the people’s perspective” (Kabul: Sanayee Development Organisation, August 2008).

397 “Opportunities and Challenges for Justice Linkages Case Studies from Kunduz and Takhar” (Kabul: CPAU, 2012). More precisely, the Oxfam survey in 2008 found that contestation over land and water right was identified as a major threat to peace by 53 percent of interviewees. At the same time, Oxfam’s analysis is clear that unemployment and difficulties securing a reasonable livelihood are intertwined with this issue in rural areas, one exacerbating the other.

398 TLO, “Building Dispute Resolution Institutions in Eastern Afghanistan Lessons from The Liaison Office Justice Shuras in Paktia and Nangahar” (Kabul: The Liaison Office, July 2011).

399 TLO, “Building Dispute Resolution Institutions in Southern Afghanistan Lessons from The Liaison Office Justice Shuras in Helmand, Uruzgan and Nimruz” (Kabul: The Liaison Office, December 2011).

400 TLO, “Land Based Conflict in Afghanistan: The Case of Paktia” (Kabul: The Liaison Office, December 2008); “Tribal Jurisdiction Agreements: The Key to Sub-National Governance in South Eastern Afghanistan” (Kabul: Tribal Liaison Office, TLO Brief/1, December 2009).

401 TLO, “Land Based Conflict in Afghanistan.”

402 Khibar Rassul, “Fractured Relationships Understanding Conflict between Nomadic and Settled Communities in Wardak’s Pasturelands” (Kabul: CPAU, October 2010); “Annual Report July 1 2010 through June 30, 2011” (Texas: PEACE Project, June 30, 2011); Coffey International Development, “HMEP Focus Study Draft Helmand Provincial Conflict Assessment,” Helmand Monitoring and Evaluation Programme” (4 June 2012).

403 For example, it was mentioned earlier that NRC has actually reported a decline in land cases from 90 percent in 2007 to 44.7 percent in 2011. However the decline was unexplained and may stem from difficulties experienced by NRC in solving such cases.

404 *Shura* and *jirga* are different in that a *jirga* is traditionally convened for a specific purpose whereas *shura* are institutionalised assemblies. *Jirga* are also characteristically large meetings. In both cases all may speak but elders and notables dominate. Decisions are by consensus and unanimous. *Shura* is a non-Pashtun term meaning “to consult” while the “*jirga*” derives from Pashtunwali and means “circle,” referring to the open forum. A “judge” or arbitrator (*marakachian*) is often appointed to lead discussion.

depend on social consensus to be upheld and use an ad hoc mix of *Shari'a*, community-based views, and customary norms. In 2006, The Asia Foundation reported that up to 90 percent of disputes, both criminal and civil, were being resolved outside the formal system.⁴⁰⁵ The majority of Afghans have never been near a court.

The Oxfam survey of 2008 confirmed that the preferred institutions for dispute resolution remain these informal local forums, such as community *shuras* (23.3 percent) and tribal *shuras* (13.6 percent).⁴⁰⁶ Police were also identified as a key institution for resolution of land conflicts by 24 percent of respondents. Only eight percent of respondents said they would use courts to resolve land disputes. The least preferred institution for resolution was politicians (0.8 percent). The Sanyayee Development Organisation survey also found local *shura* to be most popular for land dispute resolution (77 percent), followed by *mullahs* (35 percent) and district governors (22 percent).⁴⁰⁷ Courts were mentioned as useful by only 2 percent. However, if dissatisfied with local level resolution, over half of respondents said they would lodge cases in the courts.

The preference for local and informal dispute resolution stems from the fact that courts and government offices are far from villages, slow in resolving cases, extract legal and extra-legal fees, cannot be relied upon to rule transparently or fairly, and may have their decisions overturned by higher courts.⁴⁰⁸ Disputants also report feeling more comfortable with customary rules, even though these may not accord with Shari'a or international law. This is commonly the case in women's rights and land issues.⁴⁰⁹

Barfield et al. make the point that both historically and in present times, customary law and customary dispute resolution forums are also ways through which citizens insulate themselves from state control, exploitation, and decisions that are beyond their control.⁴¹⁰ Courts and police have never been widely accessible in rural areas, and the civil war saw courts, police, and government offices fall into "almost total disarray, bankruptcy, and illegitimacy" as warlords set up their own courts and *shura*. Traditional village level councils of elders filled the gaps as they had done in most areas through the 20th century.⁴¹¹

Links do however continue to be forged between the formal and informal systems with judges routinely referring to community actors for information and sometimes referring plaintiffs to community mediation. District AMLAK/ARAZI offices, *Hoquq* (Legal Rights Departments), and governors are frequently called upon to endorse community decisions on land matters where these concern two hamlets, villages, or clans. The author observed this in 2008 when

405 The Asia Foundation (2006). The source of this figure was the Afghanistan Human Development Report of UNDP published in 2007, "Bridging Modernity and Tradition."

406 Waldman, "Community Peacebuilding in Afghanistan."

407 El Saman, "Linking Formal and Informal Conflict Resolution."

408 Noah Coburn, "The Politics of Dispute Resolution and Continued Instability in Afghanistan," Special Report (United States Institute for Peace, August 2011); Stefanie Nijssen, "From Dispute to Resolution: Managing Land in Afghanistan," (Civil Military Fusion Centre, October 2011); Reed and Foley, "Land and Property"; Deschamps and Roe, "Land Conflict in Afghanistan"; "Afghanistan in 2006: A Survey of the Afghan People," (San Francisco: The Asia Foundation, 2006); "Afghanistan in 2007: A Survey of the Afghan People" (San Francisco: The Asia Foundation, 2007); Thomas Barfield, Neamat Mojumi and J. Alexander Thier, "Potential for Co-existence of the Formal and Informal Systems," in *The Clash of Two Goods State and Nonstate Dispute Resolution in Afghanistan* (USIP, 2006); "Bridging Modernity and Tradition" (Kabul: Afghanistan Human Development Report, 2007); Deborah Smith and Jay Lamey, "A Holistic Justice System for Afghanistan" (Kabul: AREU, December 2008); Deborah Smith with Shelly Manalan, "Community Based Dispute Resolution Processes in Bamiyan Province" (Kabul: AREU, December 2009); "Proceedings of a Roundtable Discussion on Community Based Dispute Resolution" (Kabul: AREU, 14 February 2011).

409 An often-cited example is the customary practice of *bad dadan* in Afghanistan, which involves the transfer of a daughter to a murder victim's family.

410 Barfield et al., "Potential for Co-existence," 183.

411 Barfield et al., "Potential for Co-existence," 176, describes the origins of the formal justice system in Afghanistan beginning with Abdur Rahman's "Fundamentals for Judges," which guided judges and established the Hanafi school of *shari'a* as the basis for judicial decision-making, and in which he made himself a chief cleric. He controlled the clerics through vetting and appointments, to serve his own will. "Abdur Rahman established a dichotomy in the Afghan court system that persisted for a century. Religious courts headed by *qazi* were responsible for civil law and state courts granted jurisdiction over specific areas, such as crimes, commerce and taxation"

following resolution of several major inter-village land disputes concerning pastures where the contesting villages jointly drafted agreements for the Yakawlang District Governor to witness.⁴¹²

The new ARAZI has now created a Land Dispute Resolution Department and taken the extraordinary step of proposing that this will be the only legal entity for submission of complaints and resolution of land disputes in the country.⁴¹³ This can hardly be acceptable to communities or courts. It also contradicts the pledge of ANDS (2008) to recognise CDCs and other non-state actors as sites for dispute resolution⁴¹⁴ for which a draft national policy was prepared in 2009. Like so many policy documents, this was not made into a formal decision and has not been applied.

In the interim, hybrid commissions have evolved with donor financing to tackle inter-clan and state-people land disputes.⁴¹⁵ These provincial *jirgas* combine independent mediators and local tribal representatives working with the governors. In a period of 18 months in Khost, 18 mostly land related cases were resolved, 10 were processed, and three referred to the provincial court.⁴¹⁶ District-level Peace *Shuras* have also had some success and may be longer lasting, if mediators were not paid a fee to participate. These mediators tend to come from the courts, depleting those institutions further.

However corruption appears to afflict every form of formal and informal land dispute resolution. Even at local level, villagers and agencies complain that a shura tends to rule in the favour of the litigant who pays most.

412 Alden Wily, "The Pasture Story."

413 Article 4 (1) of proposed revised Land Management Law, December 2012 (SY 1391).

418 ANDS, 2008: 125-26.

415 TLO, "Between the *Jirga* and the Judge. Alternative Dispute Resolution in Southeastern Afghanistan," (Kabul: The Liaison Office Brief/1, March 2009); Shahmahmood Miakhel and Noah Coburn, "Promoting Stability and Resolving Provincial Disputes"; TLO, "Building Dispute Resolution Institutions in Eastern Afghanistan, Lessons from The Liaison Office Justice Shuras in Paktia and Nangarhar"; TLO, "Building Dispute Resolution Institutions in Southern Afghanistan Lessons from The Liaison Office Justice Shuras in Helmand, Uruzgan, and Nimruz."

420 Coburn, "Politics of Dispute Resolution"; Zuhail Nesari and Karima Tawfic, "The Kabul Courts and Conciliators: Mediating Cases in Urban Afghanistan," USIP Peace brief 101, (USIP, 2011); Noah Coburn and John Dempsey, "Informal Dispute Resolution in Afghanistan," USIP Special Report, (USIP, 2010).

8. So what changed during the decade?

8.1 Looking on the bright side

Looking back over the decade, no major changes stand out, other than belated draft legal proposals in late 2012. Improvements in land governance have been partial and disconnected. Minor changes include shortcuts that have been instituted in land registration procedures in some areas, useful for those with the means to pay the fees and pursue the procedures. Forms are easier to read, since they are now available in Dari and Pashtu, not just Arabic. The record base of the court archives has been tidied up. Cadastral survey is being undertaken once again, at least to specific orders and by an increasing number of trained surveyors.

Local, and especially international, investors now find it easier to access land on extremely favourable terms. They can lease lands for 50 to 90 years. A number of laws afford investors high levels of support and protection. The legal objective to promote an investor-friendly property environment has certainly been met. This is arguably the prominent achievement of the decade. Procedures for mining and hydrocarbon exploration and extraction that aim to make this more transparent have also advanced. Where donors are involved, those affected by evictions have managed to get reasonable compensation for the lands which they can prove as their own. There has also been acknowledgement and support for customary and localised mechanisms for resolving land and property disputes.

A clear achievement has been the introduction of natural resource management and conservation into public land agenda. National parks are being created. Integrated land and resource management has strongly emerged in policy, practice, and forward programming.⁴¹⁷

For ordinary Afghans, recognition that forests, rangelands and water resources can only be rehabilitated through community-based approaches signals a substantive policy shift. As with so many elements of post-Bonn Afghanistan, the role of local and international NGOs in realising community-based pasture management has been critical. Fortunately, several of these INGOs have worked through tumultuous decades and are less likely than others to cease operations should insecurity increase. Community mobilisation to implement the strategy may also lay paths towards eventual recognition of forests and pastures adjacent to settlements as rightfully the property of those communities. Although much of the Bonn decade has been spent resisting this change, the proposed new land law provides last-minute opportunity for this to be further developed in the form of Special Village Lands.

It may also be concluded that the Bonn decade ends with higher tolerance to informal settlements created by the poor if not those established by private entrepreneurs. There is consensus that the former should be upgraded and occupancy regularised rather than demolished. This suggests an emerging compromise between refusing to acknowledge illegal housing estates and penalising the poor who have been forced to occupy public lands for the lack of alternatives.

Slim but important foundations for potential evolution of community-based land governance in both rural and urban spheres have also been built over the decade, although with resistance from the land sector. The CDCs of the National Solidarity Programme (NSP) were early steps towards this. Although these have not been promoted into formal community governments, they retain the potential to evolve in this direction. On paper at least, their functions include local land and property governance, as encapsulated in the cogent plan for sub-national local government development drafted but not pursued.

Again, the last-minute inclusion of Village Land Commissions in the proposed amendments of the Land Management Law could open a door to obtain greater say and role in governing local land

⁴¹⁷ Government of Islamic Republic of Afghanistan, Agricultural and Rural Development Cluster, "National Priority Program 1 National Water and Natural Resources Development Program," Kabul, Draft for Consultation, 7 September 2012.

relations, including allocation of lands in their vicinity. Assuming that the Parliament approves this new institution, this development, along with possibilities for communities to own not just use local grazing and forest lands, could see Afghanistan land relations begin to turn a corner.

8.2 The harsher realities

Each of the above is counterbalanced by severe weaknesses. For example, setting aside routine disputes, land conflicts continue to afflict relations and continue to demand attention precisely because their drivers are not being removed. The need for more forums to resolve disputes reflects their rising number. Forum shopping has become problematic in resolving land disputes, to the benefit of those with means to travel and engage with mediators, judges, and officials. The fact that even some of the most local and traditional *shura* are afflicted with rent seeking does not bode well for fair land and property relations.

Citizens will have greater roles in natural resource management, but setting aside provisions relating to Special Village Lands, there is still no legal or policy acknowledgement that most of the off-farm estate of Afghanistan is already customarily owned by the rural population and that the claims of the State to off-farm lands must accordingly be revisited. Special Village Lands, should legal support for this materialize, will probably be few, scattered, and limited in size.

Compensation will be paid to those evicted by rapidly expanding mining projects, but only for house and farm assets, not for the invaluable off-farm lands they possess customarily. Without a clear definition of what constitutes rights, the possibility of wrongful eviction of the poor without due compensation, has risen, not declined, in direct proportion to the predicted expansion of the private investment sector. With 90-year leases under their belt, elites and genuine investors could become the source for massive dispossession of not one, but up to five generations of local villagers.

Formalising legal title has also become easier but only for the minority who have the means to pursue this. Favouring state agency over private surveying is well intended, but so long as the President controls its functions and transparency concerns arise, the benefits are lost.

The absence of real reform in a decade is inescapable. This is doubly discouraging in light of the millions of dollars and hours of time which officials, advocates, donors, researchers, planners, and project implementers have invested in land tenure and administration reform, and the promise of change made in bold statements and planning commitments such as ANDS. Time and again the state has considered policy, legal and structural changes, and even pronounced these, but not followed through. At the time of writing, the five-year-old National Land Policy (2007) is unknown to many and endorsed by only a handful of decision-makers. Innovative Urban Regularisation Policy (2006) faded away, and the critical Local Governance Policy (2009) remains in draft form. The commitment of the Afghan State to decentralisation is highly uncertain. Periodic issue of orders such as the recent one requiring identification of *shahrak*, have also led to no action.

Despite at least US\$100 million being invested by one donor alone to bring land administration and norms into more workable forms, little has been achieved on that front. It could be argued that the new land authority is notable for its new name (ARAZI), its fine new building, and its focus on leasing to investors, not for transforming land governance in ways which will be relevant to the majority or even be applied outside Kabul. Transparency in the sector has not visibly improved. "Land grabbing," first reviled by the Administration in 2002, has multiplied over the decade, and appears to enjoy unwitting or deliberate collusion of the key institutions including courts and political actors. Penalties embedded in the proposed new land law chapter on land grabbing have a good chance of being ignored.

While institutional integration of court, cadastral, and administrative procedures was on the agenda in the early part of the Bonn decade, this has wilted. In late 2012, courts remain

as entrenched in their conflicting roles as issuers and keepers of legal entitlements and as judges in disputes affecting these rights. The opportunities for rent seeking are immense and active.

Nor are ordinary Afghans any closer to having their existing rights to lands formalized in secure ways than they were in 2002. Despite the rhetoric no progress has been made in transforming the mechanisms for identifying and registering property rights at a scale beyond expensive task forces operating on an *ad hoc* basis. The draft new law promises to make the process tidier and clearer but not cheaper or more accessible. This is despite obvious challenge to the system even from elites who secure documentation through patronage and privilege. Tentative acceptance of provisional entitlements for those without documentation could end up benefitting few as the system cannot be scaled up beyond limited and short-term donor-funded projects.

It does not help that the administration is internally conflicted about its commitment to change in land governance, undermining periodic surges of initiative by enthusiastic officials and the odd politician. It also does not bode well that many districts are not under sufficiently strong state jurisdiction for Kabul's directives to be adhered to in the first instance, even when sound in principle. This is painfully evident in the botched application of efforts to help returnees and IDPs recover lands they lost in the past, and the provision of new lands through settlement schemes. Failure in planning and delivery, and vulnerability to corruption has been at consistently astounding levels.

Legal change in the sector has been equally disappointing. Efforts to give land rights stronger constitutional protection failed early on (2004). Changes made to the key Land Management and Expropriation Laws have so far been inconsequential or skewed in favour of the minority investor community. On the other hand, most recent proposals crafted by the new ARAZI with inter-ministerial backing could signal the beginnings of change over the coming decade. Unfortunately, while tantalising, even these glimmers of reform lack the structural elaboration necessary to make them workable, if should they be approved. Additionally, everything depends on sustained commitment by the new leadership in ARAZI to see positive changes through, and this has a narrow base in terms of personnel. The more likely outcome is that the handful of individual officials leading the way will tire of the resistance, and business as usual will continue. The gap between what is written in laws and reality for most Afghans will continue to widen.

The reality is that little has changed for the better from the perspective of the majority of people. Few outside the capital are aware of the new but fragile spirit of reform discernible in the new Land Authority or the Independent Directorate for Local Government. Practically, land entitlement is still afflicted by a document-centred regime in a context where the majority do not possess these documents. Arbitrary eviction is still a major risk for informal settlers, and for those whose areas will be exploited for minerals, oil, or private housing developments over the next decade. Policy pledge to equitable land rights without discrimination on the basis of ethnicity, gender, religion and social status is far from realised, anymore than the constitutional pledge to "legal protection of peaceful enjoyment of use and ownership rights." Opportunities for allocations of government and public lands remain open-ended in their reach and far from being equitably available.

8.3 Structural failures

Institutions matter and this is clearly evident in the structural failures which underwrite most of the above. Symptoms include:

- i. A complex unaccountable and inaccessible, therefore inequitable method for recognising land rights in a system which remains dependent on the court-certified evidence of ownership.

- ii. Discriminatory denial of customarily-held communal rights to off-farm resources affecting upwards of 30,000 rural communities. Recognition of these communal rights could offer a route out of poverty in these communities, if only through returns they would gain by being legally able to lease these lands to investors, or by being properly compensated for the loss of those lands when Government takes them for national purposes.
- iii. Sustained over-centralisation of control over landholdings, an exceptional level of presidential prerogative, combined with appropriation of most of the country as *de jure* or *de facto* State property, resulting in a conflict of interest in the Government's role as regulator and protector of its citizen's rights.

A slim foot in the door to possible tenure reform

One of the features of the decade has been resistance to pro-poor land tenure reform. It is gratifying that the decade ended with a sudden concession to long-advocated restructuring of tenure into state, private, public/*mar'aa* and community lands (in the form of Special Village Lands). It has been noted several times in this paper that this is a single beacon of light in a grim decade of land relations, and one which is yet to be embedded formally. Although this proposed legal provision has not been structured in ways which will make the securement of Special Village Lands routine, it does provide a foot in the door towards fuller recognition of customary land rights, as worthy of respect as property interests, and which constitutionally must be protected. It also signals a (slim) possibility of restitution to rural communities of their most immediate local pasturelands and forests being possible in the future, if not the millions of hectares of off-farm lands, which the State has appropriated.

This promise of structural change is closely linked to the status of customary land rights, the community-based regime through which most Afghans still define and manage their land relations, but which until now have been legally interfered with by the State or associated elites. Not incidentally, these Afghans are also the poor and near-poor. Legal protection of customary rights has not improved over the decade and is still not clearly proposed. For this, reformers would expect changes similar to those instituted in a growing number of countries confronted with the same issue whereby all rural lands in Afghanistan would be protected as customary property unless proven otherwise through fair community-state adjudication. Nevertheless, even tentative acknowledgement that communities may own more resources than their family farms could be a first step towards more comprehensive recognition of community-defined rights.

Limiting contradictions

Legal reform is never sufficient on its own even in the best of circumstances. In Afghanistan where rule of law is so weak, this is doubly so. There are also a host of missing provisions of protection, such as legal requirement that no State land is allocated to private persons without the consent of communities in the affected area, especially when the intended use of land is for a private, not public purpose.

Additionally, while concessions allowing for Special Village Lands could eventually be enacted, this is not balanced by recognition from the central state that many millions of hectares may be wrongfully classified as government or public lands. If anything, State determination to hold on to, and to recover, such lands has been energized in the last decade. Nor has there been any attempt to recognise the reality that lands being made available to investors - virgin and barren lands - fall largely within the historical domains of one or the other community.

The upshot is that despite promised concessions, the greater trend is towards consolidation of the State as the largest landowner, and limitations upon expansion of the private landholding. There has also been a great deal of investment, handwringing, and policy design to better regulate urbanisation, but with remarkably little effect. In 2012, there is still no formal legal procedure to distinguish between those who genuinely have nowhere else to live or have acquired land parcels through what they understood to be lawful means, and land grabbers who have used force, patronage and manipulation of legal processes including post-dated regularisation to secure land. Nevertheless, the numbers of poor informal settlers can be expected to multiply.

8.4 Demise of social responsibility

After Bonn, it could not be expected the new administration would restart the farmland redistribution reforms that most Afghans believe had contributed to the civil war and purposely revoked by 1990 as it had been a resounding failure in most respects. On the contrary, returning lands to original landlords was high on the agenda in 2002 much as it had been through the 1990s. Social provision settled back to the traditional obligation of the state to issue lands to the needy in schemes from its own massive stock of lands, and for which beneficiaries are to pay in instalments. The legal arrangements for this in proposed amendments to the Land Management Law (December 2012) do not suggest this will be easy for the poor. Additionally, those granted lands in the past would lose lands they have been legally occupying since the 1980s if they are still unable to pay for this state munificence.

Post-Bonn schemes have not learned lessons from implementation of past schemes. Providing land without adequate water, tools, seeds and facilities makes sustainable settlement difficult. Site location is poor. Nor do existing local communities take kindly to schemes being located on lands they consider customarily their own. Angry disputes result, and schemes end up failing or being put on hold.

The commitment of the post-Bonn administration to seriously deliver lands to the rural poor is doubtful. Indeed, if the proposed terms of the new Land Management Law hold, legal obligation to do so is quietly dropped, making this a voluntary act of government notwithstanding constitutional declamation of duty in this matter.⁴¹⁸ In addition, those who already own land but live in the vicinity will also have access to these parcels if they can secure the support of local leaders. This could open the way for settlement schemes to be even less pro-poor than is already the case.

It was suggested earlier that returnees and IDPs prefer to be granted parcels in towns and cities where they are closer to economic opportunities, schools and health clinics and shops. The same case could be made for other landless, homeless and jobless people, including Kuchis without livestock, and who may now be settling in and around towns out of preference, not only necessity, to access daily paid work and education for their children. Despite the evidence of massive urbanisation of the poor and near-poor in post-conflict situations, neither the Afghan State nor advising donors have taken practical steps to promote public housing schemes in cities and towns. At most, the State has left such developments to the private sector through the lower-end of *shahrak* developments. However, beneficiaries of most *shahrak* are better-off minorities, not the poor.

On the whole, over the Bonn decade, the social land agenda of the 1960-1990 era has given way to the acceptance of landlessness, homelessness, large landholdings, unregulated tenancy in poor conditions in rural and urban areas, absentee farm landlordism, land hoarding, and idle lands and parcels. Fairer labour terms and tenure security for farm workers, tenants and long-term sharecroppers have not been advanced. Women, female-headed households, the disabled and the very poor seem as disadvantaged as in the past when it comes to securing existing occupancy or new land rights. Historical land disputes between settled and nomadic communities have been allowed to flourish instead of being addressed early on through clear and active decision-making.

8.5 A failure of democratisation

Much has been written in this paper about the unrewarded struggle of individual officials and non-state actors, including donors, to reform land administration. Three paths of change have been promoted over the decade:

- i. Institutional change to integrate and streamline land services (such as mapping and record-keeping) and transformation of entitlement towards a civil rather than judicial procedure

⁴¹⁸ For discussion of the relevant proposals in the revised Land Management Law as formulated in December 2011, and Article Fourteen of the Constitution, see Alden Wily, "Land Governance at the Crossroads."

- ii. Procedural change with regards to how property is identified and registered in ways that make it fully accessible to the entire population, including simplification and clearer protection for unregistered ownership
- iii. Structural change to decentralise authority to make land governance cheaper, more accessible and accountable, specifically through a guided and incrementally developed community-based regime, in both urban and rural domains.

Adopting community land areas as the core unit of land administration

One of the most important of these has been to pilot and advocate for a devolved approach to land governance, empowering every village and urban neighbourhood to regulate land allocation within its respective domain. Ultimately this was not pursued, despite commitments in ANDS and the Local Government Plan. And yet, this remains a logical objective as the route of land administration reform in Afghanistan, and one which could begin to be signaled by provision for each rural community to create a Village Land Commission.

If this is pursued over the coming decade, the framework would accrue in the form of distinct community land areas throughout towns and rural areas. Jurisdiction by a community would apply in these areas. This requires the development of village and *gozar* councils, in whom responsibilities and powers would be vested. In the process, the State, prominently including AMLAK/ARAZI services, would shift from being first-line land administrators to being regulators, facilitators, trainers and monitors of local level decision-making.

An early function mandated to communities would be to agree the perimeter of their community land areas with neighbouring villages or neighbourhoods. The boundary teams would jointly record decisions and receive assistance in due course for mapping each distinct area, obtaining a certificate of jurisdiction over that area on specified conditions of inclusive and fair resource management. This would be followed by a community-based exercise of identifying and adjudicating each individual/family parcel within the community land area. The details would be recorded in a Community Land Register. This information would be forwarded annually to district and national AMLAK/ARAZI records. Transactions affecting those properties would be entered into the community record. What was defined as legal would also change, enabling entitled persons to avoid the costs and travail of establishing title or transaction deeds through the courts. The entire process would be steered by incremental guidelines distributed to every village and *gozar* along with incremental empowerment to undertake functions.

As described in an earlier section, such regimes are being increasingly adopted around the world, as the means through which land governance can become more workable and inclusive. It has also been described how first stages in the approach were positively tested in both rural and urban Afghanistan during the decade and the ideas adopted as land policies in ANDS and Sub National Local Government Policy. One of the greatest tests of the next decade will be to see how far such a regime is pursued.

8.6 Looking back to see forward

This paper has focused upon internal administrative failures in securing land rights and good governance over the post-Bonn decade. Wider realities tend to have been ignored. It is necessary therefore to comment on the limited reach of the Administration over the country, especially since the rise in insurgencies and local warlord capture of control since 2007. The expanding poppy industry has also taken its toll, along with political manipulations that cut across traditional party and centre-periphery lines.

There is palpable anxiety that the country could tumble into outright civil war when ISAF forces depart in 2014. Scenarios positing fragmentation into fiefdoms abound.⁴¹⁹ Much is made of the

419 One informant told Dexter Filkins, the New Yorker journalist, that these could be between five to 30: "Mir Alam

contested ethnic nature of all institutions including ministries, the Police, and the Afghan army, and the re-emergence of ethically defined political parties with histories of warlordism. Cross-cutting groups also exist. Taliban, for example, who traditionally garner support from only Pashtuns, are now securing support among conservative Uzbek and Turkmen who are unhappy with the Karzai Administration.⁴²⁰ Support for the Taliban from *mullahs* of all ethnicities has been noted, reminiscent of their influence against the communist regimes some decades ago.

How far President Karzai and the international community including “ignorant donors” are to blame for this is periodically analyzed.⁴²¹ It could be argued that poor and deteriorating security conditions made it futile to even attempt to introduce land reforms. On the other hand, the pivotal role of land capture by strongmen (as well as elites) equally explains a need to remove the conditions and inequities associated with land. In practice, the instrument selected by the Karzai Administration to address this and other ills was simply to strengthen the authority of Kabul. This coincided with the natural revisionism of a country coming out of a long, violent, and bitter war and the conservatism of Afghan society while also resisting not just the presence of interfering foreigners but also their ideas.

Post-Bonn donor-led strategies

It is difficult not to see the land agenda of the Bonn decade as primarily donor-led. From the first land reform discussions led by the ADB in 2002, the mid-decade pilot initiatives, to the current demands by the World Bank for socially sound and reformist land laws as a potential precondition for support to the post-2014 government, donors have been the key players. Without foreign demands, even the talk of reform might not have existed.

However, Afghan decision makers have also quietly shelved policies and plans which do not engage them. This does not mean the decade has not seen the occasional civil servant or politician endorse donor positions, but supporters of reforms have in due course been frustrated or sidelined, or are tired of promoting changes for which there was limited political will and government capacity to deliver.

On the surface, land and property relations in Afghanistan in 2012 look chaotic. And yet both old and new patterns are visible, reflecting a typical contradiction in periods of rapid social transformation where “everything has changed and nothing has changed.”

Educated elites in Kabul bemoan the fact that the traditional reciprocity of landlords and tenants has dissolved, that life is harsher for the poor and land-dependent. But they also observe how much more mobile these poor families now are, “escaping” altogether the village and the burdensome life of farming, or sending family members to town. They ponder the liberation that cash incomes can bring yet also the difficulties of life without a job in town.

They also bemoan what they see as a dramatic decline in law and order, though they are the first to acknowledge that rule of law was weak even before the civil war. They, like outsiders, puzzle over the familiar contradiction in anarchic society wherein legality is sought and legal processes actively pursued by the very persons who de-legitimise these processes through corruption. This seems to suggest that Afghans continue to hope that one day order in land, property and other relations will eventually be restored and that ill-gotten resources will be confiscated.

The relationship of people and the state has also changed over the decade; there is less respect for authority and/or submission to it. The divide between people and government is

will take Kunduz, Atta will take Mazar-e-Sharif, Dostum will take Shiberghan, the Karzais will take Kandahar, and the Jalaluddin Haqqanis will take Paktika.” For more on this, see “After America: Will civil war hit Afghanistan?”

420 Guistozi and Reuter, “The Northern Front.”

421 Paul Fishstein and Andrew Wilder, “Winning Hearts and Minds? Examining the Relationship between Aid and Security in Afghanistan” (Boston: Tufts University Feinstein International Centre, January 2012); Suhrki, *When More is Less*.

wider than it was in 2001 in that confidence that the Afghan State can and will protect their rights seems more limited; or that it will rein in corruption and land grabbing, provide lands and houses in viable places and conditions, surrender lands and resources which it has so wilfully co-opted despite customary rights, resolve the pernicious conflict between settled communities and nomads as to pastoral rights, or protect informal and customary occupants from arbitrary eviction.

It is probably fair to say that there is wider popular awareness in 2012 than in 2002 as to demanded functions of the State, and more criticism of its failures.

It could also be suggested that the ancient tendency to build blocs and alliances against the State or other authority is as vibrant as ever but perhaps more consciously shaped around notions of rights than in the past. Land disputes turn into land conflicts with communal dimensions with increasing frequency. These in turn gather political dimensions, often ethnically aligned but more profoundly dependent upon personal interests. A host of competing drivers, defined by trade interests in opium poppy, economic privilege, and rivalries abound, which appear to have more to do with class and competing economic interests than with clan or tribal identity. In many ways these are merely new versions of old feudal rivalries, but which are segueing to increasingly segue into modern, class-based competition for rights and resources.⁴²² That is, while social land relations are embedded in pre-war forms of inequity, they also resemble more modern contestation borne of rising polarization of wealth and assets, including land.

Concentration in land ownership

The most traditional indicator of social change in agrarian societies is of the extent of concentration in farm ownership, the extent to which productive lands is owned by a minority and the extent of landlessness. Determining how far land ownership has become more polarised since Bonn requires a depth of social survey not available to this study. The National Rural Vulnerability Assessments (NRVA) of 2003, 2005, and 2007/08 are not as helpful on this as they could be. The survey does not clearly distinguish between ownership and access to farmland as tenants/sharecroppers. The survey is also limited to the village-based farming sector. Some of the greatest changes in property holding probably occur within the vast so-called state land sector, within which individuals may be accessing very large areas under lease or grants that do not appear in village records.

With these limitations in mind, it is nevertheless surprising that land concentration within the village farming sector does not seem to be increasing since Bonn. In fact, comparison of *access* to land shows an eight percent increase between 2005 and 2007/08. Fifty-eight percent and 69 percent of rural interviewees accessed farmland in 2005 and 2007/08 respectively. Urban land access had doubled in the same period, and for Kuchis access to land rose from 12 to 19 percent.⁴²³

As the term *access* does not inform whether these people are owners, or merely borrowers, renters, or sharecroppers on other people's lands, the more useful figure is that of those who had no land access at all. However, the percentage of landless also declined from 42 in 2005 to 31 percent in 2007/08 NRVA surveys.

We cannot be sure whether this is the result of improved access to land or the result of migration to urban areas.⁴²⁴ Early in this analysis it was observed that farms have continued

422 In Evans, "Once and future civil war," there is good description of how the Nahr-e-Saraj Police Force in Helmand is driven by competing narcotic thugs, former Hizb-e-Islami fighters, former communists and their children "all of whom share a history of rivalry, murder, war, and hatred that have barely been contained over the last several years". Many conflict resolution studies comment upon the complexity of social relations within villages, even in ethnically homogenous areas like Bamyan Province. For more details see Smith with Manalan, "Community Based Dispute Resolution Processes."

423 ICON Institute, "National Risk and Vulnerability Assessment 2007/8 A Profile of Afghanistan" Main Report, (Kabul: European Union, 2009).

424 Although figures on migration in the NRVA of 2007/08 do not suggest high levels of out-migration; ICON Institute, ICON

to decline in size, suggesting real land shortage when it comes to cultivable land. In 2007/08, among the 52 percent of rural families who had access to irrigated land, 70 percent had less than six *jeribs*. Even two years earlier in 2005, 74 percent of those with access to irrigated land had an average of 7.5 *jeribs* each. The majority of rural families do not have enough land to feed themselves.

Data on access to land and house is not available for 2012. The Central Statistic Office no longer conducts nationwide NRVA exercises and plans to conduct sample provincial surveys instead. The first for Bamyan Province was published in mid-2012. Seventy-six percent of all households had access to land. Farm sizes were very small, averaging less than one hectare (five *jeribs*) for more than 50 percent of households.⁴²⁵ Again, the definition of “access” is problematic, not giving us a clear picture of distinctions between owners and tenants/sharecroppers.

Nevertheless, while Afghanistan continues to be an overwhelmingly poor country (over half of all children are stunted and suffer nutritional deficiencies), the above does not paint a picture of mass rising landlessness. Nor does it reveal re-emergence of a limited number of very large private estates. It may be the case that those with means are investing not in rural lands but in urban housing estates, limited in *jeribs* but high in value. More detailed survey of properties in towns would give a clearer picture as to the extent of concentration of property. To be really useful, it would need to provide information not only on size of holdings but more crucially, on the capital and income-generation value of those estates. The fact that this is relevant in the Afghanistan of 2012 suggests that a marked transition in land and property relations occurred over the Bonn decade, that income indices could become more important than farm size.

Changing aspirations and demands

Typically, a first line of action in post-conflict countries is facilitating property restitution. In Afghanistan, this was not significantly achieved while the state continues to hold millions of hectares of land. Now several million more refugees are poised to return from Pakistan and Iran. More disastrously, the post-Bonn Administration has been unable to develop schemes that provide viable and stable housing and land to the several millions who have been unable to recover lands.

Poor site selection and corruption have been prominent factors but so too has been recurrent local resistance to allocation of local lands to returnees, IDPs, Kuchis, and other poor. This suggests that ordinary populations are less willing to accept the State’s claim to off-farm lands than may have been the case in the past. Modern communities are beginning to forcefully assert their customary claims. Communities may fail to protect local lands against armed outsiders, but this does not necessarily signal acquiescence.

Also, the post-Bonn Administration may still not sufficiently absorb the fact that society and aspirations have changed. It is no coincidence that the most successful settlement schemes are next to cities. Farming is hard work and wartime mobility opened up new livelihood and lifestyle opportunities to exiles. Surges in social transformation, triggered by the ending of conflicts, continue to create new settlements and livelihood norms, which defy presumed linear migration to towns. New social and economic links between the two are forged. Young people may work in town for a short or medium term without losing links to their rural homes. The socio-spatial dimensions of livelihood become more difficult to unpack and the nature of land demands presented may be surprising. The typical rise in post-conflict urbanisation can conceal this, whether in Liberia, Sierra Leone, Guatemala, Colombia, Angola, or South Sudan.

The answer seems to lie in providing urban housing schemes at a large scale for needy populations, including returnees and IDPs. Globally, this has proven difficult for governments

Institute, “National Risk and Vulnerability Assessment 2007/8.”

425 Central Statistics Organisation. “Bamiyan Socio-Demographic and Economic Survey Highlights.”

to do without help from the private sector. Public-private partnerships in the housing sector are not formally developed in Afghanistan. However, by turning a blind eye to private housing estates (*shahrak*) and inaction on expansion of poor informal settlements, the government contributes passively to housing provision. This may be more deliberate than it appears in recurrent but empty rhetoric against unregulated *shahrak* developments. In due course, the Afghan government will be forced to take a proactive stand on the regularisation of multiplying informal settlements and to surrender to the private sector the legal right to lead the way in developing medium and high cost housing estates and to focus itself on developing the regulatory mechanisms.

The alternative is to revive the communist era provision of medium-cost housing (provided for civil servants at the time) and to launch mass low-cost housing developments. This is unlikely to occur.

In the meantime, grievance among the poor and those wrongly deprived of lands on the edges of towns and cities could generate resentment and fuel participation in militia-led movements. One of the unhappy legacies of war is greater facility to channel frustrations into violent form, to form or join militias, and in its mildest form, to take to the streets in demonstrations that have a proclivity to become violent.

While many have moved to towns, moving does not mean that the youth set aside grievances or demands to rural land rights. On the contrary, notions of “homelands” or ancestral lands tend to grow and be defended, even by those who do not actually live in or depend upon village lands. This can be observed in other transforming and post-conflict economies. Contrary to expectations, old land grievances can be renewed and at times become stridently tribal.⁴²⁶ The bottom-line is that urbanisation does not necessarily relieve rural land grievances or demands.⁴²⁷

In Afghanistan grievances may also continue to consolidate along ethnic lines, much as in the past. Violent contestations, like the one that manifested between Hazara and Pashtun Kuchi may multiply. However, competition for land can just as easily be structured along non-ethnic lines and be linked to individual strongmen and alliance to their land grabbing ambitions. The private property enterprises of Dostum, Atta, Mir Alam and Fahim, among others, has been mentioned in this light, much as Uzbek, Turkmen and the *mullahs* might now increasingly turn to Taliban to further their own interests. The links between suspected rearming of political parties such as Hezb-e-Wahdat, Jamiat-e-Islami, Hezb-e-Islami, and Junbesh can be linked to notions of territory and property rights, but also to economic ambitions, which use rather than grow out of territorial ambitions.

It is therefore a mistake to dismiss land grievances in present-day Afghanistan as no more than periodically resurgent inter-ethnic competition for resources. This research has particularly emphasised that potential battles over land between people and the state are just as dangerous as those between competing ethnicities, or even economic classes.

State ownership of land can extend a profound wedge into social land relations and refashion these to its own advantage. In many ways, this encapsulates the 20th century history of contested land relations in Afghanistan, from which the post-Bonn State is still suffering. Historically, the central bone of contention has been the status of off-farm lands. Landholdings norms are reconstructed in new national laws that redefine customary norms as to what constitutes real property in ways that favour the state. Courts and national procedures determine what constitutes private

426 For specific country analyses, refer to Liz Alden Wily, “Land Rights in Gabon. Facing Up to the Past – and Present” (Brussels: FERN, April 2012); Alden Wily et al., “Land Reform in the Global Context”; Alden Wily, “So Who Owns the Forest? An investigation into forestry ownership and customary land rights in Liberia,” (Monrovia: Sustainable Development Institute/FERN, November 2007).

427 E.P. Thompson, an outstanding historian of the British working class observed this during the mass rural enclosures of the 19th century. The root of grievance always came back to land, he writes, and through the urban worker, who had never himself lived in the village of his grandfather, always articulate his hatred for the land’s aristocrat. For more on this, see E.P. Thompson, “The Making of the English Working Class” (London: Penguin Books, 1980), 253-54.

property and in the process weaken local powers over landholding, and therefore security of the tenure. While in theory individual holdings gain stronger recognition and security through their redefinition in national laws, lands held collectively lose support, viewed as ownerless and eventually, by default, the property of Government. There can be no surer way to disrobing local territorially-based authority.

However, this is rarely the end of the story. Such co-option of land is rarely accepted as it signals broader socio-political dispossession. Wars have been fought over this very issue. Across the African continent for example, post-colonial land grievances and claims are now distinctly patterned along the fault-line of State versus community-based tenure, or put another way, between statutory (national) and customary land law. We have seen this to be the case in Afghanistan. Acknowledgement of customary rights to off-farm resources has grown as an agenda over the Bonn decade and is not likely to recede in the coming decade. It is not inconceivable that by 2020 that customary rights in general in Afghanistan are embedded as fully protected, and whether or not they have been formally identified and registered in entitlements. If this evolves, then this will go hand in hand with devolved land administration, necessary to support community-based regulation of customary land interests.

In this light, it could be optimistically concluded that despite limited grasp of real reforms, the Bonn decade will signal dwindling resistance to acknowledgement that most of the Afghan population do already own their lands in legal ways, and that this ownership included valuable off-farm resources within their respective domains or *manteqa*. The alternative to such transitions is less happy, towards gathering conflict and land war, as ordinary citizens battle more actively for rights and resources. In 2012, the jury is still out as to which way Afghan land relations will go.

Appendices

Annex A: Main Land Papers by AREU

Alden Wily, Liz. "Land Rights in Crisis: Restoring Tenure Security in Afghanistan" (Kabul: AREU, March 2003).
Alden Wily, Liz. "Land and the Constitution Current Land Issues in Afghanistan" (Kabul: AREU, August 2003).
Alden Wily, Liz. "Land Relations in Bamyan Province: Findings from a 15 village case study" (Kabul: AREU, February 2004).
Alden Wily, Liz. "Land Conflict and Peace in Afghanistan," Paper presented on behalf of AREU to The World Bank Land Thematic Group ESSD Week Land Sessions in Washington DC, April 2004.
Alden Wily, Liz. "Land Relations in Faryab Province. Findings from an 11 village case study" (Kabul: AREU, June 2004).
Alden Wily, Liz. "Rural Land Relations in Conflict: A Way Forward" (Kabul: AREU, August 2004).
Alden Wily, Liz. "Looking for Peace on the Pastures: Rural Land Relations in Afghanistan" (Kabul: AREU, December 2004).
Deschamps, Colin and Alan Roe. "Land Conflict in Afghanistan: Building Capacity to Address Vulnerability" (Kabul: AREU, April 2009).
Grace, Jo. "Who Owns the Farm: Rural Women's Access to Land and Livestock" (Kabul: AREU, 2005).
McEwen, Alec and Brenda Whitty. "Water Management, Livestock and Opium Economy: Land Tenure" (Kabul: AREU, 2007).
McEwen, Alec and Sharna Nolan. "Water Management, Livestock and Opium Economy: Options for Land Registration" (Kabul: AREU, 2007).
Patterson, Mervyn. "The Shiwa Pastures 1978-2003. Land Tenure Changes and Conflict in Northeastern Badakhshan" (Kabul: AREU, 2004).
Roe, Alan. "Building Capacity to Address Land-Related Conflict and Vulnerability in Afghanistan. Inception Report." (Kabul: AREU, 2007).
Roe, Alan. "Water Management, Livestock and Opium Economy: Natural Resource Management, Farming Systems and Rural Livelihoods" (Kabul: AREU, 2008).

Annex B: Selection of frequently-cited works concerning Kuchi

The Carlsberg Foundation's Nomad Research Project produced a host of studies, including:
Gorm Pedersen. <i>Afghan Nomads in Transition: A Century of Change among the Zala Khan Khel</i> (Copenhagen: Carlsberg Foundation, 1994).
Frederiksen, Birthe. <i>Caravans and Trade in Afghanistan: The Changing Life of the Nomadic Harzabuz</i> (Copenhagen: Carlsberg Foundation, 1996).
Ferdinand, Klaus. <i>Afghan Nomads Caravans, Conflicts and Trade in Afghanistan and British India 1800-1980</i> , (Copenhagen: Carlsberg Foundation, 2006).
German and American anthropologists produced a great deal of writing in the 1980s, such as:
Glatzer, Bernt. "Processes of Nomadism in West Afghanistan" in <i>Contemporary Nomadic and Pastoral People: Asia and the North</i> , ed. P.C. Salzman (Williamsberg: Department of Anthropology, College of William and Mary, 1982).
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de Weijer, Frauke. "Pastoralist Vulnerability Study," (Rome: AFASU/VAM Unit of World Food Programme, August 2002).
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