



Informal settlement in Kabul

Will formal documents of title and the courts resolve all land disputes?

Land disputes in Kabul vary according to the type and location of property (formal or informal) and the corresponding documentation of title (legal or customary). The formal resolution system based on the Special Land Disputes Court resolves disputes over formal properties, which most often pertain to wealthier individuals and represent a minority of all land holds. However, Kabul has about 2.4 million informal settlers who often resort to informal community-based dispute resolution. This note takes as given that mechanisms to regularize tenure should be put in place to address insecurity but it accepts that tenure security will not resolve all disputes. Given the extent of Kabul's informal settlements and the city's projected growth rate of 5% per year, efforts should be made to ensure that the land dispute resolution system supports community-based mechanisms as an efficient way to address existing and potential conflicts, particularly over informal land.

1

Introduction to dispute resolution mechanisms in Kabul

There is a tendency to make the distinction between formal and informal mechanisms of property dispute resolution. Many owners consider both customary and court-based dispute resolution to be formal mechanisms. Conversely, they define informal mechanisms as those where no formal institutions, officials, or persons are involved and/or where no customary or legal evidence of property ownership exists. Recognized formal entities include the Special Land Disputes Court (see section 2) and officials or persons of locally acknowledged status, such as the *wakil-e gozar* or the mosque leader.

Regardless of these distinctions, mediation is an instrument used both formally and informally. Sharia, the Civil Code, the Civil Procedures Code, and relevant state laws share an emphasis upon procedures that in practice blur the distinctions between formal and informal processes. In Sharia, mediation towards reconciliation is invariably the recommended first-line dispute resolution mechanism.

Interventions of local bodies such as Shuras and local leaders is the second line of dispute resolution. Court action is the third and final dispute resolution mechanism recommended by the codes.

In practice, the courts, dispute commissions, and other formal institutions prefer that complainants settle their grievances out of the courts whenever possible, and many of the cases that formal

institutions address are resolved through mediation. For instance, the Attorney General's Office in Kabul Province mediates around one third of all submissions itself and only one quarter of cases accepted for investigation are eventually forwarded to the courts. The actual purpose of the Hoquq department in the Ministry of Justice is mediation. Even judges in the Special Land Disputes Court make mediation between parties their first objective.

Thus, the real distinction that should be made in applying dispute mechanisms is an assessment of whether or not that dispute is most suited for community-based interventions based on mediation (for example, boundary disputes and right of way) as opposed to a court's (formal) resolution. Another key factor determining which type of mechanisms for dispute resolution can be applied stems from the nature of the community. Efficient community-based procedures require that both parties to the dispute should agree to submit to the will of the advisers. Social coercion is also required for the decision to be acted upon. Predictably, where community identity and force are weak, disputants are less bound to submit to decisions.

2

Titles and resolution mechanisms in formal settlements

Titles in formal settlements

Evidential documentation of ownership falls into three categories: (1) legal deeds, (2) customary deeds, and (3) unofficial deeds. Legal deeds are documents prepared by the courts endorsing inheritance, purchase, gift, or other transaction of a property. They are typically held by wealthier owners in respect of better-quality buildings.

Customary deeds are documents countersigned by wakil-e gozars. Unofficial deeds are those unrecognized by local leaders (see section 3). Alternatively, tax paying and haqaba (water rights) documents can provide valid evidence of ownership when the land is noted in the original book of registration and taxation, and when the documents are officially issued.

According to a survey taken among wakil-e gozars and residents in eight gozars, legal deeds are unusual and only accounted for between 5% and 30% of all titles, except in Naw Abad Deh Afghananan (District 2), where they amounted to 75% (see Table 1). In line with the fact that the more valuable the property the more vulnerable it is to wrongful occupancy, the more formal the documentation the more vulnerable it is to formal dispute and to alteration. According to Norwegian Relief Council (NRC) records, 71% of disputed cases of ownership put before the Special Land Disputes Court involve claims of the better off. Thus, the issue of legal deeds does not seem to be directly related to security of tenure and to the resolution or elimination of property disputes.

Official procedures: the Special Land Disputes Court

The Special Land Disputes Court was instituted to specifically deal with private persons who are returnees or internally displaced and who seek to retrieve private properties of which they have been unwillingly deprived during the period since 1978. Neither the government nor its agents can use the court to seek restitution of nonprivate property. The court's structure has been modified since 2002 and today it consists of 18 judges operating in two courts, one for Kabul and one for the rest of the country. A second-level court for

appeal within the overall Special Court has been established as well.

Gozar	Legal Deeds (Qabala Sharia)	Customary Deeds (Qabala Orfi)	Informal Deeds or No Deeds
Den Donar in District 7	< 20%	80%	0
Siah Sang in District 8	7%	63%	30% (post 2001)
Chel Soton in District 7	30%	70%	0
Sar-e-Tapa in District 7	5%	60%	35% (post 2001)
Mula Bozorg in District 7	28%	42%	30% (post 2001)
Naw Abad Deh Afghananan in District 2	75%	19%	6%
UN-Habitat Project site in District 6	'few'	'most'	0
UN-Habitat Project site in District 7	'some'	'most'	

Sources: *Wakil-e gozar and residents.*

The Special Court is failing to deal swiftly or effectively with claims. Despite its statutory requirement of resolving cases within two months, only 5% of all cases registered have been resolved and an acute dissatisfaction with the rulings prevail.

The main impediments affecting the efficient functioning of the Special Land Disputes Court include the following:

- The court lacks the capacity to deal with an increasing number of cases.
- There is lack of coordination with other state agencies, particularly the police, as a result of which enforcement of decisions is problematic (the police are typically bribed by wrongful occupants to claim they cannot be found).
- There are many difficulties in the numerous cases where property has passed through the hands of several

owners, each of which is seeking compensation.

- Since the establishment of the right of appeal, an astounding 80% of cases are returned by the party who lost the case.
- Cases are time consuming, particularly as many claims are based upon disputed documentation and documents need to be sent to the Documents Registry in the Supreme Court (Markhzan) for authentication.
- A common allegation made by clients is that no case will be swiftly heard or resolved without making a payment.
- Finally, judges are generally elderly and have limited legal education beyond Sharia.

The majority of Kabul's residents living in informal areas usually lack the knowledge, time, connections, confidence, and funds to bring grievances to formal institutions. They also fear eviction because of their insecure tenure.

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Titles and resolution mechanisms in informal settlements

Customary deeds

Customary Deeds (*Urfee*) of inheritance or purchase are witness-recorded documents prepared at the local level and routinely countersigned by the *wakil-e gozar* for acknowledged members of their community. Customary deeds tend to be held by middle- to low-income families for unserviced houses in unplanned settlements. They usually take the form of bills of sale or subdivision at inheritance. These deeds are the most common documents of title since they are equivalent to legal deeds but cheaper to obtain. The study shows that in all gozars except for Naw Abad Deh Afghananan (District 2), customary deeds range from 42% to 80% of all titles (see Table 1).

By statute, customary documents are admissible evidence of tenure if they were prepared prior to 1978. Legislation is ambiguous and judges normally follow their own interpretation of Sharia, which places the emphasis upon local testimony as to the truth of occupation and rights. An important article of the statute assures owners security where they have lived “for a continuing period of 15 years and possessed (the real estate) without any dispute and objection” (Article 2779). As customary documents are embedded in the community context and are admissible proof of ownership, disputes over these properties are fewer and security of tenure firmer.

Unofficial documentation

Unofficial documentation refers to documentation that is not countersigned by the wakil-e gozar or another official. Holders of unofficial documentation face the highest insecurity of all settlers. The many thousands (and possibly over a million) of newcomers who bought land and built on public lands adjacent to existing settlements in recent years are in this situation. These settlers are considered illegal and wakil-e gozar typically refuse to endorse their land transactions. As a result, these settlers do not have any embedded customary or legal deeds. In gozars where land grabbing occurred after 2001, 30% to 35% of the households have no deeds or hold informal deeds (see Table 1).

Community-based dispute resolution procedures

All informal settlers are in different ways contravening the law and they rarely contest property rights either formally in the courts or informally. Their anxiety that the case will trigger a worse effect, such as eviction, particularly affects settlers located on government land.

According to NRC data, only 14% of the cases they mediate are located on public land (versus 86% on private land) and only 31% of cases involve property in an unserviced area (69% in serviced areas). In informal areas, most disputes arise over matters such as one house invading the privacy of another, footpaths being ruined with waste disposal, and snow being cleared from one compound to another. In these instances, community-level mechanisms are the preferred means of dispute resolution because of issues of time, cost, trust, and enforceability.

At the community level, the mosque council is responsible for channeling disputes toward the most suitable forum for dispute resolution. Local mechanisms for resolution include (1) neighbors and elders; (2) the mosque councils, comprising representatives of each mosque in the neighborhood; and (3) the wakil-e gozar.

An important feature of these mechanisms is that actors are not always the same and none of those assisting in resolving the dispute are paid. No permanently standing council for dispute resolution exists, which makes them less vulnerable to bribes. Rulings tend to be satisfactory for the parties involved, making community-based procedures an effective tool of dispute resolution.

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Conclusions and policy recommendations

Recommendations on issuance of titles and conflict resolution mechanisms are outlined in this section and further developed in Policy Note 6. Lack of formal documentation of title (such as court-prepared deeds, expensive cadastral-based surveys, and registration of house plots) is not the cause of disputes since the more formal the documentation the more it is prone to corruption and hence to dispute.

Security of tenure is not premised on holding legal deeds but is primarily premised on local cohesion and social stability. Thus, although fear of the bulldozer prevails among all informal settlers, those living in middle- to low-income properties in older, unplanned, but established settlements in the city seem to have higher security of tenure. There are two important aspects of this security.

First, most of these settlers have acquired and retain their rights customarily (customary deeds of inheritance or purchase); second, and related, they live in socially cohesive environments with respected local leadership, respected local norms, and effective social sanction systems.

Customary norms provide an excellent platform on which to build accountable, reliable, and trusted systems of evidenced ownership. Such informal and local systems will be more readily available to the mass of urban owners.

In practice, both formal and informal (or official and community-based) processes have an essential role to play in land disputes resolution, determined by factors such as the nature of the case, its location, and resolvability. Because they are interconnected, formal and informal mechanisms are usefully upgraded together. Public confidence in achievable justice in the courts is an important backdrop to successful community-level dispute resolution.

At the formal level, improving court procedures, performance, and public accountability will lead to expedited and fairer resolution of existing disputes. Better court performance will also help limit the rising number of new disputes. The logical target for both procedural and governance support is the Special Land Disputes Court, which is a manageable and

usefully discrete unit with which to begin reform and accountability. Professionally planned and executed support and monitoring will have an impact on public confidence in the state and rule of law that far outweighs the number of cases the court actually handles. New and more publicly available systems of record-keeping will also be key elements of reform.

At a community level, the large number of city dwellers living on government land with no security of tenure (by customary evidence or rightful acquisition or otherwise) are a policy challenge to the government. Practically speaking, the scope for advancing cheaper and more localized community-based systems for the issue and maintenance of evidence is very high. Such a system could build upon the existing customary traditions of evidencing. However, the system should avoid formalization of local traditions in ways that reduce the advantages of being local, grassroots, and essentially informal.

Local community-based systems should be launched and tested in selected districts and should involve *wakil-e gozars*, mosque councils, and other informal institutions such as committees formed at community level. The articulation of clear procedures that community members, committees, and leaders may adopt to maximize fair resolution of conflicts will help raise the status and authority of informal mechanisms. Training in basic legal principles and mediation and reconciliation process would be helpful.

The Judicial Commission has begun drafting a "Peace Councils Law" to assist community-based reconciliation among disputants. The draft Law takes into consideration local norms, human rights, local laws, and Islamic values, and is intended to reduce the introduction of new

cases into the courts. These efforts should be continued.

Community-based mechanisms can heighten reliability and accountability of records, and also enable thousands of families to secure their occupancy cheaply and relatively quickly.

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