

**Land Governance Assessment Framework  
(LGAF)  
Afghanistan**

**Final Report**

**December 2015**

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## 2. Acronyms

ACCI - Afghanistan Chamber of Commerce and Industries  
AGCHO - Afghan Geodesy and Cartography Head Office  
AIHRC - Afghanistan Independent Human Rights Commission  
AISA - Afghanistan Investment Support Agency  
ALCO - Afghanistan Land Consulting Organization  
AMLAK - A dedicated land administration authority, named AMLAK was established within the Ministry of Finance (predecessor of ARAZI)  
ANDMA - Afghanistan National Disaster Management Authority  
ANP - Afghan National Police  
ARAZI - Afghanistan Independent Land Authority  
CCM - Community Coordinating Mechanisms  
CDC - Community development council  
CEO - Chief Executive Officer  
CRA - Cooperation for Rehabilitation of Afghanistan  
CSOs - Civil society organisations  
CSO - Central Statistics Office  
DDR - Disaster Risk Reduction  
DFID - Department for International Development  
EITI - Extractive Industries Transparency Initiative  
FML - Forest Management Law  
GIZ - Deutsche Gesellschaft für Internationale Zusammenarbeit  
GDMA - General Directorate of Municipal Affairs  
GDP - Gross Domestic Product  
GIS - Geographic Information System  
GPS - Global positioning system  
HOOAC - High Office of Oversight and Anti-Corruption  
ICLA - Information, Counseling and Legal Assistance (NRC project)  
ICSID - International Centre for Settlement of Investment Disputes  
IDLG - Independent Directorate of Local Governance  
IDP - Internally displaced person  
IFMS - Integrated Financial Management System  
IGO - International Government Organization  
ILAC - Information and Legal Assistance Center  
INGO - International non-governmental organisations  
IWA - Integrity Watch Afghanistan  
JICA - Japan International Cooperation Agency  
LAL - Land Acquisition Law  
LAMP - Land Administration Management Project  
LARA - Land Reform in Afghanistan  
LEL - Land Expropriation Law  
LGAF - Land Governance Assessment Framework  
LML - Land Management Law  
LOJJ - Law on the Organization and Jurisdiction of Judiciary  
LTERA - Land Titling and Economic Restructuring in Afghanistan (USAID programme)  
MAIL - Ministry of Agriculture, Irrigation and Livestock  
MAU - Municipality Property Office  
MEC - Independent Joint Anti-Corruption Monitoring and Evaluation Committee  
ML - Minerals Law  
MoE - Ministry of Education  
MoBTA - Ministry of Border and Tribal Affairs  
MoEW - Ministry of Energy and Water  
MoF - Ministry of Finance  
MoHE - Ministry of Higher Education  
MoI - Ministry of Interior  
MoJ - Ministry of Justice  
MoMP - Ministry of Mines and Petroleum  
MoPH - Ministry of Public Health  
MRRD - Ministry of Rural Rehabilitation and Development

MoRR - Ministry of Refugees and Repatriation  
MUDA - Ministry of Urban Development Affairs  
NATO - North Atlantic Treaty Organisation  
NEPA - National Environment Protection Agency  
NGO - non-governmental organisations  
NLP - National Land Policy  
NRC - Norwegian Refugee Council  
NRVA - National Risk and Vulnerability Survey  
NUG - National Unity Government  
PTRO - Peace Training and Research Organisation  
RAMP UP - Regional Afghan Municipalities Program for Urban Populations  
SIGTAS - Standard Integrated Government Tax Administration System  
SNAP - Strategic National Action Plan  
TLO - The Liaison Office  
UN Habitat - United Nations Human Settlements Programme  
UNAMA - United Nations Assistance Mission in Afghanistan  
UNCITRAL - United Nations Commission on International Trade Law  
UNDP - United Nations Development Programme  
UNEP - United Nations Environment Programme  
UNHCR - United Nations High Commissioner for Refugees  
UNICEF - United Nations Children's Fund  
US - United States  
USAID - United States Agency for International Development  
USD - United States Dollar  
USIP - United States Institute of Peace

### 3. Executive Summary

#### 1. Introduction

In the past decade, land and control of resources have been a significant aspect of government and donor concerns in Afghanistan. In the light of social transformations, increased demographic pressure, displacement, and economic evolutions, land is indeed more than ever at the heart of economic and social considerations. At the same time, the legal framework for land governance remains incoherent in many aspects and ill-suited to the Afghan reality, and administrative structures with responsibility over land both lack clarity in repartition of responsibilities, and appear under-capacitated to carry out their mandate.

The Land Governance Assessment Framework (LGAF), developed by the World Bank in partnership with FAO, IFAD, IFPRI, UN Habitat, the African Union, and numerous bilateral partners, is a diagnostic tool to assess the status of land governance at country level using a participatory process that draws systematically on existing evidence and local expertise rather than on outsiders. There are nine key general areas of a country's good land governance that LGAF focuses on. These areas have traditionally often been dealt with in separation from each other. LGAF aims to bring these into one framework. For these nine focus areas, a series of land governance indicators, each divided into several dimensions, have been selected based on international experience. For each dimension, pre-coded statements are given for scoring (from best practice = A to weak practice = D), again based on international experience (please see the Consolidated Scorecard in the section 5 of the full report and at the beginning of the each sub-section in the section 9). It is also important to note that due to a number of specificities of the Afghan context, some of the indicators and terminology had to be adapted in order to be able to capture the realities of land governance in Afghanistan. These include mainly the key areas dealing with the public land and its allocation to private interests (please see the detailed modifications in the Annex II of the full report).

Implementation of LGAF happened in a number of steps:

- Preparation
- Background documentation (nine panel reports): To provide the common basis of information that is indispensable as a basis of consensus on rankings or priority actions, three sets of written outputs are needed.
- Expert/subject matter specialist panels: Intensive work sessions of between half a day and a full day per topic, consisting of five to eight subject matter experts and users of land systems from different backgrounds. They discuss each of the dimensions in detail to arrive at a consensus ranking and agree on policy priorities.
- Synthesis country report: All material (background documentation, tenure typology, institutional map, background reports and the panel minutes) is synthesised in a well-structured report to be shared widely.
- Country level validation and policy workshop: The Country report is reviewed by experts to provide input. These results are incorporated and the report is presented for a National workshop to have results validated and prioritise policy conclusions and associated monitoring indicators for presentation to key policy-makers during a policy workshop.

#### *Legal framework*

The Afghan Constitution of 2004 established a legal framework for property rights safeguarding the right of individuals to own property, stating property shall be safe from violation, no one shall be forbidden from owning and acquiring property, except by law, and private property can only be confiscated by legal order (Article 40).

Legislation for classification of land tenure is comprised of over 30 laws and decrees including the following: Civil Code, Presidential Decree 83 of 2003, Presidential Decree 99 of 2002, Land Expropriation Law of 2000, Survey and Cadastre Law of 1988, the Law on Pastures and Mara'a of 2000, Forest Law of 2012, Municipal Law 2000, Mineral Law 2015, Land Tax Law of 1976 and Income Tax Law 2007. The Land Management Law (LML) of 2008, which is currently before the Ministry of Justice for further amendments, is probably the most comprehensive one dealing with range of land issues. Afghan land laws, however, sometimes contradict each other on the classification of state, public and private land and various other issues.

National Land Policy (NLP) was adopted in 2007 containing international best practices and constituted a major improvement in Afghan land administration if implemented. Unfortunately, neither the LML of 2008 nor any other laws which were enacted after 2007 take the NLP into account, leaving the operationalisation of different provisions an unfulfilled promise.

### *Land Tenure Typology*

The situation of land tenure in Afghanistan remains opaque, with an ill-suited legal framework, inconsistent legislation, unclear delimitation of boundaries and conflicting definitions of property, including between the State and private entities (individuals and communities) contesting the State's presumption of ownership over land. Patterns of land tenure in Afghanistan further present significant regional variations, calling for a context-specific analysis.

Legislation for classification of land tenure primarily stems from four sources of law: the Civil Code, Presidential Decree 83 of 2003, the Land Management Law (LML) of 2008, currently under revision, and the Shari'a. These, however, sometimes contradict each other on the classification of state, public and private land. The presence of what may be considered residual legislation, such as the Taliban-era Rangelands Law, along with non-legal government documents which proffer land classifications, such as the Ministry of Agriculture Master Plan, further exacerbates this lack of clarity.

There is general agreement among authors of studies on land tenure in Afghanistan that the current legal framework is both incoherent and unsuitable to the reality of land tenure and land use in the country.<sup>1</sup> Whereas we have observed at least eight types of land based on field research<sup>2</sup>, the legal experts agree on three primary types of ownership based on the Afghan legal framework, with different outcomes for their transferability:

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<sup>1</sup> See, for instance, Yohannes Gebremedhin, "Legal issues in Afghanistan's land titling and registration" (Kabul: USAID, Emerging Markets Group, 2005); Wily "Land, People and the State."

<sup>2</sup> Collectively held land without documentation, collectively held land with customary documentation, collectively held land with title issued by a previous government regimes, individually held land without any title, individually held land with non-recognised title, individually held land with state title from a pre-Karzai regime, individually held land with title from the Karzai and Ghani regime and land owned by the State (versus public land).

Type of land	Legal basis	Sub-categories	Type of rights	Ownership and responsible organization	Key challenges
Private land	Legal code	<ul style="list-style-type: none"> <li>Collectively held land without documentation, with customary documentation and with documentation issued by previous government regimes</li> <li>Individually held land without title</li> <li>Individually held land with non-recognised title (customary title deeds and other informal records)</li> <li>Individually held land with state formal title (from various regimes)</li> </ul>	<ul style="list-style-type: none"> <li>Sold, transferred inherited</li> <li>Compulsory acquisition possible only for public welfare projects</li> </ul>	Individual or legal persons (ARAZI)	<ul style="list-style-type: none"> <li>Limited possibilities for tenure formalisation</li> <li>Formerly displaced people and refugees who find their lands occupied are unable to reclaim them back</li> <li>High number of informal settlements in urban settings</li> <li>Some privatised land is perceived as having been acquired by “grabbing” state or public land</li> </ul>
Public land	No clear definition in Afghan law	<ul style="list-style-type: none"> <li>Pastures - allocated for public use (collectively held) (MAIL)</li> <li>Forests (MAIL)</li> <li>Graveyards, entertainment parks, roads, green areas, playgrounds (Municipalities)</li> <li>Schools (MoE); universities (MoHE); hospitals (MoPH)</li> </ul>	<ul style="list-style-type: none"> <li>Cannot be sold nor leased, transferred or exchanged</li> </ul>	Municipalities (within the Master Plan), Ministries and ARAZI (manages all lands outside of Master plan)	<ul style="list-style-type: none"> <li>Includes lands under ancestral customary rights incl. pastures/forests - ownership is contested between either state or public</li> <li>Art. 3(8) of LML 2008 and Decree 83 blur boundaries between state and public land by putting emphasis on formal documentary proof of ownership</li> <li>Law does not define public land and has no provisions on registering “public land”; reason why public land is easily claimed as state property and reassigned subsequently to private parties</li> </ul>
State land	Registered as state land and any land that is deemed public but is not registered in the book of government	<ul style="list-style-type: none"> <li>Forests (MAIL)</li> <li>Protected land</li> <li>Arid and virgin land</li> </ul>	Only arid and virgin land can be leased or sold provided certain conditions (forests and protected land)	Governmental institutions and ministries (ARAZI)	<ul style="list-style-type: none"> <li>Lack of adequate mapping</li> <li>Some privatised land is perceived as having been acquired by “grabbing” state or public land</li> </ul>

	lands		cannot transferred)	be		
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## 2. Presentations of substantive findings per topic

### 2.1. Land Rights Recognition

\*Please note that the text below the tables in each section does not contain all the indicators. For the purposes of the executive summary, only the main issues identified by the experts during the Technical Validation Workshop and Policy Dialogue were mentioned. The related information for all of the indicators can be found in the full report.

Pan-LGI-Dim				Topic	Score			
					A	B	C	D
<b>PANEL 1: Land Rights Recognition</b>								
<i>LGI 1: Recognition of a continuum of rights</i>								
1	1	1		Individuals' rural land tenure rights are legally recognised and protected in practice.				
1	1	2		Customary tenure rights are legally recognised and protected in practice.				
1	1	3		Indigenous rights to land and forest are legally recognised and protected in practice.				
1	1	4		Urban land tenure rights are legally recognised and protected in practice.				
<i>LGI 2: Respect for and enforcement of rights</i>								
1	2	1		Accessible opportunities for tenure individualisation exist.				
1	2	2		Individual land in rural areas is recorded and mapped.				
1	2	3		Individual land in urban areas is recorded and mapped.				
1	2	4		The number of illegal land sales is low.				
1	2	5		The number of illegal lease transactions is low.				
1	2	6		Women's property rights in lands as accrued by relevant laws are recorded.				
1	2	7		Women's property rights to land are equal to those by men.				

The LML provides for a variety of ways to establish legal ownership, based upon possession of documents (customary or formal), or long-term physical occupancy. However, in practice, only the formal method of establishing ownership appears secure.

According to Art. 5 of the LML, valid recorded deeds include:

1. Documents issued by a legally recognised court, such as: title deeds, donation deeds, bequest, division, and the decision, which is made by court.
2. Presidential decree, government degree (council of ministers) (and a land purchase document from government's properties)
3. Tax payment documents (*maylati*)
4. Water rights documents (*haqaba*)
5. Customary deeds (*asnad-e orfi*)
6. Official ownership deed (*sanad rasmee mulkyet*) - during Democratic Republic of Afghanistan, 1978 - 79
7. Official deed for land ownership issued after a legal settlement of the land (*qabala-e qatae*)

In terms of undocumented rights<sup>3</sup>, long term unchallenged possession is ensured in Art. 8 of LML, 2008. However the article stipulates that in order to prove ownership the land must be cultivated and a proof of continued ownership since 1973 is required as testified by the neighbours, *de facto* limiting claims to land acquired after that date. Considering the occurrence of wars in the period after 1973, this article is in reality of limited usage.

In terms of customary tenure rights, their recognition has been at the heart of debates concerning the discrepancy of the statutory land law with the reality of practices in rural Afghanistan, primarily based on customary norms. Article 5 of the LML, 2008, recognises the validity of customary deeds under the condition that they were prepared and submitted before August 1975. In locations where declaration forms were not distributed or the registration book was lost, the LML provides a customary deed may be recognised if there are no claims to the land, and the land

<sup>3</sup> Which will be further discussed in the next sections of the report.

purchase and the possession by the buyer has been confirmed by the landowners holding lands next to the plot, as well as by the inhabitants of the locality where the land is situated. Additionally, it is only recognised only under condition that the land seller owns the valid deed.

The fact that most properties in rural and urban areas are neither evidenced by formal deeds (it was assessed that at the time of the Bonn Agreement in 2001, court-prepared documents were believed to cover 10% of rural properties and 30% of urban properties<sup>4</sup>) nor recorded (there has been no systematic update of records since 1978) has direct implications on the effective rights of rural residents. A Social Impact Assessment conducted by the World Bank on the LML noted that the law demonstrated “strong orientation towards those with formal documentation” when 90% of Afghans have no documentation at all.<sup>5</sup> It further noted that the LML, despite provisions such as Article 8, failed to adequately spell out instances where undocumented rights could be protected.

Although at the local level, despite the absence of formal legal recognition, ownership is often well recognised and accepted by communities, according to certain provisions of Afghan law (being it mainly the Presidential Decree 83), the lands with undocumented rights are de facto the property of the state. According to the Presidential Decree 83, which supersedes all previous laws relevant to establishing ownership property rights, including through customary documents, all land whose ownership cannot be proven shall be considered under the ownership of the State. Given a) the conditions tied to the recognition of customary documentation in the LML 2008, and the difficulty to comply with those in practice; b) the absence of any type of documents for the majority of rural Afghans; and c) the non-recognition of collective tenure, representing a significant portion of customary tenure, the legal framework for customary land tenure rights appears disconnected from the reality of the majority of rural Afghans.

It is unknown how much land automatically fell back to the State. Based on the figures estimated by AREU’s earlier research, the figure could potentially be as high as 90% for rural lands (70% for urban lands).

#### *Recording/registering the land*

The majority of Afghan land remains unrecorded and unmapped with considerable regional variations. Even in the areas, however, where the rights are to various extents documented, the records have not been updated. Based on different accounts, reportedly only 33-36% of the land in the country has been formally registered, with latest records dating back to the regime of Daud Khan (1973-1978). Additionally, the last nation-wide cadastral land survey, which covered only 34% of mostly rural and peri-urban private land of the country before it was stopped,<sup>6</sup> was conducted between 1970 and 1978, and has not been updated since<sup>7</sup>.

Since the policy on how to improve land governance has changed with each regime change, there are various, and not always interlinked, ways to record and/or register land in Afghanistan. Throughout this research, we have identified three distinctive ways of registering/recording rights in Afghanistan: a) through land clearance process (*Tasfia*) with ARAZI, b) acquiring of a title deed through the courts, c) through the cadastral survey. Based on the experience of the experts interviewed for this study, the registration through ARAZI’s land clearance and the court registration through acquisition of a formal title deed are the only uncontested mechanisms of registering land in Afghanistan.

One of the reasons mentioned for low registration and formalisation is reportedly the widespread corruption of government institutions, which require the payment of bribes. Another reason mentioned was the perceived complexity of the administrative process. According to the World Bank Doing Business in Afghanistan report of 2015, it takes approximately 250-360 working days for the completion of land tenure recognition in Afghanistan<sup>8</sup>. Paying taxes also deters people from registering their property, in particular when adding the informal fees, which often have to be paid in addition to regular land taxes fees. Additionally, the lack of awareness of general public, as well

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<sup>4</sup>Wily, “Land, People and the State,” 22.

<sup>5</sup>Wily, “Land, People and the State,” 44.

<sup>6</sup> There is no data available on the types of lands that were surveyed. According to the Expert’s anecdotal understanding, all types of land were surveyed.

<sup>8</sup>“Registering property, “World Bank Group, <http://www.doingbusiness.org/data/exploreconomies/afghanistan/#registering-property> (accessed 4 September 2015).

as Afghan National Police and Army, on land issues and land rights contributes, in certain cases, to the limited land rights recognition in Afghanistan.

Due to the largely customary tenure of Afghan land with only minimal portion being recorded or mapped, the opportunities for illegal land transactions are enormous. Illegal land sales are more broadly known in Afghanistan as ‘land grabbing’ or ‘land usurpation’. Presidential Decree 45 on grabbed land policy requested the mapping of all land grabbed across Afghanistan. According to this decree, the list of land grabbers was to be compiled by all ministries from which land had been grabbed, and submitted to ARAZI. Statistics compiled by ARAZI indicate that more than 1.2 million *jeribs* of land have been usurped over the past decade.<sup>9</sup> A special Parliamentary Committee created to align a list of land grabbers with the list already drafted by ARAZI includes over 15,000 individuals who had allegedly participated in land grabbing.<sup>10</sup> However, despite the extensive nature of the problem, the current legal framework does not adequately address the crime of land grabbing.<sup>11</sup>

**Policy Recommendations:**

- The minimal limit of continued ownership and cultivation of the land needed in order for the long term unchallenged possession to be formally recognised should be decreased through the amendment of current LML.
- Customary deed documents prepared after August 1975 but otherwise meeting all the other requirements as per Art. 5 of LML 2008 should be formally recognized through the amendment of current LML.
- The efforts of various NGOs (such as TLO and Checci) to capacitate Afghan citizens on what information a customary deed document should include in order for it to be formally recognised should be further enhanced involving the government in these efforts.
- Creation of centralised (gradually computerised) system at ARAZI as one-stop-shop for land registration.
- As an interim measure, community-based land recording system should be developed, which will be later on connected to ARAZI registering system (when transferred from courts to ARAZI) and their Principal Books.
- Awareness of public, Afghan National Police and Army on the land issues and land rights has to be increased. The land governance has to be included in the teaching and training curricula for these target groups.
- ARAZI’s plans to implement National Demarcation Project identifying the boundaries of villages and *Gozars* (administrative units smaller than districts in urban areas) should be materialized. As a follow-up step the land clearance process on large scale should be restarted. The judge should be included in Tasfia delegation to deal with the land disputes, if necessary. In case of more complex land disputes, the fact that the ownership of land is disputed, should be indicated on the Tasfia report and forwarded to courts. Adequate financial resources should be allocated for this purpose from the national budget. The support in form of financial means, as well as technical expertise should be sought with international community and civil society.
- The possibility of a first-stage land clearance done by communities to enable nationwide land identification should be explored.
- The regulation proposed by ARAZI that allows for registering of urban properties should be approved promptly.
- Relevant authorities should work together to operationalise already existing efforts to incorporate a provision on land usurpation into the Criminal Code. Where appropriate, donors and civil society stakeholders should provide technical assistance to the drafting process.

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<sup>9</sup>“Public Inquiry into Land Usurpation,” 9.

<sup>10</sup>“Stolen Lands,” Note 184.

<sup>11</sup> See “Stolen Lands of Afghanistan,” 9.

- Approval and support of the draft Restitution Policy on Land Grabbing.
- Prosecution of land grabbers should be made a priority within the Attorney General's office. Similarly investigation and technical capacity to do so should be enhanced within the Afghan National Police (ANP) with the possibility to establish a special police force tasked with the protection of lands against the land grabbing.

## 2.2. Rights to Forest and Common Lands & Rural Land Use Regulations

Pan-LGI-Dim				Topic	Score			
					A	B	C	D
<b>PANEL 2: Rights to Forest and Common Lands &amp; Rural Land Use Regulations</b>								
<i>LGI 1: Rights to Forest and Common Lands</i>								
2	1	1	Forests and common lands are clearly identified in law and responsibility for use is clearly assigned.					
2	1	2	Rural group rights are formally recognised and can be enforced.					
2	1	3	Users' rights to key natural resources on land (incl. fisheries) are legally recognised and protected in practice.					
2	1	4	Multiple rights over common land and natural resources on these lands can legally coexist.					
2	1	5	Multiple rights over the same plot of land and its resources (e.g., trees) can legally coexist.					
2	1	6	Multiple rights over land and mining/other sub-soil resources located on the same plot can legally coexist.					
2	1	7	Accessible opportunities exist for mapping and recording of group rights.					
2	1	8	Boundary demarcation of communal land.					
<i>LGI 2: Effectiveness and equity of rural land use regulations</i>								
2	2	1	Restrictions regarding rural land use are justified and enforced.					
2	2	2	Restrictions on rural land transferability effectively serve public policy objectives.					
2	2	3	Rural land use plans are elaborated/changed via public process and resulting burdens are shared.					
2	2	4	Rural lands, the use of which is changed, are swiftly transferred to the destined use.					
2	2	5	Rezoning of rural land use follows a public process that safeguards existing rights.					
2	2	6	For protected rural land use (forest, pastures, wetlands, national parks, etc.) plans correspond to actual use.					
2	2	7	Rural lands, the use of which is identified for rehabilitation, are swiftly transferred to the destined use.					

Although the rights to forests and common (or public) lands in Afghanistan and the restrictions on their usage are clearly defined in Afghan legal framework, the lack of adequate law enforcement leads to their illegal usage, overexploitation and destruction. The United Nations Environment Programme (UNEP) conducted a survey in 2003 and reported an estimated 50-70% of land is being used for unspecified purposes in Afghanistan.<sup>12</sup> Taking into account the fact that there are no rural land use plans existing in Afghanistan, the usage of the forests and common lands is often unregulated.

Despite various efforts of MAIL and MRRD, natural resources including forests, pastures and protected areas are affected by the lack of a comprehensive mechanism for effective and sustainable use of natural resources. For this purpose, programmes have been developed in 2014 to manage and protect natural resources in co-operation with the public so as to build community capacity in the area of sustainable utilisation, promote a sense of ownership among the people and

<sup>12</sup>“Afghanistan Post-Conflict Environmental Assessment” (Geneva: UNEP, 2003).

motivate people to contribute to the survival of these resources. The results of these efforts still remain to be seen.

**Policy Recommendations:**

- Identifying mechanisms to promote forest management in areas which are currently out of reach of the government such as developing and empowering community based adjudication groups (comprising of elders and influential figures in the community) to address rural land use restrictions violations. One possible option would be channelling the rural land management through CDCs.
- Raising awareness of the local population about the importance of forests and other natural resources and the negative impacts of deforestation in order to encourage communities to take part in maintaining the forests, particularly in the areas where the presence of the central government is limited.
- The development of the rural land use plans by the MRRD through a participatory and transparent process where public voice can be heard and the burdens are shared.
- Prioritising surveying of natural resources identified as in high risk of degradation.
- Identifying mechanisms to promote protected areas management in areas which are currently out of reach of the government such as developing and empowering community based adjudication groups (comprising of elders and influential figures in the community) to address rural land use restrictions violations
- Expediting the process of land change to protected areas by mainstreaming the steps and organisations responsible.

**2.3. Urban Land Use, Planning and Development**

Pan-LGI-Dim				Topic	Score			
					A	B	C	D
<b>PANEL 3: Urban Land Use, Planning, and Development</b>								
<i>LGI 1: Restrictions on Rights</i>								
3	1	1	Restrictions on urban land ownership/transfer effectively serve public policy objectives.					
3	1	2	Restrictions on urban land use (disaster risk) effectively serve public policy objectives.					
<i>LGI 2: Transparency of Land Use Restrictions</i>								
3	2	1	Process of urban expansion/infrastructure development process is transparent and respects existing rights.					
3	2	2	Changes in urban land use plans are based on a clear public process and input by all stakeholders.					
3	2	3	Approved requests for change in urban land use are swiftly followed by development on these parcels of land.					
<i>LGI 3: Efficiency in the Urban Land Use Planning Process</i>								
3	3	1	Policy to ensure delivery of low-cost housing and services exists and is progressively implemented.					
3	3	2	Land use planning effectively guides urban spatial expansion in the largest city.					
3	3	3	Land use planning effectively guides urban development in the four next largest cities.					
3	3	4	Planning processes are able to cope with urban growth.					
<i>LGI 4: Speed and Predictability of Enforcement of Restricted Land Uses</i>								
3	4	1	Provisions for residential building permits are appropriate, affordable and complied with.					
3	4	2	A building permit for a residential dwelling can be obtained quickly and at a low cost.					
<i>LGI 5: Tenure regularization schemes in urban areas</i>								
3	5	1	Formalisation of urban residential housing is feasible and affordable.					
3	5	2	In cities with informal tenure, a viable strategy exists for tenure security,					

			infrastructure, and housing.				
3	5	3	A condominium regime allows effective management and recording of urban property.				

There are certain restrictions on transferability of (urban) public land; i.e., public land cannot be transferred (sold and bought) to private interests. Taking into account an unclear definition of public and state land in Afghan legal framework (this will be discussed in more details in the next section), public land can be easily interchanged with state land, thus allowing the transactions of the land that would otherwise be illegal. In terms of urban land use restrictions, there are certain land use restrictions defined in the original Master Plans of the cities. However, in most of the cases the restrictions on the land use prescribed by Master Plans, including Kabul Master Plan, are not enforced. The rampant corruption in the ranks of government and land management authorities allows for the uncontrolled usage of the land.

Following the commencement of the internationally-backed war in Afghanistan in 2001, Afghanistan’s urban land use has undergone significant changes due to, most notably, a massive influx of refugee-returnees to urban centres throughout the country and extensive rural-urban migrants searching for security and/or employment opportunities. Today, approximately a quarter of Afghans live in urban areas, rendering the topic of urbanisation at the core of Afghanistan<sup>13</sup>.

Despite having said that, policies for low-cost housing and services remain tenuous. Current provisions of LML 2008 do not specify low-cost housing offers to the poor, but instead rely on instalment schemes that typically amount to the normal (not low) cost of the land. Lack of payment can result in evictions. Nevertheless, the state land distribution schemes were developed by the government through the Presidential Decrees 104 and 1091 during President Karzai’s administration to allocate state land to teachers, low ranking public employees and returnees and IDPs. However, these are rather an exception from the general policy of not distributing the state land. Additionally, the implementation of the distribution policies, mirrored with rampant corruption and conflicts caused by unclear ownership claims of distributed land, does not serve the interests of poor Afghan population. For what is worse, the implementation of the Presidential Decree 104, allowing for the distribution of land to returnees and IDPs, has been paused in recent years.

Additionally, due to rampant corruption, extensive land grabbing and a great influx of refugees, IDPs and rural to urban migrants, building in Kabul throughout the 1990s and, more recently, the 2000s largely remain outside of the Third Master Plan, and are thus considered ‘informal’ in nature<sup>14</sup>. It is believed that 70% of people in Kabul live in informal settlements<sup>15</sup>. Indeed, with the suspension of the Third Master Plan by then-President Karzai at the request of the Minister of Urban Development Affairs, the city has no clear functioning reference for planning purposes. The lack of an updated framework for regulating the urban expansion of the largest city, Kabul, is complemented with little coordination between responsible government bodies (such as the Municipality and Ministry of Urban Development). The carrying capacity of infrastructure has been long overloaded, and the plan for land use has not been updated since 1978. Further, Kandahar, Herat, Jalalabad and Mazar-e Sharif, four largest cities in Afghanistan after Kabul, suffer from an outdated urban plan as well.

Finally, although the USAID supported MUDA in drafting Policy on Upgrading Informal Settlements, it has not yet been approved by the Cabinet. Having said that, current requirements for formalising housing in urban areas are not clear to the public, and prone to power-brokering and corruption.

**Policy Recommendations:**

- Clear mechanism for use change of each type of urban land should be devised, including the requirement of permits to do so. Municipalities should establish a monitoring mechanism for this purpose, as well as a database of land use changes, which will be updated regularly, including new spatial information.

<sup>13</sup> Ibid.

<sup>14</sup>The distinction has to be made here between Kabul Informal Settlements (KIS), pursued often by Afghan poor, and informal construction in the richest areas of Kabul city.

<sup>15</sup>“KnowingKabul: A potential powerhouse of social and economic development, ”Discussion Paper #10, UN-Habitat, March 2015.

- Zoning Law for both national and municipality purposes should be enacted.
- Long-awaited National Urban Policy and new Municipality Law have to be enacted.
- An inter-agency commission between MUDA and municipalities should be established to clearly delineate the responsibilities between these two institutions in relation to the formulation, implementation and monitoring of the master plans. In future, this commission can serve as a forum for discussion of various pressing issues such as status of informal settlements in Afghan cities.
- New Master Plans have to be developed for biggest cities in Afghanistan as per MUDAs commitments within “Big Cities Master Plan” initiative with the support of international community.
- With the development of new master plans for the biggest cities, the infrastructural needs of the population and the current state of the cities (considerably changed in comparison to 1990s) needs to be taken into account and adequate mechanisms to provide necessary infrastructure have to be developed.
- Presidential Decree 104 has to be amended (or annulled and new law should be adopted) that tackles the shortcomings of the Presidential Decree 104 such as the allocation of non-viable land and cumbersome eligibility criteria. The National IDP Policy (including Forced Eviction Guidelines) has to be adequately implemented.
- The initiatives like Maslakh, where IDPs are given the land titles, should be supported and if possible reproduced.
- The policy on Upgrading of Informal Settlements has to be approved and implemented.
- A policy on low-cost housing for the poor should be adopted. The policy should be developed in a consultative manner, with input from all stakeholders including civil society representatives, the government and the public in question itself. Additionally, anti-eviction laws should be designed (based on Forced Eviction Guidelines already existing within the National IDP Policy) with constitutional protections in mind and, in the case of eviction, a legal commitment to fair compensation should be established.

## 2.4. Public Land Management

Pan-LGI-Dim				Topic	Score			
					A	B	C	D
<b>PANEL 4: Public Land Management</b>								
<i>LGI 1: Identification of Public Land and Clear Management</i>								
4	1	1	Criteria for public land ownership are clearly defined and assigned to the right level of government.					
4	1	2	There is a complete recording of public land.					
4	1	3	Information on public land is publicly accessible.					
4	1	4	The management responsibility for different types of public land is unambiguously assigned.					
4	1	5	Responsible public institutions have sufficient resources for their land management responsibilities.					
4	1	6	All essential information on public land allocations to private interests is publicly accessible.					
<i>LGI 2: Justification and Time-Efficiency of Acquisition Processes</i>								
4	2	1	There is minimal transfer of acquired land to private interests.					
4	2	2	Acquired land is transferred to destined use in a timely manner.					
4	2	3	The threat of land acquisition does not lead to pre-emptive action by private parties.					
<i>LGI 3: Transparency and Fairness of Acquisition Procedures</i>								
4	3	1	Compensation is provided for the acquisition of all rights regardless of their recording status.					

4	3	2	Land use change resulting in selective loss of rights there is compensated for.				
4	3	3	Acquired owners are compensated promptly.				
4	3	4	There are independent and accessible avenues for appeal against acquisition.				
4	3	5	Timely decisions are made regarding complaints about acquisition.				

There is no specific definition of public land in Afghan legal code. However, the Afghan state does manage some lands which would broadly meet potential definitions of public land. According to the broad definition, the lands that have been allocated for public use and are neither the property of the state nor the property of the individual are public lands. The issue arises with Art. 3(8) of LML 2008, which stipulates that any land that is deemed public but is not registered in the book of government lands is considered state land. Additionally, Presidential Decree 83 further blurs the boundaries between state and public land by putting emphasis on formal documentary proofs of ownership. The fact that the Afghan legal framework does not define public land, does not provide provisions on how to register public land and the registration of land in general occurs rarely in Afghanistan, public land can be easily interchanged for the state land. In other words, land that is under public use and not registered can easily be claimed by the state as its property and be reassigned subsequently. Furthermore, it is prone to various illegal occupation, uses and transactions.

#### *Acquisition procedures*

The purpose of land acquisition is that lands owned by individuals are appropriated by the state with the aim to be used for public benefit in return for just compensation. In other words, land is only acquired for the execution of public welfare projects such as the construction of hydropower dams, airports, roads and other infrastructure. Due to the lack of adequate monitoring mechanisms to verify the authorised use of the land, it is not clear how much land was acquired by the state and then turned to the project with private purpose. Having said that, it is important to note that from the limited field research conducted for this study, people talked about illegal transfers of land after state acquisition processes. The availability of qualitative evidence combined with lack of state monitoring mechanism might suggest that the process of acquisition is at best highly imperfect where the illegal use of acquitted land cannot be ruled out. Furthermore, no database of acquisition processes exist, therefore it is not possible to estimate how fast the acquired land is transferred to destined use in timely-manner.

Probably the most disturbing shortcomings of the current LEL are the provisions on compensation. Compensation is provided only to people holding the legal title deed document. Considering the prevalence of informal land tenure in Afghanistan, a considerable number of Afghans are susceptible for acquisition without any right for compensation. Additionally, there is no stipulation in the LEL about the unrecorded rights such as grazing, right of passage and gathering forest products. Finally, although the compensation for land, residential buildings and fruit-bearing trees and other samplings is legally prescribed in Afghanistan, in the majority of cases, the paid compensation is not sufficient for the individual whose land has been acquired to be able to maintain his/her previous status of life.<sup>16</sup> The cases when the acquired land has been located in a central part of the city, but the exchanged land is situated on the outskirts can serve as an example of this. Another problem is that there is no deadline for the payment of compensation for land acquisition. Compensations may be made three or four years after the acquisition. When the land prices go up in this time period, the landowner might find himself not being able to afford the same standard of living as before. Finally, there is no particular authority where individuals can lodge their complaints against acquisition and the compensation that has been paid to them.

Having mentioned the shortcomings of the current LEL, the newly proposed Land Acquisition Law (LAL), currently under review by the MoJ, would be a major improvement in Afghan land acquisition practices if adopted and properly implemented.

#### ***Policy Recommendations:***

<sup>16</sup>Interview with ARAZI employees, Kabul, 11 March 2015.

- Newly proposed amended LML addressing the shortcomings of the public land definition, classifying four types of land including “land specific to village(s),” containing a clear definition of “public interest,” classifying types of public land and delineating responsibilities between the institutions responsible for different types of public land should be enacted.
- The plans of ARAZI to restart the cadastral survey of the remaining 66% of lands (including public lands) should be implemented promptly and adequately financed. The survey, as planned by ARAZI, should start in Bamiyan province no later than end of 2015.
- A community-based management of public lands should be put in place (potentially through *shuras*, *jirgas*, CDCs), when the definition of public lands is clarified including raising awareness of the public about the public land, laws and regulations associated with its use.
- The amended LAL containing clear provision on fair and just compensation process including compensation paid prior to the project start, compensation of grazing and other rights, identification of the suitable exchanges for acquired land and provisions on resettlement of individuals who face losses as a result of acquisition of their lands should be promptly enacted.
- An IT-based database system where all acquired land together with the cadastral maps and other related land documents will be recorded should be developed, kept with ARAZI and shared with other land institutions.

## 2.5. Transfer of Large Tracts of Land to Investors

				Score			
Pan-LGI-Dim		Topic		A	B	C	D
<b>PANEL 5: Transfer of Large Tracts of Land to Investors</b>							
<i>LGI 1: Transfer of Public Land to Private Use Follows a Clear, Competitive Process and Payments are Collected</i>							
5	1	1	Public land transactions are conducted in an open transparent manner.			■	
5	1	2	Payments for public leases are collected.		■		
5	1	3	Public land is transacted at market prices unless guided by equity objectives.				■
5	1	4	The public captures benefits arising from changes in permitted land use.			■	
5	1	5	Policy to improve equity in asset access and use by the poor exists, is implemented effectively and monitored.			■	
<i>LGI2: Private Investment Strategy</i>							
5	2	1	Land to be made available to investors is identified transparently and publicly, in agreement with right holders.			■	
5	2	2	Investments are selected based on economic, socio-cultural and environmental impacts in an open process.			■	
5	2	3	Public institutions transferring land to investors are clearly identified and regularly audited.			■	
5	2	4	Public bodies transferring land to investors share information and coordinate to minimize and resolve overlaps (incl. sub-soil).			■	
5	2	5	Compliance with contractual obligations is regularly monitored and remedial action taken if needed.			■	
5	2	6	Safeguards effectively reduce the risk of negative effects from large scale land-related investments.			■	
5	2	7	The scope for resettlement is clearly circumscribed and procedures exist to deal with it in line with best practice.				■
<i>LGI3: Policy Implementation is Effective, Consistent and Transparent</i>							
5	3	1	Investors provide sufficient information to allow rigorous evaluation of proposed investments.	■			
5	3	2	Approval of investment plans follows a clear process with reasonable timelines.		■		
5	3	3	Right-holders and investors negotiate freely and directly with full access to relevant information.	■	■	■	■
5	3	4	Contractual provisions regarding benefit sharing are publicly disclosed.			■	
<i>LGI 4: Contracts Involving Public Land are Public and Accessible</i>							

5	4	1	Information on spatial extent and duration of approved concessions is publicly available.				
5	4	2	Compliance with safeguards on concessions is monitored and enforced effectively and consistently.				
5	4	3	Avenues to deal with non-compliance exist and obtain timely and fair decisions.				

*(Note: the analysis of this section makes the assumption that the indicator talks about “state land” rather than “public land” in the context of Afghanistan.)*

There are five possibilities of state land transactions:

1. Transfer to other government entities - ARAZI transfers state land to other governmental entities based on their request
2. Exchange - ARAZI provides an exchange of private land in one area with the state land in desired area based on request. The private land is exchanged for state land with the same grade. When same grade land is not available in desired area, the value of the acquired land has to match the value of the original land. Monthly, ARAZI receives 7 - 10 requests for exchange.
3. Donation - ARAZI allocates the land for donation based on the Presidential Decree. In comparison to distribution, where minimal prices for distributed land are set, donations are free of charge.
4. Lease - these transactions will be discussed in detail in this section of this report.
5. Sale/Distribution - there is ambiguity in the Afghan legal framework about the sale of state land (see below). For distribution purposes, ARAZI allocates the land based on the Presidential Decree and the respective ministries are responsible for the actual distribution.

The sale of state land was banned by Presidential Decree 99 in 2002, including virgin and arid land for housing and all other purposes.<sup>17</sup> However, despite the ban on state land sales prescribed by this decree, the LML enacted in 2008 allows for both selling and leasing of state land and provides guidelines and procedures. However, state land is sometimes sold for investment and not always in an open and transparent manner. Of particular interest are the transactions of Afghanistan Investment Support Agency (AISA), established as a part of the Ministry of Commerce and Industry. The ministry can request state land from ARAZI to be transferred to AISA, which then sells it to investors. The legality of these transactions remains unclear.

The leases of the state land are a major venue for providing large tracks of land to investors. ARAZI is responsible for managing the leases and ensuring that the requirements of the LML are observed. The bidding for contracts goes through public auction, which is announced publically and the process starts ideally after at least three bidders show interest. If there are not at least three applicants after the determined bidding deadlines, the auction is re-advertised at least two times. If after a third announcement less than three bidders have expressed interest, the process continues with the existing number of bidders. However, this does not always happen in reality and sometimes the ARAZI Land Lease Procedures are not fully followed, making the transparency on paper unfulfilled in the reality. Additionally, the results of land valuation are not made public, further compromising the transparency of land lease processes.

Land lease prices are determined either through the valuation commission established based on Art. 69 of LML 2008, or, if this larger commission cannot be established, based on the type, grade (quality) and size of land by the smaller Leasing Committee comprised of local representatives of ARAZI, MoF (*Mustofiat*) and district administration representative. Although provisions stated in the Afghan legal framework set clear procedures for the land valuation, delays in assessing the land and setting price is an issue as the members of the valuation delegation often take time to present themselves. Sometimes it takes longer than one year to get the lease contract signed off on by both parties despite the fact that ARAZI has reduced the number of steps. Taking into account the lack of clarity on when the larger commission based on Art. 69 of LML 2008 should be formed; the market value of the land is not always taken into account. Additionally, due to the high level of corruption in Afghanistan, powerful strongmen and public officials at times put

<sup>17</sup> See art. 1 of the presidential decree #99

pressure on the valuation committee to decrease the value of the land. Finally, the results of the valuation are not publicly accessible creating transparency issues within the process, providing the room for setting the lease price value irrespective of the market price.

The LML 2008 stipulates that any failure to comply contractual obligations will result in contract termination. LML also stipulates that ARAZI monitor the progress of land development, which is under lease contract every six months.<sup>18</sup> In practice, however, there is no regular monitoring taking place. In very rare cases ARAZI performs monitoring every six months due to the lacking human resources, financial capacity and bad security situation in some parts of Afghanistan. The lack of proper and regular monitoring creates space for corruption and illegal practices.

**Policy Recommendations:**

- The possibility for state land sales should be clarified through the Cabinet Regulation clarifying current legal provisions on this matter. Clear categorisation should be developed based on which the restrictions on transferability will be applied.
- The status of AISA and its activities should be clarified by clear rules of engagement interlinked with ARAZI Investment Policy.
- Devising mechanism for assessing performance of members of the valuation commission, with poor performance being addressed immediately.
- Addressing corruption in land valuation process.
- The results of land valuation for land lease purposes and the information about the land leases for various projects particularly where it concerns the public should be made publicly available.
- Establishing clear monitoring system of application of lease contracts and benefit-sharing mechanisms, with participation of local communities.

**2.6. Public Provision of Land Information, Registry and Cadastre**

<b>PANEL 6: Public Provision of Land Information: Registry and Cadastre</b>					
<i>LGI 1: Mechanisms for Recognition of Rights</i>					
6	1	1	Land possession by the poor can be formalised in line with local norms in an efficient and transparent process.		
6	1	2	Non-documentary evidence is effectively used to help establish rights.		
6	1	3	Long-term unchallenged possession is formally recognised.		
6	1	4	First-time recording of rights on demand includes proper safeguards and access is not restricted by high fees.		
6	1	5	First-time registration does not entail significant informal fees.		
<i>LGI 2: Completeness of the Land Registry</i>					
6	2	1	Total cost of recording a property transfer is low.		
6	2	2	Information held in records is linked to maps that reflect current reality.		
6	2	3	All relevant private encumbrances are recorded.		
6	2	4	All relevant public restrictions or charges are recorded.		
6	2	5	There is a timely response to requests for accessing registry records.		
6	2	6	The registry is searchable.		
6	2	7	Land information records are easily accessed.		
<i>LGI 3: Reliability of Registry Information</i>					
6	3	1	Information in public registries is synchronised to ensure integrity of rights and reduce transaction cost.		
6	3	2	Registry information is up-to-date and reflects ground reality.		
<i>LGI 4: Cost-effectiveness and Sustainability of Land Administration Services</i>					
6	4	1	The registry is financially sustainable through fee collection to finance its operations.		
6	4	2	Investment in land administration is sufficient to cope with demand for high		

<sup>18</sup> See LML Art.67.3.

			quality services.				
<b>LGI 5: Fees are Determined Transparently</b>							
6	5	1	Fees have a clear rationale, their schedule is public, and all payments are accounted for.				
6	5	2	Informal payments are discouraged.				
6	5	3	Service standards are published and regularly monitored.				

The ways of registering the land in Afghanistan (already explained in the section 2.1) has a number of shortcomings preventing a considerable portion of the population (including the poor) to have their rights recognised. The petty bureaucracy in the form of multiple steps and offices creates opportunities for corruption and defers the poor to proceed with the registration process. This lengthy and time-consuming process can be expedited by informal payments; however, people who cannot afford or refuse to engage in corrupt practices have to follow the proper procedure, which can take over a year to finalise.

Furthermore, only 34% of land was surveyed in Afghanistan. From 1965 to 1978, the state surveyed state and private agricultural and barren lands (deserts, pastures, forests) covering approximately 30% of Afghan lands<sup>19</sup>. Land surveying was put to a halt after the land reforms by Democratic Republic of Afghanistan. During the communist regime (1978-1992), surveying was only available on demand for land clearance and resolution of land conflict purposes. During the transitional Islamic State of Afghanistan the surveying process was suspended based on Presidential Decree 99 of 2003. Following this decree cadastral survey activities were carried out only based on official request of ministries and government institutions, which had obtained presidential orders (approximately 4%).

Finally, Afghanistan does not have one single registry so the information is scattered across various registries with different ministries and agencies (such as Principal Book of Private and State Land at ARAZI, Deeds Registration Book in courts, Land Statistics Registration book at the Cadastral Department, Land and Property Taxation Book at MoF, *Safayi* tax registration book at the municipalities) with only limited synchronisation. This compromises the reliability and access to the land information.

**Policy Recommendations:**

- Different registries in Afghanistan should be mainstreamed and interlinked (more details below) in order to prevent overlaps, outdated and missing information. ARAZI should be established as “one-stop-shop” for registering the land (both within and outside of the Master Plan): The land clearance process *Tasfia* should be done on large scale and should always include the members of the Cadastral Department to conduct the survey. Then the land is recorded to ARAZI Principal Books and the formal title deed is given to the owner. Technical and financial support to ARAZI’s pilot project in Herat that, if successful, will be extended to all 34 provinces, should be accorded. This process should be later computerised to allow for the inter linkages with other registries such as in courts and MoF tax books.
- An independent monitoring body should be created that will monitor the process of land formalisation in order to maintain the process effective and transparent.
- In-house procedures and anti-corruption policies of ARAZI should be reviewed to prevent lengthy and costly process of land registration.
- ARAZI’s plans, based on their Operational Strategy, to establish national comprehensive cadastral registration programs should be technically and financially supported.
- Cadastral records have to be connected to both ARAZI Principal Books and courts title deed registration in consistent manner. Furthermore, uniform and standard format of circular form including the verification of the Cadastre should be developed stating all the personal information of the buyer and seller, photos, signatures (or fingerprints), physical specification of land etc.

<sup>19</sup>Cadastral Survey Statistics Report, 1978.

- As an interim measure, all cadastral maps should be scanned to expedite the manual search happening at present in the Cadastral Department; however, with the aim to be later included in the computerised system.

## 2.7. Land Valuation and Taxation

PANEL 7: Land Valuation and Taxation					
<i>LGI 1: Transparency of Valuations</i>					
7	1	1	There is a clear process of property valuation.		
7	1	2	Valuation rolls are publicly accessible.		
<i>LGI 2: Collection Efficiency</i>					
7	2	1	Exemptions from property taxes payment are justified and transparent.		
7	2	2	All property holders liable to pay property tax are listed on the tax roll.		
7	2	3	Assessed property taxes are collected.		
7	2	4	Receipts from property tax exceed the cost of collection.		

In Afghanistan, there are only four instances, when the land valuation through the establishment of impartial commission is used - during the acquisition of the private land by the state in order to estimate the amount of the compensation, when transferring the state land from one governmental entity to another, when leasing the state land to the private investors and when estimating land and property transaction tax.

However, this process is often mirrored by a number of shortcomings such as that the process of land valuation at times does not happen with each transaction, the commission takes longer than one month to set the price, the whole process can take more than a year (in cases where an individual's land has been appropriated for state projects), so by the time the individual is compensated, the compensation amount is less than the current market value, real estate dealers are not providing accurate assessment of the price, and corruption and strongmen and powerful individuals whose economic interests are at stake are putting pressure on the commission so that the set price benefits them. In none of these cases is the land valuation used for the land/property taxation purposes. The calculation for taxation purposes is determined according to the fixed calculation schemes based on the size and the grade of land. The market values of the land are not used in this procedure.

Although the land valuation happens in certain instances, there are no legal provisions in Afghanistan that would require making the valuation rolls public. State organisations can provide information regarding the value of land or property upon request as long as an individual has a legal basis for such a request, such as a land dispute case that he/she is involved in.

In terms of the tax collection, there are four types of tax collections in Afghanistan connected to land and property: land tax (from agricultural land both in rural and urban areas), *Safayi* tax (from all the properties only in urban areas), tax on the transfer of property and land and tax on rents. There is no property tax collected in rural areas.

The tax collection is, however, mirrored with numerous shortcomings, one of which is the fact that the tax rolls are often out-dated. Most of the property and land owners are not registered with MoF taxation provincial offices because they didn't wish to go through the formal procedures to register their land, which requires payments and taxation, or the information sharing between courts, ARAZI and MoF is not happening in consistent manner. Furthermore, the capacity of the MoF provincial and district offices to update records and to collect taxes is limited. There is not always enough staff to pursue cases of tax evasion. In some areas, there are no MoF district offices at all, either due to the lack of security or simply because such offices are not formed yet. This means that in certain areas the land transactions are not recorded and land tax books are not modified.

Since not all property holders are registered, collecting taxes from these property owners faces challenges. Taking into account the scale of urban informality reaching an estimated 70% of Afghan cities<sup>20</sup>, not all taxes that are supposed to be paid in reality actually are.

<sup>20</sup>“Managing Land Mobilizing Revenue.”

### Policy Recommendations:

- There are four instances when the valuation of land through the commission (of different members and sizes) is conducted. Mainstreaming of land valuation for different purposes through the Cabinet Resolution bringing all valuation practices under one regulation should be performed and the land valuation process should happen regularly, with each transaction.
- A clear mechanism should be developed for the activities of the various valuation commissions to expedite the valuation process. Additionally, performance-based evaluations should be introduced for the members and a corresponding monitoring mechanism should be established to verify the compliance.
- Land valuation for acquisition should be done before the acquisition process is announced to prevent rapid increase of the land price and possible land grabbing by powerful individuals.
- Valuation rolls should be compiled in one national database and made public only after the adequate actions against land grabbing are implemented to prevent empowering the land usurpers from benefiting from this action.
- A study should be conducted on the current state of tax collection in Afghanistan and its deficiencies. Clear policy recommendations and guidelines should be devised to establish a well-functioning system that is suitable for Afghan context. Lessons learned from other countries should be used as a guideline.
- The Land Taxation Law of 1988 should be reviewed, drafted by MoF and approved by MoJ taking the findings of the study into account.
- Formalisation of largely informal land tenure in Afghanistan is a prerequisite for successful tax collection efforts (see the sections above for more details on land tenure recognition) together with the improvement of security situation.
- Formal mechanism has to be developed for courts and ARAZI to inform MoF about the changes in ownership and land sizes and adequate enforcement mechanism have to be devised aiming to pursue possible tax evaders.

### 2.8. Dispute Resolution

PANEL 8: Dispute Resolution				
<i>LGI 1: Assignment of Responsibility</i>				
8	1	1	There is clear assignment of responsibility for conflict resolution.	
8	1	2	Conflict resolution mechanisms are accessible to the public.	
8	1	3	Mutually accepted agreements reached through informal dispute resolution systems are encouraged.	
8	1	4	There is an accessible, affordable and timely process for appealing disputed rulings.	
<i>LGI 2: The Share of Land Affected by Pending Conflicts is Low and Decreasing</i>				
8	2	1	Land disputes constitute a small proportion of cases in the formal legal system.	
8	2	2	Conflicts in the formal system are resolved in a timely manner.	
8	2	3	There are few long-standing (> 5 years) land conflicts.	

Afghanistan's court system enjoys competence to address land disputes. However, alleged corruption in courts and, consequently, costliness is most commonly cited among Afghan population preventing them from reaching out to the formal system. Although notable improvements were made in Afghanistan's formal justice system after 2001, the informal non-state justice sector still handles what appears to be the majority of disputes in the country.

Even though the informal justice system is widely used in Afghanistan, it does not enjoy full legal recognition and the evidence and rulings are shared between state formal mechanisms such as *Huqooq* and courts and formal mechanism and non-state dispute resolution venues only on an ad

hoc basis. Often it happens that the court decides the case differently than the *shura* or *jirga*, creating obstacles for the implementability of any decision.

Recently a new wave of interest in the possible linkages of formal and informal justice system has arisen among Afghan political circles and international community. The debate started around the possibility of the revival of the draft “*Law on Dispute Resolution, Shuras and Jirgas*” that was initiated in 2010 and is still pending at the Ministry of Justice. Secondly, the first draft of Land Dispute Resolution Regulation for ARAZI, supported by USIP, is currently being drafted. However, the outcome of the current debate on the possibilities to link formal and informal justice system still remains to be seen, particularly in relation to the alleged complaints towards informal justice system of non-respecting rights of women and minorities.

The majority of Afghans lack access to conflict resolution mechanisms for land disputes. However, the level of access varies dramatically between demographic groups. Adult men of majority populations enjoy the greatest degree of access, whether it is to formal or informal justice systems. Men from marginalised population groups face additional barriers to accessing conflict resolution services. However, women in Afghanistan have extremely limited access to both state and non-state dispute resolution forums. In both instances, strong and strictly enforced social norms discourage women from approaching any dispute resolution forum.

#### **Policy Recommendations:**

- Case Management System (CMS) - implemented by the USAID is already being rolled out, however this system needs internet and it does not connect all the conflict resolution bodies such as police. The adequate solutions for remote areas should be found to be able to benefit from this system. Additionally, the access to this system should be granted to all conflict resolution institutions such as *Huqooq* and ARAZI.
- Computer databases such as Oracles that are cheaper and take less time to implement, should be considered as an interim measure before fully operational computerised system is in place to create a database of all land disputes within each formal conflict resolution body’s central office.
- Fighting corruption, particularly in courts, should become the priority of the NUG. The Anti-Corruption Strategy established by the President Karzai in 2008 should be implemented through the stronger engagement of the President himself and increased results-based support of the international donor community. Additionally, the past and yet unaddressed cases of corruption should be the priority of the Attorney General’s Office.
- The auditing capacities of the High Office of Oversight and Anti-Corruption should be increased by the provision of technical and financial support and internal audits should be conducted to prevent corruption within formal justice system.
- Internal audits of all land administration institutions should be conducted on regular basis.
- The law devising more effective linkages between formal and informal conflict resolution mechanisms (taking into account lessons learned from projects like NRC’s Information and Legal Assistance Centres (ILACs), PEACE, LC Project and USIP/ARAZI sponsored pilot) should be broadly and inclusively consulted with the public and approved<sup>21</sup>.
- Mechanisms to encourage women to approach formal justice system should be devised while sensitising the rest of the community about the right of women to equal access to justice.

## **2.9. Review of Institutional Arrangements and Policies**

### **PANEL 9: Institutional Arrangements and Policies**

#### **LGI 1: Clarity of Mandates and Practice**

<sup>21</sup>As mentioned in this report already, there are currently two draft laws with this objective at the MoJ awaiting the decision. The effort to adequately publicly consult the content of both draft laws is of utmost importance as the enactment of such law is a highly sensitive and political issue.

9	1	1	Land policy formulation, implementation and arbitration are separated to avoid conflict of interest.					
9	1	2	Responsibilities of the ministries and agencies dealing with land do not overlap (horizontal overlap).					
9	1	3	Administrative (vertical) overlap is avoided.					
9	1	4	Land right and use information is shared by public bodies; key parts are regularly reported on and publicly accessible.					
9	1	5	Overlaps of rights (based on tenure typology) are minimal and do not cause friction or dispute.					
9	1	6	Ambiguity in institutional mandates (based on institutional map) does not cause problems.					
<b>LGI 2: Equity and Non-discrimination in the Decision-making Process</b>								
9	2	1	Land policies and regulations are developed in a participatory manner involving all relevant stakeholders.					
9	2	2	Land policies address equity and poverty reduction goals; progress towards these is publicly monitored.					
9	2	3	Land policies address ecological and environmental goals; progress towards these is publicly monitored.					
9	2	4	The implementation of land policy is costed, matched with benefits and adequately resourced.					
9	2	5	There is regular and public reporting indicating progress in policy implementation.					
9	2	6	Land policies help to improve land use by low-income groups and those who experienced injustice.					
9	2	7	Land policies proactively and effectively reduce future disaster risk.					

The separation of land policy formulation, implementation and arbitration in Afghanistan is relatively well ensured. However two particular issues deserve the attention.

With the decision of Council of Ministers 23 of 2009 and 11 of May 2013, ARAZI is aiming to become an independent “one-stop-shop” for land issues in Afghanistan. However, concentrating all the responsibilities for land issues in ARAZI, although making the administrative procedures more effective and management of land issues more coordinated, risks blurring the lines between land policy formulation, implementation and arbitration. This is of a particular concern in relation to the land registration and land dispute resolution. ARAZI is aiming to be responsible for all the land registration in the country through promoting itself to a “one-stop-shop” for Afghan land issues as well as aiming to be responsible for land dispute resolution, while ARAZI’s Department of Addressing can already informally resolve the dispute, which is then recorded at ARAZI. One has to be careful not to create a similar conflict of interest such as one already existent in courts (responsible for both conflict adjudication and land registration).

The National Land Policy was adopted in 2007 after extensive but informal consultations with public institutions over a two-year period<sup>22</sup>. Although the contents of the policy are largely considered to hold up to international best practices<sup>23</sup>, most of the pledges of the National Land Policy of 2007 have not yet been ‘absorbed’<sup>24</sup> into the legal framework of the country.

One example of the provisions meeting international standards is the Policy’s pro-poor and equality provisions. However, while the policy is generally intended to alleviate poverty and increase equity among citizens of Afghanistan, the goals of the policy have not been sufficiently incorporated into the legal framework, nor has the monitoring mechanism put in place to measure those.

**Policy Recommendations:**

- The role of ARAZI as a dispute resolution body has to be decided, while making sure not to replicate the same conflict of interest as currently courts inhibit (being the issuer of title deeds as well as the adjudicator of land conflicts)

<sup>22</sup>Wily, “Land Governance at the Crossroads,” 9.

<sup>23</sup>Ibid, 9.

<sup>24</sup>Wily, “Land Governance at the Crossroads,” 1.

- The draft Land Dispute Resolution Regulation prepared by ARAZI, which includes provisions on appellate procedures establishing the district level commission as a first instance and the provincial level commission as an appellate stage, should be promulgated and effectively implemented taking into account the new draft law on Shuras and Jirgas.
- Creation of centralised (gradually) computerised system at ARAZI as “one-stop-shop” for land registration and information (as opposed to the land registration at courts) to mainstream the access to land information.
- The current draft of LML 2014 should be promptly ratified by the Afghan Parliament and enforced by the Afghan National Unity Government because it builds on the National Land Policy 2007. If necessary, the law should be adopted through the Presidential Decree.
- The Plans of ARAZI to conduct a conference on Land Policy 2007 and its possible amendments should be supported.

### 3. Conclusion

Various stages of LGAF implementation identified a number of issues that require immediate attention. Clear policy recommendations and responsible institutions for implementing these recommendations were also identified to provide the ways forward on each of the pressing issues. Monitoring indicators of success/failure of the approaches were devised as well. All of this information was put in one Policy Matrix (section 11 of this report), which will serve as a Roadmap for Afghan policy-makers and international community to improve the land governance in Afghanistan.

Based on the discussions during the Policy Dialogue, the participants suggested the following steps for the future implementation of LGAF recommendations:

1. Follow-up meetings with ARAZI to internalize the Policy Matrix document
2. Presentation of the document to the High Council on Land and Water chaired by the President by ARAZI
3. Review of the measuring indicators and the capacities of the institutions to perform the monitoring. If needed, new measuring system should be devised (lead by ARAZI with the participation of all related land administration institutions).
4. Review conference of the progress of the Policy Matrix implementation conducted by ARAZI every 6 months

#### 4. Introduction

In the past decade, land and control of resources have been a significant aspect of government and donor concerns in Afghanistan. In the light of social transformations, increased demographic pressure, displacement, and economic evolutions, land is indeed more than ever at the heart of economic and social considerations. At the same time, the legal framework for land governance remains incoherent in many aspects and ill-suited to the Afghan reality, and administrative structures with responsibility over land both lack clarity in repartition of responsibilities, and appear under-capacitated to carry-out their mandate.

Despite efforts of the Afghan government and donors to reform land governance and clarify land tenure, recent research showed major challenges are yet to be addressed due to poor land management and a legal framework ill-suited to the reality faced by the majority of Afghans.<sup>25</sup> Customary rights and collective ownership of land, a major pattern of land holding across the country, remain out of the scope of the legal framework. Deregulated practices of land acquisition and transfer, land grabbing<sup>26</sup> and poor management of urban expansion have increased tensions surrounding land and further blurred an already murky land tenure situation. The status of state and public land also remains opaque. Attempts to recognize private property and clarify the land tenure situation of holders settled on government land has barely gone beyond wishful thinking, with Presidential Decree 83 (2003) even reinforcing government capture of off-farm land by making government land the default form of land holding. Finally, the majority of Afghans still do not hold valid documentation for land ownership. Most land holders probably have no documents at all, with customary documentation unrecognized by the state filling some of the gap.

Acknowledging these problems, donors and the Afghan Government have pushed for reforms in land administration and governance. As noted by Alden Wily<sup>27</sup> among others, most of these, however, remained ineffective. The National Land Policy (NLP) of 2007, designed to set property norms and renew land governance has been unfruitful and was mostly ignored in setting the government's subsequent course of action. The four primary bodies of Law governing land tenure, the Civil Code, Presidential Decree 83, the Shari'a, and the current Land Management Law, amended in 2008, and under constant redraft since, contradict each other in several aspects and insufficiently address the reality of land governance in Afghanistan. Furthermore, supplementary land -related legislation is currently under draft and yet remains to be implemented.

Though ongoing amendments are a positive sign of a will to reform the current system, significant effort needs to be put into addressing the above mentioned issues and structural problems. That being said, the emergence of the Afghan Land Authority (ARAZI), whose goals closely reflect NLP priorities to facilitate reform of land laws; set up a comprehensive, computerized database of land holdings; provide a "one-stop shop" for the leasing of government lands for investment; and establish an efficient, simplified land registration system<sup>28</sup>; might represent an opportunity for reform better tailored to the current reality of land tenure and conflicts in Afghanistan.

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<sup>25</sup>Liz Alden Wily, "Land, People and the State in Afghanistan, 2002-2012," (Kabul: Afghanistan Research and Evaluation Unit [AREU]/United States Institute for Peace [USIP], 2013); Yohannes Gebremedhin, "Land Tenure and Administration in Rural Afghanistan: Legal Aspects," (Kabul: Asian Development Bank [ADB]/Department for International Development [DFID], 2007).

<sup>26</sup> Given the wide variety of situations that communities can regard as "land-grabbing," TLO does not here define the term. Rather, we treat "land-grabbing" as that perceived to be land-grabby by communities - as it is this perception, rather than any a priori definition, that shapes individual and community response and action preferences.

<sup>27</sup>See, e.g., Wily, "Land, People and the State."

<sup>28</sup> Wily, "Land, People and the State," 16-18.

## 5. Methodology

*Governance* has been defined as “the manner in which public officials and institutions acquire and exercise the authority to shape public policy and provide public goods and services” (World Bank 2007, 67)<sup>29</sup>. As far as land governance is concerned, this definition includes the ways property rights to land (held by groups or individuals) are defined and can be exchanged and transformed; the ways in which public oversight over land use, land management, and taxation are exercised; the types of land that is state owned and the way such land is managed, acquired, and disposed of; the nature and quality of land ownership information available to the public and the ease with which it can be accessed or modified; and the ways in which disputes are resolved and conflict is managed.

Within the Afghan historical context deficiencies in these dimensions of land governance have resulted in poorly managed processes of urban expansion, concentration of poverty in slums, lack of clarity on land rights, and resulting conflicts over land. These issues underline the need to strengthen land governance to create the preconditions for environmentally and socially sustainable investments and appropriate economic development<sup>30</sup>.

The Land Governance Assessment Framework (LGAF), developed by the World Bank in partnership with FAO, IFAD, IFPRI, UN Habitat, the African Union, and numerous bilateral partners, is a diagnostic tool to assess the status of land governance at country level using a participatory process that draws systematically on existing evidence and local expertise rather than on outsiders. There are nine key general areas of a country’s good land governance that LGAF focuses on. These areas have traditionally often been dealt with in separation from each other. LGAF aims to bring these into one framework. The areas are (1) Land Rights Recognition (2) Rights to Forest and Common Lands & Rural Land Use Regulations; (3) Urban Land Use, Planning, and Development (4) Public Land Management (5) Transfer of Large Tracts of Land to Investors, (6) Public Provision of Land Information: Registry and Cadastre, (7) Land Valuation and Taxation, (8) Dispute Resolution and (9) Institutional Arrangements and Policies. For these nine focus areas, a series of land governance indicators, each divided into several dimensions, have been selected based on international experience. For each dimension, pre-coded statements are given for scoring (from best practice = A to weak practice = D) again based on international experience. In the section 9 the findings of this study will be presented based in each of the nine areas and the scores will be provided based on the consensus of the technical experts on land governance in Afghanistan. While the section 9 serves as an assessment of the above mentioned subject-areas, the next section will provide the conclusions and recommendations.

The LGAF process helps to establish a consensus and priority actions for these areas on:

3. Gaps in existing evidence, areas for regulatory or institutional change
4. Piloting of new approaches
5. Interventions to improve land governance on a broader scale (e.g. by strengthening land rights and improving their enforcement);
6. Criteria to assess the effectiveness of these measures.

Undertaking a LGAF has a number of benefits. In particular, it:

- Helps facilitate communication and collaboration between different Government Departments as well as the private sector, civil society, and academics to agree on key gaps and priority actions in the land sector as a basis for specific actions to foster change and in doing so establish a reference group of qualified and interested stakeholders with a shared understanding of the challenges of land governance and ways to address them;

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<sup>29</sup> For the full list of technical concepts’ definitions please see Annex VIII.

<sup>30</sup> The previous two paragraphs were suggested by David Stanfield, land governance expert with extensive experience in Afghanistan and other countries, currently serving as Professor Emeritus at Land Tenure Center, University of Wisconsin-Madison, USA.

- Documents good practice against global standards and allow broad dissemination, evaluation, and eventually up-scaling of innovative approaches to improving land governance; and
- Puts in place a structure (and associated institutional arrangements) to monitor progress in the quality of land governance and the effective service delivery over time that can increasingly be used to inform policy decisions and allocation of resources. Key land indicators are being identified and tested, which can be monitored using administrative data.

Implementation of LGAF happens in a number of steps:

- Preparation: This phase includes review of the LGAF framework to identify any areas where customization to country conditions may be needed as well as potential data availability, identification of the team of expert investigators and panel members from a wide range of sectors/stakeholders, formulation of a time plan; and enhancing government buy-in.
- Background documentation (nine panel reports): To provide the common basis of information that is indispensable as a basis of consensus on rankings or priority actions three sets written outputs are needed.
- Expert/subject matter specialist panels: Intensive work sessions of between half a day and a day per topic consisting of 5-8 subject matter experts and users of land systems, from different backgrounds. They discuss each of the dimensions in detail to arrive at a consensus ranking and agreed policy priorities.
- Synthesis country report: All material (background documentation, tenure typology, institutional map, background reports and the panel minutes) is synthesized in a well-structured report to be shared widely.
- Country level validation and policy workshop: The Country report is reviewed by experts to provide input. These results are incorporated and the report is presented for a National workshop to have results validated and prioritize policy conclusions and associated monitoring indicators for presentation to key policy-makers during a policy workshop. Ideally this will result in agreement on follow up actions some of which can be supported by government and other partners.

### ***Adapting the LGAF to the Country Situation***

Due to a number of specificities of Afghan context, some of the indicators and terminology had to be adapted in order to be able to capture the realities of land governance in Afghanistan. These include mainly the key areas dealing with the public land and its allocation to private interests (please see the detailed modifications in the Annex II.)

In addition to the number of adjustments in terms of the substance, modifications have been made to the methodology of the project itself. Originally the expert investigators were nominated from the pool of national and international researchers on the topic. However, this approach was changed after the beginning of the project and Afghan practitioners of land governance were chosen to develop the panel reports. Lack of writing skills and often-limited knowledge of land governance issues in Afghanistan created a number of problems and delays to the project. To counterbalance the delays, it was decided to skip the development of background reports and separate briefing notes and only the longer panel reports were prepared. From those, after the panel workshops, the final LGAF report was developed.

### ***Government Engagement***

Government representatives were engaged on regular basis throughout the whole duration of the project by providing their inputs to the content of the panel reports, approving their final versions (done mainly by ARAZI) and providing the final validation for the final LGAF report. Additionally, number of participants for panel workshops, technical validation workshop and policy dialogue were suggested by government employees and experts on land governance.

Five out of nine expert investigators tasked with the development of the panel reports were current employees of the state institutions dealing with land governance (such as ARAZI and MAIL), four remaining were previous employees of the government institutions (such as Cadaster and AIHRC) and independent experts, all with an extensive experience in land issues. Secondly, the lists of participants for the panel, technical validation workshops and policy dialogue were developed in a close partnership with a number of national experts on land governance in Afghanistan, including

the national representatives of the World Bank, government employees and Afghan CSOs (in particular TLO). Finally, the participation at all three types of workshops organized within this project was relatively high with the government representatives from various ministries and governmental agencies such as ARAZI, MAIL, Cadaster, MUDA, various municipalities and national and international NGOs. It is worth to mention, that the participation of the government representatives was higher than the NGOs' partners, with the highest participation of ARAZI<sup>31</sup>. In the technical validation workshop and policy dialogue these ministries and government agencies were present: Presidential Office, ARAZI, Kabul and Kandahar Municipality, Afghanistan Investment Support Agency (AISA), MAIL, NEPA, MoF, Ministry of Mines and Petroleum (MoMP), AIHRC, Ministry of Border and Tribal Affairs (MoBTA) and MoJ.

In addition to the official outreach activities, the Country Coordinator often approached personally MoF, ARAZI, Cadastral Department and MAIL to provide clarifications for certain issues.

### ***From the collection of background data to the Policy Dialogue***

Nine experts - Afghan practitioners (the list names and qualifications is in the Annex III)- were selected for the development of nine panel reports. Semi-structured qualitative interviews, mainly with the experts from ARAZI, and extensive desk research were used to collect information about land management in Afghanistan. While some officials were interviewed individually, at times discussions pertaining to a particular indicator were conducted in groups of two or three officials who jointly decided on analysis and rating of an indicator. Follow-up interviews were conducted in Kabul to clarify certain issues and scoring dimensions. The desk research included a review of Afghan laws and regulations, reports published by NGOs and international organizations and data collected by the government. Different sources of information, such as official documents, published literature and interviews with officials, were used as a triangulation technique to ensure the validity of the information collected. There was a minimal field research conducted, mainly due to a specific methodology prescribed for this study, however previous AREU research in this field, as well that of other research organizations was used.

It is important to note that lack of reliable statistics about land management and absence of surveys covering all the lands in Afghanistan makes it difficult to provide an exact and comprehensive picture of issues discussed in various indicators. Hence, land experts make informed estimates based on their work experience in the field. However, in number of cases, lack of data does not allow making estimations at all. Hence, while this report provides a general overview of public land management issues, many aspects of this topic need more extensive surveying.

Nine panel workshops (please see Annex IV or the lists of participants) were organized after the finalization and translation<sup>32</sup> of all the panel reports to validate the information, acquire new information on more complex issues and create a debate among technical experts on the issues of land governance. Despite of various problems<sup>33</sup> during the workshops, they have attracted a number of experts in the field, hence created a lively debate on certain issues related to land in Afghanistan.

Based on the panel reports, aide memoires from the panel workshops and follow-up semi-structured personal interviews the final report was developed, peer-reviewed by two international experts and validated through the Technical validation workshop (the list of participants is in the Annex V). Aiming to inform Afghan policy-makers and to create a momentum for a debate on land

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<sup>31</sup> For example, in most of the panel workshops, often two or three representatives from different departments of ARAZI were present. This was mainly because the facilitator of all the panel workshops was an employee of ARAZI, as well as due to the fact that three out of nine expert investigators were working for ARAZI. Since the expert investigator was always present for the panel discussion, ARAZI often had more than one representative present. However, at times this could also be contributed to the pro-activity and height level of knowledge of certain ARAZI employees and the high and unique standing of this organization among land institutions in Afghanistan (one-stop-shop for land issues in Afghanistan).

<sup>32</sup> All nine panel workshops had to be translated to Dari because the majority of the participants at the panel reports did not speak English.

<sup>33</sup> Unwillingness of participants to read and score the corresponding panel report beforehand, limited knowledge on certain complex issues, tendency to speak in general terms without providing detailed information, translation discrepancies between Dari and English versions of the reports etc.

governance among Afghan policy circles, the Policy Dialogue was organized at the beginning of November 2015 (the list of participants is in Annex VI).

## 7. Consolidated Scorecard

Legend:

	Regular scoring as per LGAF indicators
	N/A in Afghanistan or no data available
	Divided indicator
	New indicator established

Pan-LGI-Dim				Topic	Score			
					A	B	C	D
<b>PANEL 1: Land Rights Recognition</b>								
<i>LGI 1: Recognition of a continuum of rights</i>								
1	1	1	Individuals' rural land tenure rights are legally recognized and protected in practice.					
1	1	2	Customary tenure rights are legally recognized and protected in practice.					
1	1	3	Indigenous rights to land and forest are legally recognized and protected in practice.					
1	1	4	Urban land tenure rights are legally recognized and protected in practice.					
<i>LGI 2: Respect for and enforcement of rights</i>								
1	2	1	Accessible opportunities for tenure individualization exist.					
1	2	2	Individual land in rural areas is recorded and mapped.					
1	2	3	Individual land in urban areas is recorded and mapped.					
1	2	4	The number of illegal land sales is low.					
1	2	5	The number of illegal lease transactions is low.					
1	2	6	Women's property rights in lands as accrued by relevant laws are recorded.					
1	2	7	Women's property rights to land are equal to those by men.					
<b>PANEL 2: Rights to Forest and Common Lands &amp; Rural Land Use Regulations</b>								
<i>LGI 1: Rights to Forest and Common Lands</i>								
2	1	1	Forests and common lands are clearly identified in law and responsibility for use is clearly assigned.					
2	1	2	Rural group rights are formally recognized and can be enforced.					
2	1	3	Users' rights to key natural resources on land (incl. fisheries) are legally recognized and protected in practice.					
2	1	4	Multiple rights over common land and natural resources on these lands can legally coexist.					
2	1	5	Multiple rights over the same plot of land and its resources (e.g. trees) can legally coexist.					
2	1	6	Multiple rights over land and mining/other sub-soil resources located on the same plot can legally coexist.					
2	1	7	Accessible opportunities exist for mapping and recording of group rights.					
2	1	8	Boundary demarcation of communal land.					
<i>LGI 2: Effectiveness and equity of rural land use regulations</i>								
2	2	1	Restrictions regarding rural land use are justified and enforced.					
2	2	2	Restrictions on rural land transferability effectively serve public policy objectives.					
2	2	3	Rural land use plans are elaborated/changed via public process and resulting burdens are shared.					
2	2	4	Rural lands, the use of which is changed, are swiftly transferred to the destined use.					
2	2	5	Rezoning of rural land use follows a public process that safeguards existing rights.					
2	2	6	For protected rural land use (forest, pastures, wetlands, national parks, etc.) plans correspond to actual use.					
2	2	7	Rural lands, the use of which is identified for rehabilitation, are swiftly transferred to the destined use.					
<b>PANEL 3: Urban Land Use, Planning, and Development</b>								
<i>LGI 1: Restrictions on Rights</i>								







## 8. Context

### *Geographical Description*

Afghanistan is a landlocked country neighbouring Turkmenistan, Uzbekistan and Tajikistan from the North, China from the Northeast, Pakistan from the East and South and Iran from the West. It has a population of approximately 28.1 million inhabitants (51% males and 49% females)<sup>34</sup> with an area of 652,864 km<sup>2</sup>, which makes Afghanistan the 42<sup>nd</sup> most populous and 41<sup>st</sup> largest nation in the world<sup>35</sup>. Most of the country in Afghanistan is covered with mountains and valleys, the Hindu Kush splitting the country from the East to the West. The most flat lands can be found in the Southwest and the North of the country with large areas of sandy desert particularly in the Southwest. Please see the table below for the land coverage of Afghanistan:

Due to Afghanistan's diverse geological foundation including the tectonic history as a result of the country's position west from Himalaya, Afghanistan possesses rich mineral heritage with over 1400 mineral occurrences recorded to date including various precious and semi-precious stones and metallic minerals such as halite, talc and mica<sup>36</sup>.

Afghanistan's in general very dry climate varies from one region to another as the topography changes dramatically throughout the country. Its arid and semi-arid climate creates very cold winters and hot summers, with large areas experiencing little or no precipitation. The limited rainfall usually occurs in the form of snow in the months of November to April. Consequently, the droughts are a major problem in Afghanistan with estimated 2-3 years of drought conditions each 15 years. However, in recent years the drought cycle occurs more often with the droughts experienced in years 1963-64, 1966-67, 1970-72, 1998-2006, 2011 and in specific locations in 2013 since 1960<sup>37</sup>.

### *Historical Evolution*

The history of modern Afghanistan started in 18<sup>th</sup> century with Hotaki dynasty in Kandahar and Ahmad Shah's Durrani rise to power in 1747. In 19<sup>th</sup> century Afghanistan served as a chessboard of British and Russian "Great Game" until winning its independence in 1919 following the third Anglo-Afghan war. Since 1970, Afghanistan witnessed long decades of war starting with the Soviet war (1979 - 1989), followed by the civil war and Taliban era in 1990s to the US-led military operation to overthrow Taliban regime in 2001<sup>38</sup>. Since 2001 US and NATO coalition troops provided military support to Afghan military forces until their partial withdrawal in December 2014. Since then, only approximately 13,000 troops are providing training to Afghan military forces aiming for complete withdrawal until the end of 2016. The outcomes from the current debates on slowing down the withdrawal still remain to be seen.

### *Key Social and Economic Indicators*

The "Transformation Decade 2015-2024" in Afghanistan has certainly not started easy. The political crisis arising from the outcomes of the presidential elections and withdrawal of foreign troops in 2014, followed by numerous cooperation issues among the members of the National Unity Government, surge in violence by armed opposition groups with increased civilian casualties and deadlocked negotiations with Taliban in 2015 are only some of a numerous issues that Afghanistan is currently facing and these have enormous impact on main social and economic indicators in the country.

Afghanistan's GDP in 2014/2015 was estimated by the Afghanistan Central Statistics Office (CSO) at 1,209,178 millions Afs (18,940 millions USD), resulting in GDP per capita of 747 USD, 25 USD decrease comparing to year 2013. The economic growth also slowed down dramatically from 10.9% in 2012/2013 to 2.1% in 2014/2015<sup>39</sup>. The World Bank statistics, which to the contrary to the CSO

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<sup>34</sup> "Afghanistan Statistical Yearbook 2014-2014" (Kabul: Central Statistics Office, 2015), 3.

<sup>35</sup> *Ibid.*, 1.

<sup>36</sup> "Afghanistan Initial National Communication to the United Nations Framework Convention on Climate Change" (Kabul: National Environmental Protection Agency [NEPA], 2012), 14.

<sup>37</sup> *Ibid.*, 14-15.

<sup>38</sup> *Ibid.*, 13.

<sup>39</sup> "Afghanistan Statistical Yearbook 2014-2015" (Kabul: Central Statistics Office, 2015), 131.

work with non-opium GDP, were also observing the decrease in Afghanistan real GDP from 14.4% in 2012 to 3.7% in 2013, while this trend continued in 2014<sup>40</sup>.

Two biggest sectors - services and agriculture - have experienced decrease or slow down. Although agriculture sector, where approximately 49% of Afghan labor force acquires their living<sup>41</sup>, increased by 3.7% in 2014, its share in national GDP decreased<sup>42</sup>. The CSO cites the water shortages as the main reason for this trend<sup>43</sup>. Growth in service sector, constituting 51,33% of national GDP<sup>44</sup>, increased by 2.2% in 2014/2015. However this constitutes slowing down of the service sector growth by 4.2% in comparison to year 2013/2014<sup>45</sup>.

According to the National Risk and Vulnerability Survey (NRVA) approximately 36% of people in Afghanistan find themselves below poverty line, with great disparities between rural and urban areas and among different ethnicities. In rural areas the incidence of poverty is by 9% higher than in the urban areas, while the Kuchi population is the most vulnerable to absolute poverty<sup>46</sup>.

Migration constitutes another major problem exhibiting very complex patterns. According to the NRVA 2011-2012 approximately 16% Afghans are born in a different district than they currently reside in, 6% was born in another province and 3% in another country, while the urban population migration is significantly higher than the rural. The majority of Afghan and international migrants are migrating to Kabul. Out of 4.2 million inhabitants, around 360,000 people were born abroad and 1.9 million in other provinces in Afghanistan<sup>47</sup>.

The issue of migration is closely linked with the urbanization. Following the US-led military intervention in 2001, a massive influx of refugee-returnees has started to urban centers. Displaced families, who lost vested investment in their local communities, became accustomed to a relatively urban life while in refuge and feared the growth of counterinsurgency in rural areas, often decided to return not to their original villages or provinces but to urban centers (and, in particular, Kabul) in search for safety and employment opportunities. While population growth rate for the nation is steady at 2.6%, it is only 2.3% in rural areas whereas it is 4.7% in urban areas. Today, approximately a quarter of Afghans live in urban areas, rendering the topic of urbanization at the core of Afghanistan<sup>48</sup>.

Poverty and rapid urbanization contributes to the fact that the housing conditions of Afghan population are considered to be poor, with large differences between urban and rural areas. One issue is the remoteness of Afghanistan with 14% of households located more than 6 km from the nearest drivable road. Only 14% of Afghan population, out of which 45% is urban and 5% rural, live in a dwelling that can be considered durable and approximately 37% of Afghans live in overcrowded dwellings. The rapid urbanization has contributed to the situation, where 87% of urban Afghan population (5.3 million people) live in slum-like conditions<sup>49</sup>.

Finally, the specificity of life of women in Afghanistan is important to note. There were major improvements since 2001 in women access to justice and education, their political participation and cultural acceptance. Nevertheless the disparities between women and men in Afghanistan still exist mostly in rural areas and vary from province to province<sup>50</sup>. According to the Asia Foundation survey in 2014, a major improvement can be seen in the likelihood of women to take the dispute to either formal or informal justice system. In 2013 women were significantly less likely to approach either *Huqooq* department or *shuras/jirgas* (not the courts), whereas in 2014 this gap seem to have

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<sup>40</sup> "Afghanistan Economic Update, October 2014" (Kabul: The World Bank, 2014), 2.

<sup>41</sup> "National Risk and Vulnerability Assessment 2011-12. Afghanistan Living Condition Survey" (Kabul: Central Statistics Organization, 2014), 35.

<sup>42</sup> "Afghanistan Statistical Yearbook 2014-2015," 132.

<sup>43</sup> Ibid., and "National Risk and Vulnerability Assessment 2011-12," 35.

<sup>44</sup> "Afghanistan Statistical Yearbook 2014-2015," 139.

<sup>45</sup> Ibid., 133.

<sup>46</sup> "National Risk and Vulnerability Assessment 2011-12," 45-46.

<sup>47</sup> Ibid., xvi.

<sup>48</sup> "Kabul's Hidden Crisis" (London: Overseas Development Institute [ODI], 2012), <http://www.odi.org/comment/6688-kabul-refugee-idp-displacement-urban-afghanistan> (accessed 2 September 2015).

<sup>49</sup> "National Risk and Vulnerability Assessment 2011-12," 83.

<sup>50</sup> It is important to note here that the nationwide statistics experience various factors that can influence the final numbers such as the inability or unwillingness of women to say the truth, respondents stating what the surveyors want to hear, major regional disparities that get "buried in" the overall national statistics, etc.

disappeared<sup>51</sup>. In 2015, 47% of Afghan population thinks that courts treat women and men equally.<sup>52</sup>, while the women political participation improved in last years as well. 69.7% of women stated that they have voted in the runoff presidential election in 2014, whereas in 2009 it was only 43.4%. Nevertheless, women still face major barriers to their political participation such as lack of voting cards (32.3%, resistance from the family (24.6%) and insecurity (11.1%)<sup>53</sup>. In terms of women education, despite the major improvements in last decade, not all Afghans agree with the equal access to education for women. Islamic *madrassa* education is a most accepted type of education for women in Afghanistan (93.6%). Even though the percentage of women contributing to household income increased since 2009, only 64% of Afghans agree with women working outside the home compared to 70.1% in 2006<sup>54</sup>. In terms of the customs and cultural practices, most Afghans prefer the *burqa* as the most appropriate women attire, with only 1.2% reported that they agree with women not covering their head at all<sup>55</sup>.

### **Political System and Administrative Structure**

Afghanistan is an Islamic republic led by president with great executive powers is. After a major political crisis, which resulted from the contested run off presidential elections in 2014, two presidential candidates agreed to sign a deal and a National Unity Government (NUG) was formed with Ashraf Ghani as a President and Abdullah Abdullah as CEO. The position of CEO shall be further changed to the post of Prime Minister through the amendment of the constitution. This led to numerous questions among Afghan and international legal experts on the constitutionality of such move. Inability to form a new government, limited willingness of the members of both camps to cooperate and disagreements between the President and CEO on important political issues such as the electoral reform did not help to raise the hopes of ordinary Afghan citizens for better functioning state.

Afghanistan is a presidential democracy with bi-cameral parliamentary system. President is elected every 5 years through the direct vote. Until now three presidential elections were organized in Afghanistan in 2004, 2009 (President Hamid Karzai) and 2014 (President Ashraf Ghani). Government of Afghanistan is the main executive organ with the ministers working under the chairmanship of the President. As mentioned above, after the contested presidential runoff elections in 2014 followed by the political crisis and the audit of all ballots, the National Unity Government was formed and the new post of CEO with vaguely defined responsibilities was created. Parliament, the main legislative organ is comprised of House of People (*Wolesi Jirga*) and House of Elders (*Mesherano Jirga*). According to the Afghan Constitution, *Wolesi Jirga* is elected by the people in free, general, secret and direct vote every 5 years. Until now only two parliamentary elections took place in Afghanistan in 2005 and 2010.

The Afghan judiciary is an independent organ of the Islamic Republic of Afghanistan comprised of Islamic, statutory and common law. No law should contravene the tenets and provisions of Islam<sup>56</sup>. The courts are the primary organs for addressing disputes, however the majority of people refer their disputes to informal justice system of *shuras*, *jirgas* or other ad hoc dispute resolution bodies. The court system consists of primary courts in each district or municipality, provincial courts of appeal in each province, and the National Supreme Court including courts with specialized jurisdiction whose organization and authority are regulated by the law<sup>57</sup>. The key role of the Supreme Court is dispute resolution as it is the highest judicial organ of the state. However, it carries out certain administrative roles such as land registration, land transfer and issuing title deeds, which among certain experts is considered as creating a conflict of interest in terms of Supreme Court's judicial role.

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<sup>51</sup> Zach Warren, "Afghanistan in 2014. A Survey of Afghan People" (Kabul: The Asian Foundation, 2014), 125 - 143.

<sup>52</sup> Zachary Warren and Nancy Hopkins, "Afghanistan in 2015. A Survey of Afghan People" (Kabul: The Asian Foundation, 2015), 131.

<sup>53</sup> Zach Warren, "Afghanistan in 2014. A Survey of Afghan People" (Kabul: The Asian Foundation, 2014), 125 - 143.

<sup>54</sup> Zachary Warren and Nancy Hopkins, "Afghanistan in 2015. A Survey of Afghan People" (Kabul: The Asian Foundation, 2015), 140

<sup>55</sup> Ibid. 132.

<sup>56</sup> *Constitution of Afghanistan*, Article 3, 2004 (SY 1382).

<sup>57</sup> *Constitution of Afghanistan*, Article 16, 2004 (SY 1382).

Organs of the formal justice system are rarely connected to the informal justice system bodies and while informal dispute resolution mechanisms are to a certain extent legally recognized in Afghanistan, due to the lack of clear legislation on the linkages between the formal and informal justice system, major regional variations exist in Afghanistan in relation to the recognition of the informal justice system. Finally, in the areas under control of armed opposition groups, Taliban courts or other forms of justice are served.

Afghanistan is divided into 34 provinces and 368 districts. Provinces are the primary administrative divisions led by the Governor. However due to the fact that Afghanistan is a highly centralized state with majority of executive powers vested in the hand of the President, the Governors have limited powers<sup>58</sup>. The provincial governors are appointed by the President and each province is represented in Afghan Parliament by two members in the House of Elders (*Mesherano Jirga*). One representative is elected by the Provincial Council for four years and another one by the District Councils for three years. Three provincial council elections were held until now in 2005, 2009 and 2014.

No district council elections were organized in Afghanistan since 2001. This creates major difficulties particularly now, when the question of amending the constitution aiming to create a new post of a Prime Minister was open as a part of the deal between Ashraf Ghani and Abdullah Abdullah to end the political crisis after 2014 presidential runoff elections. The amendment of the constitution requires the conduction of *LoyaJirga*, “the highest manifestation of the will of the people of Afghanistan”<sup>59</sup>. The *LoyaJirga* consists of the members of the National Assembly and Presidents of the provincial as well as district assemblies. Without the district council elections, the *LoyaJirga* seems highly unlikely to happen.

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<sup>58</sup> The relative power of each governor varies considerably across provinces as a result of historical circumstances, ethnical allegiances and military strengths of respective governors.

<sup>59</sup> *Constitution of Afghanistan*, Article 110, 2004 (SY 1382).

## 9. Land Tenure System, Tenure Typology, Institutional Organigram

### *Legal Framework*

The Afghan Constitution of 2004 established a legal framework for property rights safeguarding the right of individuals to own property, stating property shall be safe from violation, no one shall be forbidden from owning and acquiring property, except by law, and private property can only be confiscated by legal order (article 40).

Legislation for classification of land tenure is comprised of over 30 laws and decrees including the following: Civil Code, Presidential Decree 83 of 2003, Presidential Decree 99 of 2002, Land Expropriation Law of 2000, Survey and Cadastre Law of 1988, The Law on Pastures and Mara'a of 2000, Forest Law of 2012, Municipal Law 2000, Mineral Law 2015, Land Tax Law of 1976 and Income Tax Law 2007. The Land Management Law (LML) of 2008, which is currently before the Ministry of Justice for further amendments, is probably the most comprehensive one dealing with range of land issues. Afghan land laws, however, sometimes contradict each other on the classification of state, public and private land and various other issues.

National Land Policy (NLP) was adopted in 2007 containing international best practices and constituted a major improvement in Afghan land administration if implemented. Unfortunately, the LML of 2008 nor any other laws were enacted after 2007 which would take the NLP into account leaving the operationalisation of different provisions an unfulfilled promise.

### *Evolution of land governance in Afghanistan*

Afghanistan has had four major periods of land administration throughout its history: traditional (until 1933); moderate (1933- 1978), radical (1978-2001) and modern (2001 to present).<sup>60</sup> The moderate period saw concrete efforts to survey land, document land rights, and unify land administration systems. However, ensuing years of conflict disrupted many of the gains made, and each successive regime sought to reform land relations in Afghanistan. The post 2001 era, known as the modern era has seen significant constitutional, legal, and policy reforms that sought to strengthen land management and administration. However, despite these gains, significant legal ambiguities and gaps, as well as practical challenges in-terms of lack of resources and enforcement capacity remain.

Afghanistan started its first formal recording of properties towards the end of the 'traditional period'. During this period land was passed on as entitlements from Kings to private individuals, mostly to clan heads. From the early 1930s, largely for the purpose of collecting tax revenues, the Ministry of Finance began to keep a record of private properties.

During the Moderate Land Administration Period (1933- 1978), the Courts and the Ministry of Interior began to play a key role in land administration. This period saw a relative modernization in land management and land administration. A dedicated land administration authority, named AMLAK was established within the Ministry of Finance. Efforts were made to modernize land administration by mainstreaming documentation of property rights. AMLAK was given the main tasks of managing state lands and recording the allocation of state lands to private persons.<sup>61</sup> In part this was motivated by a desire to improve collection of taxes, centralize land use planning, and facilitate private investment.<sup>62</sup> These goals continue inform land administration in the present context. To this end "Land books" were created so that official records could be kept.

This period also saw a greater western influence in land administration in Afghanistan. Under USAID funding a Directorate of Cadastre Survey was established within AMLAK. USAID also funded a survey institute in Kandahar, and 640 surveyors graduated from the institute.<sup>63</sup> In 1965 a *Survey and Statistics Law* was passed with a view to move Afghanistan closer to a title system. Under the new regime, a title deed would be issued to the owner, and future transactions would only be legal if they were recorded by a court, against a file specifically created for that property.<sup>64</sup>

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<sup>60</sup> Peikar Jawad, "Historic and Current Institutional Developments in Afghanistan's Land Sector" (presentation, CEO of ARAZI, Housing Land Property Task Force, Kabul, 22 April 2014).

<sup>61</sup> Wily, "Land, People, and the State," 19.

<sup>62</sup> Wily, "Land, People, and the State," 2, 19.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

Under USAID initiative, an ambitious program to survey land in Afghanistan was commenced. Between 1965 and 1978 approximately 34% of the country was surveyed.<sup>65</sup> However, as funding diminished the cadastral survey was reduced to a mere record of owners and the location of their lands.<sup>66</sup>

However, much of these gains to centralize and mainstream land administration were disrupted during the period known as ‘radical administration’. Key developments during this period included land ceilings and redistribution policies. For example, President Daoud introduced land ceilings where farm sizes were prescribed at 20 hectares, and additional land had to be sold privately or passed over to the Afghan government.<sup>67</sup> The Communists radically reduced this ceiling from twenty to six hectares. The Communist regime also established a policy of acquiring land without compensation, and re-distributing land among the landless, poor farmers and nomads.

Over the years of conflict, each regime attempted to change land ownership schemes and their systems of administration. During 1992- 96, under the Mujahedeen era land ownership became particularly problematic as property rights in urban and rural districts became dependent on which commanders controlled the area. In 1996, after the Taliban came into power, they sought to reform land laws; however many of their initiatives were mere replicas of laws from the past.<sup>68</sup>

During this ‘radical period’ many land records, including Ownership and Taxation books, taxation receipts, as well as municipals records were lost and or destroyed. At the time of the Bonn agreement in 2001 court prepared documents were believed to cover approximately 10% of rural properties and 30% of urban properties.<sup>69</sup> The private land sector was reduced to 5-12% of the country.<sup>70</sup> Multiple legal frameworks applied to property transactions including customary, religious, civil, statutory and constitutional law.

Since 2001 Afghanistan has seen several major policy initiatives in the land sector. The 2004 Constitution inter alia provided for protection of private property, right to settle in any part of the country and just compensation where land rights are acquired for public purposes.<sup>71</sup> In 2007 Afghanistan adopted its first National Land Policy providing for a strategic outlook for the land sector. The latest iteration of the Land Management Law was adopted in 2008. Some of these initiatives, have been criticized for returning Afghanistan back to the pre-1964 Constitution position, ‘as if forty years of land reform had never happened.’<sup>72</sup> In particular the Land Management Law was criticized for instituting a strong bias towards owners with documentation even though ‘up to 90% of Afghans have no documentation over their holdings’.<sup>73</sup>

In terms of land institutions, AMLAK was re-structured and renamed as the Afghanistan Independent Land Authority (ARAZI). It is now an independent agency and reports to an inter-ministerial board. ARAZI has ambitious plans to adhere to international best practice and become a ‘one-stop shop’ for land administration.<sup>74</sup> Though its goals of following international best practice is commendable, serious concerns remain about its lack of technical capacity and financial viability of its long term plans.

Despite these significant legal and policy advances serious practical challenges remain to administering and managing land in Afghanistan. Land grabbing in both the urban and rural sector remain a serious challenge. Land grabbing under the ‘colour of the law’, by returnees, armed actors, and powerful elites even within government remain largely unaddressed. Informal settlements especially in urban areas are widespread without any concerted efforts to formalise or upgrade them. Additionally, land related conflicts, including involving armed actors are continuing and in some cases increasing.

### ***Tenure Typology***

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<sup>65</sup> Jawad, “Historic and Current Institutional Developments,” 1.

<sup>66</sup> Wily, “Land, People, and the State,” 2, 19.

<sup>67</sup> Wily, “Land, People, and the State,” 1, 26.

<sup>68</sup> Wily, “Land, People, and the State,” 1, 22.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> *Constitution of Afghanistan*, Articles 9, 10, 14, 15, 32, 38, 39, 40 and 41, 2004 (SY 1382)

<sup>72</sup> Wily, “Land, People, and the State,” 1, 18.

<sup>73</sup> Ibid.

<sup>74</sup> ARAZI Operational Strategy (2014).

*“Land tenure refers to the legal regime in which rights in land are exclusively assigned to and individual, or entity, who is said to “hold” the land. A land tenure system refers to the regulations for the allocation of rights in land, transactions of property, [and] the management and adjudication of disputes regarding rights and property boundaries.”*

The situation of land tenure in Afghanistan remains opaque, with an ill-suited legal framework, inconsistent legislation, unclear delimitation of boundaries and conflicting definitions of property, including between the State and private entities (individuals and communities) contesting the State’s presumption of ownership over land.

Legislation for classification of land tenure primarily stems from four sources of law: the Civil Code, Presidential Decree 83 of 2003, the Land Management Law (LML) of 2008, currently under revision, and the Shari’a. These however, sometimes contradict each other on the classification of state, public and private land. The presence of what may be considered residual legislation, such as the Taliban-era Rangelands Law, along with non-legal government documents which proffer land classifications, such as the Ministry of Agriculture Master Plan, further exacerbates this lack of clarity.

A minority of landholders in Afghanistan appear to possess any form of land document from the Afghan State. The lack of statutory process legalizing the rights of those who possess land, but do not own formal deeds<sup>75</sup> places them in an ambiguous legal position. Moreover, land documents, especially those dating from previous regimes, have often been lost following decades of conflict and displacement.

There is general agreement among authors of studies on land tenure in Afghanistan that the current legal framework is both incoherent and unsuitable to the reality of land tenure and land use in the country.<sup>76</sup>

Various historic, demographic, and social realities have contributed to the current incoherent land regime in Afghanistan.

- Ancestral customary rights of ownership and land use of communities are currently (though not for the first time) in conflict with the State’s definition of tenure. This discrepancy has become more pronounced with the increasing attempts to capture land by the State in the past decade, notably through presidential decrees (Decree 83 of 2003).
- Return from displacement of communities and individuals who find their land has been occupied in their absence, and are sometimes unable to reclaim their rights over land in their place of return. Though no precise records exist, in some areas nearly 100% of the local population appears to have been displaced at some point during the last thirty years.
- Ongoing conflict-induced, disaster-induced and/or economic migration and subsequent informal occupation of land by communities. This phenomenon has notably become prominent in urban and peri-urban areas with rural exodus and rapid urbanization.
- Land grabbing (as perceived by communities) and/or unregulated acquisition of land by wealthy well-connected individuals and power holders.

Patterns of land tenure in Afghanistan further present significant regional variations, calling for a context specific analysis.

As such, in order to capture the existing forms of land tenure in the country, the following typology will focus on observations stemming from existing field research on land issues in Afghanistan, and not primarily on land-related legislation. Further specific research will be needed in order to assess precisely the reality of tenure holdings in Afghanistan, across regions, and diverse rural/ urban realities.

With these points in mind, research to this point suggests three types of collectively-held land tenure (at 1-3 below); four types of individual land tenure (at 4-7 below); and one type of state land (at 8 below). No conclusions have been drawn on the “validity” or “invalidity” of holdings under each tenure type. Each tenure type below probably exists throughout the country, and, more often than not, each exists under a cloud of dubious legality or significant community resentment.

#### *1. Collectively held land without documentation*

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<sup>76</sup> See, for instance, Yohannes Gebremedhin, “Legal issues in Afghanistan’s land titling and registration” (Kabul: USAID, Emerging Markets Group, 2005); Wily “Land, People and the State.”

In the framework of this report, collectively-held land refers to off-farm barren land, rangeland, and mountain/forest land. Based on the Pasture Law 2000, it can be considered as specific pasture (Art. 3 (2)) located in the proximity of the village. However, in the past, various tribes were not only given the land in the proximity of the village, therefore for the purposes of this report, collectively-held land does not equal only to *specific pasture* land, but includes all the lands irrespective of their proximity to the village that is collectively held. Collective ownership of land constitutes a major pattern of land holding across the country (in all likelihood encompassing the majority of land in Afghanistan). However, this type of land ownership is not recognized under Afghan law.

One noteworthy example of the prominence of collective holding is Afghanistan's Southeast region (Khost, Paktia, and Paktika provinces)<sup>77</sup>, where much land is perceived as commonly owned by tribes and other groups. As such, in virtue of (perceived) ancestral norms of land holding, entire areas are considered to be under the control of a single tribe or group, who then regulates use of the land and its resources based on custom, including resource division based on the number of members within each group (with this being calculated in various ways).

For the great majority of the Southeastern collective holdings at issue here, delimitations of boundaries are based on oral tradition passed on from father to son and physical markers such as rock formations, and are not documented, whether by legally recognized documentation, or customary documents. Nevertheless, at least when discussing the issue with outsiders, these groups present the ownership and boundaries of such land as being well-established, and there is significant resistance to "outsiders" claiming ownership or management rights of the land.

It cannot be confirmed that collective land holdings in other parts of the country exactly fit these patterns. However, the Southeast is used here as an example, and it is likely that undocumented collectively held land in other areas also displays at least some of these characteristics.

Afghan state law contests the ownership of off-farm barren land, rangeland and forest land, creating a notable discrepancy between *de facto* and *de jure* ownership and administration. Afghanistan's legal framework also remains internally inconsistent as to the status of these lands - certain paragraphs of the law consider these lands public land, some state land. This notably creates a situation of uncertainty surrounding which land is destined to public use and to benefit the public, and which land, owned by the state, can be made available for private investment or other non-public use.

Finally, proposed amendments to the LML by ARAZI in 2012 could formalise some community claims by introducing a new type of land called "Special village land."<sup>78</sup> This proposed classification of land might ameliorate some of the challenges of the existing state/ private land dichotomy which denies rights to community ownership. Circulated drafts of the revised Forest Law and Rangeland Law would also recognize some forms of community management, if not ownership, based upon the community's geographical proximity to the resource.

## 2. *Collectively held land with customary documentation*

At least in part in order to address disputes arising between communities over the boundaries of their land, or their extensions due to demographic pressure and economic motivations, Afghanistan has witnessed the development of customary written documentation for the collective types of holdings described above. That being said, there is no precise information on the extent to which this documentation is used, and it appears to stem mainly from non-state processes of dispute resolution, in order to forestall the reignition of conflicts.

## 3. *Collectively held land with title issued by a previous government regimes*

Past regimes, including that of Abdurrahman Khan for the resettlement of *naqilin* in various parts of Afghanistan, and Nader Shah and Zahir Khan in the Southeast, as a reward for the support of the region's tribes in the reestablishment of the Durrani monarchy, have granted, by decree, entire areas to specific tribes or groups. Documents provided at the time have often been safeguarded and kept by the concerned groups, who consider them as a valid, if not indubitable evidence of their prerogatives over the land. Current Afghan law, however, remains silent over this matter. As mentioned above, only individual property is recognized by the state and all land for which

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<sup>77</sup> On patterns of land holding in Khost province, see "Major Land Disputes and Land Titling Systems in Khost Province, Implications for a Collaboration between Traditional Dispute Resolution Mechanisms and ARAZI," (Kabul: The Liaison Office/United States Institute of Peace, October 2014).

<sup>78</sup> Wily, "Land, People and the State."

individual, legally valid proof of ownership cannot be provided is considered as state land as per Afghan legal framework.

#### 4. *Individually held land without any title*

As just noted, the Afghan state recognizes land ownership only in cases where individuals possess legally valid title documents. However, after various sorts of collectively-held land, individually held land with no documentation might constitute the most common sort of land tenure in the country. As with collectively-held land, many local populations consider the ownership of this land as uncontested - as it has passed from owner to owner via family inheritance, without contestation outside the family, but also without recording of any kind.

#### 5. *Individually held land with non-recognized title*

There is no precise information on the date of introduction of customary land documents for individuals. The phenomenon, however, seems to have gained momentum, as the production of written documentation has reportedly increased over the past decade to avoid competing claims over a parcel of land following transfer, or memorializing the resolution of a dispute over individually held land. Informal deeds' relatively widespread use also stems from the need to adapt to an evolving situation where land is less often transmitted via non-commercial processes (e.g. inheritance), but increasingly sold and purchased. Written customary land documentation thus compensates for the presence of "new" parties outside of traditional ownership structures, and fills in the gaps left open by nonexistent or poorly maintained government registration.

Individual customary documents, however, in most cases appear to not meet the conditions regarding legally valid documentation for ownership and their owners are thus not legally entitled to own the land they exploit. Indeed, as laid out by the LML 2008, customary deeds are theoretically recognized as valid documentation if they were prepared before August 6<sup>th</sup>, 1975, and either recorded in the Books of Ownership and Taxation of 1977-1978; or, in areas where these books were never prepared or have been lost, if all neighbours to the land attest to its ownership.<sup>79</sup> Much of the existing customary documentation, however, was produced after 1975. For the minority of citizens owning customary land titles from that era, let alone titles recorded by the administration, synchronizing these records with what in many cases is a highly complex record of land transfer and occupation may be close to impossible.

#### 6. *Individually held land with state title from a pre-Karzai regime*

In the majority of cases when formal documentation is present, some research indicates tax documents (*maylati*) prior to 1975 are used to evidence ownership. With that said, these only contain a limited amount of relevant information: they do specify the amount of the land on which tax was paid, but do not specify its boundaries. What is more, in order to avoid heavy taxes, many land holders only partially recorded their land, leading, for example, to a complex situation where land was transferred between two private parties but only part of it is legally recognized as property of its holder.

Royal-era land documents are another somewhat common form of government-issued land documentation. These were mainly issued under Nader Shah and Zahir Khan, at the demand of individuals who had either settled a dispute over purchased land and obtained informal documentation which they could convert into formal titles with the royal administration; had settled their dispute in a government court; or were members of tribes with connections to the royal family (particularly in Afghanistan's South). However, these documents are rarely sufficient to delineate the precise boundaries of a parcel, which are sometimes barely decipherable, and were often lost during Afghanistan's protracted conflict, though copies of some are reportedly kept in provincial administrations. Even when the documents remain intact, they often do not record transfers by inheritance, or other forms of transfer.

#### 7. *Individually held land with title from the Karzai and Ghani regime*

There are no comprehensive data on the extent of land registration under the current government, but it appears to be a minority phenomenon. In some areas, no official land registration since 2001

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<sup>79</sup> Given the ambiguous wording of the LML, the possibility remains that the "pre-1975" requirement does not apply to areas where registration books were not prepared. However, this reading raises the question of why post-1975 land transactions would be treated so much more favourably in areas without recordation than in areas with recordation. And, in any event, research by TLO and others suggests that courts actually treating any customary deed as valid is exceptionally rare.

seems to have taken place at all. In those areas where registration has occurred, the process seems to take place over a period of months, and to involve a large number of steps. If the applicant completes the process, he or she then receives a land title from the local court. In many cases, persons seem to seek government land title pursuant to a commercial land transaction, or where receipt of the land is tied to a government distribution scheme. However, as regards commercial land transactions (let alone more small-scale or “ordinary” transactions), one cannot assume that most parties, most of the time, apply to a Court or to a State agency to register a transaction. . Factors impeding registration and the provision of legal title documents include lack of capacity for land management on behalf of the state, the complexity of the titling or formalization process, repeatedly modified<sup>80</sup>, fear of tax payment<sup>81</sup>, negative perceptions of the court (responsible for issuance of land title), general wariness of government involvement in land affairs, and widespread corruption of the administration (at the least exacerbating the other mentioned difficulties). Many purchasers/ owners of land have thus not fulfilled the legal formalities required for the competent court to formalize ownership, and, assuming any deed exists, consider a customary deed, deed from a pre-Karzai administration, or other form as attestation as sufficient proof of their ownership.

Conversely, and particularly in peri-urban areas which have witnessed increased settlement in the past decade, there are indications that some dwellers have sought formalization of their titles through the court, in order to secure their rights to tenure. That being said, the registration process in practice remains quite unclear as research uncovered repeated mentions of fraud by the administration itself across several regions of Afghanistan. This can take the form of bribes paid to the court to obtain the required document, or pressures exerted by power-holders and their connections in the government. This has added complexity to the tenure landscape, with, occasionally, competing claims over land between holders of pre-Karzai documentation, which seems to have been issued by regular processes, and holders of newly acquired court documentation, which might have been procured fraudulently.

#### 8. Land owned by the State (versus public land)

As mentioned previously, inconsistencies in the legal framework for tenure rights and its discrepancy with the reality of urban and, especially, rural tenure in Afghanistan render the practical status of state-owned land opaque. On the one hand, the Land Management Law of 2008<sup>82</sup>, supplemented by Presidential Decree 83, has set up a system where, in the absence of legally recognized documentation, ownership of land reverts to the state. On the other, research indicates the majority of Afghans do not hold valid documentation for land ownership. Most landholders especially in rural areas have no documents at all. As such, informal documentation, unrecognized by the state, often fills some of the gaps left open by absent state documentation. Especially given the lack of recognition for group ownership in Afghan law, the state is the *de jure* owner of an estimated 80% of land in Afghanistan. However, the state has the capacity to administer only a small fraction of that land - either due to a general lack of human and technical capacity, or because many of these areas remain outside of State control or even legitimate state ownership.

The current framework also does not provide for specific and clear distinctions between state and public land. It notably remains vague on the status of *mara'a* land<sup>83</sup>, *waqfi* land (endowment land), and the case of land owned by Government agencies which appear in practice to be owners of the land they control or manage, with the capacity to rent or lease it, albeit without clear legal authorization for doing so.

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<sup>80</sup> Under the Land Management Law, holders of land under customary systems may in theory “convert” their customary ownership to state-recognized (“formal”) ownership. However, this process requires both parties producing highly detailed customary ownership documents prepared before 1975, and accompanied by ample attestations of the habitation of the use and land since that time - along with procedural steps that many parties will find burdensome.

<sup>81</sup> Though the Afghan government does not at present assess land tax, persons seem to fear the assessment of pre-Communist back taxes, and the future re-imposition of a land tax, should their holdings be known to the state.

<sup>82</sup> According to the LML of 2008, state land includes:

“1. Plot or plots of land containing *bogi*, *abi*, *lalmi*, *tapaha*, *chamani*, *jabazar*, *jungalzar*, *alafchar*, *naizar* and other lands that have been officially registered by the government in its principal registry.

2. Lands that are deemed *malkiat-i-auma*, but that have not been officially registered by the government in its principal registry.

<sup>83</sup> The term roughly equates with pasture land, but is used in Afghan law without being precisely defined.

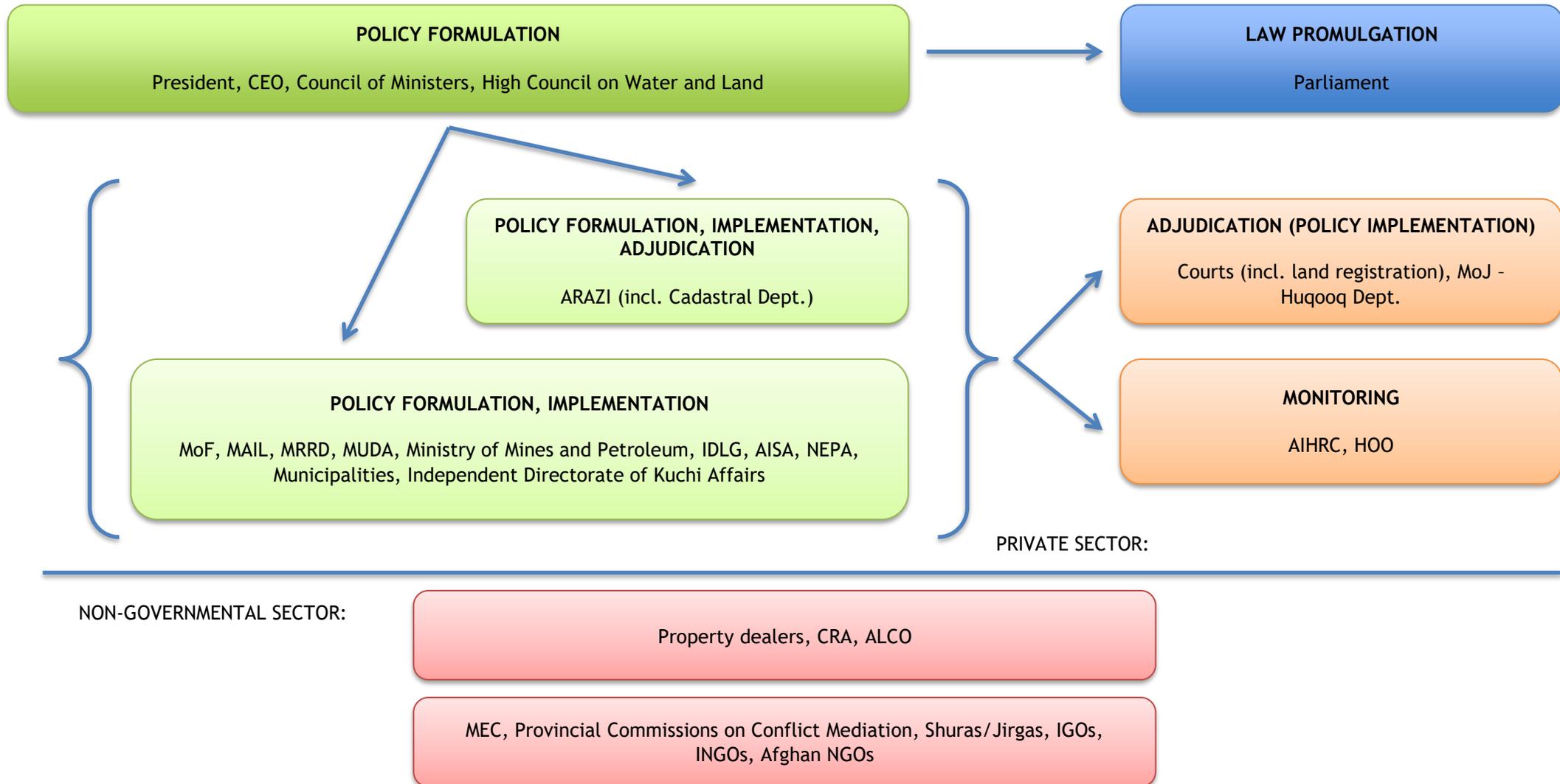
As mentioned above the realities in Afghanistan differ substantively from the legal framework. Whereas we have listed at least 8 types of land based on field research, the legal experts agree on three primary types of ownership based on Afghan legal framework, with different outcomes for their transferability:

Type of land	Legal basis	Sub-categories	Type of rights	Ownership responsible organization and	Key challenges
Private land	Legal code	<ul style="list-style-type: none"> <li>• Collectively held land without documentation, with customary documentation and with documentation issued by previous government regimes</li> <li>• Individually held land without title</li> <li>• Individually held land with non-recognized title (customary title deeds and other informal records)</li> <li>• Individually held land with state formal title (from various regimes)</li> </ul>	<ul style="list-style-type: none"> <li>• Sold, transferred inherited</li> <li>• Compulsory acquisition possible only for public welfare projects</li> </ul>	Individual or legal persons (ARAZI)	<ul style="list-style-type: none"> <li>• Limited possibilities for tenure formalization</li> <li>• Formerly displaced people and refugees who find their lands occupied are unable to reclaim them back</li> <li>• High number of informal settlements in urban settings</li> <li>• Some privatised land is perceived as having been acquired by “grabbing” state or public land</li> </ul>

Public land	No clear definition in Afghan law	<ul style="list-style-type: none"> <li>• Pastures - allocated for public use (collective held) (MAIL)</li> <li>• Forests (MAIL)</li> <li>• Graveyards, entertainment parks, roads, green areas, playgrounds (Municipalities)</li> <li>• Schools (MoE); universities (MoHE); hospitals (MoPH)</li> </ul>	<ul style="list-style-type: none"> <li>• Cannot be sold nor leased, transferred or exchanged</li> </ul>	Municipalities (within the Master Plan), Ministries and ARAZI (manages all lands outside of Master plan )	<ul style="list-style-type: none"> <li>• Includes lands under ancestral customary rights incl. pastures/ forests - ownership is contested between either state or public</li> <li>• Art. 3(8) of LML 2008 and Decree 83 blur boundaries between state and public land by putting emphasis on formal documentary proofs of ownership</li> <li>• Law does not define public land has and has no provisions on registering “public land” reason why public land is easily claimed as state property and reassigned subsequently to private parties</li> </ul>
State land	Registered as state land and any land that is deemed public but is not registered in the book of government lands	<ul style="list-style-type: none"> <li>• Forests (MAIL)</li> <li>• Protected land</li> <li>• Arid and virgin land</li> </ul>	Only arid and virgin land can be leased or sold provided certain conditions (forests and protected land cannot be transferred)	Governmental institutions and ministries (ARAZI)	<ul style="list-style-type: none"> <li>• Lack of adequate mapping</li> <li>• Some privatised land is perceived as having been acquired by “grabbing” state or public land</li> </ul>

### ***Institutional Organigram***

The detailed information on various institutions, their interaction and possible overlap are explained in the section 9.9. This organigram aims to identify the main actors in Afghan land governance in terms of policy formulation, implementation and adjudication and their interaction with each other (for detailed institutional map, please see the Annex VII.)



## 10. Presentations of substantive findings per topic

### 9.1. Land Rights Recognition

Pan-LGI-Dim				Topic	Score			
					A	B	C	D
<b>PANEL 1: Land Rights Recognition</b>								
<i>LGI 1: Recognition of a continuum of rights</i>								
1	1	1		Individuals' rural land tenure rights are legally recognized and protected in practice.				
1	1	2		Customary tenure rights are legally recognized and protected in practice.				
1	1	3		Indigenous rights to land and forest are legally recognized and protected in practice.				
1	1	4		Urban land tenure rights are legally recognized and protected in practice.				
<i>LGI 2: Respect for and enforcement of rights</i>								
1	2	1		Accessible opportunities for tenure individualization exist.				
1	2	2		Individual land in rural areas is recorded and mapped.				
1	2	3		Individual land in urban areas is recorded and mapped.				
1	2	4		The number of illegal land sales is low.				
1	2	5		The number of illegal lease transactions is low.				
1	2	6		Women's property rights in lands as accrued by relevant laws are recorded.				
1	2	7		Women's property rights to land are equal to those by men.				

#### Recognition of a Continuum of Land Rights

The LML provides for a variety of ways to establish legal ownership, based upon possession of documents, or long-term actual occupancy. However, in practice, only the former method of establishing ownership appears secure.

According to Art. 5 of the LML, valid recorded deeds include:

8. Documents issued by a legally recognized court, such as, title deeds, donation deeds, bequest, division, and the decision, which is made by court.
9. Presidential decree, government degree (council of ministers) (and a land purchase document from government's properties)
10. Tax payment documents (*maylati*)
11. Water rights documents (*haqaba*)
12. Customary deeds (*asnad-e orfi*)
13. Official ownership deed (*sanad rasmee mulkyet*) - during democratic republic Afghanistan 1978 - 79
14. Official deed for land ownership issued after a legal settlement of the land (*qabala-e qatae*)

#### ***Land tenure rights recognition in rural areas (incl. customary tenure rights recognition)***

As mentioned above, one of the main challenges concerning the recognition of rights of the majority of Afghans include the discrepancy between the existing legal framework and the reality of land tenure in the country which is overwhelmingly informal, and inconsistent within the legal framework itself.

In terms of undocumented rights<sup>84</sup>, long term unchallenged possession is ensured in Art. 8 of LML 2008. However the article stipulates that in order to prove the ownership the land must be cultivated and a proof of continued ownership since 1973 is required as testified by the neighbors, *de facto* limiting claims to land acquired after that date. Considering the occurrence of wars in the period after 1973, this article is in reality of limited usage.

In terms of customary tenure rights, their recognition has been at the heart of debates concerning the

<sup>84</sup> Which will be further discussed in the next sections of the report.

discrepancy of the statutory land law with the reality of practices in rural Afghanistan, primarily based on customary norms. Though the Constitution is silent on the authority of customary law, it is *de facto* recognized so long as it perceived not to interfere with Shari'a, which permits the practice of customary law, and is embedded in the Constitution.<sup>85</sup>

Article 5 of the LML of 2008 recognizes the validity of customary deeds under the condition that it was prepared and submitted before August 1975. In location where declaration forms were not distributed or the registration book was lost, the LML provides a customary deed may be recognized if there are no claims to the land, and the land purchase and the possession by the buyer has been confirmed by the landowners holding lands next to the plot, as well as by the inhabitants of the locality where the land is situated. Additionally, it is only recognized only under condition that the land seller owns the valid deed.

At the local level, and despite the absence of formal legal recognition, ownership is often well recognized and accepted by communities. However, while within the community this system is often well functioning and recognized, it is not always accepted by the “outsider(s)” (members of other community, government officials etc.). Local residents are mainly relying on customary documentation (*urfi*) developed by informal justice forums such as *jirgas* and tribal shuras, which are not legally recognized, except under very stringent (generally unrealistic) conditions (see above). Most of these customary documents take the form of bilateral agreement between the two transaction parties, in the presence of local leaders and witnesses. Current grey literature suggests that informal deeds generally tend to include the following information: name and address of the transferor and transferee, a description of the boundaries of the land, the price of the transaction, and fingerprints or signatures of two or more witnesses.<sup>86</sup> Often, however, they lack all the necessary information such as dates, signs/fingerprints or exact land boundaries.

Though in some instance, court documents have formalized customary rights of tenure, there remain some significant gaps and contradictions between statutory law and customary practices as related to land rights. An employee of the Municipality in Kandahar, for instance, reported: “Individuals and communities can claim a land only if they have legal documents. Some communities think that the lands near them belong to them. ARAZI never accepts this. According to laws, communities do not have the right to possess lands.”<sup>87</sup> This statement underlines, as above, the existing discrepancy between communal perceptions of land holding and the legal framework, which refuses to recognize them.

Second major problem in the recognition of rural tenure rights in Afghanistan is that Afghan land laws do not protect collective ownership, very commonly used in Afghanistan<sup>88</sup>. Particularly in the rural context, where due to the historical, tribal and ethnical linkages most of the lands are held collectively without any or only a customary documentation, according to the World Bank assessment, there were “weak or no real provisions” to protect collectively owned lands. In Herat, for instance, respondents spontaneously mentioned land commonly held by tribes and subdivided according to availability of water among tribal members. This reality was observed in other areas of Afghanistan, and is notably widespread in the Southeast - though different practices of land repartition are in use. When recorded (which represents only a minority of cases), these lands are usually either in the name of a single tribal leader, or under the name of the head of a family. This issue will be explained in more details in the section 9.2 *Rural group rights, their mapping, recording and boundary demarcation of communal lands*.

The fact that most properties in rural areas are neither evidenced by formal deeds (it was assessed that at the time of the Bonn Agreement in 2001, court-prepared documents were believed to cover 10%

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<sup>85</sup>E.g., at Art.130 (specifying that, if there is no superseding legal source, Afghan judges shall rely on Hanafi Sharia).

<sup>86</sup>The Liaison Office, “Major Land Disputes and Land Titling Systems of Khost Province Implications for Collaboration between Traditional Dispute Resolution Mechanisms and ARAZI” (Kabul: The Liaison Office, 2014), 38

<sup>87</sup> Interview with municipality employee, Kandahar, 9 July 2014.

<sup>88</sup> To explain as to why a collective ownership is not provided for in Afghan legal framework was not part of the scope of this study. However the existence of various regimes in Afghanistan in the course of its modern history, which each time brought different and at times contradictory approaches to land governance, can be one factor why the collective ownership did not find its place in the current Afghan body of law.

of rural properties and 30% of urban properties<sup>89</sup>, nor recorded (there has been no systematic update of records since 1978) has direct implications on the effective rights of rural residents. A Social Impact Assessment conducted by the World Bank on the LML noted that the law demonstrated “strong orientation towards those with formal documentation” when 90% of Afghans have no documentation at all.<sup>90</sup> It further noted that the LML, despite provisions such as article 8, failed to adequately spell out instances where undocumented rights could be protected.

According to the Presidential Decree 83, which supersedes all previous laws relevant to establishing ownership property rights including through customary documents, all land whose ownership cannot be proven shall be considered under the ownership of the State. Given a) the conditions tied to the recognition of customary documentation in the LML 2008, and the difficulty to comply with those in practice; b) the absence of any type of documents for the majority of rural Afghans; and c) the non-recognition of collective tenure, representing a significant portion of customary tenure; the legal framework for customary land tenure rights appears disconnected from the reality of the majority of rural Afghans.

It is unknown how much land automatically fell back to the State. Based on the figures estimated by AREU’s earlier research, the figure could potentially be as high as 90% for rural lands (70% for urban lands). Further even with the existence of the LML law, a recent report by UNAMA Rule of Law notes that it is “unknown how many individuals have successfully asserted ownership and obtained land titles pursuant to the LML”, and that “it is unknown how much untitled land is being used by the government or is part of a government development project, or is otherwise claimed by the government, any of which could negate a customary claim by those individuals who occupy or use the land”.<sup>91</sup>

Echoing a similar sentiment, an ARAZI official in Balkh province assessed that approximately 90% of rural villages in Afghanistan are thus considered to be illegal, as they have been built over land considered as government land<sup>92</sup>. Though this figure has not been verified, it is further indicative of the discrepancy between the reality of land holdings in Afghanistan, and the legal framework for its recognition - leading to the consideration that most rural land has been illegally occupied. This was a recurrent comment by land administration officials in all four provinces where interviews were conducted for this study. As reported by an ARAZI official in Khaki Jabbar district of Kabul: “Most of the land is government land. But from a customary perspective, people consider these land as much theirs as government property. People actually use government land according to customary rights. But this is not a legal right.”<sup>93</sup>

### ***Indigenous rights recognition***

In the Afghan context, the definition of indigenous group may apply to much of the rural population, particularly in some tribal areas (mainly Pashtun, but not only) where customary principles and tribal mechanisms remain strong, tribes retain a strong sense of identity, and the relationship to land and the resources available on it are governed by customary principles perceived as ancestral. There are no castes or legally recognized ethnic groups in the Afghan Law. That being said, the existence of the Independent Directorate of Kuchi Affairs and the recognition of a separate political constituency for Kuchi groups within the Parliament indicate that there is a formal recognition of their distinct identity. In order not to create an overlap with the previous indicator concerning customary rights, “indigenous rights to land” will therefore here apply to nomadic, semi-nomadic and recently settled nomadic tribes (Kuchis and Jat communities).

The definition of Kuchi, however, is contested, but appears to involve both considerations of lifestyle and ethnicity. Indeed, in the past decades, many Kuchis have settled, adopted a sedentary lifestyle, and acquired land, facing similar problems as other sedentary groups.

Article 14 of the 2004 Afghan Constitution provides for “improving ... the settlement and living

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<sup>89</sup>Wily, “Land, People and the State,” 22.

<sup>90</sup>Wily, “Land, People and the State,” 44.

<sup>91</sup>“The Stolen Lands of Afghanistan,” 5.

<sup>92</sup> Interview with ARAZI official, Mazar-e Sharif, Balkh, 30 June 2014.

<sup>93</sup> Interview with ARAZI official, Khaki Jabbar, Kabul, 5 June 2014.

conditions of nomads”. In practice, this mostly translated into state policies of settlement of nomadic tribes and land distribution plans often met with the resistance of local populations. The Environment Law (2007) requires demarcation of “areas appropriate for use of pastoralists” (rangeland), including migration corridors, and consultation with nomadic communities in land use and resource management plans (Ch. 1<sup>94</sup>). According to Art. 4<sup>95</sup> of Forest Law, management and custody of the forests are with MAIL. According to article 7 of the Forest Law all products of the forest belong to the state; individuals and private organizations can use the products from the forest, provided a fee is paid to MAIL. However, in practice local tribes and villages use jungle resources according to their own established procedures. In turn, the new Rangeland law, meant to clarify the conditions of use of rangeland (which represent 80% of Afghanistan’s rural land) is still under draft.

However, the reality in Afghanistan is different from the prescriptions of the legal framework. In most cases, conflicts over land involving Kuchis occur over public or state land. This maybe either on their traditional *mena*, or in peri-urban areas where services and livelihood opportunities are perceived as more accessible. By laying claim to rangeland, Kuchis may be able to settle informally and provisionally, but their tenure is necessarily among the least secure, because of rival claims by other communities or the risk that the state decides to uphold its right to its ownership. Thus, even when Kuchis try and permanently settle on lands they have been using for generations as temporary winter abodes, they are often technically landless in what they consider ‘their place of origin’.<sup>96</sup> Throughout research conducted for this study, the settlement of Kuchis was mentioned as particularly problematic in Gozara, Pashtun Zargun and Enjil districts of Herat, where respondents denied nomadic Kuchis had any right to settle. The settlement of Kuchis in Arghandab district of Kandahar and in the suburbs of Kandahar city was also reported to create tensions with already settled communities. Another example from more recent times 2010 and 2012, when Presidential Decrees, providing for the settlement of 5000 Kuchi families in Logar, Laghman and Nangarhar were perceived by some as the use of a legal instrument to provide land privileges to a certain group based on proto-ethnic considerations, and resisted by local residents.

The violent conflict over land use rights between Kuchi nomads and local population in Hazarajat can serve as another example for the limited recognition of nomadic tribes in Afghanistan. Historically, from 1892 onwards, Amir Abdul Rahman Khan issued a series of decrees, according to which pastures and vast swathes of agricultural land was taken away from the local Hazara people and were allocated (ownership rights) to certain Pashtun and Kuchi ethnic groups as rewards for their co-operation in the war and/or to appease them.<sup>97</sup> These lands were converted into settlements, residential houses and/or agricultural lands, downsizing rangeland in the process. This situation persisted until the time of Amir Amanullah Khan, who issued a decree, according to which arable lands were restored to the Hazaras and upstream lands remained as pastures for Kuchis. During the rule of Nader Khan and Zaher Khan, instructions were issued to provincial governors in the north and in the centre that pasture use<sup>98</sup> documents be given to Kuchis<sup>99</sup>, which continue to be held by them until now. Relying on these decrees, the Kuchis claim their usage rights over these lands (at times special pasture lands that are located in close proximity of the village), causing conflicts with the agriculturalist local people claiming their usage rights as well.<sup>100</sup>

The conflicts are less intense in the winter times. Field observations in the South East further indicate that, customarily, nomads’ rights to temporary settlement in the cold season are to an extent recognized by communities on specific parcels of land (*mena*). These are notably often currently-fallow land where they are temporarily allowed to settle until the start of the agricultural season.

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<sup>94</sup>Environment Law, Government of Afghanistan, 2007 (SY 1386).

<sup>95</sup>Forest Law of Afghanistan, (Official Gazette no. 795), Article 4, 2012.

<sup>96</sup> Fabrizio Foschini, “The Social Wandering of the Afghan Kuchis”(Kabul: Afghan Analysts Network, Thematic Report, 2013), 16.

<sup>97</sup>Gholam Mohammad Ghoobar, *afghanestan dar masir-e tarikh* (Afghanistan in the Course of History), Jomhuri Publications, 1st edition, SY1384 (2005).

<sup>98</sup> Government only gave the right of usage to Kuchis, not the ownership rights

<sup>99</sup> Based on Pasture Law, Art. 3 - pastures cannot be sold, bought or leased, they can be only used.

<sup>100</sup> Based on the author’s experience and analysis

That being said, the violent Kuchi-Hazara conflict in the Hazarjat over the use of pasture land (by Kuchis for grazing their herds and local residents for either grazing their livestock, or as *zaminelalmi* (non-irrigated agricultural land) indicates that land-related conflicts involving Kuchis are not simply related to their permanent settlement, but also imply complex considerations of access to summer pastures and the recognition (or non-recognition) of communities' rights to access and exploit them<sup>101</sup>. To this end, ARAZI suggested the establishment of technical working group comprised of MAIL, MRRD, MEW, Independent Directorate of Kuchi Affairs and members of the Commission for Dispute Resolution for Kuchi and Nomad Affairs, the parliament and ARAZI to provide technical inputs on adequate solutions to the issues of Kuchi communities in Afghanistan. This effort has yet to materialize.

The situation of Jat communities is distinct from that of Kuchis<sup>102</sup>. Composed of an estimate 20,000 to 30,000 individuals who have recently settled in peri urban areas, mainly surrounding Kabul and Mazar-e Sharif, these communities are notably characterized by social, economic, and political marginalization, political exclusion, as well as a distinct lifestyle, including nomadic practices distinct from other nomadic groups<sup>103</sup>. Considered as stateless, most are refused citizenship by the Afghan authorities. As such, studies indicate approximately 80% of households are not registered and do not hold any form of identification document, inhibiting, among other things, their legal access to land ownership.

#### ***Land tenure rights recognition in urban areas***

The difficulties for land tenure recognition in rural areas are similar to those of urban areas, however due to different reasons. In urban areas it is a rapid urbanization, extensive land grabbing and large informal settlements being established that create serious problems for urban land tenure recognition. It was assessed that at the time of the Bonn Agreement in 2001, court-prepared documents were believed to cover only 30% of urban properties.<sup>104</sup> Based on AREU's earlier research, due to the tendency of Afghan legal framework to prioritize state ownership over any other, it is estimated that approximately 70% urban lands fell back to state due to the inability of the potential owners to prove their rights.

There are a number of legal and policy provisions that aim to provide urban land tenure security. The Presidential 104 enacted in 2005 puts the provisions in place on the distribution of land for housing to eligible returnees and IDPs. The National Policy on Internal Displacement, approved in November 2013 addresses the right to adequate housing and access to land (Article 7.1.3). It notably urges the Afghan Government to take measures to ensure that IDPs and returnees<sup>105</sup> are permitted to upgrade their settlements, explore community-level initiatives to lend, rent or sell land in IDP settlements, and identify possibilities to grant IDPs security of tenure. This includes the identification of available land, the clarification arrangements with landowners and hosting communities, and usufruct schemes.

However in practice, urban tenure security has been severely impacted by a drastic increase in urbanization in the past decade, with a rate of urbanization close to 5% per year, one of the highest in the world<sup>106</sup>. Additionally, internal displaced persons (IDPs) and returnees in the past decade, most of which are settling in cities in search of livelihood opportunities and greater access to services, further remains one of the major challenges in terms of urban tenure security in the country. Finally, land grabbing is another major issue that prevents urban population to secure their tenure rights. All the above mentioned issues will be discussed in more detail in the section 9.3.

### **Respect for Enforcement of Rights**

#### ***Opportunities for tenure individualization***

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<sup>101</sup>Foschini, "Social Wandering," 17-21.

<sup>102</sup> The categorization of Jats (also known as Jogi and Chori Frush) in an ethnic category is also contested, and the denominations "jat," "Jogi" and "Chori Frush" are exogenous to the communities themselves. Cf. "Assessment of Out of School Children and Jogi communities," Samuel Hall, UNICEF, 2011.

<sup>103</sup>"Assessment of Out of School Children and Jogi communities", Samuel Hall, UNICEF, 2011.

<sup>104</sup>Wily, "Land, People and the State," 22.

<sup>105</sup> Returnees are persons who return to Afghanistan after they were compelled to leave the country due to persecution or a situation of generalized violence, including returning asylum seekers and refugees: See Howard and Madzarevic, "Security of Tenure," 7.

<sup>106</sup> Shobha Rao and Jan Trustka, "Enhancing Security of Land Tenure for IDPs" (Kabul: UN-HABITAT, 2014).

As mentioned above, it is common (however not legally recognized) in Afghanistan, that piece of land is used and/or collectively held by more than two parties, with one original document in the name of a village, or most commonly in the name of an ancestor whose descendants share the use of the land. Requests for tenure individualization mainly come from heirs aspiring to divide inherited land among themselves. Art. 25 of the LML of 2008 provides for formalization of individual tenure recognition, which were recorded collectively under the name of an elder or a community through the settlement. According to ARAZI officials, there are currently two types of individualization procedures:

1. Through the court
2. Through land clearance (*Tasfiya*), the responsibility of ARAZI.

The land clearance process *Tasfiya* covers only land legally held under the LML. It includes the mobilization of a land clearance delegation (composed of MoF, MAIL, Cadaster - each 2 members; and ARAZI - 3 members), in charge of verifying the original document and proceeding to the division of the land based on the information available.

The process through the courts is reportedly similar, following a petition to the court by the parties, who are provided with a “document of division” (*Taraka Khatt*), considered as a valid formal deed as per Art. 5 of the LML. If none of the documents specified in Art. 5 of the LML are available, the process is done according to article 8 of the LML, which can recognize the tenure of a person if he has been holding the land in question for 35 years or more.

In reality, however, a major issue concerning the opportunities for tenure individualization is the general absence of legal documentation by landholders across the country, and difficulties for land holders to comply with Art. 8 of the LML, given both high trends of displacement, and the extent of land holding by the government mentioned above. Moreover, dispositions in the existing LML for land clearance remain insufficiently descriptive concerning the set of procedures and mechanisms to be used.

That being said, the opportunities for the tenure individualization remain limited in Afghanistan. Additionally, due to the unclear process of the tenure individualization, high corruption of public institutions, in reality uncontested customary ownership rights mainly in rural areas and fear from paying taxes, the motivation for the collectively held areas to be individually registered is very low. Nevertheless, there have further been scattered reports of formalization of traditionally distributed lands - usually government land - in some provinces (such as the southeastern province of Khost), with communities registering individual ownership of their various members within the court. That being said, these practices have been reported to have been conducted through substantive use of corruption and bribes.<sup>107</sup>

### ***Recording and mapping of rural and urban land***

Before engaging in the discussion on recording of the land, it is important to clarify the terminology used for the purposes of this report based on Afghan context. *Recognition* of rights, as discussed above, talks about how the rights are recognized legally based on various land related laws and decrees. *Registration* is an act of writing down the information about one's land in the Principal Books of ARAZI or courts' Register of Title Deeds (*Kondas*). The rights in Afghanistan can be *recorded* in Land Statistics Registration book of the Cadastral Department, which serves as a “probable” ownership record in Afghanistan.

The majority of Afghan land remains unrecorded and unmapped with considerable regional variations. Even in the areas, however, where the rights are to various extent documented, the records have not been updated. Based on different accounts, reportedly only 33-36% of the land in the country has been formally registered, with latest records dating back to the regime of Daud Khan (1973-1978). Additionally, the last nation-wide cadastral land survey, which covered only 34% of mostly rural and

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<sup>107</sup> “Major Land Disputes.”

peri-urban private land of the country before it was stopped,<sup>108</sup> was conducted between 1970 and 1978, and has not been updated since<sup>109</sup>.

Because with each regime change, the policy on how to improve land governance has changed, there are various, and not always interlinked, ways how to record and/or register land in Afghanistan. Based on the experience of the experts interviewed for this study, the registration through ARAZI's land clearance and the court registration through acquiring of a formal title deed are only uncontested mechanism of registering land in Afghanistan:

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<sup>108</sup> There is no data available on the types of lands that were surveyed. According to the Expert's anecdotal understanding, all types of land were surveyed.

	Formal	Customary	Non-documentary evidence
<b>Registration at ARAZI - land clearance (Tasfia)</b>	<p>Land registration at ARAZI is probably most valid proof of ownership in Afghanistan because, when transacting the land through court registration, the validation of the registration in Principal Books of ARAZI is needed. However, this is possible only through land clearance process (<i>Tasfia</i>).</p> <p><i>Tasfia</i> is a process, when a team (currently including members of Cadastral Department) goes to the field and through the usage of different measuring techniques establishes the boundaries of the land, water rights, taxation status and the legitimate owner based valid legal documents (all legally valid documents proving the ownership of a land as set by the LML 2008)<sup>110</sup>.</p> <p>However, currently <i>Tasfia</i> is conducted only in cases when a major dispute over land exists, a big development or mining project is planned to be implemented, when land is located near the state land or specific cases when powerful people are involved. It is very difficult for ordinary Afghan citizens to get his/her land cleared by ARAZI, hence to be registered in Principal Books of ARAZI.</p>	<p>A customary deed document has to be prepared before 1975 and the seller has to possess original legal deed for it to be considered as legal. The buyer and seller invite two to three persons as elders, <i>Arbab/Malek</i> (Head of Village) in rural areas and <i>Wakil-e- Gozar</i> (representative of the community) in urban areas and the Mullah in their house or the local mosque. The Mullah or one of the participants writes the details on a piece of blank paper which includes the date, name, father's name, grand father's name of the buyer(s) and seller(s), the size of the property, boundary, the cost according to the market value and a statement of agreement by both sides. The buyer and the seller sign and put a fingerprint at the bottom of the deed. The elders, the Mullah and <i>Arbab</i> or <i>Wakil-i-Gozaral</i> sign the deed as witnesses. This is prepared in two copies, one for the buyer and one for the seller.</p> <p><i>Tasfia</i> team accepts the customary deed documents provided they fulfill the above mentioned requirements. If the rights holder does not have a copy of the original valid title deed, he/she has to seek the validation from the court against their archives (<i>makhzans</i>).</p> <p>However, the majority of Afghans do not possess the original valid title deed. Due to the wars many legal documents have been destroyed. Additionally the condition stipulating that only the customary deeds prepared after 1975 are considered valid, excludes the holders who acquired their rights after that year.</p>	<p><i>Tasfia</i> delegation conducts their investigation on long term unchallenged possession. Long term unchallenged possession is recognized when proven through the testimonies of neighbors that the person lived on land for more than 35 years, cultivated it and there are no other claims over it.</p> <p>However, to prove long term unchallenged possession is problematic in Afghanistan, taking into account the decades of war and internal and cross border migration.</p>
<b>Court registration -</b>	Courts in Afghanistan do not equally weight the various forms of government documentation listed in	Customary deed documents are accepted in theory as long as they meet al the above mentioned	The long term unchallenged possession is

<sup>110</sup>*Tasfia* form has 57 columns to be filled in by the team, such as if the land is shared, inherited, if there are any encumbrances such as loans etc.

<p><b>acquiring of title deed</b></p>	<p>the LML as valid evidence of ownership.</p> <p>Objective of the acquiring of a title deed is to formalize land ownership after the transaction (buying) of the land. This type of recording of rights can only happen when doing a transaction.</p> <p>Although the courts are legally bound to accept all the seven legal documents proving the ownership as listed in LML 2008, in current Afghan realities, often the judges refuse to accept the tax and water payment receipts, as well as <i>sanad rasmee mulkyet</i> - documents proving the ownership during the period of the Democratic Republic of Afghanistan (1978 - 79) fearing the acceptance of forged documents<sup>111</sup>.</p>	<p>requirements. Often, however, the required information such as signatures or fingerprints of the witnesses on the customary deed is missing, therefore these cannot be accepted by the courts.</p> <p>It is important to note, that it is not possible to formalize customary title deed without actually transacting (selling) the land. In other words, there is no mechanism established in Afghanistan, where one could go and after meeting all the necessary requirements, the customary deed document will be turned to formal title deed. Only the buyer, buying the land based on the customary deed document of the seller (as explained above), after going through the court registration will get formal title deed. There were efforts by the Judicial Reform Commission to push for an approval of a Customary Deed Registration Law in 2005, however this draft law was not enacted until now.</p>	<p>accepted in theory by the court as long as all the requirements as per Art. 8 LML are met, taking into account the difficulty to prove long term unchallenged possession in praxis.</p> <p>The process of formalizing the long term possession based on non-documentary evidence does not exist in Afghanistan. Similarly to the customary deed documents, one has to transact the land in order for the buyer to acquire formal title deed.</p>
<p><b>Cadastral recording and mapping</b></p>	<p>The entry of an owner's name on the forms of the Cadastral Survey (ownership list and ownership card) does not necessarily represent an official confirmation of ownership. It is rather a statement of "probable ownership" based on the field data that the survey teams collected about each parcel they surveyed. The main reason for this is the fact that the Cadastral team does not have the responsibility to investigate who is the rightful owner.</p> <p>a) National Cadastral Survey - started in 1964. Its objective is to provide maps and spacial information about the land and linking it to other information land in other land registries. Last survey was conducted between 1970-78, while only 30% of land was surveyed. The records were not updated since</p>	<p>Customary deeds are accepted, taking into account that the cadastral department does not have the responsibility to find the rightful owner. The word "customary" is written on ownership list and in the cadastral records.</p>	<p>Long term unchallenged possession based on all required non-documentary evidence is accepted. The words "under claim" is written on the ownership list and into the cadastral records.</p>

<sup>111</sup> After 1979, Afghanistan's three decades of war started and the judges, out of fear of accepting forged documents, often do not accept any.

	<p>then, except for additionally 4% of land surveyed in last 5 years, based on various presidential decrees<sup>112</sup>.</p> <p>The cadastral map is the most valuable output that can be obtained only through this process. The outcomes of the cadastral mapping are sent to ARAZI for their recording.</p> <p>b) National Inventory Survey (<i>Mowzeyee survey</i>) - the methodology from the cadastral to inventory survey was changed to accelerate mapping process<sup>113</sup>. This shorter and simpler methodology is used until now, although in rare cases as mentioned above.</p> <p>It is possible for the individual to have his/her land surveyed on demand; however the approval of the ARAZI CEO is needed. In cases of large tracts of land such as whole villages, the approval of the President has to be sought. This is done by submitting a letter of request to the Administrative Office of the President. However, in reality the land inventory happens rarely for ordinary citizens in Afghanistan.</p>		
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<sup>112</sup> After 1978, the National Cadastral Survey was halted by a Presidential Decree and only upon his approval can the Cadastral department conduct further surveys.

<sup>113</sup>Change of the equipment, avoiding of an astronomical observation, triangulation, and measurement by steel tape, etc.

Though some geographical variations were observed<sup>114</sup>, as mentioned above, only a minority of landholders in Afghanistan register their land, hence lacking any form of land document from the Afghan State, while informal documents still appear to be the most widespread form of documentation (if the documentation exists at all).

The possession of formal land documentation varies considerably in Afghanistan from province to province. In Balkh province, for instance, reportedly 80% of the land has been surveyed (though, as above, the records have not been updated since). In this part of Afghanistan, where documentation appears to be overall more available than in other provinces researched, only the district of Shur Tapa was reported to be under-documented, as compared to those of Khulm, where a majority of people were mentioned to hold formal land documents. Similar variations were observed in rural areas of Kabul province, where less than 20% of landholders allegedly have formal documents in Khaki Jabbar and Surobi, whereas this proportion rises to a reported 70% in Shakardara.

One of the reasons mentioned for low registration and formalization is reportedly the widespread corruption of government institutions, which require the payment of bribes. According to agencies involved in addressing land issues, most rural residents prefer the use of customary deeds as the process for formalization and registration requires the payment of informal fees. Customary deeds are thus considered cheaper, do not require travelling to the nearest centre, and include little or no payment of debts.<sup>115</sup>

Another reason mentioned was the perceived complexity of the administrative process. According to the World Bank Doing Business in Afghanistan report of 2015 it takes approximately 250-360 working days for the completion of land tenure recognition in Afghanistan<sup>116</sup>. Therefore, most of the people prefer directly deal with community representatives to divide land among heirs, distribute land among tribe members or sell parcels. There were further mentions of individual parties documenting transfers “themselves” - e.g. concluding bilateral agreement without the assistance of a judicial forum (formal or informal). Officials, despite usually tolerating customary forms of land ownership, do not regard these documents as having any legal value<sup>117</sup>.

Paying taxes also deter people from registering their property, in particular when adding the informal fees, which often have to be paid in addition to regular land taxes fees. People try to avoid paying taxes due to the lack of financial resources or because they do not believe that the government will spend the money to their benefit. Some high-ranking officials and rich people do not pay taxes knowing they will not be pursued.

### ***Illegal land transactions***

Due to the largely customary tenure of Afghan land with only minimal portion being recorded or mapped, the opportunities for illegal land transactions are enormous.

Illegal land sales are more broadly known in Afghanistan as ‘land grabbing’ or ‘land usurpation’. It occurs more in urban areas than rural because the value of land in urban areas is higher, while all types of land (private, public, state) are being usurped. The term has been defined as “use, control, occupation or ownership of land by one without a bona fide right.”<sup>118</sup> This definition

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<sup>114</sup> These variations were not so much observed on a regional basis but within small pockets of districts. For instance, though landholders in Balkh province appeared to by and large hold more formal documentation than in the other three provinces, the Balkh district of Shur Tapa was reportedly deprived of formal deeds. Similar variations were observed within Kabul province, with relatively more documentation in Shakardara than in Surobi or Khaki Jabbar, and between districts within Kabul City, with less than 1% of PD 13 residents holding formal documentation.

<sup>115</sup> A development worker interviewed in Balkh province provided the following anecdotal evidence: “In Sari-Pol, you have to pay at 6000 Afghanis when you want to register your land if you refer it to the courts. And they see the size of your land and based on that, they ask for additional bribes to give a Qabala-e Shariayi. And it gets delayed. This is a chronic issue.” Interview with a development worker, Mazar-e Sharif, 30 June 2014.

<sup>116</sup> “Registering property,” World Bank Group, <http://www.doingbusiness.org/data/exploreconomies/afghanistan/#registering-property> (accessed 4 September 2015).

<sup>117</sup> Interview with community leader and district administration officer, Zendan, Khaki Jabbar, 7 June 2014.

<sup>118</sup> “Stolen Lands,” 38. This definition was also used in the Draft Policy Paper titled “Addressing land grabbing through the criminal justice system,” prepared by the Policy Advisory Group on Land, convened by UNAMA Rule of Law.

captures many forms of illegal land transactions including the following instances: “the use of physical force, intimidation or violence by powerful people to remove others from land; individuals occupy and improve empty land; individuals obtain title through a land allocation scheme that feels to meet legal requirements; individuals obtain title through fraud.”<sup>119</sup>

Presidential Decree 45 on grabbed land policy requested the mapping of all land grabbed across Afghanistan. According to this decree, the list of land grabbers was to be compiled by all ministries from which land had been grabbed, and submitted to ARAZI. Statistics compiled by ARAZI indicate that more than 1.2 million *jeribs* of land have been usurped over the past decade.<sup>120</sup> A special Parliamentary Committee created to align a list of land grabbers with the list already drafted by ARAZI includes over 15,000 individuals, who had allegedly participated in land grabbing.<sup>121</sup>

A recent report by Independent Joint Anti-Corruption Monitoring and Evaluation Committee identified that one of the most common means of land usurpation is forgery of documents.<sup>122</sup> During the registration process documents and deeds are being removed or replaced with fake deeds in court archives (*Makhzans*). Land is also being usurped through forged powers of attorney, customary deeds and inheritance. Additionally documents that are stored in poor quality conditions have made them vulnerable to deterioration. In particular, forgeries carried out by court employees have been identified as one of the main forms of land usurpation. The report also notes that there have even been instances of deliberately destroying existing records.<sup>123</sup>

Additionally, field data collected for this report showed that illegal land transactions are a widespread practice across the country. It was notably mentioned as a serious problem by local ARAZI offices. The district ARAZI of Balkh District for instance, mentioned land grabbing was the main challenge he was faced with, and insisted most land grabbers had not been identified by the government<sup>124</sup>. In Balkh in general, but also in Herat Province, land grabbing by local power holders and former jihadi commanders, who then illegally sell the parcels they have appropriated, was notably mentioned as a widespread phenomena by several interviewees. Most parks within Mazar have similarly been grabbed by local power holders, allegedly with the tacit support of government employees<sup>125</sup>. In other areas, such as Kandahar city, illegal land sales by land grabbers was reported to occur on a “huge scale”<sup>126</sup> ARAZI officials, despite mentioning the wide scale occurrence of illegal land sales, reported they had no precise information concerning the extent of these practices in their areas. Others provided approximate figures concerning illegal land sales in their area. In Guzara district of Herat province for instance, illegal land sales reportedly reach 35% of transactions - mostly through the use of fake documentation. In Pashtun Zarghun district of the same province, 10% of sale transactions are reportedly considered illegal. The proportion reportedly raises to 60% in Spin Boldak district of Kandahar. No information, however, was provided concerning the criteria used to define “illegal land sales”, which, as above may cover different realities

However, despite the extensive nature of the problem, the current legal framework does not adequately address the crime of land grabbing.<sup>127</sup> The LML contains a criminal provision relating to land grabbing; however, this provision has been criticised as it does not define the act of land grabbing or set out elements of land grabbing or provide for any penalties.<sup>128</sup> Similarly land grabbing is not separately criminalised in the Penal Code. There are possibilities to prosecute the crime of land grabbing as “theft” under the Penal Code. However, it has been argued that the Penal Code’s theft provisions only cover moveable property.

Given the limited reach of government authorities in most of the country, and the widespread occupation of government land under customary norms unrecognized by the state, transactions over land legally state-owned but customarily or de facto occupied by communities who consider it

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<sup>119</sup> “Draft Policy Paper on Addressing Land Grabbing through the Criminal Justice System” (Policy Advisory Group on Land, 2014).

<sup>120</sup> “Public Inquiry into Land Usurpation,” 9.

<sup>121</sup> “Stolen Lands,” Note 184.

<sup>122</sup> “Public Inquiry into Land Usurpation,” 9.

<sup>123</sup> “Public Inquiry into Land Usurpation,” 10.

<sup>124</sup> Interview with District ARAZI, Balkh district, 3 July 2014.

<sup>125</sup> Field research, Balkh and Herat provinces, June-July 2014.

<sup>126</sup> Interview with Provincial ARAZI, Kandahar, 9 July 2014.

<sup>127</sup> See “Stolen Lands of Afghanistan,” 9.

<sup>128</sup> Ibid.

as their rightful holding might also be considered illegal.

Another form of illegal land sales includes the sales of state land or public land, which is not allowed under Afghan law, sales of the leased land or sales of land with partially forged document. Illegal private land leases as opposed to illegal land sales, were mentioned to be scarce, allegedly due to low revenue drawn from leases as compared to sales. Given the high proportion of unrecorded land and potential inter-personal lease transactions between individuals, one cannot exclude, however, that the practice does exist<sup>129</sup>.

Illegal state land leases, according to the Art. 19 of the ARAZI Land Lease Procedure are:

- Leasing a state land for agriculture purposes and use it for business purposes because the price of leasing of land for agriculture purposes is lower than for business purposes.
- Further lease of already leased government land for higher price than original lease (sub-leasing).
- Leasing of a state land for business purposes with harmful effects to environment.
- Leasing of a state land for a specific purpose without using it

The procedures of leasing the state land and the issues connected to it will be explained in more details later in this report. At this stage it is, however, important to note, that illegal state land leases happen in Afghanistan. One example of a state land in Ade Torkhum in Jalalabad can serve as an example. The land was leased for agriculture purposes by two businessmen, which was later turned to residential area, where the plots are being sold to third parties.

### ***Women's formal rights***

Women's rights to ownership and acquiring of land are embedded in the Afghan Constitution particularly in Art. 40 similarly to those of any other Afghan citizen. It provides that "no one shall be forbidden from owning property and acquiring it." Art. 22 further mentions: "The citizens of Afghanistan, man and woman, have equal rights and duties before the law." Additionally, the Art. 34 of the Elimination of Violence Against Women Law (EVAW) of 2009 establishes a short term imprisonment for those who prevent a woman from possessing or acquiring personal property, such as her salary, house, and other goods. According the Shari'a, law firmly embedded in the Afghan Constitution and other statutory law, there is no prohibition on women obtaining equal property rights to those of men. Daughters and wives are thus entitled to a share of their brothers and husbands inheritance.

Despite formal legal provisions that allow women to own land, few women actually do. Daughters tend to abandon their inherited land rights in favor of their brothers, and widows, who inherit land, commonly transfer it to their sons (this is known as the practice of renunciation (*tanazul*)). The rare cases where women retain control of inherited land are those when women have no brothers and are not married, keeping the land due to the lack of support from their brothers and husbands. Widows and female heads of households are sometimes recognized at the local level as the owners of a parcel, but rarely register their rights in their own name, preferring to register them in that of a male member of the family (son, nephew, etc).

Studies thus found almost all land is registered in the name of the male head of household: less than 2% of women own land and most of those women are widows<sup>130</sup>. Field research largely confirmed the above findings, though slight geographical variations were observed - with a reported 10% of women owning land in several Balkh districts, though it remains unclear if the land is effectively recorded in their name or in that of their late father, husband, or son, which appears to be the case in most areas across Afghanistan.

The reasons for this trend are strong social and customary barriers to property ownership by women, where patriarchal structures remain prevalent. Women in Afghanistan often believe that it is not appropriate for them to inherit from their parents because they will have right on their husband's property after marriage. In practice, this is not applicable most of time, particularly in cases, when a woman is divorced. In this case it barely happens that women inherit property from her husband. Similarly, when a woman is widowed and doesn't have children, she often does not inherit property due to the popular belief in Afghanistan that as long as a woman does not have children, she will re-marry again and inherited land would end up in hands of her new husband. To

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<sup>129</sup> More on state land leases will be discussed later in the report.

<sup>130</sup>Wily, Land and the Constitution"

the contrary, when a woman has children, often the inheritance rights are granted to her. Moreover, the complexity of the formal process of registration deters many women, who lack knowledge and access to these institutions, to register their rights. In urban settings, where female heads of household and widows are increasingly asserting their rights to land, they are still unlikely to try to register their rights formally because the process is time consuming and costly, but also because due to social pressure, women are less familiar with administrative processes.<sup>131</sup>

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<sup>131</sup>Ibid.

## 9.2. Rights to Forest and Common Lands & Rural Land Use Regulations

Pan-LGI-Dim				Topic	Score			
					A	B	C	D
<b>PANEL 2: Rights to Forest and Common Lands &amp; Rural Land Use Regulations</b>								
<i>LGI 1: Rights to Forest and Common Lands</i>								
2	1	1	Forests and common lands are clearly identified in law and responsibility for use is clearly assigned.					
2	1	2	Rural group rights are formally recognized and can be enforced.					
2	1	3	Users' rights to key natural resources on land (incl. fisheries) are legally recognized and protected in practice.					
2	1	4	Multiple rights over common land and natural resources on these lands can legally coexist.					
2	1	5	Multiple rights over the same plot of land and its resources (e.g. trees) can legally coexist.					
2	1	6	Multiple rights over land and mining/other sub-soil resources located on the same plot can legally coexist.					
2	1	7	Accessible opportunities exist for mapping and recording of group rights.					
2	1	8	Boundary demarcation of communal land.					
<i>LGI 2: Effectiveness and equity of rural land use regulations</i>								
2	2	1	Restrictions regarding rural land use are justified and enforced.					
2	2	2	Restrictions on rural land transferability effectively serve public policy objectives.					
2	2	3	Rural land use plans are elaborated/changed via public process and resulting burdens are shared.					
2	2	4	Rural lands, the use of which is changed, are swiftly transferred to the destined use.					
2	2	5	Rezoning of rural land use follows a public process that safeguards existing rights.					
2	2	6	For protected rural land use (forest, pastures, wetlands, national parks, etc.) plans correspond to actual use.					
2	2	7	Rural lands, the use of which is identified for rehabilitation, are swiftly transferred to the destined use.					

### Introduction

Approximately, 80 % of rural Afghan population depends on land to secure their day-to-day livelihoods. The country's future stability and economic development is also dependent on the management of natural resources including forests, common lands and pastures (rangelands).

Currently, pasturelands comprise 30.1 million hectares of land, constituting around 45% of the country's overall area<sup>132</sup> excluding the vast swathes of land that are considered 'non-arable lands' or 'arid lands', which are used for grazing in winter. Therefore the total area used for grazing in Afghanistan constitutes 70 - 80%. These pasturelands can provide habitat and fodder for around 35 million of livestock as well as wildlife. Pasturelands constitute major sources of revenue for the rural population who use these lands to make livestock by-products and herbs.<sup>133</sup>

Forests are one of Afghanistan's most important national assets, which play a significant role in supplying construction timber, fuelwood and industrial timber. Forests are crucial in protecting the environment, mitigating floods, and preventing soil erosion. In the mid-twentieth century, Afghanistan had 3.1 to 3.4 million hectares of forestland, however the recent reports and surveys have estimated the current area of forestland to less than 1 - 1.3 million hectares.<sup>134</sup> If deforestation continues at the

<sup>132</sup> "National Plan for Sustainable Rangeland Management," fourth draft (Kabul: MAIL, 2012).

<sup>133</sup> "Afghanistan Initial National Communication to the United Nations Framework Convention on Climate Change" (Kabul: UNEP, 2012), 16.

<sup>134</sup> "Afghanistan Initial National Communication," 4.

same rate, the total degradation of the country's forests in the next 20-25 years will not be far from reality and the country will face an absolute loss of construction timber and fuelwood as well as the devastating repercussions of floods and excessive soil erosion.

Afghanistan's natural resources have been severely destroyed by natural factors such as droughts and floods, as well as hand-made disasters such as wars, weak management and lack of rule of law the recent past. Increasing population, climate change, deforestation, overgrazing, degradation of water reservoirs and reduction of water, salinization, soil degradation and loss of biodiversity have, all in all resulted in desertification in many parts of the country.<sup>135</sup>

*Concept definitions:*

*Rural lands* are lands located in rural areas such as pasturelands (including deserts, cemeteries, mountains and hills and river banks), forests, protected areas, agricultural, arid and virgin land, rain-fed lands and *chermanjay* - a special field for cultivating wheat.

*Common lands* are viewed as equal to public lands in Afghanistan and they can include pasturelands and forests. Public lands are not adequately defined in current Afghan statutory law. Given that the Art. 3(8) of LML 2008 stipulates that any land, which is deemed public and is not registered in the book of government lands, is considered state land, the blurred definition of public and state land resulting from the Presidential Decree 83 and the fact, that registration of land occurs rarely in rural areas, public (and also private) land can be easily interchanged for the state land. Hence, in some cases, public lands have been given away by the state to other private owners<sup>136</sup>.

*Pasturelands* are the "entire land stretches, including wastelands, hillock and the meadows, marshy lands on both sides of a river and woodlands covered with herbaceous plants and natural shrubs and bushes and which can be used as animal fodder" according to the Pasture Law (2000). However, the definition itself and the ownership rights over pasturelands in Afghanistan are not clear. According to the Art. 3(9) of LML 2008, the grazing land, which is a sub-group of pastureland is unprecisely defined as "if a person having loud voice and standing at the last home of village or town calls loudly, this land up to the place where the voice of the loud voice having person is heard, is considered to be grazing land." In relation to the ownership rights, according to the LML (2008), Art. 3 (8), pastures have been included in the government land, whereas paragraph 9 of the same article and Art. 82 (1) explain that the pasturelands are "those virgin and arid lands, on which state and individual possession has not been proved legally and they are deemed public property. An individual or the State can not possess pasture lands, unless otherwise stipulated by the Shari'a." Taking into account the traditional customary claims on pastures prevalent in Afghanistan such as in the example of the local communities in Hazarajat, Central Highlands, concurrent understanding of the land ownership over these lands by the Kuchi tribes and local communities, and most importantly continuing claims on both sides stemming from different regimes' allocations of land, where the lands has gone from Kuchi tribes and communities back and forth the conflicts over pastures in Afghanistan are numerous. Additionally, the ambiguity on the land tenure of the pasturelands leads to the various interpretation on the use of these lands. Art. 3 of the Pasture Law (2000) divided the pastureland into 2 types: specific and communal pasture. It stipulates, "The right to use a pasture shall confine to cattle grazing. Only the cattle of the nearby villages can be grazed on the specific pasture and the communal pasture can be used for grazing cattle belonging to the communities<sup>137</sup>." However, coming to the example of the conflict over pastures in Hazarajat, the interpretation of the Kuchi communities that the pastures are state lands hence can be used by all and the local communities cannot restrict their usage, creates major conflicts in this area.

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<sup>135</sup>"Afghanistan's Environmental Recovery: A post-conflict plan for people and their natural resources,"(Kabul: UNEP Post-Conflict Branch, 2006).

<sup>136</sup> Liz Alden Wily, "Land Governance at the Crossroads: A Review of Afghanistan's Proposed New Land Management Law" (Kabul: AREU, 2012).

<sup>137</sup>Also LML 2008, Art. 82(2) stipulates that the pastures shall be used by the local villagers.

Based on the definition in Forest Management Law (FML) 2012, Art. 22 (5), “forest includes at least half a hectare of land with surface coverage of at least 10 per cent of fertile and infertile trees”. Forests are considered a government (state) land (LML, 2008, Art. 3(8)) and can be used by all the citizens of the country (FML 2012, Art. 5). According to Art. 4138 of Forest Law, management and custody of the forests are with MAIL. According to article 7 of the Forest Law all products of the forest belong to the state; individuals and private organizations can use the products from the forest, provided a fee is paid to MAIL. However, in practice local tribes and villages use forest resources according to their own established procedures. Although no such statutory law ambiguity exists in the definition, ownership and usage rights in relation to forests, the customary claims over some parts of Afghanistan forest area exist, creating conflict over the usage of the forests.

### **Rights to Forest and Common Lands**

#### ***Definition of Forests and Common Lands***

The legal codes of the country provide a clear definition of forests, as mentioned above. There are various types of forests. Based on Art 3. (11) a “state forest” is a forest that belongs to the government and is utilised and protected by the state organisations. Art 3 (9) defines “city forest” as a forest, which is created on state land inside a city for its produce, housing animals, protecting water, recreational and educational purposes. Art. 3 (12) stipulate private forest as a forest that is created by people in their private or leased land. Art. 3 (13) defines “protected forests” as forests that are announced as protected forests because of environmental reasons.

User rights are also stipulated in the legal code. As mentioned above, the citizens of the country can use the state forests based on the MAIL’s regulations. In Arts. 25 and 26, the Forest Law provides the provisions for “the arbitrary and unlicensed utilisation, exploitation, transportation and processing of forest products”. The illegal use of forests can to criminal penalties.“

The Department of Forests within MAIL is responsible for management of the forests.<sup>139</sup> Art. 17 of the Forest Law (2012) also stipulates that the responsibility of protecting and maintaining the forests falls within the citizens and the government organisations.

As mentioned in the introduction, common lands are considered equal to public lands in Afghanistan. However, the current body of laws does not provide a clear definition of public lands (the issues with the unclear definition of public lands will be explained in more detail in the section 9.4.).

The contradicting articles in LML along with the fact that the most of the land in particularly rural Afghanistan is not registered, nor surveyed, creates major problems in terms of the identification of public land ownership and usage rights. Weak legal understanding of common property particularly undermines the interests of those who own small farms or no farms at all. The rights of this group of people are endangered by people with influence and that legal standards are not able to protect their rights. Disputes over outlying lands such as rain-fed agricultural lands and pasturelands are commonplace, putting into conflict the rights of individuals versus the local population as well as the interests of different ethnic groups.<sup>140</sup>

#### ***Rural group rights, their mapping, recording and boundary demarcation of communal lands***

Rural groups in Afghanistan hold themselves to be a number of families living in the same rural area, sharing the same traditions, culture, who have approximately same standards of living and have created certain bonds between each. In the context of Afghanistan it is a plethora of tribes, clans and sub-clans or *qawms*<sup>141</sup> that can be considered a rural group. A group right is a right that is shared between two or more persons in a manner that each member of the group has certain user rights in each portion of the commonly held land (as opposed to the land being divided into number of smaller

<sup>138</sup>Forest Law(Official Gazette no. 795), 2012(SY 1391), Article 4.

<sup>139</sup>See Art. 4 of FML 2012.

<sup>140</sup>Liz Alden Wily, “Looking for Peace on the Pastures,”(Kabul: AREU, 2004).

<sup>141</sup> This term more precisely means “solidarity group”, and can be used to refer to small entities an individual’s family, or large groups such as clan and tribe.

parcels depending on the number of members of the group). However, as mentioned above the collective property rights are not provided for in the current body of laws in Afghanistan, therefore no mapping nor recording of group rights is happening in Afghanistan.

The collective property rights are not provided for in the current body of laws in Afghanistan. Even though the National Land Policy (2007) defines the term “community land”, this term is not embedded in any other existing laws in relation to land management. The Draft Rangeland Law, currently being prepared by MAIL, provides the framework for management of private, community and public rangeland. It is currently under revision, however has not been approved yet. Under this draft, nomadic or semi-nomadic people may acquire pastureland for grazing their livestock through application to the local authorities stating the need for land, and through the identification of vacant land (*mawat*)<sup>142</sup>.

Additionally, considering the public ownership as a group right, as mentioned above, Afghanistan did not establish the process of legal recognition of the public as an owner of public lands. This means that even though the general understanding is that the public lands (although not properly defined in Afghan laws) are owned by the public, there is not legal way to prove that during *Tasfia* (land clearance) processes. Therefore according to the Art.2(8) LML 2008, stipulating that all the lands, which ownership cannot be legally proven, belong to state, all these lands legally belong to the state.

Even though in Afghan statutory law the group ownership rights are not formally recognized, in the customary law, the tribes, villages, clans and families can in reality be perceived by others and hold themselves out as owning pieces of land that they exercise user rights over. The rights are usually recorded in the name of one person of the village/tribe/clan and are customarily considered as group rights. On paper, there is no difference between the land owned by a group and land owned by one individual, who could use that registration to exclude other persons from the land. This leads to a real legal vulnerability for the rest of the group. However through the witnesses (the process used often in rural Afghanistan) is possible to find out if the land belongs to one individual or a group.

Additionally, in the past, the legal concept of collectively held lands existed and at times they were allocated to different tribes or clans. Such examples can be found in Shewa, Badakhsnah, where in times of Zahir Shah, the Kuchi tribes were allocated land to use it every summer for 3 months. The reminiscence of collectively held lands exists until today, with majority of Afghan rural land being collectively held. However, as mentioned above, the current body of law is silent on the status of collectively held lands from the past giving no possibility of legal recognition. These lands are also not properly mapped.

The definition of communal land is not provided for in Afghan body of law. Communal lands in Afghanistan can be considered as a public land, taking the issues with their definition and communities’ rights recognition mentioned in the previous parts. Nevertheless, the Pasture Law 2000 mentions the communal pastures<sup>143</sup>. Art. 2(2) provides the definition of communal pastures: “Communal pasture: Arid land which, in accordance with section (9) of the land management law does not fall within bounds of villages or towns.” According to Art. 3 of the same law, “the communal pasture can be used for grazing cattle belonging to the communities” and it cannot be brought, sold or leased (Art.6).

This concept exist until now and people distinguish between special and communal pasture. However, the boundaries of communal pastures are not demarcated.

### ***Recognition of user rights to key national resources***

For the purposes of this study the key natural resources are forests and its products, pastures, water and other natural resources like wood. There are multiple articles within the laws covering users’ rights. According to Art. 5 of the FML 2012 the citizens of the country can use the state forests based on the MAIL’s regulations. Art. 22 of the same law stipulate that “the license to use and exploit state

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<sup>142</sup>Draft Rangeland Law.

<sup>143</sup> Art. 82 of LML, Dari version: pasturelands are translated as *mara’a* land, meaning it can be grazing land, graveyard, hills, etc. Therefore, the common pasture can be certainly considered as *mara’a* land.

forests is awarded by the Ministry of Agriculture, Irrigation and Livestock at the request of forestry associations". The Pasture Law (2000) Art.3 clearly states that pastures can be used by communities for grazing cattle. The Water Law enacted in 2009, stipulates in its Art. 2 that the water is owned by public and it should be managed and protected by the government.

Even though the Afghan legal code provides certain clarity in the relation to key natural resources, in reality there were and still are numerous conflicts over the usage of pasture and forest lands in Afghanistan such as already mentioned conflict between Hazaras and Kuchi communities and conflicts over water rights, particularly during dry seasons such as in Ghazi in Sarab district and Gedargu<sup>144</sup>.

In addition to insecure user rights, the communities suffer from the illegal use of natural resources. Lack of security and the inability of the government to implement the rule of law throughout the country often leads to the destruction of the forests, cutting down the trees and smuggling. Other violations include converting forestland to residential areas and using forestland for private purposes. From 1992 onwards, forests have been, contrary to the law, converted into farmlands, orchards and unplanned settlements in Balkh, Samangan, Baghlan, Kunduz and Takhar provinces. This trend has taken place as a result of the lack of law enforcement in these provinces and has continued up to the present day. Furthermore, in Samangan, Ghor and Badghis provinces, pistachio forests that constitute large parts of the income of the residents of this province have been cut down to trade and use as firewood, leading to widespread deforestation. In Kabul, Zabul, Kandahar, Helmand, Farah and Nimruz, the usage of the forests for timber smuggling persisted at least for the last three decades and continues to the present day. A prominent example is firewood markets in Kabul and its neighbouring provinces, where the timber is usually illegally provided.<sup>145</sup> Even though the state and the international community have made an investment on reforestation starting in 2002, the redevelopment of these forests has not yet been completed.

Another recent example for no respect of the community rights, as well as lack of rule of law and good governance is the area around Amu Darya river. Around 1,560 *jeribs* of public pasturelands and forests, located adjacent to the Amu Darya, were leased by the local ARAZI department in Imam Saheb district and the Afghanistan Independent Land Authority (ARAZI) to some 31 people in Qaraqarawal, Shalbafi, Barzangi Arabia and Hajji Talab areas of Imam Saheb district of Kunduz province. However, these lands were converted into arable lands after cutting down forests and destroying pasturelands. As a result, around 1,600 families were deprived of the right to use these pasturelands, in contravention to the Pasture Law, Article 3. Also, around 1,000 *jeribs* of lands - recently protected from the Amu Darya floods and having a vegetation surface were converted into arable lands and leased afterwards. Furthermore, around 500 families have lived in Imam Saheb's public forest for years. However, this forest and pasturelands converted into arable lands, destroying the largest natural and biological sources in the process.<sup>146</sup> It is correct to think that the state should be employing measures to prevent the conversion and unsustainable land use, however it the process needs to start with the recognition of rights of the local communities to these pastures and forests.

### ***Multiple rights over common and private lands and their natural resources***

Multiple rights over common (public) land and its natural resources can coexist in Afghanistan. The prominent examples would be the Kuchi and local communities using the pastures in summer time, when the Kuchi communities have right to use certain pastures otherwise used by the local communities. In some areas this arrangement is well functioning, in other areas the sharing of the summer pastures can lead to conflicts between Kuchis and local communities over usage rights. Even though the Afghan laws and practices provide the venues for the dispute resolution, in praxis, as already mentioned, there are examples of lengthy and complicated unresolved disputes. Taking into account the slow and costly court proceedings in Afghanistan, even this possibility is not effective to

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<sup>144</sup> For further information please read Vincent Thomas, "Unpacking the Complexities of Water Conflicts Resolution Processes in Afghanistan" (September 2014); "Water Rights and Conflict Resolution Processes in Afghanistan: The Case of the Sar-i-Pul Sub-basin" (December 2013), "'Good' Water Governance Models in Afghanistan: Gaps and Opportunities" (March 2013).

<sup>145</sup> Interview with ARAZI employees, Kabul, 27 March 2015.

<sup>146</sup> Author's personal experience

swiftly resolve the disputes arising from the multiple rights over the common lands and their natural resources.

Multiple rights over the same plot of land and its resources can legally coexist in Afghanistan. One prominent example is share-cropping, very often used in rural Afghanistan. Share-cropping is a system of agriculture, in which the land owner allows a tenant to use the land in return for a share of the crops produced on the land. Another example, when the municipality decides to plant the trees on the side of the road on the plots that belong to individuals, they conclude contracts with them where all the provisions, rights and duties are stipulated and can vary from contract to contract.

#### ***Multiple rights over land and mining resources located on the same plot***

Art. 38 of the Minerals Law 2015 stipulates the rights and obligations of the surface owner and the license holder:

“A landowner may not use the surface of land which is within an Area subject to a License for the purpose of cultivation, planting trees, waterway, grazing livestock, constructing buildings or infrastructures, except with written agreement of the Holder”.

“The Holder of a License shall conduct Mineral Activities in accordance with the provisions of this Law and avoid any unsafe [unprotected] activities, which may create hazardous waste dumps or other hazards likely to endanger the livestock, crops or any lawful activity of the landowner or local residents.”

Art. 39 stipulates that the violations of the above mentioned provisions result in fines and compensations. Art. 93 of the Mineral Law clarifies, in case a dispute arises between a License Holder and State entities or between a License Holder and non-State actors, the parties may settle the dispute by mutual agreement or the authority defined in the contract for dispute resolutions. Where such authorities are not defined in the contract the parties may refer to one of the following:

- Arbitration by an expert upon the agreement of the parties
- Assignment of a Dispute Resolution Panel of independent experts, selected by the Commission, that shall be comprised of not less than three (3) and more than five (5) members

Whenever the party or parties do not consent to a decision made by experts, the parties may, within thirty (30) days of such determination, refer the dispute to one of the following for final resolution:

- The Financial Dispute Resolution Commission as stipulated in the Da Afghanistan Bank Law
- The International Centre for Settlement of Investment Disputes (ICSID)
- Arbitration under the United Nations Commission on International Trade Law (UNCITRAL)

Whether or not the government is able to implement the Minerals Law 2015 remains to be seen. Past experience illustrate that the government is not able to monitor the application of the mining contracts. Recently the Minister of Mines, Minerals and Petroleum stated that security issues and corruption have impeded transparency and accountability both in terms of bidding of the contracts and implementation of these contracts.

In addition to the venues for dispute resolution in the Mining Law, other dispute mechanism exist to resolve the conflicts between the parties ranging from the informal consultations between the ministries involved, through the involvement of the Parliament or President of the republic, to the courtin case of the conflicts of more complicated nature.

### **Effectiveness and equity of rural land use regulations**

#### ***Restrictions on rural land use***

Rural lands, which have been allocated for specific use in Afghanistan, include pasturelands, forestlands, agricultural land and protected areas. None of these can be used for other purposes than specified by the law. Agricultural land (private or state) cannot be changed to residential land, nor the roads and highways can be built on agricultural land, pastures can be only used for grazing animals and

graveyards, forests for harvesting products and hunting animals, protected areas limit the usage of the land to prevent its degradation because of its value to the whole nation. Having said that, all of these restrictions serve the public purpose. To the contrary, based on the Art. 46 - 49, arid and virgin land can be transferred, sold or leased providing certain conditions are met; hence its usage can be changed.

Although the restrictions on rural land use are stipulated in the Afghan legal codes, in praxis at times these lands are not used for the purposes specified by the law. The United Nations Environment Programme (UNEP) conducted a survey in 2003 and reported an estimated 50-70% of land is being used for unspecified purposes in Afghanistan.<sup>147</sup>

Together with previous examples, another example would be the Jamal Mina suburb of Kabul, where people build the houses on steep hills. Hills are considered pastures according to the Pasture Law, defining pasture in part as “hillocks and meadows”, therefore cannot be used for residential purposes<sup>148</sup>. However, around 20%, or one million, of Kabulis live in these hills surrounding the city<sup>149</sup>.

### **Restrictions on rural land transferability**

Pasture and forest lands, together with other public land<sup>150</sup> in rural areas is prohibited to be transferred, leased or sold. Art. 6 of Pasture law prohibits selling lease or buying the pastureland. General understanding of public land stipulates that the public land can only serve the public purpose; hence it cannot be sold nor leased to private interests.

Privately owned agricultural land can, in the contrary, be sold or leased, as well as arid and virgin land. Article 46(3) and 48 of LML 2008 addresses the transfer of virgin and arid lands and it stipulates: “Selling of virgin and arid lands to individuals, agriculture & livestock institutions, private and joint domestic companies by Ministry of Agriculture, Irrigation and Livestock shall take place on the basis of auction after being approved by the president of the Islamic Republic of Afghanistan.” Additionally, “sale of virgin and arid lands for the sake of establishing agriculture farms, to domestic private and joint-stock companies shall take place upon considering the volume of capital.”

Due to the unclear definitions of pastureland and public land in general, as well as often illegal usage of these lands including the forests, the transferability restrictions are not always enforced and followed.

Below is the table summarizing the rural land use and transferability restrictions:

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<sup>147</sup>“Afghanistan Post-Conflict Environmental Assessment” (Geneva: UNEP, 2003).

<sup>148</sup> It is important to note that this provision of Pasture Law is somewhat absurd considering Afghanistan is a largely mountainous country.

<sup>149</sup>“Living in the 'burbs, Kabul style: The human wave of homes for one million people sweeping up the steep hills around Afghan capital.” *Daily Mail*, 10 October 2012, <http://www.dailymail.co.uk/news/article-2215793/Poverty-Kabul-style-One-million-residents-populate-steep-hills-Afghan-capital--long-way-high-life.html>.

<sup>150</sup> Please note the unclear definition of public lands explained before.

Type of land	Legal Basis	Type of land (based on tenure typology)	Legal restrictions on ownership	Legal restrictions on transferability	Legal restrictions on use (land use change)
Pastureland (incl. hills, mountains and river banks)	Pastureland law 2000, LML 2008	Discussion on either state or public ownership	Discussion on either state or public ownership	Cannot be leased, sold nor bought, transferred nor exchanged	Only for grazing animals and as graveyards (no land use change allowed)  State can implement development projects based on LEL Art. 3(3), which requires an exception of Council of Ministers
Forest	Forest Law	State land	State owned only	Cannot be leased, sold nor bought, transferred nor exchanged	Harvesting products and hunting animals (no land use change allowed)
Protected areas	Environmental Law, Law on the Preservation of Afghanistan's Historical and Cultural Artifacts	State land	State owned only	Cannot be leased, sold nor bought, transferred nor exchanged	Limited usage of the land to prevent its degradation (no land use change allowed) including protective measures. The process of transforming the land to protected areas follows complicated procedure and takes months or even years.
Arid & virgin land	LML 2008 (Art. 46-49)	State land (discussion if arid and virgin land can't be pastureland)	State owned (discussion if arid and virgin land can't be pastureland)	Can be leased or sold provided certain conditions <sup>151</sup> (the concurrent texts of the Presidential Decree 83 and LML 2008 create ambiguity in legal framework regarding the possibility of selling of state land).	No restrictions, land can be changed to residential area and to agricultural land (no concrete mechanism developed for this purpose)
Agricultural	LML Art. 90	Private and state	No restrictions	No restrictions <sup>152</sup>	Land cannot be changed to residential area,

<sup>151</sup>President Karzai already enabled the foreign investors to lease the government land for 30 years in 2002 by his Decree No. 134, and then in 2003 through his Decree No. 89 he made the surplus government land available to the High Commission for Investment for allocation to investors.<sup>151</sup> The Private Investment Law 2003 enabled the leases for up to 50 years (Article 21).

<sup>152</sup>Same as above.

land		land			nor public infrastructure such as roads cannot be built unless the approval of ARAZI CEO and the President
Disaster prone areas	Municipality Law, LML Art. 46				Residential buildings cannot be built in these areas. The state land cleared by Tasfia gives a report about the feasibility of the development of the residential area, it is a responsibility of the concrete government entity to which the land is transferred to inform people .If the land is private, <i>Tasfia</i> team makes the recommendations, however the monitoring of compliance is not available.

### ***Rural land use plans and mechanisms for land use change***

There are no rural land use plans existing in Afghanistan. Over certain rural lands such as pastures, forests, agricultural land, protected areas and other public land<sup>153</sup> the restrictions over change of land use exist. In fact, the changes are not allowed in most of the cases according to the Afghan law (please see the table above). Nor the rural land in general cannot be converted to urban, unless the proper acquisition procedure is followed<sup>154</sup>. It is only arid and virgin land that can encounter the land use change together with the conversion of rural lands to protected areas<sup>155</sup>.

When changing the usage of the land, the acquisition processes are used in the most of the cases without any public consultations. Due to the absence of data on number of land use changes and the time needed to perform the land use change, it is difficult to estimate the duration of land use changes in Afghanistan.

### ***Protected rural areas and rural lands identified for rehabilitation***

As mentioned in the previous sections, certain rural lands such as pastures, forests etc. are protected in terms of their transferability, as well as their usage. There are only two national parks in Afghanistan - Band-amir in Bamyán, which is Afghanistan's first National Park established in 2010 and Wakhan corridor in Badakhshan, established in 2014. Other protected areas exist such as Nawor Dessert, Big Pamir, standing waters of Ghazni, Aajar valley and under-water lake of Hashmad Khan.

The lack of enforcement of the protective regulations was also explained in the previous sections, which leads to the degradation of protected rural lands. The United Nations Environment Programme (UNEP) conducted a survey in 2003 and reported an estimated 50-70% of land is being used for unspecified purposes in Afghanistan.<sup>156</sup> Additionally, the suggestions for creation of more protected areas such as in Nuristan province, Badghis Forest and Budha Monuments in Bamyán were put forth to NEPA in 2002, however these are still pending.

As mentioned above, Afghanistan's natural resources have been severely degraded in the last several decades due to factors such as overgrazing, collection of surface vegetation for fuel, conversion of forest and pastureland into arable land, cutting down of forests<sup>157</sup> and the smuggling of the timber by the timber mafia, war, decreased rainfall and climate change.

The Ministry of Agriculture, Irrigation and Livestock has launched a natural resources management programme in 2006 in order to effectively rehabilitate and protect forests, pastures and protected areas by constructing water reservoirs, reconstructing and building new irrigation canals and managing water for the farmland. The overall objective of this programme is to ensure the sustainable exploitation of existing water and renewable energy resources and the enhancement of livelihoods in the rural areas. These programmes pursue the following objectives:

- To improve irrigation systems in order to protect water, develop agriculture and increase access to potable water
- To motivate the local communities to protect forests, pastures and water and offer technical assistance on the renewability of these resources

The purpose of the natural resources management programme is to rehabilitate natural resources for effective use by the rural people. To fulfil this purpose, the Ministry of Agriculture, Irrigation and Livestock has developed policy framework. The Ministry's natural resources management strategy is based on an effective and sustainable regime, aimed at using pastures, forests, wildlife, protected

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<sup>153</sup> Please note the unclear definition of public land.

<sup>154</sup> Discussed in Panel 4.

<sup>155</sup> Please consult the LML 2008, Art. 46 - 49 for the rezoning of arid and virgin land, as well as the Environment Law for the rezoning of rural areas to protected areas.

<sup>156</sup> "Afghanistan: Post-Conflict."

<sup>157</sup> "Afghanistan's Environmental Recovery: A Post-Conflict Plan for People and their Natural Resources," (Kabul: UNEP Post-Conflict Branch, 2006).

areas, herbs and water resources, including water infrastructures, in such a way that the use and the right to access natural resources are regulated. Afghanistan's environment is an inseparable part of the comprehensive agricultural development strategy and a major component of the natural resources management programme. Activities to manage natural resources focus three areas:

- 1) Surveying and planning natural resources
- 2) Managing and protecting natural resources with the participation of people
- 3) Developing and modernising irrigation systems

Nevertheless, natural resources including forests, pastures and protected areas are affected by the lack of a comprehensive mechanism for effective and sustainable use of natural resources. For this purpose, programmes have been developed in 2014 to manage and protect natural resources in co-operation with the public so as to build community capacity in the area of sustainable utilisation, promote a sense of ownership among the people and motivate people to contribute to the survival of these resources. The following are the purposes of this procedure:

- To build the capacity of associations and local communities to develop plans for the rehabilitation and regulation of natural resources such as forests, pastures and protected areas
- To develop projects from the development budget by social forestry associations in accordance with contracts
- To mobilise forestry associations and to increase public participation in the regulation of forests, pastures and protected areas

Additionally, the Ministry of Rural Rehabilitation and Development (MRRD) has also a major rural rehabilitation strategy in its portfolio, particularly through its flagship rural development programme - the National Solidarity Programme (NSP). NSP aims to empower the rural communities to be able to make decisions that are affecting their own lives and livelihoods through various participatory mechanisms that promote local governance and aim to reduce poverty. Having said that the NSP is implemented through four main activities:

- Establishing a national network of Community Development Councils (CDCs) that empower communities to make decisions;
- Funding priority subprojects that improve access to infrastructure, markets, and services;
- Strengthening community capacities through participatory processes and training;
- Promoting accountability and wise use of public and private resources.

Finally, forest and pasture associations exist in Afghanistan, that are accountable to all members of the society. These associations develop rules and regulations on the management and regulation of social natural resources and the way these resources can be used, on pricing, and on participatory benefits; assign responsibilities for and prepare the budget of natural resources; and supervise external assistance. Associations are created as per Forest Management Law in order to administer, survey, research, protect, rehabilitate, construct, reform, use, exploit and operationalize forestry-related scientific, technical and economic concepts and applications in various provinces of the country. The method of operation, obligations, powers and other affairs related to the forestry associations are regulated by a bylaw. The legal personality of a forest association is established after its bylaw is registered and licensed by the Ministry of Agriculture, Irrigation and Livestock.<sup>158</sup> The Department of Natural Resources allows public partnerships to protect and sustainably use lands, pastures, forests and water resources; meet their daily needs in a safe environment by using the scientific and community knowledge of natural resources; and help solve problems related to people's free access to natural resource

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<sup>158</sup> Forest Law, article 6, 1391.

### 9.3. Urban Land Use, Planning and Development

Pan-LGI-Dim				Topic				Score			
								A	B	C	D
<b>PANEL 3: Urban Land Use, Planning, and Development</b>											
<i>LGI 1: Restrictions on Rights</i>											
3	1	1	Restrictions on urban land ownership/transfer effectively serve public policy objectives.								
3	1	2	Restrictions on urban land use (disaster risk) effectively serve public policy objectives.								
<i>LGI 2: Transparency of Land Use Restrictions</i>											
3	2	1	Process of urban expansion/infrastructure development process is transparent and respects existing rights.								
3	2	2	Changes in urban land use plans are based on a clear public process and input by all stakeholders.								
3	2	3	Approved requests for change in urban land use are swiftly followed by development on these parcels of land.								
<i>LGI 3: Efficiency in the Urban Land Use Planning Process</i>											
3	3	1	Policy to ensure delivery of low-cost housing and services exists and is progressively implemented.								
3	3	2	Land use planning effectively guides urban spatial expansion in the largest city.								
3	3	3	Land use planning effectively guides urban development in the four next largest cities.								
3	3	4	Planning processes are able to cope with urban growth.								
<i>LGI 4: Speed and Predictability of Enforcement of Restricted Land Uses</i>											
3	4	1	Provisions for residential building permits are appropriate, affordable and complied with.								
3	4	2	A building permit for a residential dwelling can be obtained quickly and at a low cost.								
<i>LGI 5: Tenure regularization schemes in urban areas</i>											
3	5	1	Formalization of urban residential housing is feasible and affordable.								
3	5	2	In cities with informal tenure, a viable strategy exists for tenure security, infrastructure, and housing.								
3	5	3	A condominium regime allows effective management and recording of urban property.								

## Introduction

Following the commencement of the internationally backed war in Afghanistan in 2001, Afghanistan's urban land use has undergone significant changes due to, most notably, a massive influx of refugee-returnees to urban centers throughout the country and extensive rural-urban migrants searching for security and/or employment opportunities. An estimated 20% of Afghanistan's total population (6,110,00 individuals of the total 30,550,000 population) are classified by the United Nations High Commissioner for Refugees as returnees from Pakistan, Iran and other countries<sup>159</sup>. These returnees, primarily displaced through a series of conflicts beginning with the 1979 Soviet-Afghan War, often moved to the cities. Easy access and focus of international aid in the early 2000s in the urban centers of Kabul, Kandahar, Jalalabad, Herat and Mazar e Sharif resulted in extensive international presence in the country's cities. Displaced families - sometimes not having been back to Afghanistan for nearly three decades, often lost vested investment in their local communities, became accustomed to a relatively urban life while in refuge and feared the growth of counterinsurgency in rural areas - often decided to return not to their original villages or provinces but to urban centers (and, in particular, Kabul) in search for safety and employment opportunities. While population growth rate for the nation is steady at 2.6%, it is only 2.3% in rural areas whereas it is 4.7% in urban areas<sup>160</sup>.

Today, approximately a quarter of Afghans live in urban areas, rendering the topic of urbanization at the core of Afghanistan<sup>161</sup>. A total of 31% of the country's population is estimated to live in cities in Afghanistan by 2025, jumping to 50% by 2060<sup>162</sup>. This is a massive increase from 1979, when the census indicated that about 85% of the population lived in rural areas; those living in urban areas primarily settled in Kabul<sup>163</sup>. These demographic shifts have altered the map of urban areas, rendering previous urban and development plans and regulations outdated.

It is important to further emphasize the lack of reliable figures related to urban land use in Afghanistan, even for basic matters such as the population of Kabul, which remains contested. As noted by the UN-Habitat in its Discussion Paper on 'Understanding Urbanization', a 'lack of clarity characterizes all other Afghan cities' rendering evidenced-based policy and programme planning difficult if reliant on quantitative data<sup>164</sup>. Data that is available is typically 'not urban disaggregated, or not done in a way that makes it clear what is *rural* and what is *urban*', and 'city-specific data is very limited, which makes city comparisons nearly impossible'<sup>165</sup>. Given that 'no systematic urban monitoring systems exist'<sup>166</sup> and data is weak or non-existent, this panel focuses on the qualitative material and experience available to the expert instead of relying on disputed quantitative information.

At the heart of urban planning issues in Afghanistan exists the issue of informal settlements. The issue is most contentious and visible in Kabul. Kabul's population today is estimated at hovering between 5 and 5.5 million today. "It is estimated that at least 70% of the population of Kabul is currently residing in property which has not been formally registered or that falls outside the formally planned parts of the city. This percentage represents an approximate number of 2.5 million people. Although many of these residences are legitimate occupiers, they have no security of tenure and no means by which to formalize and register their rights of tenure"(Emphasis added, MUDA White Paper, 4).

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<sup>159</sup>"2015 UNHCR Country Operations Profile - Afghanistan,"(United Nations High Commissioner for Refugees, 2015).

<sup>160</sup>"Kabul's hidden crisis"(London: Overseas Development Institute, 2014), <http://www.odi.org/comment/6688-kabul-refugee-idp-displacement-urban-afghanistan>.

<sup>161</sup> Ibid.

<sup>162</sup>"Afghanistan's Urban Future," Discussion Paper #1, State of Afghan Cities, UN-Habitat, 2013.

<sup>163</sup> Ibid.

<sup>164</sup> "Understanding Urbanization: Monitoring Urban Dynamics in a Fragile and Resource-Constrained Context," Discussion Paper #9, UN-Habitat, March 2015.

<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

Of particular issue is a specific set of informal settlements in Kabul, which consist of approximately 40,000 individuals in about 51 Kabul Informal Settlements<sup>167</sup>. Families are primarily returnees, internally displaced peoples and some economic migrants. They not only lack tenure security, but also have poor levels of health, education, and safety, lacking protection from the local police forces or powerful brokers. Nearly every national-level legislation dealing with urban land use over the past ten years makes mention of the informal settlements, emphasizing its importance in the realm of urban development in the country. Fundamentally, there exists a fierce internal debate within the Afghan government about the future of the informal settlements: Should they remain and be ‘formalized’, or should they be destroyed? Similar issues exist in Kandahar city, for instance, where some more government collaboration and internal agreements have resulted in efforts to upgrade the infrastructure of the settlements, thereby beginning the ‘formalization’ process.

## Restrictions on rights

### *Ownership and Transferability*

The Land Management Law 2008 forms the backbone of restrictions on urban land ownership and transfer. There are several common types of rights of ownership in urban areas:

1. *Private ownership - Legal title deed (Qabele Sharayee)*: “Those who acquired their land legally from the government (through a grant or a rightful purchase) typically have a *sharayee* title deed that certifies their ownership of the land. Those who inherit the land or buy it also acquire a legal title, provided they go through the required legal process to transfer the title to their name.”<sup>168</sup>.
2. *Private ownership - Customary deed (Urfi)*: “This is the type of document that most informal settlement dwellers and some property owners in the formally developed parts of the city (those who purchased the land from a rightful owner but failed to complete the ownership transfer process) hold. In settlements built on former agricultural land, the *urf*i title is often based on a legal *sharayee* original (given that the initial landlord of the un-subdivided land has in many cases a legal *sharayee* title).”<sup>169</sup>
3. *Privately registered lease: possession of title* for a specified period (for instance, wedding halls on airport road in Kabul city)
4. *Private ownership - No title*: “This situation usually pertains to the first generation of squatters on confiscated public or private land. Although with time the possession of an *Safayi* book can reportedly strengthen the hand of squatters in the face of possible eviction.” (Kabul Urbanization and Development Challenges: A Synthesis Report, 2011)
5. *State ownership - within the Master Plan*: The lands that are not private land and which are included in the city Master Plan belong to the Municipality which ultimately decides the usage/ownership of that land. These lands can be roads, parks, public schools, hospitals etc. However, the ownership of these lands is contested due to the unclear definition of public land in current Afghan legal framework. This will be explained in the next section of the report.
6. *State/ ownership - outside of the Master Plan*: The lands that are not private lands and which are located within the boundaries of the city, however are not included in the city Master Plan, belong to the state (or concrete state institution)
7. *Private ownership - Endowed land (Waqf)*: In addition to the lands owned by ministries and other offices, *waqf* land is land for specific public use by people and is under the technical ownership of the government (but for the people).
8. *Public ownership* - this type is disputed due to unclear legal framework stipulating the ownership rights between state and public land. Roads, green areas, parks, playgrounds, cemeteries and other infrastructure is generally considered as public land.

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<sup>167</sup> “Winter Assistance to the Kabul Informal Settlements 2014/2015 - Report on the Post-Distribution Monitoring Survey” (Kabul: Task Force on the Kabul Informal Settlements, 2015).

<sup>168</sup> “Kabul Urbanization and Development Challenges: A Synthesis Report” (Kabul: Aga Khan Trust for Culture, 2011).

<sup>169</sup> Ibid.

There are not any land ownership, owner type, size or price restrictions in Afghanistan. The objective included in the LML 2008 to create “a favorable environment for private sector investment in land”<sup>170</sup> and all the amendments done to the LML in 2008, aimed to serve this purpose by facilitating the wide variety of persons to have access to land including foreigners. President Karzai already enabled the foreign investors to lease the government land for 30 years in 2002 by his Decree No. 134 and in 2003 through his Decree No. 89 he made the surplus government land available to the High Commission for Investment for allocation to investors.<sup>171</sup> The Private Investment Law 2003 enabled the leases for up to 50 years (Article 21).

However, there are certain restrictions on transferability of public land i.e. public land cannot be transferred (sold and bought) to private interests. Taking into account an unclear definition of public and state land in Afghan legal framework, public land can be easily interchanged with state land, thus allowing the transactions of the land that would otherwise be illegal.

In practice, the lack of clear delineations of responsibility render the ownership and transfer of land a game of power-brokers, not serving public interest. The regulations themselves are generally justified and aimed towards the benefit of the public good. However, because of the government's unwillingness or inability to enforce the regulations under question, the regulations' usefulness is limited.

### ***Urban land use***

The primary reference for regulations on urban land use can be found in the Land Management Law of 2008, which outlines the various types of land ownership, and outlines the types of possible land use (i.e. agricultural land, private residential land, etc.). Additionally, there are certain land use restrictions defined in the original Kabul Master Plan such as one cannot buy a piece of land in residential area for industrial purposes.

Master plans in Afghanistan date back to times of Doud Khan and enjoy continuity to this date. Although most of the Afghan cities' Master Plans are outdated (as will be discussed below), they serve important functions. Firstly they are maps, pictures of the city of how the planners think the city should look like, therefore they control the urban development by clearly stating what is and what is not in the map. The map approach, however, does not allow the urban planners to promote development or mobilize resources, it rather brings their focus on mere monitoring and checking of the urban growth<sup>172</sup>. Secondly, the urban planning in Afghanistan is considered as an important part of actual state-building, where the municipality is only recognized, when it has the ability to implement the Master Plan. Therefore the entities responsible for urban planning are given a special identity role in Afghanistan<sup>173</sup>.

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<sup>170</sup>Land Management Law, 2008, Article 2(8).

<sup>171</sup>Law on Domestic and Foreign Private Investment in Afghanistan, Decree No. 134 (Official Gazette no. 803) and Decree on the Transfer of Government Property, Decree no. 89, 2013 (SY 1392).

<sup>172</sup> Giovacchini, Tommaso. “Governance and Representation in the Afghan Urban Transition.” Kabul: Afghanistan Research and Evaluation Unit, 2011, 9.

<sup>173</sup> Ibid. 9

However, in most of the cases the restrictions on the land use prescribed by Master Plans, including Kabul Master Plan are not enforced. The rampant corruption in the ranks of government and land management authorities allows for the uncontrolled usage of the land irrespective of the residential areas. The example of the informal settlements built on the mountain slopes within and at the outskirts of the cities such as Kabul is another example of the friction with urban use restrictions. Mountains and hills are considered pastureland meaning for the usage of the public. By appropriating technically public land to private interests deprives other people from using the mountain for pastures. The fact that the Third Master Plan for Kabul was abandoned on the request of the Ministry of Urban Development by the Karzai administration rendering the urban planning in Kabul irregularised<sup>174</sup>, only enhances the possibilities for corruption.

Additionally, President Ghani enacted the decree allowing no construction on arable land. However certain arable lands are included in the city Master Plans dating sometimes 50 years back, creating the issues of their implementation. Additionally, LML 2008, Art. 90 stipulates that the “construction of roads, buildings and establishments and non-agriculture activities are not allowed on agriculture lands”. It is possible in exceptional cases, when an approval from MAIL and the President of the Islamic Republic of Afghanistan is needed. In reality, the restrictions on agricultural land use change are not respected in practise. Particularly in peri-urban areas such as Bagrami in Kabul or Behsud in Nangarhar, the arable land is being converted to urban use at a rapid pace, where sellers are often transferring the land as agricultural land to facilitate a lower price to attract buyers, while having full knowledge that construction will then occur on it<sup>175</sup>.

Further reference should be given to the National Disaster Management Law of 2012, developed to ‘regulate activities related to disaster response, preparedness and risk reduction’ and which established the National Disaster Management Commission as a step following the adoption of the Strategic National Action Plan (SNAP). SNAP aimed to reduce the risk of disaster as well as the severity of disaster as experienced by the public through the establishment of a National Disaster Risk Reduction Platform that prioritized local solutions to disaster risk. The final reference point is the National Disaster Management plan of 2010, a chief component of which involved the assessment and reduction of disaster risk in both rural and urban settings, referring to the Afghanistan National Disaster Management Authority as the primary source of response. Based on these policies and regulation, the government has a right to specify an area as being prone to natural disasters and place a restriction on building residential houses. These regulations are, however, not specific to Kabul Municipality. The Municipality stated that efforts are currently underway to develop a policy on land use for disaster risk without providing any further information.

Legal frameworks also exist for land that is under risk from non-disasters. In 2004, the Government of Afghanistan adopted a Law on the Preservation of Afghanistan’s Historical and Cultural Artifacts building upon the 2002 and 2003 inscriptions of the *Minaret and Archaeological Remains of Jam* and *Cultural Landscape and Archaeological Remains of the Bamiyan Valley*, respectively, to the UNESCO World Heritage List. The Law lays out definitions of historical and cultural artifacts (Article 3) and specifies the legal requirement to protect such artifacts and monuments. Similarly, natural heritage is recognized under the law, and resulted in the declaration of two national parks in the country: Band e Amir in 2009 and the Wakhan National Park in 2014. A thriving black market for looted historical and cultural artifacts coupled with generally poor enforcement of protection measures, much of Afghanistan’s physical cultural heritage can be considered at risk. Such legal measures are key in providing a legal foundation for heritage protection.

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<sup>174</sup> Please see more detailed explanation in the section 3.3.2.

<sup>175</sup> Personal communication with USIP land expert, October 7, 2015.

While the legal framework has been well-developed to serve the needs of the Afghan public, the government has been unable to enforce the regulations and practices put in place in urban areas. While disaster risk and natural heritage regulations exist in Afghanistan's urban areas, little focus has been put by the main urban actors - namely, the respective municipalities and representatives of the Ministry of Urban Development and the Ministry of Agriculture, Irrigation and Livestock - towards the actual implementation of disaster risk regulations due to a presumed lack of resources, high rates of corruption, focus on other issues (such as the lack of sufficient urban infrastructure) and so on.

### **Transparency of land use restrictions**

#### ***Urban expansion/infrastructure development process***

The process of urban expansion and infrastructure development is shared between local urban municipalities (Kabul, Jalalabad, Kandahar, etc.) as well as the Ministry of Urban Development, formally tasked with developing urban policy for the country. Actual collaboration has developed informally and depends heavily on the individual municipal and ministerial objectives and ideologies. When shared ideology and objective is weak, urban expansion and infrastructure development remains primarily outside of the formal realm. Planning objectives differ by municipality and the Ministry of Urban Development, with no specific planning objective existing across the board in either group. Objectives remain overly individualized and often in conflict with one another, resulting in numerous stalemates in policy planning.

In Kabul city, for instance, the responsibility is shared with the Municipality's Plan Implementation Office and the Ministry of Urban Development<sup>176</sup>. Due to a fundamental disagreement in the implementation of the third and final Master Plan of Kabul between the Office and the Ministry, partially upheld by the formal suspension of the Master Plan in 2005 through a presidential decree, clear information about planned urban expansion often does not reach the public. Despite efforts to develop a fourth plan, no plan for the urban space inside Kabul's city limits has been established<sup>177</sup>. Focus has instead been placed on developing legal mechanisms to change the urban landscape of Kabul, with a 2009 plan for urban expansion *outside* of the city ('Kabul Jadid' - New Kabul City) attempting to incentivize Kabul residents to move outside of the city in hopes of reducing the population of the city to a more manageable amount. The lack of a legal framework has resulted in a process that lacks transparency and can be dismissive of the facts on the ground.

Formal planning mechanisms from the Ministry are to be shared with the public through official announcements, and through local authorities such as the municipality, respecting all citizen rights outlined in the Land Management Law of 2008, Constitution of Afghanistan and relevant articles in the Civil Code. However, the information is not always shared with public in consistent manner. While occasional announcements about urban expansion exist, these are limited to major urban changes (i.e. the release of the plans for the new Kabul city) and are generally not detailed. The public is generally unable to obtain more information about planned urban expansion without previously established social networks with individuals working in relevant municipal or ministerial departments. Most discussion on expansion and development thus remain inaccessible to the public.

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<sup>176</sup> Pietro A. Calogero, "Planning Kabul: The Politics of Urbanization in Afghanistan," (doctoral dissertation, University of California, Berkeley, 2011, 79.

<sup>177</sup> Calogero, "Planning Kabul," 80.

What is important to note is that the withholding of the information is allegedly sometimes used to prevent illegal and corrupt behavior of the citizens<sup>178</sup>. Based on the example of “New Kabul City” project, where the information was publicly available in the media and reports of MUDA, people realizing the increase of the value of the land after the construction is finished, have begun to make claims over the lands based on forged documentation. On the other hand, when people are not informed about the planned urban expansion, those landless, returnees, IDPs or rural migrants are considerably more tempted to build informal settlements outside of the Master Plan, as if the information was available. Finally, with the absence of the publicly available information on planned urban expansion, the oversight in form of public scrutiny is missing when planning and implementing urban expansion projects.

### ***Changes in urban land use plans***

The decisions on changes in urban land use plans do not involve the public in Afghanistan. Construction projects are developed based on the legal documents giving permission to the particular organ for changing urban land use. The uncertain status of the Land Management Law of 2008<sup>179</sup>, coupled with disputes over the implementation of the Third Master Plan, and relatively weak authority of the government has rendered the legal framework for changes in urban land use convoluted, under-developed and disregarded by enforcement authorities. While exact figures of land use change and requests are not possible to obtain<sup>180</sup>, requests for change in land use do not have a process to be followed, nor has the proper land use changes mechanism or database been developed. Disputes between the Ministry of Urban Development and local municipalities make it difficult to distinguish the appropriate authority for such requests.

Additionally, the lack of public involvement in the decisions about land use change often renders the implementation of the project impossible, due to the lack of ownership among original landowners to allow the implementation.

The poor legal framework is matched by unprecedented flows of refugee- returnees into urban areas in Afghanistan (most notably, Kabul, Herat and Jalalabad) and rural to urban migration. Urban land use changes are most commonly visible through informal processes, with formal requests hardly being the case in Afghanistan. Requests for changes in urban land use rarely come from the public, and are typically put forth only by power-brokers who are able to manipulate or better navigate the request process. Such changes thus provide little benefit to society in general.

Please see the table below with possible land use changes in Afghan cities:

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<sup>178</sup> Based on accounts of a number of land experts participating at our discussions.

<sup>179</sup> The President has powers to enact laws in Afghanistan, which should be brought in front of parliament for approval. Often this does not happen, e.g. with the adoption of the LML 2008, where the approval of the Parliament was not sought.

<sup>180</sup>Please see the explanation for the lack of data in the introduction.

Type of land	Legal Basis	Type of land (based on tenure typology)	Restrictions on ownership	Restrictions on transferability	Restrictions on usage
Residential area (within the Master Plan)	Municipal Law 2000, Presidential Decree 83, LML 2008	Private and state	No restrictions	No restrictions (ambiguities about selling state land)	Cannot be changed to industrial area, however can be changed to commercial area (administrative process to follow unclear)
Residential area (outside of Master Plan) - informal settlements <sup>181</sup>	No policy adopted yet	Private and state	No restrictions	No restrictions (ambiguities about selling state land)	No policy has been adopted yet to upgrade informal settlements.
Agricultural land	LML Art. 90	Private and state	No restrictions	No restrictions	Land cannot be changed to residential area, nor public infrastructure such as roads cannot be built unless the approval of ARAZI CEO and the President (in reality changes happen without the presidential approval illegally)
Roads and other public infrastructure, green areas, etc.	Municipal Law 2000	Ambiguity over public or state ownership	Ambiguity over public or state ownership	Cannot be sold, leased nor transferred	Cannot be changed to anything other than their original purpose (in reality changes happen without the presidential approval illegally)

<sup>181</sup> All the residential areas that are outside of the Master Plan are considered as informal settlements in Afghanistan. Considering the fact that the urban expansion often does not follow the city's Master Plan, most of the residential settlements in Afghan cities are considered informal.

## Efficiency in the urban land use planning process

### *Policy on low-cost housing and services*

Policies for low-cost housing and services remain tenuous. While efforts in the 1970s aimed to shift government-owned land to the poor, provisions have since decreased, with significant shifts in the requirements of the state to the poor. Namely, as noted by Wily, “firstly, allocation of lands to needy persons is not longer an obligation; secondly, the definition of eligible recipients has been broadened to include any person in the district (Article 35[2]), which could include large landowners; and thirdly, the proposed amendments (to the Land Management Law) are silent on the need to include urban dwellers in need of housing in its purview”<sup>182</sup>. Current provisions do not specify low-cost housing offers to the poor, but instead rely on instalment schemes that typically amount to the normal (not low) cost of the land. Lack of payment can result in evictions (see Article 99, Chapter 11: Penalties, Land Management Law). Focus has instead been placed on providing incentives for families living in informal urban settlements to move outside of urban centers and into semi-urban areas, rural lands or ‘new towns’ (such as the new Kabul city) or ‘small towns’ near urban centers (locally known as *sharaks*).

Additionally, state land distribution schemes were developed by the government through the Presidential Decrees 104 and 1091 during President Karzai regime to allocate state land to teachers, low ranking public employees and returnees and IDPs. However, these are rather an exception from the general policy of not distributing the state land (based on ARAZI and MoE records, 154,000 jeribs of land have been distributed to afghan returnees coming from Iran or Pakistan until now). Additionally, the implementation of the distribution policies, mirrored with rampant corruption and conflicts caused by unclear ownership claims of distributed land, does not serve the interests of poor Afghan population. Based on a research by UNAMA for example, a governmental settlement town Sare Dowra, which should have been distributed to low-income government employees, was actually grabbed by high-ranking officials and then sold on to others for high prices. No land was allocated for ordinary landless people<sup>183</sup>. For what is worse, the implementation of the Presidential Decree 104, allowing for the distribution of land to returnees and IDPs has been paused in recent years.

There were also initiatives to introduce the mortgage system in Afghanistan to allow people acquire proper housing through borrowing the money from the bank and paying back through instalments. However due to the high levels of poverty and unstable security situation rendering the livelihoods of Afghans insecure, the mortgage system idea was left behind. The new National Unity Government Minister of MUDA stated that the focus of his term in the office will be to provide adequate low- cost housing for people, the outcomes of this statement, however, still remain to be seen.

Having that said, the responsibility to provide low-cost services to households in urban centers has been adopted by international organizations and NGOs such as the NRC (providing basic shelter services and assistance to IDP and refugee returnee households in urban area), UNHCR and so on. Adequate shelter and associated services are, in practice, dismissed by the Afghan government and shifted onto international organizations and NGOs. With a per capita GDP of only 662 USD<sup>184</sup>, the need for low-cost housing is visibly high. While no government or large-scale NGO projects allocating low-cost (not free) housing exists in urban areas, banks such as the First Microfinance Bank of Afghanistan began as early as 2005 offering housing microfinance loans to Afghans. Thus while low-cost housing itself does not exist in urban areas due to a highly competitive market fueled by international aid and military intervention funds, some limited opportunities exist to support those searching for a new home.

### *Urban spatial expansion in the largest city*

Land use planning in urban areas of Afghanistan formally began in the 1923, with King Amanullah Khan attempting to establish a ‘New Kabul’ with the creation of the Kabul City government tasked with the area’s urbanization. It was during this time that, for instance, the Daruloman Palace and its radial avenues to Chihilsitoun Palace and Tapa-e Taj Beg were constructed, creating the

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<sup>182</sup> Wily, Liz Alden. “Land Governance at the Crossroads: A Review of Afghanistan’s Proposed New Land Management Law.” Kabul: Afghanistan Research and Evaluation Unit, 2012, 18.

<sup>183</sup> “Stolen Lands,” 31-32.

<sup>184</sup> “Fact-sheet on GDP per Capita,” World Bank, 2013, <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD>.

appearance authoritative grandeur, along with the gridded districts (Karteh-3 and -4 included). By the reign of King Nadir Shah in 1930, Amanullah's projects were abandoned until later revived by King Zahir Shah who focused on transforming the 'urban core' through 'state-led development' and 'major, planned urban expansions'<sup>185</sup>. It was under the reign of King Zahir Shah that the country developed, for instance, the First and Second Master Plans of Kabul in 1964 and 1970, respectively.<sup>186</sup> The last Master Plan was established under the reign of Daoud Khan in the 1970s, and envisioned an expanded Kabul housing 2 million residents.

Decades of conflict and associated migration revamped the urban fabric of Afghanistan, resulting in quickly growing cities (as Afghans searched for safety and employment opportunities) that were unable to handle the mass in flow of residents into the cities. The latest Master Plan - developed in 1978 - was created by the City Plan-Making Office of Kabul, with support from the United Nations and other international support. Analysis of the three Master Plans indicates an awareness of an expanding population (the First Master Plan of 1964 was designed for 800,000 residents, the Second Master Plan of 1970 was designed for 1,200,000 residents and enforced a 6-floor limit, and the Third Master Plan of 1978 projected the existence of 2,000,000 residences with a 16-floor limit)<sup>187</sup>. Kabul Municipality currently employs a 2011 Master Plan developed by JICA in partnership with the Afghan government related to the New City Development Area (in Deh Sabz) as well as to the current boundaries of Kabul city. The status of this plan, however, remains tenuous and is not implemented by the MUDA. Given the reality of Kabul's population today (with estimated hovering between 5 and 5.5 million), it is reasonable to note that there does not exist effective urban spatial expansion in the country's largest city, Kabul.

Due to rampant corruption, extensive land grabbing and a great influx of refugees, IDPs and rural to urban migrants, building in Kabul throughout the 1990s and, more recently, the 2000s largely remain outside of the Third Master Plan, and are thus considered 'informal' in nature<sup>188</sup>. Indeed, with the suspension of the Third Master Plan by then-President Karzai at the request of the Minister of Urban Development Affairs, the city has no clear functioning reference for planning purposes. Similar, though less contentious, issues remain in other major urban areas where recent urban building and planning have been largely outside of original plans and occupy a gray space of legality. The lack of an updated framework for regulating the urban expansion of the largest city, Kabul, is complemented with little coordination between responsible government bodies (such as the Municipality and Ministry of Urban Development). The carrying capacity of infrastructure has been long overloaded, and the plan for land use has not been updated since 1978. While proposals for piecemeal infrastructure development have been proposed internally to the Government and by INGOs, no comprehensive strategy for the provision of new infrastructure and services has been adopted or considered by the government primarily due to the unresolved issue of the Kabul informal settlements. The question also poses itself, if the development of new Master Plan for Kabul would be something preferable and effective, or rather new ways should be evaluated on how to use a community-based approaches (for example through the development of community action plans) to get the cooperation of people aiming to upgrade the informal settlements and provide them with safe homes<sup>189</sup>.

### ***Urban development in the four largest cities***

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<sup>185</sup> Calogero, "Planning Kabul," 85.

<sup>186</sup> Ibid.

<sup>187</sup> Calogero, "Planning Kabul," 105.

<sup>188</sup> The distinction has to be made here between Kabul Informal Settlements (KIS), pursued often by Afghan poor, and informal construction in the richest areas of Kabul city.

<sup>189</sup> Suggestion made by David Stanfield, land governance expert with extensive experience in Afghanistan and other countries, currently serving as Professor Emeritus at Land Tenure Center, University of Wisconsin-Madison, USA.

Kandahar, Herat, Jalalabad and Mazar e Sharif, four largest cities in Afghanistan, suffer from an outdated urban plan. Still in use in Jalalabad, it is a 50-year-old plan no longer in line with the present landscape of the city<sup>190</sup> with 'local authorities [unable] to guide urban growth and control land use'<sup>191</sup>. Data on the current status of the city of Herat was previously collected in 2011 through a joint conference held by the University of Florence and Herat University entitled 'Herat: a city quickly growing'<sup>192</sup>. The conference resulted in a provision of socio-demographic data of Herat, providing useful information about the demographics associated with current land use. The conference also sparked interest from the local Department for Urban Development regarding a draft of a 'new urban master plan for managing the city's rapid expansion'; as of yet, no updated plan has been developed for Herat<sup>193</sup>. As is the case for other cities, Mazar and Kandahar's plans are severely outdated, with the former's plan 'designed for a population probably a fifth of its current size' and continued weak 'investment in service provision'<sup>194</sup>.

In all four cities, government officials have been unable to maintain a clear hierarchy of land use plans and responsibility, resulting in vulnerabilities to extensive land grabbing or seizing 'by power individuals for their own profit, or spontaneously occupied by economic migrants'<sup>195</sup>. USAID continues to work with the city authorities throughout in Afghanistan to map governmental and non-governmental activity, attempting to understand 'Who Does What, Where'<sup>196</sup>. Similar activities are ongoing throughout major urban centers through the State of Afghan Cities Programme, implemented by the Government of Afghanistan with technical support from UN-Habitat. The Programme has held multiple city consultations throughout Afghanistan attempting to understand the *current* status of urban land use in order to develop policy shaping with key stakeholders<sup>197</sup>.

While the Ministry of Urban Development has committed to developing updated urban land use plans that match the carrying capacity of infrastructure and acknowledges the present status of cities as part of its 'Big Cities Master Plan' (for Kabul, Mazar, Herat, Kandahar, Bamyan, Jalalabad and Kunduz), no plan has yet been updated for the cities in question.

However, with an ineffective urban planning, insufficient investment, poor coordination and lack of adequate municipality and land management, the Afghan cities are not able to develop their full potential in supporting social and economic development and state-building in Afghanistan<sup>198</sup>. Additionally, a complicated web of corruption and political opportunity made it clear that the 'Afghan master plans tend to be a map without a strategy'<sup>199</sup>. While, in practice, the responsibility of master plans remains highly centralized with the MUDA, local municipalities exercise a significant amount of control in actual enactment and coordination<sup>200</sup>. The master plans are graphic representations used as planning instruments, but are not regulations in themselves. This places master planning in a gray area among policy makers, and its implementation 'piecemeal and fragmentary'<sup>201</sup>.

Most current infrastructure development in urban areas continues through either (1) international aid organizations, donors, development corporations and so on, (2) private investors. In both situations, bureaucratic processes can be considered expedited for these bodies compared to ordinary citizens. Such building implies the continued piecemeal development of infrastructure that lacks clear cohesion or place in the city. Most infrastructure development and expansion are not implemented by either body with sufficient consideration to city's ground realities or its coherence, a characteristic activity that does not seem to have a visible end date in site.

### ***Ability of planning processes to cope with urban growth***

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<sup>190</sup>"Mapping a Future for Jalalabad,"(Kabul: USAID, 2012).

<sup>191</sup> Ibid.

<sup>192</sup>"Cooperation: Herat, a database designing a future city,"(Kabul: Farnesia, Ministero degli Affari Esteri e della Cooperazione Internazionale, 2011), 1.

<sup>193</sup> Ibid.

<sup>194</sup> Stefan Schutte, "Poor, Poorer, Poorest: Urban Livelihoods and Vulnerability in Mazar-i-Sharif," (Kabul: AREU and European Commission, 2006), 4.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid.

<sup>197</sup>"Participatory City Workshop held in Herat City, Afghanistan"(Herat: UN-Habitat, 5 February 2015).

<sup>198</sup> "State of Afghan Cities 2015. Volume one." (Kabul: MUDA, IDLG, Kabul Municipality, 2015), vii.

<sup>199</sup>Ibid, 23.

<sup>200</sup>Ibid, 14.

<sup>201</sup>Ibid, 29.

The Afghan government has little ability to cope with urban growth. As a result, most growth takes place outside of formal planning processes. In 2005, an estimated 65% of the residents of Kabul city lived in informal settlements, leaving urban planning authorities unable to cope with the increasing demand for services units and land<sup>202</sup>. The figure is believed to have increased with the rise in population from 3.6 million to approximately 5-5.5 million, 70% of whom are believed to live in informal settlements<sup>203</sup>. This is a marked shift from the city in the 1960s, during which time the vast majority of residents were living in formal, ‘mapped’ settlements. Most new residential building construction in Kabul today is, however, considered informal (constructed outside of the Third Master Plan framework), a trend growing from 2001 onwards. A range of settlement types reveals a complicated landscape with squatters on public land, informal homes on private land, grabbed land and more. The wide range of possible classifications attempt to clarify the on-the-ground situation but, instead, render the situation illegible. An informal settlement may, for instance, qualify under more than one settlement type according to the legal typology, resulting in a possibly contradictory range of regulations related to it. The legal framework, while attempting to be sensitive to the ground realities through nuanced classification, fails to acknowledge the similarities between categories that ultimately result in over-classification. Further regulation on urban growth and required service provision can be found in the Land Management Law (see Chapter 2 on Title Deeds, Chapter 3 on Settlement of Land and Chapter 4 on Restoration of Appropriated Lands to their Owners).

The unregulated urban expansion, where people are building their houses without an official building permit, is resulting in the decrease of available green spaces and agricultural land in Afghan cities, myriad of informal land ownership claims and consequently a high number of land disputes. Khushal-Khan Square in Kabul, for instance, according to the Master Plan should be a green protected area. However, currently shops and other buildings are constructed in that area. Some of the owners have customary legal documents proving their ownership, however these do not correspond to the plans in urban Master Plan for the city. Therefore, when the government decides to implement the project planned according to the Master Plan, citizens will claim the ownership of the lands and obstruct the implementation.

#### **Speed and predictability of enforcement of restricted land uses - Residential building permits**

Our research shows the following classification in relation to the requests of residential building permits:

<b>Applicant</b>		<b>Process</b>
Individual	Within the Master Plan	Providing that the applicant is a holder of valid title deed, he/she sends the requests to the Municipal District Office ( <i>Nahyia</i> ) to verify alignment with the Master Plan. Further, the application goes to the Property Municipality Office, where the engineer section gives the approval of the design of the building. Since the designs have to be provided by the applicants, however the municipality does not provide such services, the applicant has to approach private companies to acquire the design. This process may prolong the application.
Individual	Outside of Master Plan	There are no procedures for acquiring of building permit in areas outside of Master Plan and in rural areas. People often proceed with building without any approval of Afghan authorities.
Construction Company	Less than 5 floors	A request letter is taken to the MUDA provincial office. After the verification of the location and design of the building and alignment with the Master Plan, the building

<sup>202</sup> Yohannes Gebremedhin, “Preliminary Assessment of Informal Settlements in Kabul City”(Kabul: USAID, Emerging Markets Group, 2005), 3.

<sup>203</sup> “KnowingKabul: A potential powerhouse of social and economic development,” Discussion Paper #10, UN-Habitat, March 2015.

		permit is issued. This process usually should take no more than 3 months.
Construction company	More than 5 floors	When a building has more than 5 floors, a request letter is submitted to the MUDA provincial office, however this request has to be approved at the Ministry headquarters in Kabul. Often the individual companies bring the letter to Kabul in person in order to prevent long delays. When sending the letter through the post office, the process can take up to 1-2 months to reach Kabul.

For the construction companies and big construction projects, there are certain conditions, based on which MUDA provides building permits. The construction company must have a physical office in the country and qualified engineers, architects and administrative employees, should possess necessary construction equipment and supplies and needs to prove sufficient financial resources when providing its bank statement. The ranking of the companies ranges from 1 to 5, 1 being the highest given to companies able to build more than 10 floor buildings, while 5 is given to companies newly established on the market. Each year two evaluation officers are sent to monitor and evaluate construction companies achievements and provide the ranking. When licensing the construction companies, the number of floors they are allowed to build is mentioned in the building license of the company.

However, the current legal framework for building permits remains convoluted. While several actors, including the government and the World Bank, aim to develop ‘a procedure for quickly providing building permits...’<sup>204</sup>, no national-level policy has been identified for residential building permits.

The convoluted legal framework related to building permits - legal text often littered with holes and opportunities for bribery (including texts like the LML which outlines general requirements and goals but lacks specific procedures for implementation) - renders it rare that building permits are obtained in strict compliance to the regulations in place. Similarly, while costs of building permits themselves may be considered affordable, the lack of compliance to actual permit costs by public institutions and the need for informal fees renders the actual cost of permits expensive. Available funds can also render the technical requirements of building irrelevant. Poor government resources restrict the possibility of public audits for most building projects, and a lack of technical expertise and a reputation of corruption render it all the more difficult to adhere to a set standard of technical requirements for new construction or expansion.

As the regulations on residential building permits are not clear or unified, with several types of valid ownership documents lacking a clear order of hierarchy or validity, it is established that the requirements cannot be judged as complied with. Residential building permits often occur between individual landowners in urban centers and buyers, or households who identify potential areas, and cost 2000 Afs (compared to 5000 Afs for commercial building permits). Building permits are generally granted in three months in corruption-free environments, but the on-the-ground realities in Afghanistan render the process filtered with corruption and typically extend the required time.

### **Tenure regularization schemes in urban areas**

#### ***Formalization of urban residential housing***

As mentioned above, the residential dwellings in Afghan cities are mostly informal while owners do not have any legal documentation proving their ownership. According to the 2008 LML, if a landowner does not own formal title deed or other documents demonstrating formal ownership to a piece of land, he/she may make a claim ‘on the basis of his long term unchallenged possession ‘ (Article 8). Further details on the formalization of ownership of urban property is detailed in Article 10 (Granting the Document to the Seller). Efforts towards formalization remain limited, with the Ministry of Urban Development noting in a 2006 White Paper that the 70% of informal settlements which exist in Kabul lack tenure security (MoUD White Paper, 4). USAID supported MUDA in drafting Policy on Upgrading Informal Settlements, however it has not yet been approved by the Cabinet.

<sup>204</sup>“Kabul urban land crisis: A summary of issues and recommendations,”(Kabul: Kabul Urban Policy Notes Series no. 1, World Bank, 2005), 4.

In advance of the White Paper, a conference was held in Kabul to, among other objectives, ‘draft an action plan and proposal to the government on methodologies for the formalization of property rights in informal settlements’<sup>205</sup>. The White Paper recommended a doctrine of adverse possession based on Islamic jurisprudence be implemented to the formalization issue as well as an Informal Property Formalization Law that should ‘formalize property in urban areas’ and ‘prevent expansion of informal settlements in urban areas’<sup>206</sup>. Recommendations towards formalization would formalize informal settlements while requiring them to address construction issues. The proposals have not yet gone forward, but their drafting remains an important step towards improved formalization processes.

However in practice, urban tenure security has been severely impacted by a drastic increase in urbanization in the past decade, with a rate of urbanization close to 5% per year, one of the highest in the world<sup>207</sup>. A significant problem is the absence of title deeds for most urban residents, and the absence of proper land records<sup>208</sup>. Indeed, studies<sup>209</sup>, consultations with NGOs and agencies active in urban areas on land issues (UN-HABITAT, NRC, UNHCR), and government authorities indicate the vast majority of urban landholdings remain informal in various forms (an approximate 70% of the urban space), insecure and the majority of dwellers do not hold legally recognized documentation<sup>210</sup>.

Additionally, internal displaced persons (IDPs) and returnees in the past decade, most of which are settling in cities in search of livelihood opportunities and greater access to services, further remains one of the major challenges in terms of urban tenure security in the country. When they settle on government owned land, economically disadvantaged IDPs notably face the reluctance of authorities to consider them as permanent citizens of a city and prefer pushing for return of displaced persons to their places of origin. This rapid and uncontrolled urbanization has created a situation of increased vulnerability, especially for the recently displaced, who lack access to land and adequate housing<sup>211</sup>. In some areas, however, municipalities are stating to consider local integration, and potential upgrading and regularization of settlements.

Having said that, current requirements for formalizing housing in urban areas are not clear to the public, and prone to power-brokering and corruption. Insecurity of tenure of urban dwellers has drawn the attention of the international community in the past decade, and led to several initiatives attempting at securing rights of land tenure in urban areas. These include the RAMP-up, LTERA and LARA projects funded by USAID, UN-HABITAT programmes and shelter programmes targeted at returnees and refugees settling in urban areas by NGOs and agencies such as UNHCR, NRC, and GIZ, among others.

UN-HABITAT has notably been involved in initiatives to secure tenure and formalize rights in four municipalities across Afghanistan (Herat, Kandahar, Mazar-e Sharif and Jalalabad), through land records to improve property tax collection. Despite the absence of documentation, this initiative notably contributed to *de facto* secure property rights for an approximate 80,000 households by providing municipalities with records on land holding in the target areas<sup>212</sup>. Similarly, in Mazar-e Sharif, UNHCR and NRC intervened in Hamdard Shahrak, an informal settlement in the South of the city, in order to urge the landlord to issue individual title deeds for households settled on his land. Another significant initiative is the Maslakh informal settlement in Herat, where a joint UNHCR/UN-HABITAT project carried out in 2013 aimed at the formalization of the settlement through provision of basic services and support for livelihood opportunities, in close cooperation with local authorities (the Municipality and the Governor of Herat, IDLG, MUDA, MAIL, and ARAZI)<sup>213</sup>.

Both the LTERA and LARA Project, funded by USAID, engaged in supporting the Government of

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<sup>205</sup>“White Paper on Tenure Security and Community Based Upgrading in Kabul,”(Kabul: Ministry of Urban Development Affairs, 2006), 4.

<sup>206</sup>“White Paper on Tenure Security”, 12.

<sup>207</sup> Shobha Rao and Jan Trustka, “Enhancing Security of Land Tenure for IDPs” (Kabul: UN-HABITAT, 2014).

<sup>208</sup>Interview with UN-HABITAT, Kabul, 26 June 2014.

<sup>209</sup>Tommaso Giovacchini, “Jalalabad City Profile” (Kabul: LARA, USAID, 2013).

<sup>210</sup> See, for instance; Liz Alden Wily, “Land and the Constitution, Current Land Issues in Afghanistan”(Kabul: AREU, 2003); AlecMcNewan &Sharna Nolan, “Water Management, Livestock and the Opium Economy Options for Land Registration” (Kabul: AREU, 2007).

<sup>211</sup>Rao and Trustka, “Enhancing Security.”

<sup>212</sup>Interview with UN-HABITAT, Kabul, 26 June 2014.

<sup>213</sup>Rao and Trustka, “Enhancing Security.”

Afghanistan with “informal settlements upgrading, formalization, cadastral mapping, laws for urban planning and land use regulation, and training in planning and enforcement strengthening of tenure security by supporting the Supreme Court and communities with rights formalization and informal dispute resolution<sup>214</sup>”. The USAID LARA project involved the development of a Policy on Upgrading Informal Settlements, currently awaiting Cabinet approval. Facing lack of support from the Ministry of Urban Development, UN-HABITAT has further been supporting the MUDA for its finalization of the informal settlement upgrading policy, including improvements in terms of access to services and transportation. Provided this policy is adopted, it could provide greater strategic direction to facilitating improved access to basic services and tenure security.

The LARA project, launched in 2009 by USAID, had similar objectives of urban upgrading and security of land tenure, including legal, urban development, and capacity building components. Urban development initiatives were notably carried out as part of a pilot project in two locations in Jalalabad, through the use of *Safayi* notebooks for recording of land holdings and provision of services. LARA also included components for formalization of informal settlements, through outreach to communities to raise awareness about their right to having their land holdings formalized, capacity-building, and coordination with government authorities, including IDLG, GDMA, MUDA, ARAZI and Municipal authorities.

Municipalities have also been engaged in upgrading programmes. The Kabul municipality, for instance, has been involved in the upgrading of District 7 (Murad Khani area). As above when addressing the issue of IDPs and returnees settling in the outskirts of the city, the prevailing practices of authorities to address land tenure in urban areas is to focus on long-term settlements, and there remains reluctance to consider newly settled areas in the outskirts of the city. As explained by an employee of the Kabul municipality interviewed for this study: “Until now, we have decided that the areas which have been recently settled on or constructed would not be addressed, and that we would focus on the areas of old settlement, where people have been staying for years or decades and can be considered as legitimate occupants of the land. We can intervene there because then we can consider this land is not unduly occupied, grabbed or usurped<sup>215</sup>.” While such efforts are a positive step towards strengthening the tenure rights of urban dwellers, this raises concern about the rights of the increasing number of recently settled populations in urban areas, most studies indicating that these are planning to settle permanently.

Despite these upgrading activities of INGO/NGO community and municipalities itself, the efforts are not coordinated leading to a unclear picture of what has been done where, preventing to identify best practices and develop more comprehensive policy on upgrading of informal settlements.

### ***Strategy for tenure security, infrastructure, and housing***

The unexpected rush of migration to Kabul city has resulted in a developing legal framework (led by the MUDA, MAIL and MoJ (along with Kabul municipality) that aims to regulate the on-the-ground situation of the capital primarily through the formalization of urban services, active debates on the issue of Kabul informal settlements and streamlining of titles and other forms of ownership documents. An impressive strategy mentioned above has been proposed by the MUDA for improved tenure security and housing, with further regulations passed regarding infrastructure requirements of buildings in urban areas (see *White Paper on Tenure Security and Community Based Upgrading in Kabul*). Further recommendations are located in the Land Policy Draft of 2007 that aimed to offset the ‘ongoing failure of the formal land allocation, adjudication and registration systems’ that have ‘caused uncontrolled informal developments in urban and rural areas’ (see Draft Land Policy, 2.1.1). Bertaud recommended the development of an urban development strategy addressing urban tenure issues in Kabul city<sup>216</sup> and addressing what he termed the city’s ‘main problem’: ‘infrastructure and access to legally subdivided land’<sup>217</sup>. The growing acknowledgment of informal tenure as a major problem that must be addressed, coupled with initial efforts towards developing formal regulations and strategies, demonstrate progress towards sustainable resolution.

### ***A condominium regime***

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<sup>214</sup> Land Reform in Afghanistan (LARA): <https://www.usaid.gov/news-information/fact-sheets/land-reform-afghanistan-lara>, accessed: 21 September 2015.

<sup>215</sup> Interview with Kabul Municipality employee, 08 July 2014.

<sup>216</sup> Alain Bertaud, “Kabul Urban Development: Current City Structure, Spatial Issues, Recommendation on Urban Planning,” 2005, 16.

<sup>217</sup> Bertaud, “Kabul Urban Development,” 12.

Urban condominiums in Afghanistan take primarily two forms: (1) privately owned, publicly managed apartment complexes such as the Macroyan neighborhoods, and (2) privately owned, privately managed apartment complexes, un-developed plots of land, commercial areas and more such as Sharak Haji Nabi that are monitored by government officials<sup>218</sup>. Further regulations on common land are outlined in the Land Management Law, which provides a guideline for dispute resolution of commonly land (in situations '[w]here the title deed belongs to various landowners are prepared on the basis of common boundaries and where the areas of their lands are held in common'<sup>219</sup>). Apart from limited references in the Land Management law, no regulations for the specific classification or record-keeping, development or management of condominiums were identified. Legal regulations fall short of detailed management guidelines, and are limited to the recognition of common property under condominiums.

In practice, condominiums are growing in demand in places such as Kabul city where limited access to land has resulted in a vertical expansion of the city and concerns about insecurity and cultural values has prioritized the formation of smaller communities, whether like those existing in Macroyan or in the small towns, or sharaks. Urban condominium property, particularly when privately managed; involve a premium for improved management services that are often delivered to families in the areas.

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<sup>218</sup> The status of some sharaks, including Sharak Haji Nabi, remains gray. While recognised by the Ministry of Urban Development, the sharak is not recognized officially by Kabul Municipality. Monitoring of construction and development in the area is thus not clear.

<sup>219</sup> *Land Management Law*, Article 28, 2008.

## 9.4. Public Land Management

				Score			
Pan-LGI-Dim		Topic		A	B	C	D
<b>PANEL 4: Public Land Management</b>							
<i>LGI 1: Identification of Public Land and Clear Management</i>							
4	1	1	Criteria for public land ownership are clearly defined and assigned to the right level of government.				
4	1	2	There is a complete recording of public land.				
4	1	3	Information on public land is publicly accessible.				
4	1	4	The management responsibility for different types of public land is unambiguously assigned.				
4	1	5	Responsible public institutions have sufficient resources for their land management responsibilities.				
4	1	6	All essential information on public land allocations to private interests is publicly accessible.				
<i>LGI 2: Justification and Time-Efficiency of Acquisition Processes</i>							
4	2	1	There is minimal transfer of acquired land to private interests.				
4	2	2	Acquired land is transferred to destined use in a timely manner.				
4	2	3	The threat of land acquisition does not lead to pre-emptive action by private parties.				
<i>LGI 3: Transparency and Fairness of Acquisition Procedures</i>							
4	3	1	Compensation is provided for the acquisition of all rights regardless of their recording status.				
4	3	2	Land use change resulting in selective loss of rights there is compensated for.				
4	3	3	Acquired owners are compensated promptly.				
4	3	4	There are independent and accessible avenues for appeal against acquisition.				
4	3	5	Timely decisions are made regarding complaints about acquisition.				

### Identification of public land and clear management responsibilities

There is no specific definition of public land in Afghan legal code. However the Afghan state does manage some lands, which would broadly meet potential definitions of public land. To explain the blurred boundaries of public and state land, the explanation of each category of land is needed:

Type of land	Definition	Ownership and responsible organization	Restrictions on transferability
Public land	According to the broad definition, the lands that have been allocated for public use and are neither the property of the state nor the property of the individual are public lands. The issue arises with the Art. 3(8) of LML 2008, which stipulates that any land that is deemed public but is not registered in the book of government lands, is considered state land. Additionally the Presidential Decree 83 further blurs the boundaries between state and public land by putting emphasis on formal documentary proofs of ownership. The fact, that Afghan legal framework does not define public land and does not provide provisions on how to register public land and the registration of land in general occurs rarely in Afghanistan, public land can be easily interchanged for the state land. In other words, land that is under public use and not registered can easily be claimed by the state as its property and be reassigned subsequently.	Ownership is contested between either state and public. The responsibilities over public land, although not stipulated clearly in LML 2008 and scattered across other laws such as Forest, Pastureland and Municipality Law, are in praxis divided as follows: MAIL - forests and pastures ; Municipalities - graveyards, entertainment parks, roads, green areas, playgrounds ; MoE - schools, MoHE - universities ; MoPH - hospitals ; ARAZI - all lands outside of Master Plan	Cannot be sold nor leased, transferred nor exchanged
State land	Mountains, hills, deserts, river banks, arid and virgin land, state-owned agricultural land pasture lands (with ambiguity) that are registered as state land in Principal Book of State Land in ARAZI are state lands. When an individual cannot prove the ownership of the land, the land falls under the state land category when the land clearance ( <i>Tasfiya</i> ) is done or dispute is resolved in courts. Considering that a majority of Afghans do not possess formal documents proving their ownership, the difficulties to formalize customary deed documents and to prove unchallenged long term possession according to Art. 8 or LML 2008, and most importantly, inexistence of the possibility of public land to be registered as such, most of the land can be considered state land in Afghanistan.	State (can be also owned by concrete governmental organizations and ministries with land being registered in Principal Books of ARAZI as institutional land) with the responsibility of ARAZI over state land.	Cannot be sold <sup>220</sup> but possible to lease, transfer or exchange. The regulations about the transferability change, when land is state or public, therefore the lack of clear definition of public lands is problematic.

<sup>220</sup> Taking into account the ambiguity of legal framework in relation to this question.

Public land can be easily interchanged for the state land. Hence, in some cases, public lands have been given away by the state to other private owners<sup>221</sup>. This is particularly problematic when it comes to the ownership rights over virgin and arid lands. Virgin and arid land can be a pastureland<sup>222</sup>, hence it cannot be sold nor leased<sup>223</sup>. However, based on the concurrent articles 46 - 49 of LML 2008, the state, providing certain conditions are met, can allocate and distribute arid and virgin land to individuals and other legal persons. In the current body of laws, it is not clear, which arid and virgin land is considered pastureland<sup>224</sup>, and often, visual characteristics are used to distinguish pastureland from arid and virgin land. However, in extremely wet and similarly dry season for instance, arid and virgin land can look similar to pastureland<sup>225</sup>. In this case the testimonies of witnesses are used to distinguish between these two types of land. However, the distinguishing factors being the visual characteristics and the testimonies of witnesses, provides considerable room for corruption and creates a situation where, although public land cannot be sold nor leased, it can indeed be distributed to individuals and other legal persons.

Like this, the country's best pastures that have historically been used for grazing are leased by the Afghanistan Independent Land Authority (ARAZI) to investors for agricultural and residential purposes due to lack of irrigation, which turned these lands into arid and virgin lands. This leads to disputes between livestock raisers and investors in number of areas in Afghanistan such as the conflict between Kuchi Ibrahim Khail tribe and leasees in Dur Baba Plain (Laghman), lands around Amu Darya River etc. Additionally, the long lasting conflict between Kuchi tribes and local communities in Central Highlands is a prominent example of unclear identification and definition of public lands in Afghanistan.

Another important feature of the definition of public land is the fact that the public lands are allocated only for public use to serve the common interests and welfare of the residents of a particular area. Using public lands for purposes that have not been set out by the law is not permitted. For example, pastures that have been allocated for the grazing of animals and to be used as graveyards must not be used for a different purpose. However, the current body of laws (LML 2008, Land Acquisition Law (LAL) of 2000 with its amendments) does not clearly define the terms "public interest", "public need", "public purpose", "public reasons" or "public welfare". The law uses these terms interchangeably, which leads to creating the space for numerous interpretations.

Paragraph 4, Article 5 of the newly proposed amended LML is trying to address the above mentioned shortcomings of the public land definition by stating the public land as "*a land that the public people can commonly use for their interests such as mar'aa, cemetery and site for harvesting, and such land is not owned by the state and the individual.*"

The amended LML classifies four kinds of land:

1. Private land;
2. State land;
3. Land specific to village/villages; and
4. Public land.

Of these four categories of land, the last two comprise public lands with clear definition of "land specific to village/villages":

"Land that is managed by the Land Authority (ARAZI), is situated adjacent to one or more villages and is commonly used by the residents of the village or villages as a legal entity in order to realise their interests and fulfil their determined purposes; such lands are not the property of the state."

### **Recording of public land**

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<sup>221</sup>Wily, "Land Governance at the Crossroads."

<sup>222</sup>Based on the definition of pastureland in Art. 3(9) LML 2008.

<sup>223</sup>LML 2008, Art. 82(1): "Pastures shall be kept unoccupied for the sake of public requirements of local villagers (for cattle grazing, graveyard, threshing ground and etc.)" and Pasture Law 2000, Art. 6: "Buying, selling and leasing a pasture is prohibited."

<sup>224</sup>Hence the very unclear definition of the pastureland in Art 3 (9.2).

<sup>225</sup> Arid and virgin land can grow plants in wet season, so as the pastureland can dry out significantly during the dry season.

Between the years 1966 and 1977 a national cadastral survey was conducted which included 34% of all the land in Afghanistan including arable and non-arable lands, forests and pasturelands. The remaining 66% of Afghanistan's arable and non-arable lands have not been surveyed so far. It is not clear what proportion of the un-surveyed land is public land. The Afghanistan Independent Land Authority (ARAZI) has a five-year strategic plan, according to which it intends to conduct a cadastral survey of the remaining 66% of lands. The survey is set to start in Bamiyan province in 2015.<sup>226</sup>

Additionally, let alone an unclear definition of the public lands itself, the classification of different types of public lands in LML is not clear, making the identification on the ground impossible. The problems with legal definition and visual identification of arid/virgin land and pastureland was already mentioned above. The distinction between specific pasture, located close to the village, and communal pasture (according to the Pasture Law 2000) is not developed in the body of the law at all<sup>227</sup>. Furthermore, the limits of pastureland are established as follows in accordance with Article 3 (9) of the LML: "Pastureland is land that extends as far as the human voice may be heard from the edge of the village." The determination of the limits and the understanding of pastureland based on the audibility of the human voice are not compatible with present-day conditions, thus in Afghanistan the recording of the public land is incomplete and virtually impossible.

### ***Accessibility of information on public land***

The information on public land in Afghanistan is not made public. Firstly, an unclear definition of public lands and the fact that the public land cannot be registered as such based on current Afghan framework renders access to information impossible. Secondly, the Presidential Decree 83, 2003 halted survey and mapping of Afghan lands previously conducted by the Survey Department of the Afghan Cadastre. President Karzai allowed the Survey Department to conduct surveys only on his request and/or after his approval for the surveys done on demand (Article 15 (1)) and the Cadastre could not make any survey information public (Article 15 (2)). This, however, led to the complaints that the survey offices were making records available to elite persons who then used the information to change the ownership in their favour. This practice did not necessarily stop until today, adding to the extreme gathering of power over land matters in the hands of the President.<sup>228</sup>

### ***Management of public land***

The government has entrusted the Ministry of Agriculture, Irrigation and Livestock (MAIL), Ministry of Hajj and Endowment, Municipalities and ARAZI with the management of public lands. MAIL's Directorate of Natural Resources manages two major types of public lands, namely pasturelands and forests. The third type of public lands, namely endowed lands, is administered by the Ministry of Hajj and Endowment. The MUDA and respective municipalities are responsible for the management of the public infrastructure, green areas, playgrounds, schools, hospitals, mosques, cemeteries and parks within the Master Plan<sup>229</sup>. The rest of the public land is managed by ARAZI. Even though the level of government including the provincial and district municipalities responsible for the public land seems to be appropriate, the conflict between the ministries and other state agencies sometimes occur.

Firstly, unclear definition of public land and its different types render the clear delineation of responsibilities almost impossible. Of particular importance is also the delineation of responsibilities between MAIL and ARAZI. Based on the Decision 23 of the Council of Ministers of September 2009, the land management authority AMLAK<sup>230</sup> was renamed ARAZI (Afghanistan Independent Land Authority) and restructured within MAIL. ARAZI was the land affairs management authority that operated under MAIL structure until September 2013, when its status was changed by the Council of Ministers Resolution 11. Since then, ARAZI is an independent body. With the Presidential Decree 2200 of 2013, all the land responsibilities formerly attributed to MAIL, have been transferred to ARAZI. However, since ARAZI was established as an independent body only in 2013, its responsibilities are not outlined in current LML of 2008.

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<sup>226</sup>Interview with ARAZI employees, Kabul, 11 March 2015.

<sup>227</sup> Wily, "Land Governance at the Crossroads," 19.

<sup>228</sup>Wily, "Land, People, and the State," 33.

<sup>229</sup> Please see the activities of MUDA and municipalities in the institutional map in Annex VII.

<sup>230</sup>AMLAAK: Land affairs management authority that operated under MAIL structure until September 2009.

Additionally, the unclear division of responsibilities between MUDA and municipalities explained in the previous section renders the management of (not only) public land ineffective and inequitable.

Finally, lack of professional land experts and financial resources in Afghan land administration for the implementation of day-to-day activities are some of the challenges that make it difficult to put in practice their strategic and action plans. In ARAZI, for instance, although merging the Department of Cadastral Survey of the Directorate of Geodesy and Cartography with ARAZI strengthened the latter's professional capacity, ARAZI continues to lack a sufficient technical structure that can address countrywide land affairs. In specific terms, ARAZI's provincial capacity is limited in terms of human resources and integrated cadastral maps.<sup>231</sup> Other problems facing ARAZI include the lack of modern technical equipment for cadastral survey, insecurity in some provinces and the lack of provincial departments of cadastral survey. For these reasons, the establishment of some new departments have been proposed in ARAZI's *tashkil* (organisational structure) for the coming year; these departments are needed to effectively address land affairs in the country.<sup>232</sup>

These problems are of greater severity in smaller provinces, compared to the capital and bigger provinces; which in general makes land management (including public land management) in these provinces unequal.

In certain provinces (mostly in rural areas), community based management of public land is very common particularly in relation to the management of forests and specific pastures located in close proximity of the village. Restrictions are placed on cutting the trees and collection of products unless allowed by the community. The community also sets up the dates for harvesting, penalties for non compliance etc. In some areas, woodcutting is also regulated and monitored by the community and is not allowed when the trees are still green. Specific pastures are monitored not to allow other communities from neighbouring villages to graze animals on these pastures. In remote areas, graveyards are also managed by the community.

Various national and international NGOs have developed projects to support the community-based public land management, in particular in relation to pastures.

### **Public land allocations**

Only state land can be allocated (leased) to private and public interest in Afghanistan or private land can be acquired (through the acquisition) for public interest. Public lands, cannot be allocated (sold, leased, transferred or exchanged) to private interests under any circumstances. However, the ambiguity of the definition in particular of virgin and arid lands gives room for their illegal allocation to private hands. According to the Article 46-49 of LML 2008, the state can allocate and distribute arid and virgin land to individuals, while pasturelands can be arid and virgin lands at the same time without any clear distinction between those two land types in Afghan legal code. The examples of ARAZI leasing arid and virgin land in Dur Baba plain and along Amu Darya river mentioned earlier can serve as one example of convoluted legal framework.

Consequently, since public land allocations to private interests are illegal in Afghanistan, there is no information recorded on these transactions, although in reality public land is at times forcibly acquired (grabbed) and transferred to private investors.

### **Justification and time-efficiency of acquisition processes**

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<sup>231</sup> Strategy to promote the Afghanistan Independent Land Authority as a modern state institution in the field of land services, Afghanistan Independent Land Authority, 1392, 6.

<sup>232</sup> Interview with ARAZI employees, Kabul, 11 March 2015.

The purpose of land acquisition is that lands owned by individuals are appropriated by the state with aim to be used for public benefit in return for just compensation. In other words, land is only acquired for the execution of public welfare projects such as the construction of hydropower dams, airports, roads and other infrastructure. Due to the lack of adequate monitoring mechanisms to verify the authorized use of the land, it is not clear, how much land was acquired by state and then turned to the project with private purpose. Having said that is important to note that from the limited field research conducted for this study, people talked about illegal transfers of land after state acquisition processes. The availability of qualitative evidence combined with lack of state monitoring mechanism might suggest that the process of acquisition is at best highly imperfect where the illegal use of acquitted land cannot be ruled out. Furthermore, no database of acquisition processes exist, therefore it is not possible to estimate, how fast the acquired land is transferred to destined use in timely-manner.

Various state organisations such as municipalities and ministries can possibly be considered as appropriating authorities and determine if a project is needed for public welfare. The current law is not transparent as to which departments have powers of expropriation or the limits of the powers of implementing officials.<sup>233</sup> This can encourage corrupt practices. Article 3 of the current Land Expropriation Law (LEL) 2005 lists three different categories of public projects with examples for each. If the project is on the list, they can move forward with the appropriation. The appropriating authorities afterwards determine the land that needs to be appropriated. If the land is within the master plan, municipalities and MUDA can acquire the land; if the land is outside the master plan, any government institution can be an appropriating authority. The expropriating authority then creates a land valuation committee<sup>234</sup> to determine the value of the land.

The final price of the land produced by this commission requires the approval of the Council of Ministers.<sup>235</sup> According to Article 20 of LEL 2005, the owner is informed to vacate the land three months prior to the start of the project. No independent third party institution is appointed to assess if a project truly serves the public welfare. ARAZI is in theory the responsible institution to monitor the leases and transfers of state land every six months to make sure that the land is used for the purpose it was acquired. However, this creates conflict of interest since ARAZI is both the leasing and the monitoring authority.<sup>236</sup> Nevertheless, no regular monitoring by ARAZI takes place due to the lack of financial and human resources and limited security in certain areas of Afghanistan.

The proposed Land Acquisition Law (LAL), currently under review by the MoJ, is an improvement of the LEL 2005. The proposed LAL lists 19 different categories of public projects with examples for each as compared to LEL 2005. The land required for planned public welfare project is assessed and Article 7(3) of the proposed LAL requires the organisation to estimate the least amount of land required for the project. This provision is absent from LEL 2005, where the law does not require the expropriating authorities to estimate the least amount of land for their projects. According to the proposed LAL, after the project is approved by ARAZI (when among the list of 19 types of public projects) or the Council of Ministers (when not on the list), the state organisation which is implementing the project is required to announce the implementation of project to all the local citizens who will be affected by the project directly or indirectly. The announcement has to be done by the media nine months (compared to three months in the LEL 2005) before the start of the project (Article 7(15)). The new LAL also suggests a third party monitoring body, which can assess whether the leased and transferred land is used for their destined purposes. If adopted and adequately implemented, this law would be certainly an improvement in Afghanistan land acquisition practices.

Another issue worth mentioning in the length of acquisition processes. The length of the acquisitions processes is often prolonged, due to the occasional resistance from landowners. This prolongs the three-month period even further and delays the implementation of public welfare projects. This is happening due to various reasons, one of them being the LEL 2005, which is currently in effect, does not make any provisions for public consultation in regards to the public welfare projects. This can undermine the principle of transparency and accountability as the local communities who are most

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<sup>233</sup>Wily, "Land, People, and the State," 49.

<sup>234</sup> The detailed process of land valuation will be explained later in this report.

<sup>235</sup>See Article 10 of LEL 2005.

<sup>236</sup> Interview with ARAZI employees, Kabul, 11 March 2015.

affected by the project, however, have no say in the process. Since acquisition of lands owned by individuals for the implementation of public welfare projects is a compulsory process without any possibility for appeal. When it is decided that the implementation of a project has a benefit for the public, it is the duty of the state to implement it and the individual owner to give up the land needed without any complaints or, at times, any compensation. However, the proposed LAL, currently under review by the MoJ, makes provisions to ensure good governance through a process consultation with local communities (See Art. 7 (10)).

Additionally, pre-emptive actions are taken when the acquisition process is announced, which usually leads to the increase of the value of the land. Before the government determines the price of the land, numerous land grabbings and land sales for minimum price take place just to be able to sell the lands later for higher price. These pre-emptive actions slow down the development of the project because when the acquisition is announced, the expropriating authorities have already received the budget for this purpose. When the land valuation commission estimates already increased value of the land, the budgets are risking not being sufficient for paying compensation and for other expenses.

Furthermore, when the owners are not satisfied with the compensation, the acquisition process can be lengthy and complicated and can create many conflicts with evicted owners. In such cases, people try to obstruct the implementation of development projects and at time the residents even refuse to vacate their houses to put pressure on the government to reach an agreement on a better compensation price. Nevertheless, the acquisition of lands owned by individuals for the implementation of public projects can, in some cases, cause public dissatisfaction particularly when people face losses as a result of acquisition, suggesting insufficient compensation being paid during acquisition processes. Regardless, people are forced to give up their lands for the implementation of these projects.<sup>237</sup>

Finally, there is no accurate statistical information on lands that have been acquired and whether or not these acquired lands have been transferred to destined use in a timely manner. Various projects are underway in various parts of the country and the lands acquired are recorded per project, but there is no specific institution to gather and keep these records nation-wide.

### **Transparency and fairness of acquisition procedures**

#### ***Compensation***

Compensation is provided only to people holding the legal title deed document. Considering the prevalence of informal land tenure in Afghanistan, a considerable number of Afghans are susceptible for acquisition without any right for compensation. The legal code makes a number of provisions for land acquisition. According to Article 6 (1) of LEL 2005, the rights to ownership and damages will be compensated. Article 6 (2) and 8 of LEL 2005 allow (unless rapid evacuation is necessary) for the rights to be compensated for the price of the land, residential houses, buildings and other constructions located on the land and fruit bearing or ornamental trees, or other saplings set on the land<sup>238</sup>. There is no stipulation in the LEL about the unrecorded rights such as grazing, right of passage and gathering forest products.

In terms of the responsibility for valuation of the land, residential buildings and products being produced on the land for the purposes of compensation, according to Art. 69 of LML 2008, the land price is determined by a special valuation committee consisting of:

1. The provincial governor or their representative as chairperson;
2. Competent representative of the local ARAZI as deputy chairperson;
3. Competent representative of the Department of Cadastral Survey of ARAZI as member;
4. Competent representative of the Promotion Department of MAIL as member;
5. Competent representative of the Ministry of Finance as member;

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<sup>237</sup>Interview with ARAZI employees, Kabul, 11 March 2015.

<sup>238</sup>Article 8 of the LEL 2005.

6. Competent representative of the Ministry of Urban Development as member;
7. Competent representative of the acquisition authority as member;
8. The owner of the land to be acquired or their legal representative or, if there are several owners, their legal representative as member;
9. Two informed people from private real estate agencies as members; and
10. If necessary, representatives from other institutions as members.

Each of the members has clearly defined responsibilities. Art. 10 of LEL stipulates that “The price of lands subject to expropriation shall be approved by the Council of Ministers and the grade [quality] and location of the land shall be considered for determining the price of the land.” While Art. 11 of the same law states: that “The price of residential houses, buildings and other constructions belonging to the owner or user of the land shall be determined by a committee of Kabul Municipality, in accordance with The Unified Table for Valuation.” Additionally, Art. 15 stipulates that “The price for fruit-bearing or ornamental trees or other saplings set on a land subject to expropriation, which belong to the owner and user of such land, shall be determined as decided by the municipality and the administration for agriculture.”

Although the compensation for land, residential buildings and fruit-bearing trees and other samplings is legally prescribed in Afghanistan, in the majority of cases, the paid compensation is not sufficient for the individual whose land has been acquired to be able to maintain his/her previous status of life.<sup>239</sup> The cases when the acquired land has been located in a central part of the city, but the exchanged land is situated on the outskirts can serve as an example of this.

Another problem in the applicable law is that there is no deadline for the payment of compensation for land acquisition. Compensations may be made three or four years after the acquisition. When the land prices go up in this time period, the landowner might find himself not being able to afford the same standard of living as before. Additionally, the acquisition process is lengthy in itself. It can take up to 120 weeks until the completion of acquisition process. Since the actual payment of the compensation requires the landowner(s) to have their land titles verified by court<sup>240</sup>, it takes a few weeks to even call up all price committee members and convene a meeting. Since the price is rarely set up during one meeting and no clear method is prescribed for how the committee sets the prices<sup>241</sup>, the actual payment can turn out to be inadequate and can come very late. This, in light of the Art. 40 of the Afghan Constitution, which states that the private land can be expropriated only in exchange for a prior and just compensation, it can be argued that most of the acquisition processes in Afghanistan are unconstitutional.

Furthermore, if grazing land is (by mistake or illegally) used for a construction of a public project (i.e., an airport), people who have formerly used the land as grazing land cannot use it any more, however no provisions in the current legislation stipulate the provision of compensation for the loss of the grazing rights. Finally, an adequate resettlement policy has not been incorporated into the applicable law and it does not have any provisions for providing clear and fair resettlement options for people whose land has been appropriated.

The proposed LAL, Article 24 states that if the locals, such as the *Kuchis* (nomads) and villagers who used the land for grazing incur losses, the organisation which has appropriated the land with consultation with ARAZI shall compensate these communities by finding an alternative grazing land. Additionally, LAL tries to compensate the shortcomings of the current LEL by stipulating in Art. 36, that exchanges for the acquired land include the following:

1. Land equivalent to the acquired land in terms of degree, type, location and commercial value;
2. If sufficient land is non-existent, exchange in cash according to the requirements set out in paragraph 1 of this article;
3. If land is completely non-existent, exchange in cash;

<sup>239</sup>Interview with ARAZI employees, Kabul, 11 March 2015.

<sup>240</sup>Jawad Peikar, Asta Olsen and Sanjay Upadhyay, “The Proposed Law on Land Acquisition and Just and Fair Compensation in Afghanistan” (Annual World Bank Conference of Land and Poverty, Washington DC, March 23-27, 2015).

<sup>241</sup> Please see the detailed issues with the setting up the prices of land in the section 9.7.

4. Other methods of exchange are regulated by a special bylaw.

Additionally, Art. 37 of the amended LAL law states: “Individuals who do not own lands in the project implementation area but lose their professions, jobs and working opportunities as a result of project implementation have priority in employment for the project.”

Also, the amended law has included provisions on resettlement of individuals who face losses as a result of acquisition of their lands. Article 44 stipulates: “When residents of an area lose their residential houses as a result of project implementation, the acquisition authority has the responsibility to relocate and resettle them, so they can continue their living before the commencement of project implementation.”

It is important to note, that none of the land related laws include any provisions that would stipulate the right for compensation in the cases of the land use change outside of the acquisition process. For example, issues such as conversion of rural land to urban land and how this would affect secondary rights such as access to grazing are not considered in the laws. With more research conducted in peri-urban areas<sup>242</sup>, little is known about how land use change influences the livelihood of citizens.

Only recently approved Minerals Law 2015, makes some provisions for land use change. Art 39 stipulates “If during the mineral activities, any damage is caused to the landowner’s properties, the holder shall be required to pay compensation in accordance with the applicable Laws. If the Holder of a License fails to pay compensation as demanded by the landowner, or if the owner of the land is dissatisfied with any offer, such compensation may be determined by an expert appraiser. Where the parties may not reach any agreement, the issue shall be resolved by the competent court. “

***Appeal against acquisition***

According to Alden-Wiley, “the owners cannot appeal against the expropriation, to receive payments 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.”<sup>243</sup> If the owners are not willing to give up their land, the acquisition process starts and based on the transparency of the acquisition process, satisfaction with the compensation and resettlement measures, the actions of the private owners is determined. There is no particular authority where individuals can lodge their complaints against acquisition and the compensation that has been paid to them. Complaints offices (not specific to land acquisition purposes) exist with courts and people can also approach Council of Ministers but not all individuals have an access to these institutions. The access strongly depends on the extent of social network and ability to provide informal payments. This de facto means, that certain mechanisms for lodging complaints exist, however not equally accessible to all. Although those affected can ultimately approach the court system, resorting to courts should be the last instance to launch a lawsuit as opposed to only present a common complaint. Furthermore, rampant corruption and lengthy processes in the judiciary leaves lawsuits filed by such individuals unaddressed for long time. At the same time, individuals whose lands have been acquired cannot easily defend their rights against powerful figures and/or state institutions. For example, a farmer whose lands have been acquired by the Ministries of the Interior or Defence cannot easily sue these legal entities in the court and defend their rights if they are dissatisfied with the acquisition. For these reasons, ordinary individuals often refrain from approaching the court system.<sup>244</sup>

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<sup>242</sup> See Fabrizio Foschini, “The Social Wandering of the Afghan Kuchis. Changing patterns, perceptions and politics of an Afghan community” (Kabul: Afghan Analyst Network, 2014) and “Justice & Security Practices, Perceptions, and Problems in Kabul and Nangarhar” (Kabul: The Liaison Office, 2014).

<sup>243</sup>Wily, “Land, People, and the State.” 49.

<sup>244</sup>Interview with ARAZI employees, Kabul, 11 March, 2015.

However, there is no accurate statistical information on the number of lawsuits launched in relation to land acquisition or the time needed for their solution in Afghan courts. However, it is estimated that it takes the court approximately a year or more to decide a lawsuit.<sup>245</sup>

To address this issue, the amended LAL law has proposed the creation of a complaints hearing committee. Based on the proposed LAL (Article 40), the proposed composition of this committee includes land experts, an expert engineer, a representative from the organisation that has appropriated the land, a representative of the Pricing Committee and the person/or his/her representative whose land/property has been appropriated. The objective of this committee is to make sure that the rights of individuals are not violated by powerful figures or state institutions and to shorten the time taken to adjudicate a complaint. This committee can prove effective in addressing normal complaints within a shorter period of time. However, the structure of a complaints hearing committee is the same as that of the pricing committee, which clearly constitutes a conflict of interest

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<sup>245</sup>Interview with ARAZI employees, Kabul, 27 March, 2015.

<sup>246</sup>Interview with ARAZI employees, Kabul, 11 March, 2015.

## 9.5. Transfer of Large tracts of land to investor

Pan-LGI-Dim				Topic	Score			
					A	B	C	D
<b>PANEL 5: Transfer of Large Tracts of Land to Investors</b>								
<i>LGI 1: Transfer of Public Land to Private Use Follows a Clear, Competitive Process and Payments are Collected</i>								
5	1	1	Public land transactions are conducted in an open transparent manner.					
5	1	2	Payments for public leases are collected.					
5	1	3	Public land is transacted at market prices unless guided by equity objectives.					
5	1	4	The public captures benefits arising from changes in permitted land use.					
5	1	5	Policy to improve equity in asset access and use by the poor exists, is implemented effectively and monitored.					
<i>LGI2: Private Investment Strategy</i>								
5	2	1	Land to be made available to investors is identified transparently and publicly, in agreement with right holders.					
5	2	2	Investments are selected based on economic, socio-cultural and environmental impacts in an open process.					
5	2	3	Public institutions transferring land to investors are clearly identified and regularly audited.					
5	2	4	Public bodies transferring land to investors share information and coordinate to minimize and resolve overlaps (incl. sub-soil).					
5	2	5	Compliance with contractual obligations is regularly monitored and remedial action taken if needed.					
5	2	6	Safeguards effectively reduce the risk of negative effects from large scale land-related investments.					
5	2	7	The scope for resettlement is clearly circumscribed and procedures exist to deal with it in line with best practice.					
<i>LGI3: Policy Implementation is Effective, Consistent and Transparent</i>								
5	3	1	Investors provide sufficient information to allow rigorous evaluation of proposed investments.					
5	3	2	Approval of investment plans follows a clear process with reasonable timelines.					
5	3	3	Right holders and investors negotiate freely and directly with full access to relevant information.					
5	3	4	Contractual provisions regarding benefit sharing are publicly disclosed.					
<i>LGI 4: Contracts Involving Public Land are Public and Accessible</i>								
5	4	1	Information on spatial extent and duration of approved concessions is publicly available.					
5	4	2	Compliance with safeguards on concessions is monitored and enforced effectively and consistently.					
5	4	3	Avenues to deal with non-compliance exist and obtain timely and fair decisions.					

**Transfer of state land to private use follows a clear, transparent, and competitive process and payments are collected**

(Note: the analysis of this section makes the assumption that the indicator talks about “state land” rather than “public land” in the context of Afghanistan.)

There are five possibilities of state land transactions:

6. Transfer to other government entities - ARAZI transfers state land to other governmental entities based on their request
7. Exchange - ARAZI provides an exchange of private land in one area with the state land in desired area based on request. The private land is exchanged for state land with the same grade. When same grade land is not available in desired area, the value of the acquired land has to match the value of the original land. Monthly, ARAZI receives 7- 10 requests for exchange.
8. Donation - ARAZI allocates the land for donation based on the Presidential Decree. In comparison to distribution, where minimal prices for distributed land are set, donations are free of charge.
9. Lease - these transactions will be discussed in detail in this section of this report
10. Sale/Distribution - there is an ambiguity in Afghan legal framework about the sales of the state land (see below). For distribution purposes, ARAZI allocates the land based on the Presidential Decree and the respective ministries are responsible for the actual distribution.

The sale of state land was banned by Presidential Decree 99 in 2002. The decree banned selling of state land, including virgin and arid land for housing and all other purposes.<sup>247</sup> The philosophy behind this was to prevent the misuse and corruption in state land distributions.<sup>248</sup> The allegations of corruption of the Mayor of Kabul for distributing townships to parliamentarians, or the case of Sare Dawra township<sup>249</sup> can serve as an example of the corruption, lack of transparency and oversight in state land distribution processes. However, despite the ban on state land sales prescribed by the Presidential Decree 99 in 2005, the LML enacted in 2008 allows for both selling and leasing of state land and provides guidelines and procedures. According to art. 47 LML 2008 “Lands being specified for sale shall be the net property of the State, or shall be virgin and arid lands, and shall not be under State projects, urban master plan, forests, pastures, mines and historical monuments.” According to Art. 46(3), such land is subject to sale and transfer to individuals, agriculture and livestock institutions and private and joint domestic companies by ARAZI upon auction and subsequent approval by the President. The law allows also for selling of virgin and arid land contingent to presidential approval (Art. 46(3), 47), which brings us back to the issue of unclear definition of arid and virgin land, that can be considered both public (as a pasture land) and state land having different impacts on transferability restrictions.

Having said that, state land is sometimes being sold for investment not always in open and transparent manner. Of particular interest are the transactions of Afghanistan Investment Support Agency (AISA), established as a part of the Ministry of Commerce and Industry. The Ministry can request state land from ARAZI to be transferred to AISA, which then sells it to investors. The legality of these transactions remains unclear. Furthermore, ARAZI has currently stopped transferring land to AISA due to the lack of clarity and coordination of their respective investment policies (AISA implements policies such as selling land to investors at very high price, which can discourage the investors) and the ambiguity in relation to the legal status of AISA. While it was created under the Ministry of Commerce and Industry to support private investment, now it claims to be an independent entity.

State land can be leased<sup>250</sup> to individuals, organizations, domestic and external private and joint-venture agriculture companies based on an agreement and according to the provisions of the law.<sup>251</sup> ARAZI is responsible for managing the leases and ensuring that the requirements of the LML are observed. To attract private investment to establish agriculture, livestock, and farming, ARAZI has the

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<sup>247</sup> See art. 1 of the presidential decree #99

<sup>248</sup> “The Stolen Lands of Afghanistan and its People” (Kabul: UNAMA Rule of Law, part 2 of 3, 2015).

<sup>249</sup> All governmental institutions were given a quota of land, which they distributed amongst their staff by lottery. No land was earmarked for non-governmental landless persons. The price for a plot of 450m<sup>2</sup> was 5,000 Afghanis, equal to about \$100 USD. The low price of plots provided an opportunity for officials to buy multiple plots and derive large profits by reselling them. Allegedly, some high officials took up to 200 land plots and sold them on the open market at up to \$7,000 each, seventy times higher than the governmental price (ibid).

<sup>250</sup> See LML, Art. 59(1).

<sup>251</sup> See Art. 64(1).

authority to lease fertile land for up to 50 years and virgin and arid land up to 90 years.<sup>252</sup> The authority for leasing of land up to 1,500 *jeribs* is ARAZI. For 1,500 to 5,000 *jeribs*, it is the Economic Committee of the Council of Ministers making the final decision. For land over 5,000 *jeribs* it is the Council of Ministers.<sup>253</sup> In addition, ARAZI is authorized to lease land for investment purposes other than for agriculture, livestock and farming, if the purpose complies with the Private Investment Law, such as land leased for installation of commercial TV and radio antennas,<sup>254</sup> restaurant, hotels, pump stations, fishing farms, poultry, orchards, agri-business, food process, factory, car wash, green houses, universities, entertainment parks and so on.

Therefore ARAZI categorized land lease for the following purposes:

- For installation of telecommunication purposes such as TV, radio and mobile antennas;
- For agriculture purposes;
- For development projects

In the past ministries and municipalities were also authorized to lease out state lands under certain conditions, including the requirement that the lands be “relevant landed” properties of the ministry or department;<sup>255</sup> However, these lands may not be leased for more than five years and must be leased through public auction.<sup>256</sup> To mainstream the lease of state land, the Cabinet Resolution 5 of 2014 requires all the ministries and municipalities to transfer their surplus land to ARAZI for further leasing. This, however, is not always implemented in practise.

To attract investments ARAZI has made efforts and developed a detailed procedure under LML to simplify, save time, reduce administrative steps, and ease up the leasing process. Investors can initiate a land lease request (reactive procedure), or ARAZI can proactively announce a bidding process for land leasing in media and mosques (proactive procedure). The initiation of leasing process by individual investors starts from the district where the land is located, then it goes through the local ARAZI office to the provincial ARAZI and finally it is processed by the land lease directorate and approved at the management of ARAZI. Individual in this case has to go through different ministries mentioned in Art. 69 of LML 2008 that are involved in the land valuation to get their opinion on land value. This creates an enormous space for corruption. However, the proactive land lease is more common nowadays.

The following are the steps for reactive land lease (with slight differences for each category of land lease):

1. A person makes a lease request at the ARAZI local offices
2. ARAZI local office sends the request along with the *Personal information form* and the *Form of the approval of the Local Shura* to the district administration (3 days).
3. At the district administration level, Art. 69 from LML 2008 should be applied. In case this is not possible<sup>257</sup>, a smaller leasing committee is formed (this is not possible for the state land leases for the purposes of development projects). This committee includes representatives from ARAZI, *Mustofiat* (the local taxation office of the MoF) and the districts administration representative. The committee expresses its opinion about the specifications of the land and its spatial dimensions and the minimum price for land is set by the committee based on the type, size and grade of the land (3 days).
4. After receiving the information from the committee, the ARAZI main office makes an announcement for public auction about the land lease. If there is no media in the district, the announcement will be made through the mosques (2 days). This does not happen in the state land leases for telecommunications purposes.

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<sup>252</sup>See Art. 64.

<sup>253</sup>See Art. 66(2).

<sup>254</sup>See Art. 64(2).

<sup>255</sup>See Art. 64(3).

<sup>256</sup>See Arts. 64(3-5).

<sup>257</sup>Without any specification when the commission doesn't have to be formed.

5. Any applicant can submit a bid (including the person who initiated the whole procedure) with all necessary documents such as business plan in sealed envelop to the ARAZI office no later than the announced deadline. It is important to note that if the initiator of the process proposes a rent higher than the rents proposed by any other applicant, he/she is considered as a winner automatically. If this is not the case, a letter will be issued to the initiator to negotiate the increase of rent value.
6. The lease documentation is collected by ARAZI district officials. After the legal procedures are completed internally, ARAZI office at the district level sends an official letter with the documents to the provincial ARAZI office (3 days).
7. The Provincial ARAZI office, after verifying that the documents have been processed properly in accordance with ARAZI lease procedure, sends the documents to the Leasing Office of ARAZI in Kabul.
8. MAIL, the Leasing Office of ARAZI and authorized representative from provincial sector assesses the documents and business plans (2 days). This only happens for state land leases for development project purposes. For agricultural and telecommunications projects such assessments are not conducted.
9. When approved, it sends the documents to the Head of ARAZI for approval (5 days).
10. The contract for lease will be prepared (4 days) for the signature of the Head of ARAZI (3 days).
11. The contract is then send to the Leasing Department. The Leasing Department makes 4 copies of the contract and sends them to the ARAZI office at the district level to get the signature of the lessee (4 days).
12. After getting the lessee's signature, the office of ARAZI at the district level sends one copy of the contract to the ARAZI department at the provincial level and another one to Kabul (3 days).
13. ARAZI office at the district level sends one copy of the contract to the lessee and keeps one copy in the archives of the Leasing Department (3 days)<sup>258</sup>.

For pro-active procedure, the steps are similar, except first two, and the process starts with the formation of the committee based on Art. 69. There is no possibility to form the smaller version of the committee.

### ***Transparency and efficiency of lease processes***

The leases of the state land are a major venue for providing large tracks of land to investors. The bidding for contracts goes through public auction, which is announced publically and the process starts ideally after at least 3 bidders show interest. If there are no at least three applicants after the determined bidding deadlines, the auction is re-advertised at least two times. If after third announcement less than three bidders expressed interest, the process continues with existing number of bidders. However, this is not always happening in reality and sometimes the ARAZI Land Lease Procedures are not fully followed, making the transparency on paper unfulfilled in the reality. Additionally, the results of land valuation are not made public, further compromising the transparency of land lease processes.

Reducing administrative steps from 53 to 8 -12 steps depending on the type of lease has reduced the amount of time required for finalization of the lease process. The detailed procedures for leasing state land developed by ARAZI also aims at ensuring transparency and accountably to the investors and the public. The timelines set forth for each of the administrative steps, inclusion of the business plan templates, annexes and all required forms including the instructions on how to proceed with the land lease process made the leasing of state land in Afghanistan more effective and faster.

All the information about the process is available in ARAZI offices. Nevertheless, sometimes it is difficult to get the exact information required on time. Particularly in provinces and districts, the low

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<sup>258</sup>ARAZI Land Lease Procedure, 2012.

capacity of the staff, as well as occasional corruption, can prevent access to the required information such as information on the procedures or the forms. Additionally, although the new procedures have simplified the process and are much less time consuming, these steps cannot always be completed in the time required due to corruption, incomplete, incorrect or missing information. In case the required information is missing or the data is entered incorrectly or it is incomplete, the documents have to be sent back to the province or the district. Hence, it takes longer time than specified as per procedural requirements.

### ***Collection of payments for state leases***

Revenues from leasing state lands are collected in two ways. The leased land revenues for agriculture and farming purposes are collected after the harvest as per the contract. For telecommunication, and development projects purposes, lease rents are collected at least one year in advance and the contractor has to proceed with the payment no later than 60 days after the signature of the contract. If the contractor fails to comply, the fine of 2% of lease sum has to be paid for a delay of 1-30 days and 50% of lease sum for a delay of 31-180 days. If the payment is delayed for more than 180 days, it constitutes a grave violation of the contract and it can be terminated.

The procedure for lease collection based on ARAZI's lease procedure is as follows: The contractor/lessor receives the invoice at local ARAZI office, which he pays via bank onto government account of MoF. The local ARAZI office is responsible to report all collected lease rents at the end of the month to the national ARAZI office in Kabul. Based on the information from the land lease directors at ARAZI and the database for land lease contracts, allegedly only 10% of the total agreed payments are not collected<sup>259</sup>. However, due to the bad security situation in some areas, which can lead to missing information in ARAZI state lease database, it can be assumed that this figure might fluctuate into certain extent. Additionally, some state leases were conducted during Taliban regime, where no records exist. This has a direct impact on collecting the payments for state land leases.

### ***Land valuation***

Land lease prices are determined either through the valuation commission established based on Art. 69 of LML 2008, or, if this larger commission cannot be established, based on the type, grade (quality) and size of land by the smaller Leasing Committee (see point 3 of the ARAZI Land Lease Procedure) comprised of local representatives of ARAZI, MoF (*Mustofiat*) and district administration representative. Based on some accounts of land experts, in cases if there is no land record with ARAZI or the land has never been leased before, then the delegation as per Art. 69 of LML will determine the price. Because the members of the valuation commission approach local property dealers and compare the current lease prices of lands of similar types and grades in that area with the land being valued, the price will allegedly be determined based on market value<sup>260</sup>. If the smaller committee is formed, the market value of the land is not taken into account.

Although provisions stated in Afghan legal framework set clear procedures for the land valuation, delays in assessing the land and setting price is an issue as the members of the valuation delegation often take time to present themselves. Sometimes it takes longer than one year to get the lease contract signed off by both parties despite the fact that ARAZI has reduced the number of steps. Taking into account the lack of clarity on when the larger commission based on Art. 69 of LML 2008 should be formed; the market value of the land is not always taken into account. Additionally, due to the high level of corruption in Afghanistan, powerful strongmen and public officials at times put pressure on the valuation committee to decrease the value of the land. Finally, the results of the valuation are not publicly accessible creating transparency issues within the process, providing the room for setting the lease price value irrespective of the market price.

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<sup>259</sup>It is in MS excel format and contains all required information such as the contractor's personal details, type of contract, location, duration of contract, rent, contract start and end date, etc.

<sup>260</sup> Please note however that there are various problems connected to the process of land valuation, which will be mentioned in more detail in the section 9.7.

### ***Public capture of benefits***

In urban areas one way of capturing benefit from a land use change resulting from the lease of the state land is *Safayi* (land/property) tax. Depending on the size of the construction, the tax increases, which should be then used for the development of the community by the Municipality. However, public benefits from collecting taxes are rarely seen in the communities. In rural areas, *Safayi* tax is not collected, it is only tax from agricultural land that can serve as a mechanism for capturing the public benefits. However, unless the investor uses the leased land for agricultural purposes, the land tax is not collected at all. Hence the capturing public benefits from the state land lease are limited.

For the mining sector, certain efforts to this end were undertaken; however they were not successful. There was a proposal for the amendment of the Mining Law that said that 5% of the profit from the mines should be spent in the particular province. This law was not approved by the Cabinet when it was proposed in 2013.

It is correct to say that sometimes the communities benefit from increased employment opportunities due higher investment in that area, but the implementation of relevant policies to enable public capture of benefits arising from changes in permitted land use has largely been ignored; thereby resulting in some members of society unduly benefitting from these and some not being touched by the benefits at all.

### ***Policy to improve equity in asset access and use by the poor***

The LML 2008 stipulates that any Afghan having the legal status, can have access to land lease. Even ARAZI land lease procedure gives priority to women and up to 10% decrease in lease rent for women based on the bidding process.<sup>261</sup> ARAZI is taking steps to amend the procedures to include other marginalized groups such as handicapped, internally displaced persons, returnees etc. Additionally, as mentioned earlier there are some land distribution schemes for minimal prices for returnees, handicapped, teachers, municipality and MUDA for social housing purposes. Nonetheless, implementation of these laws and regulations is facing challenges such as corruption, lack of political will to implement the laws and inability of the government to establish rule of law in insecure parts of the country. For example, land grabbing by powerful individuals can easily limit the poor's access to grazing lands. Field research shows that state land was not always distributed to those eligible.<sup>262</sup>

### **Private investment strategies**

#### ***Identification of land suitable for lease***

The legal code is clear regarding the type of land that can be leased, who can lease the land and the state organisation that is responsible for the oversight of the leased land. However, the lack of clarity of the Afghan legal framework on what land actually is the state land (as opposed to public land) makes the identification of suitable land for lease at best murky.<sup>263</sup>

Article 59 (1) of LML 2008 identifies the kind of land that can be leased: "State and private lands shall be leased on the basis of a written agreement between lesser and lessee in accordance with the provisions of law." And art. 66, makes provisions for the lease of virgin and arid lands stipulating that 250 *jeribs* of land can be leased to individuals, up to 5000 *jeribs* to agriculture private and joint-venture companies. However, public consultations with local communities regarding the lease of land and private investment does not have any strong legal backing and does not take place allegedly due to the same reasons as to why acquisition processes trigger various reactions from the side of the community (see the section on acquisition). Hence, secondary right holders can potentially be left out of the process.

#### ***Selection of investments***

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<sup>261</sup>Land lease procedure, Art. 9, p. 7.

<sup>262</sup>Please see the examples of Sar Dawra township or the distribution of state land to low-ranking public officials above (in The UNAMA report "The Stolen Lands of Afghanistan and its People" part 2 of 3 March 2015).

<sup>263</sup> Please see the explanation of blurred boundaries between state and public land in the section 9.4.

ARAZI is responsible for the transfer of state land. As per provisions of LML an investment is selected based on the type of project. Article 64 and 69 further elaborates the types of projects. It considers all required parameters, and the land can be leased or transferred only after a comprehensive evaluation.<sup>264</sup>

If one is requesting a land for food processing project, for instance, the potential leasee has to develop a business plan. The business plan should include information such as availability of capital, equipment, availability of skilled, semi-skilled and non-skilled staff, information on their salaries, source for raw materials, identification of a market for the final product, potential availability of competitors, how the company will compete in the market and so forth. Other factors such as the proximity to residential areas and environmental impacts should be included in the business plan as well. If land is requested for building a university, for example, these factors must be clear in the business plan: the size of land, potential number of students, number of faculties, professors, number of admin workers, official approval of MoHE, inclusion of parking and green area and so on.

The selection of investments mainly happens through the evaluation of above mentioned aspects of business plans by MAIL, the Leasing Office of ARAZI and authorized representative from provincial sector (see the step-by-step process of ARAZI lease procedure above). In telecommunication and simple agriculture lease no economic assessment is conducted. However, in case of the development projects and pro-active leasing requested by individuals a proper business and action plan is required. More than three bidders are needed in order to proceed with the process. The criteria for selection are based on analysis of the market, competitors and skilled, semi-skilled and non-skilled labour.

Although a land leasing process is in place as explained in the introduction and the legal codes which require environmental, social and economic assessment of the investment projects exist, a formal mechanism of benefit sharing that would consider local benefits does not have been developed. Taking the high level of corruption in Afghanistan into account, some investments go ahead that are either not according to the policy or despite unfavourable outcomes.

#### ***Public institutions responsible for transferring the state land***

ARAZI was established by the Cabinet Resolution 5 of 2014 as the only organization to manage the transfer and lease of state and public land. However, various other state organizations continue leasing state land on ad hoc basis without following proper procedures and no coordination with ARAZI.

ARAZI is audited through the High Office of External Oversight and Joint Commission of Monitoring and Evaluation (MEC). The provisions on how often ARAZI has to be audited are not clear in Afghan legal framework, however ARAZI's last audit was conducted in the beginning of 2015. Sometimes special audits are conducted if a case of corruption is investigated. Furthermore, both AISA and ARAZI lack qualified and capacities to carry out all its obligations. Particularly AISA does not have offices in some provinces while ARAZI has offices in most provinces.

#### ***Monitoring of compliance with contractual obligations***

The LML 2008 stipulates that any failure to comply contractual obligations will result in contract termination. LML also stipulates that ARAZI will be monitoring the progress of land development, which is under lease contract every six months.<sup>265</sup>

In praxis, however, there is no regular monitoring taking place. In very rare cases ARAZI performs monitoring every 6 months due to the lacking human resources, financial capacity and bad security situation in some parts of Afghanistan. The lack of proper and regular monitoring creates space for corruption and illegal practices. One example of this can be the leased land in Canal-e-Nanagrahar. The state leased agriculture land, which was supposed to be used for agriculture purposes. However, it was converted to residential area by influential political figures in the Nangarhar province. Another case in Nangrahar is the Kabul Ada case, which was leased for agricultural purposes. The leased land has been converted to commercial land. Both cases are currently under investigation, with no tangible outcomes. The cases, when ARAZI finds out about non-compliance are rare and remedial action is

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<sup>264</sup>LML, Art.64 and 69.

<sup>265</sup> See LML Art.67.3.

almost never taken. Having said that, there is little information about whether the land leased or transferred is used for the purpose that it was leased and if the terms of the agreement are followed or violated.

### ***Existence of safeguards***

Based on the Art. 61 LML 2008 and ARAZI land lease procedure Art. 31, the lease contractor is obliged to consider and protect the environmental protection principles. Also, it is one of the monitoring obligations of ARAZI to assess environmental impacts and make sure that the project is not a threat to the environment and does not have any negative impacts on the environment.<sup>266</sup> In addition, one of the requirements of the lease contract is that the contractor must be committed to the environmental protection principles.

In addition, the National Environmental Protection agency (NEPA) and the Environmental Law makes provisions for environmental protection. NEPA is responsible to make sure that no project is threatening environment and has the authority to stop any project that has a negative environmental impact. Art. 6 of the Environmental Law makes provisions regarding government rights and obligations in terms of environmental protection and Art. 7 discusses individuals' rights and obligations towards the environment. Environmental, socio-cultural and economic impacts of an investment project are also mentioned in the new Minerals Law (2015).

Article 89 of Minerals Law (ML 2015) makes provisions for assessing environmental and social impact of investment projects in the mining sector: "The License Holder shall comply with the conditions set forth in the License and other applicable laws and as the case may be, conduct an assessment of environmental and social impacts which shall include:

1. A detailed study of the natural and artificial environment of the License Area prior to any Mineral Activities, based on measurements and indices with respect to the quality of air and water, soil, trees, and animals, and other flora and fauna in order to provide a comprehensive environmental baseline to be measured from that time; and
2. An Environmental and Social Management Plan that includes a detailed description of reclamation activities and mine closure including:
  - a. Detailed data regarding contaminating substances and resources;
  - b. Identification of likely negative environmental impacts, including water, air and soil pollution damage to flora and fauna, and injection of poisonous and destructive substances into the environment;
  - c. A review of the negative impacts of Tailings;
  - d. Mitigation actions to be taken with respect to each environmental impact of each contaminating source;
  - e. The availability of equipment required to mitigate environmental impacts and measures to be taken to anticipate expected impacts;
  - f. The timetable for implementation of the Plan;
  - g. The Projected budget and its timetable to achieve environmental objectives;
  - h. An introduction of employees responsible for implementation of environmental mitigation;
  - i. An introduction of monitoring officer, the methodologies to be used for monitoring, and sources of funding for monitoring activities;
  - j. Meet with local communities and relevant government agencies in relation to environmental and social impacts; and
  - k. Submission of an Environmental and Social Management Plan in accordance with the provisions of the Law.

Whenever the License Holder proposes to amend its work program, it shall provide sufficient reason to the relevant agency that it will implement an appropriate environmental and social management plan. Based on Art. 90 of ML 2015, investors are required to provide annual reports on environmental and social impact of the project.

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<sup>266</sup>Land lease procedure, page 108, article 13.5

Additionally, ARAZI have build in some safeguards into the requirements for bidders. When ARAZI provide lease for chicken farms, for instance, these should not be located in the cities and crowded areas. When leasing land to petroleum companies, companies are not allowed to build the petroleum pump in green areas. Protection of environments is mandatory and is included in the contract of investors when leasing land from ARAZI. In fresh vegetables and fruits packaging houses, employees have to wear sanitary clothing. However, due to the minimal monitoring that takes place, the compliance with the safeguards is not possible to verify.

### ***Resettlement and rehabilitation policy***

Afghan legal framework does not provide for the resettlement and rehabilitation policy despite the fact that many large-scale development projects, for example in the mining sector, can lead to mass displacement of local communities. Art. 40 of the Mining Law states that the resettlement should be used as a last resort and it only requires a license holder to ‘consult’ with local populations without any protection set out if the local population does not want to accept the terms offered. This can potentially lead to forced eviction by the investors.

However, the proposed Land Acquisition Law drafted by ARAZI has clear provisions in line with most of the world’s best practices. Having said that, the proposed LAL law is in draft form and has not yet been approved. It can be speculated that the government might not be financially able to make compensations for large-scale investment projects.

### **Policy implementation is effective, consistent and transparent**

As mentioned already above, investors’ business plans are evaluated based on various information provided to ARAZI. Based on the Land Lease Procedures, ARAZI is responsible to assess technical viability, community consultations - provincial office asks in the community, availability of resources, project risks before the implementation and mechanisms for monitoring of the progress of the project. ARAZI currently carries out these obligations and conducts technical viability and market assessments. It also assesses demand in the market, competitors, risks, possible customers, marketing strategy, funding, budget, staffing and environmental impacts.

The concrete steps for the approval of leasing of the state land to investors has been mentioned already earlier in this report. In ARAZI land lease procedures, a timeline is given for each administrative step depending on the type of the project (telecommunications, agricultural or development). It usually takes around 45 working days to finalise the process. However, the leasing process is negatively affected by a number of factors. It is sometimes difficult to process the administrative steps on timely manner due to missing, incorrect or incomplete information required on the forms, absence of ARAZI local officials, their limited capacity or bribery. In case of missing or incomplete information the file has to be bounced back to province to district.

As discussed in the introduction, the only land holder, which can lease and transfer land for private investment is the state. The leasing process, as explained before, as per Afghan law should happen through the public auction; therefore it does not require negotiations. The public has been left out of the discussion on investment projects even though they can exercise certain user rights over public lands. Taking into account the lack of clarity of public and state land definitions, it can be assumed that these rights are not always recognized; hence the need for the public consultation is not upheld.

In terms of public disclosure of benefit sharing modalities, the actual contracts include such provisions allowing the public to share benefits. These include provision on hiring the unskilled labor from the community, materials used should come from the community, if available, and products should be preferably sold for the community. All these provisions, however, depend on the type of project.

However, there is a gap between the legal framework and practice due to many reasons such as lack of proper monitoring, the weak local governance at the provincial and district level and absence of an effective mechanisms to implement the provisions of law in consistent manner (in less secure areas for example). This is mainly because of corruption, lack of public knowledge regarding the laws and inaccessibility of the contracts to the public.

### **Contracts involving state land are public and accessible**

If a piece of land has already gone through the land clearance process (*Tasfia*) or the GPS department of ARAZI took the coordinates of the land beforehand, then the spatial data is available with ARAZI. Otherwise, every parcel of land, which is to be leased or transferred, must go through the land clearance process or through the measurements of GPS department. Hence, there is spatial data available for all of the leased lands except the leases dating way back, when the GPS technology wasn't available and those that are located in insecure areas, where ARAZI officials have no access. Additionally, there is a special column in lease contract with GPS information and land boundaries.

The maximal land lease contract duration is determined by the LML as well. Currently, arid and virgin land can be leased up to 90 years and agriculture land can be leased up to 50 years accounting for the type of the project, investment and business plan as discussed earlier. Nevertheless, each project can have different duration as long as it does not exceed the maximum allowed lease period. These records such as duration of the contract, type of the project, spacial data etc. albeit existent, they are not accessible to public.

The fact that ARAZI is responsible for the state land leases and at the same time for their monitoring creates conflict of interest.<sup>267</sup> The only third-party monitoring is conducted by the civil society on ad hoc basis. Organisations such as Integrity Watch Afghanistan and EITI occasionally investigate whether contracts such as mining contracts or development projects for which land was allocated have adhered to the contracting terms. Furthermore, there is a government body, the High Office of Oversight and Anti-Corruption and Joint Commission on Monitoring and Evaluation (MEC), which does sporadic monitoring on ARAZI, which consequently should monitor investors. However, the lack of capacities in HOO is preventing rigorous and regular third-party monitoring by this institution. It should also be noted that the Afghan media has addressed some cases of gross violations of lack of compliance with contracts. Nonetheless, in the absence of adequate safeguards and formal procedures in place as well as lack of public information, the investors are less likely to cooperate with third parties such as the NGOs and the media.

As mentioned above, there is a limited third-party monitoring of projects on leased lands, nor the ARAZI conducts internal monitoring regularly. Due to the lack of adequate monitoring mechanism, the question poses itself about how many cases of non-compliance is ARAZI actually able to “catch” in order to proceed with their resolution. Nevertheless, issues such as violations of contract (if observed by the ARAZI monitoring team) shall be resolved by the local ARAZI office and approved at the centre-in Kabul. Based on accounts of one ARAZI official, the process is effective and efficient and the cases are resolved locally. If the issue cannot be resolved, they are then referred to main office in Kabul or relevant authorized court for resolution and final decision.

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<sup>267</sup> Interview with ARAZI employees, Kabul, 11 March 2015

## 9.6. Public Provision of Land Information, Registry and Cadastre

PANEL 6: Public Provision of Land Information: Registry and Cadastre				
<i>LGI 1: Mechanisms for Recognition of Rights</i>				
6	1	1	Land possession by the poor can be formalized in line with local norms in an efficient and transparent process.	
6	1	2	Non-documentary evidence is effectively used to help establish rights.	
6	1	3	Long-term unchallenged possession is formally recognized.	
6	1	4	First-time recording of rights on demand includes proper safeguards and access is not restricted by high fees.	
6	1	5	First-time registration does not entail significant informal fees.	
<i>LGI 2: Completeness of the Land Registry</i>				
6	2	1	Total cost of recording a property transfer is low.	
6	2	2	Information held in records is linked to maps that reflect current reality.	
6	2	3	All relevant private encumbrances are recorded.	
6	2	4	All relevant public restrictions or charges are recorded.	
6	2	5	There is a timely response to requests for accessing registry records.	
6	2	6	The registry is searchable.	
6	2	7	Land information records are easily accessed.	
<i>LGI 3: Reliability of Registry Information</i>				
6	3	1	Information in public registries is synchronized to ensure integrity of rights and reduce transaction cost.	
6	3	2	Registry information is up-to-date and reflects ground reality.	
<i>LGI 4: Cost-effectiveness and Sustainability of Land Administration Services</i>				
6	4	1	The registry is financially sustainable through fee collection to finance its operations.	
6	4	2	Investment in land administration is sufficient to cope with demand for high quality services.	
<i>LGI 5: Fees are Determined Transparently</i>				
6	5	1	Fees have a clear rationale, their schedule is public, and all payments are accounted for.	
6	5	2	Informal payments are discouraged.	
6	5	3	Service standards are published and regularly monitored.	

### Introduction

#### *Cadastral and Inventory Land Surveys*

A decision was made (in 1965) to conduct the first nation-wide cadastral survey, a comprehensive mapping of land parcels and gather information about the probable ownership of each of the mapped parcels. The parcel mapping was to be the basis of a new system of land registration as well as an inventory of land resources for property taxation and program planning of various governmental sectors as described and regulated in the Land Survey and Statistics Law of 1344 (1965). That law also established the structure and mandate of the Cadastral Survey Directorate in the Ministry of Finance. Upon enforcement of the Law, the nation wide cadastral survey started in Kandahar and then expanded to other provinces. From 1965 to 1978, it surveyed state and private agricultural and barren lands (deserts, pastures, forests) covering 27,411,493 *Jeribs* or 5,64 Million Hectares<sup>268</sup>. Land surveying was put to a halt after the land reforms by Democratic Republic of Afghanistan. During the communist regime (1978-1992), surveying was only available on demand for land clearance and resolution of land conflict purposes. It cannot be estimated how much land was surveyed as at the time there as was no proper registry system to register the records. During the transitional Islamic State of Afghanistan the surveying process was suspended based on Presidential Decree 99 of 2003. Following this decree cadastral survey activities were carried out only based on official request of ministries and government

<sup>268</sup>Cadastral Survey Statistics Report, 1978.

institutions, which had obtained presidential orders. Having said that, only 34% of overall land in Afghanistan was surveyed.

One already mentioned shortcoming of the cadastral recording of right is the fact that the entry of an owner's name on the forms of the Cadastral Survey does not necessarily represent an official confirmation of ownership because the cadastral team in the field does not conduct investigations on rightful owners. It is rather a statement of "probable ownership" based on the field data that the survey teams collected about each parcel they surveyed.

The destruction of records during three decades of conflicts only adds to the complexity of the issue. As many people were killed, disappeared or were displaced as refugees and IDPs, their properties were taken over by others. Some of these lands were then sold leading to a significant number of contested ownership cases. However, the courts do not provide any consolidated data on the number of these cases. This issue was meant to be addressed by the LML 2008, Art. 28, which says that "in places where principal property and tax books as well as valid land documents which could confirm the property of a person are destroyed, and in case of non-existence of the books in the center, the landholding area of persons shall be settled after the property is being confirmed legally." This, however, proves to be problematic in the current context of Afghanistan considering the limited recognition of other than formal ownership documentation at Afghan courts.

### **Mechanisms for recognition of rights**

#### ***Recognition of rights***

The Afghan Constitution of 2004 established a legal framework for property rights safeguarding the right of individuals to own property, stating property shall be safe from violation, no one shall be forbidden from owning and acquiring property, except by law, and private property can only be confiscated by legal order (article 40). Additionally, more than 30 laws and regulations were developed to ensure the rights of all individuals to own the land and property. Nevertheless, the ways of registering the land in Afghanistan, already explained in the section 9.1, has a number of shortcomings (see the table in the section 9.1.) preventing a considerable portion of the population (including the poor) to have their rights recognized. Although the legal code for land ownership has progressively evolved to more comprehensive set of legal framework, its emphasis on formal documentary evidence of land ownership and a number of contradictions, in particular concerning the definition of public and state land, can, if implemented, deprive a considerable portion of Afghan population of their rights. Furthermore the petty bureaucracy in the form of multiple steps and offices creates opportunities for corruption and defers the poor to proceed with the registration process.

For example when registering the property with courts, the existing circular form has to go through at least five different offices (please see the concrete steps of registration in the table below). This lengthy and time-consuming process can be expedited by informal payments, however people who cannot afford or refuse to engage in corrupt practices have to follow the proper procedure, which can take over a year to finalize.

In addition, as mentioned already in section 9.1, it is believed that most of the rural population in Afghanistan owns only customary deed proving their ownership (*Sanad-e-Urfi*) or possesses no documentation at all. There are two conditions for customary deed documents to be formally recognized:

1. During the transaction of land both parties fill all documents properly and accurately such as both parties include signature or fingerprints, two witness's signatures or fingerprints. Then the customary deed documents are prepared in two copies, one for buyer and one for seller.
2. When the customary deed documents were acquired before 1957 and the seller has a valid title deed (LML, Art.5(5)).

Nevertheless, even if these two conditions are met, there is no mechanism put in place to formalize customary deed document without the land clearance process (*Tasfia*) or without selling the land, where the future owner receives formal title deed when registered with courts.

Additionally, the non-documentary evidence is used only as a last resort to prove individual land ownership. Non-documentary evidence is particularly crucial in the context of Afghanistan since in many places principal property and tax books as well as valid land documents, which could confirm the property of a person were destroyed during the wars leaving no official record of who the owner of a disputed land is. Also, 35 years of unchallenged possession is not always possible due to the three decades of wars in Afghanistan's modern history. During the wars, many Afghans left their homes, were internally displaced or migrated outside the country. Their land and properties were then occupied without the permission of their owners. This provided the opportunity for powerful men and militias to grab land. They occupied houses and took over commercial centres and stores. Additionally, there are also concerns that the longer people remain on the grabbed land/property, the more likely to establish rights on those lands based on the very same article.

One type of non-documentary evidence, often used in Afghan context, are the testimonies of witnesses (for authentication of formal and customary deed documents) and neighbours (when certifying 35 years of unchallenged possession). According to the Civil Procedure Code, at least two witnesses are necessary<sup>269</sup>. Nevertheless, due to the extensive migration of population caused by the decades of war, it does not provide effective way to secure the ownership. There are many cases when the witnesses have moved from their place of origin and the claimants for land ownership do not have any means to contact them<sup>270</sup>.

### ***First-time recording of rights***

As mentioned already in the section 9.1, there are several ways of registering or recording the ownership rights in Afghanistan, each with different procedure and different costs<sup>271</sup>.

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<sup>269</sup> Civil Procedure Code 1990, Art. 294

<sup>270</sup> Please see the section 9.8 for more information on informal land rights recognition through non-state justice mechanisms such as jirgas and shuras, frequently used by the Afghan rural population.

<sup>271</sup> Please see the section 9.1. for the information on their efficiency and effectiveness.

Type of registration	Steps	Forms needed and costs	Other costs (taxes , service fees or informal payments)	Time
<b>Recognition by the State of private rights to land (Registration at ARAZI - land clearance (<i>Tasfia</i>))</b>	<ol style="list-style-type: none"> <li>1. Initiation by ARAZI or other governmental entity (individual cannot request the land clearance)</li> <li>2. Request of presidential approval</li> <li>3. Approval of the President</li> </ol>	N/A	No taxes or service fees, possibility of informal payments	<p>1- 15 days</p> <p>(Depends on a size of the land). Additionally, the existence of a dispute over the ownership prolongs the process considerably. When the <i>Tasfia</i> team does not manage to solve the dispute informally<sup>272</sup>, the case has to go to the court.</p>
<b>Cadastral recording and mapping</b>	<p>a) National Cadastral survey</p> <ol style="list-style-type: none"> <li>1. Request by the President through the Presidential Decree</li> <li>2. The Cadastral Department forms a team</li> <li>3. Team is sent to the field to perform technically complicated and time consuming measurements</li> </ol> <p>b) Inventory Survey</p> <ol style="list-style-type: none"> <li>1. Individual requests ARAZI to conduct the inventory survey of his/her land.</li> <li>2. ARAZI CEO give approval</li> <li>3. The cadastral team is sent to the field to conduct simplified measurement of the land</li> <li>4. In cases of large tracts of land such as whole villages, the approval of the President has to be sought before conducting the survey. This is done by submitting a</li> </ol>	<ol style="list-style-type: none"> <li>a) N/A</li> <li>b) N/A</li> </ol>	<ol style="list-style-type: none"> <li>a) No taxes or service fees, possibility of informal payments</li> <li>b) b) 550 - 1350 Afs based on a grade of the land while adding 50 - 200 Afs per each jerib based on size (based on the Cadastral Bill of Service Fees, Art. 4).</li> </ol>	<p>15 days after the Presidential approval<sup>273</sup> (in rural areas might take longer due to accessibility, lack of public media etc.)</p>

<sup>272</sup>*Tasfia* team can indeed be considered as one of the informal dispute resolution forum. Previously, the *Tasfia* delegation included a judge to support the dispute resolution, however this practice was abandoned. Our research team did not find the conclusive evidence into why exactly it was abandoned.

<sup>273</sup> The Presidential approval can take months to obtain

	letter of request to the Administrative Office of the President.			
<b>Court registration - acquiring the title deed of transaction documents (deeds)</b>	<ol style="list-style-type: none"> <li>1. Submission of a petition form to the respective civil court and taking the circular form</li> <li>2. The circular form has to be taken to court archives (<i>Makhzan</i>), where the title deed is compared to the court records (<i>Konda</i>). <i>Makhzan</i> certifies the circular form. When the court records of the title deed of the seller do not exist, the process cannot continue. In recent praxis, the courts do not accept tax and water payments as a valid ownership documents although prescribed by the law due to fears of accepting forged documents.</li> <li>3. Circular form is taken to ARAZI, where the certification based on their Principal books is conducted. However, since the change of the owners of the land (who acquired new title deed through the court registration when buying the land) is not communicated to ARAZI, ARAZI often cannot certify the ownership because in the previous owner figures on their records. When one or part of a plot of land is sold more times using the court registration, ARAZI does not have the information on current owner nor the size of land. However, based on accounts of ARAZI officials, as long as the seller has the tax or water payment receipts, the Presidential Decree or valid customary deed document based on which the ownership is claimed, they can proceed with the verification of the circular form.</li> <li>4. Circular form is taken to the community experts for cost estimation, size of the property and other relevant information regarding the land.</li> <li>5. Circular form is taken to the Revenue Office of MoF (<i>mustofiat</i>) to verify if all taxes were paid. However, since the MoF tax records haven't been updated since 1978 after Doud Khan's assassination<sup>274</sup>, most of the tax payers are not registered in MoF taxation books. If the</li> </ol>	<ol style="list-style-type: none"> <li>1. Petition form - 5 Afs (additionally 100 - 500 Afs informal fee for the court clerk to fill it in; it is not possible to fill it in by yourself); Circular form is free (again for filling in the form by a clerks an informal fee is often paid)</li> <li>2. N/A (circulation with one circular form to five offices)</li> <li>3.-9. N/A</li> <li>10. 200 Afs for the title deed (<i>Qabala</i>)</li> </ol>	<ol style="list-style-type: none"> <li>1.- 6. No taxes or service fees</li> <li>7. 3% of court registration tax and 1% transaction tax to the Revenue Office of MoF (<i>mustofiat</i>)</li> </ol> <p>The whole process can be done through the dealer - 1% of property or land from buyer and 1% from seller.</p> <p>The payments of informal fees throughout the whole process is often required.</p>	<p>The certification of all the offices on the circular form can takes up to 1 week - 10 days, when the owner possesses formal title deed. In other cases the process is often stopped.</p> <p>The rest of the steps depend on the amount of informal payments the seller is willing to pay, as well as the personal networks. In some cases the process can take even up to 7 months.</p>

<sup>274</sup> During Doud Khan's regime (1973 - 1978), the so-called *Izharnamas* -Land Declarations - were collected for taxations and tenure security purposes. People had to declare (although often providing a smaller size of land to prevent paying high taxes) how much land they owned, and based on that, MoF tax books were developed. This process stopped after Doud Khan's death.

	<p>tax payments are not registered, no certification can be accorded.</p> <ol style="list-style-type: none"> <li>6. The certified Circular form by all above mentioned offices is taken to the head judge of the respective court for a signature.</li> <li>7. Commission of property valuation comprised of MoF, MoJ, Municipality, ARAZI, (those are the main members) and possibly member of Attorney's General Office, NDS, local elders) revises the prices estimated by buyer and seller by</li> <li>8. Court gives a tariff to be paid for court registration and transaction tax. Furthermore, sometimes purchasers and sellers report a lower transaction amount in order to pay less tax, while the actual transaction has been higher. In such cases of tax evasion, the courts are often unable to establish the actual transaction cost.<sup>275</sup></li> <li>9. The seller brings the receipt of a payment to the court.</li> <li>10. Witnesses go to head judge for testimonies and questioning about the authenticity of the sellers ownership.</li> <li>11. New title deed is written and signed by the head judge of the respective court (the court archive documents (<i>Konda</i>) have 2 parts, one is given to the new owner, one is kept for archiving purposes)</li> </ol> <p>Please note that the certification of the Cadastral Department is not necessary posing the questions about the land spacial information. In the past, the certification of the Cadastre was required (old circular form), however this requirement was abolished. At times, however, when the land is next to state land, the judges decide to use old circular form and the person needs to get the certification of Cadastre. Similarly the certification of Ministry of Water and Energy was required to verified the water rights. Now, it was abolished.</p>			
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<sup>275</sup>Interview with ARAZI official, Kabul, 27 March 2015.

## Completeness of the land registry

### *Total cost of recording a property transfer*

Though the amount of registration fees for either of the procedures are not extremely high, during the course of preparing the paper work, several informal payments must be made to get the process running. Additionally it is the length of the procedure that can last up to 7 months or one year, which makes the process so cumbersome. These problems in particular affect people living in rural areas as they have to travel a long distance to get to one of the land registry sites and the long procedures and corruption they have to incur increases the costs of registering their land. Therefore, they are more likely to bypass such issues and refer to the village elders and formalize land transactions through customary deeds. Hence, there are no effective and proper safeguard requirements for recoding rights to prevent the costs and abuse. Furthermore, while the formal registration of rights has been compulsory in previous versions of the LML, this is not explicitly the case in the 2008 version or in current proposed amendments of the law.<sup>276</sup> In the absence of a registering their land (customary) or do not register their land at all.

### *Record keeping*

The only office in Afghanistan which records the location with spatial information (land survey measurements) and maps is the Cadastral Department. As mentioned already in this reports, only 34% of the land in Afghanistan has been registered with its spatial specifications. 30% of land was recorded by the Cadastre from 1965-1978, and 4% has been surveyed since based on presidential decrees. Although the land registry offices at the local level might have a recording of the privately held land in the area of their responsibility, identifying this on the maps is not necessarily possible since the Cadastral Survey Department does not have maps of all the land in the country.<sup>277</sup> The surveyed records include the boundaries of the land and their spatial specifications. Cadastral surveying information, however, have not been updated since 1978. Taking into account that much of the land recorded and mapped have changed drastically in recent years, such as currently 75% of the arable land is changed<sup>278</sup> to residential areas, the records available in Cadastre cannot be considered reliable nor complete.

When registering the land with courts, the courts are using two types of circular forms. One is the latest version approved by Supreme Court and one is the old circular form. The decision is with the court to which one they choose. The new circular does not include cadastral certification, whereas the old one has the cadastral certification column. The fact that the new circular form does not contain the exact spacial information about the land, provides room for corruption for people potential land grabbers and illegal usurpants of the land. The old form is more often used, when the land transaction is happening adjacent to a state land, where the courts are paying more attention to prevent the corruption.

When the delegation of land clarification (*Tasfia*) goes to the field, allegedly the team includes the members of the Cadastral Department or at least the members of *Tasfia* delegation should draw a sketch. It was impossible to verify how often these processes are actually happening in practice.

Private encumbrances, such as conflicts over land and mortgage are recorded during surveying process. The information about private encumbrances is recorded in cadastral ownership lists by cadastral surveyors while doing the survey. The surveyors mark the forms as “not finalised”. The same procedure is in place for the state land as well. However, since only 34% of the irrigated lands is surveyed and recorded and yet not updated, the information cannot be considered reliable. Additionally, land conflict cases, which are taken to court, are recorded in the courts. ARAZI and municipalities records all the information about land or houses including encumbrances such as existence of the guarantee over the land. In case someone wants to buy a property than they verify with ARAZI and municipality. The buyer can also verify with MoF if the property is free of any charges or taxes. However, the obligation to verify the existence of any encumbrances in not legally binding for the offices certifying the circular form during the process of land registration. Therefore unless the

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<sup>276</sup>Wily, “Land Governance at the Crossroads,” 15.

<sup>277</sup> Interview with ARAZI officials, Kabul, March 2015.

<sup>278</sup> Interview with ARAZI official, Kabul, 1 September 2015.

individual proactively seeks this information, the possibilities of buying the land with encumbrance is very high.

Additionally, public restrictions and charges are not recorded. In the past the violations of public restrictions used to be recorded in ARAZI principle books (e.g. when using public land for a purpose other than the one specified). The law on pasture, during King Zahir Khan's ruling, required registration of all violations; however, later this requirement was removed from the law. The reasoning behind the removal of these provisions was, the less records about any aspect of public land (e.g. violations), the easier it is to change records and take public land for state land and distribute it or use it for private purposes. Recently in the new Land Management Law, which has not been approved yet, provisions have been made to record the violations and charges.

#### ***Access to the registry records***

For accessing records on land ownership people have to go to different public institutions for each type of information or a copy of a document.

Organization responsible	Information from	Information and documents	Accessibility <sup>279</sup>	Costs <sup>280</sup>	Time
ARAZI	Principal Books of State and Private Land	Information about registration of private and state land; information about Land Declaration Forms ( <i>Izharnamas</i> )	Publicly available (Information on state land only accessible for the government or powerful figures)	Free of charge	1 week
Court Archives ( <i>Makhzans</i> )	Land Title Registration Books ( <i>Konda</i> )	Copy of the title deed (whole process as when transacting the land); copies of others documents (usage of the petition form)	Publicly available (*computerized system installed by LTERA project is not publicly available)	Petition form - 5 Afs (*when acquiring the copy of a title deed, the whole process of registration has to be conducted with all its costs)	2-3 months
Cadastral Department	Land Statistics Registration Book	Matching maps with existing legal documents; sub-division of properties; inventory survey on demand; requests of owner lists; coordinates of an area on a trace paper	Publicly available (Information on state land only accessible for the government or powerful figures)	Cadastral service fee based on the grade and size the land (based on the Bill of Cadastral Fees)	1 week
MoF	Property and Land Taxation Books	Information about the payment of the land and property taxes	Publicly available	Free of charge	Depending on the age of the original records (if the records were established long ago, it takes more time (2-3 months))
Municipality Property District Office	<i>Safayi</i> Tax Book	Information on the payments of <i>Safayi</i> tax	Publicly available	Free of charge	1 day
Ministry of Hajj and	Registration Book of	Information on endowed lands	Publicly available	Free of charge	Depending on

<sup>279</sup> Please note that the accessibility to information for third persons (e.g., information about somebody else's private land or state land) is never granted unless it is a powerful person. Therefore, "publicly available" in this context means that the access to information is granted to the owner of the land. Additionally, in reality, the access to the land information, can also differ from province to province and district to district based on individual decisions of ARAZI employees to disclose the information or not.

<sup>280</sup> Please note that there is always a possibility of informal payment requirement.

Endowment	Endowed Land	(accessible only to owners, not third persons)	(Information on state land only accessible for the government or powerful figures)		the availability of the ministerial officials
Respective Ministries	Registry of properties	Information on properties and land owned by the ministries (not accessible to public)	Not publicly available (Information on state land only accessible for the government or powerful figures)	Free of charge	Depending on the sensitivity of the particular land
Archive of the Office of the President	Archives	Information on land distributed by the Presidential Decree (not public)	Publicly available in theory (in praxis the information only accessible for the government or powerful figures)	Free of charge	Impossible to estimate, however in general months

The information on land is in general available for individuals, however not third parties e.g. the information on state land is not accessible to public, nor the information about somebody else's land. Nevertheless, the powerful figures have priority access to information, putting question marks on the transparency of land registration processes. The process, particularly in courts (2-3 months), is time-consuming and cumbersome due to the high informal payments that have to be made to keep the process going. Additionally, the records are only available for manual search, prolonging the access to information even more.

Formally registered land/property ownership documents have a personal and a general registration number. A record of these documents is registered and kept in courts. As mentioned above, through the LTERA project, some of the archives in courts have been computerised. The portion of court archives records that have been computerized can be searched by name, father's name, date of issues and special court number.<sup>281</sup> However, the land tenure records in Cadastral Survey Department and ARAZI are yet to be computerized linking ARAZI Principal Books and cadastral maps.

The cadastral records and maps can be manually searched by parcel number and owner's name. However, since these cadastral records have not been updated since 1978, searching for the right owner can be rather a challenging task because some of the owners are not the rightful owners anymore or are deceased. Additionally, the Presidential Decree 83 forbid to make any survey information public (Article 15 (2)) due to the complaints that survey offices were making records available to elite persons, who then used the information to acquire the ownership. Even though this practice did not necessarily stop, this restriction added to the over land matters in the hands of the President.<sup>282</sup> Copies or extracts of documents recording rights over property can be obtained by anyone who makes a request and pays the necessary formal fee. The client is requested to pay a certain amount of money to Cadastre's account at one of the local banks and bring back the receipt to obtain copy of his/her deeds. The process only takes up to one day.

In 2003, RONCO-USAID started a project to reorganize the legal documents in court archives. Pursuant to this, LTERA-USAID started the computerization of court archives. Land records, to various degrees, had been computerized in 22 provinces. However, access to computerized records is not allowed for public, coming from the reasoning that if the records were public, they can fall into the hands of powerful people, who can then utilise them for their own private interests. Thus only the Heads of archive has an access to these records. This reasoning, however, is somewhat dubious, in particular in light of the existing corruption in the Afghan justice system despite the lack of public availability of land information.

### **Reliability of registry information**

Afghanistan does not have one single registry and the information is scattered across various registries with different ministries and agencies with only limited synchronization:

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<sup>281</sup>It is not known what aggregate percentage has been computerised.

<sup>282</sup>Wily, "Land, People, and the State," 33.

Registration Book	Organization responsible	Information recorded	Issues and comments (linkages)
<b>Private land</b>			
Principal Book of Private Land (incl. registry of <i>Izharnama</i> - Land Declaration Forms during Doud Khan regime) <sup>283</sup>	ARAZI	All the information above and name of the owner, father's and grandfather's name, type of ownership documentation, water rights, taxation type of transaction - inherited land etc.	Connected with the court Land Title Registration Book ( <i>Konda</i> ) through the circular form (the process of acquiring of a title deed can only be finalized, when circular form is certified by ARAZI e.g. when ARAZI has the record of particular land in their Principal Books).
Deeds Registration Book ( <i>Konda</i> )	Courts	Names of the buyer and the seller, date, boundaries (names of neighbors north, south, east, west), title deed number, price, signatures (or fingerprints), pictures of the buyer and seller and witnesses (cadastral maps are not included)	See above. However courts inform ARAZI only sporadically about new owners of the land when new title deed is accorded and people do not record the change themselves regularly either. Therefore ARAZI certification is mere verification if the land is private, not state land due to often missing information about new owner and size of owned land, which can also be sold only partially.
Land Statistics Registration book	Cadastral Department	Name of "possible" owner, father's and grand father's name, land size and grade, boundaries - name of neighbors (north, south, east, west), type of ownership document, existence of share croppers, cadastral map	Only connected to ARAZI (based on current Cadastral Law, it is a responsibility of the Cadastral Department to send a copy of the survey report to ARAZI, when survey is done). Additionally, during <i>Tasfia</i> process, the members of the cadaster are included in the delegation.
Land Taxation Book	MoF	Name, date, size of the land, amount of taxes paid.	The MoF land taxation books are interlinked with other land registries only sporadically, are often outdated and don't have an effective mechanism in place to update the records. Provincial district finance offices ( <i>mustofiat</i> ) of MoF collect land tax based on their taxation books, which contain information about eligible tax payers based on land declaration forms ( <i>Izharnamas</i> ) dating back to Doud Khan regime (1973 - 1978), sporadic exchange of official letters between courts and MoF informing about new landowners and even more rare voluntary reporting by new owners. Due to due to these

<sup>283</sup> More than 80% of Afghanistan has *Izharnama* (not in south, were it wasn't allowed) - Interview with land expert, Kabul, 13 September 2015.

			reasons, the tax records are often not accurate. Additionally, a considerable number of Afghans do not go through official land registration channels, completely circumscribing the updating mechanism of courts and ARAZI. No effective enforcement mechanism exists to search for not registered tax eligible persons, people have themselves responsibility to go to <i>Mustofiat</i> offices and pay taxes. Therefore, when the land is transacted outside of the close family <sup>284</sup> , nor record is written in MoF taxation books, nor the new owner registers with <i>Mustofiat</i> office, the MoF cannot trace the eligible tax payers, hence the land taxes are not paid in full.
Property Taxation Book	MoF	Name, date, size of the property, amount of taxes paid.	See above.
<i>Safayi</i> tax registration book (land and property tax only in urban areas)	Municipality Property Office (MAU)	Information on physical characteristics of the property including GIS images	Not connected to the property and land taxation book of MoF because Municipalities are allowed to spend their own revenues.
Endowed Land Registration Book	Ministry of Hajj and Endowment	Boundaries (name of neighbors north, south, east, west), land grade and type, past transactions.	Not connected, except when cadastral department makes the survey, they write down the description of land as <i>waqf</i> .
<b><i>State Land (*there is no registration for public land)</i></b>			
Principal Book of State Land	ARAZI	Boundaries (newly cleared or surveyed lands by using GPS coordinates, otherwise names of north, south, east, west neighbors), land grade and type, past transactions, (rarely cadastral map)	Connected to the each property book of respective ministry when the land was transferred by ARAZI. The surplus land should be given to ARAZI for further lease, however this has not happened in full yet (some of the ministry properties were not declared to ARAZI).
Land Statistics Registration book	Cadastral Department	Land size and grade, boundaries - name of neighbors (north, south, east, west), type of ownership document, existence of share croppers, cadastral map	Only connected to ARAZI (based on current Cadastral Law, it is a responsibility of the Cadastral Department to send a copy of the survey report to ARAZI, when survey is done). Additionally, during <i>Tasfia</i> process, the members of the cadaster are included in the delegation.

<sup>284</sup> When the land stays in the family, the tax payments can be traced back based on the father's or grandfather's name. When the transaction happens outside of the family, this is not possible.

Book of properties	Each Ministry	Different for each Ministry, however the main data is available such as boundaries (newly cleared or surveyed lands transferred by ARAZI by using GPS coordinates, otherwise names of north, south, east, west neighbors), land grade and type, past transactions, (rarely cadastral map)	Connected to ARAZI Principal Book of State Land (with exceptions see above).
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Adding to the issue of synchronization of various registries, the reliability of registries is further compromised by the out-dated information it contains. The cadastral survey records and maps have not been updated since 1978, as well as the MoF tax records and ARAZI Principal Books lack an adequate mechanism for updating the data. Taking into account that approximately 66% of the land is not surveyed yet at all and the customary land tenure is often not formally registered, only further aggravates the situation. Finally, the fact that some documents were destroyed during years of wars and forgery of documents is a recurrent issue, renders updating of registries difficult compromising the reliability of registry information.<sup>285</sup> It is also important to note, that even though the changes in land records, sometimes occur in the provinces, they are not necessarily forwarded to the centre. Hence no centralized database of land records exist in Afghanistan.

#### **Cost-effectiveness and sustainability of Land Administration Services**

***The registry is financially sustainable through fee collection to finance its operations.***

As explained in the table above at the beginning of the section, the fees collected by the land administration authorities are very limited (excluding the informal payments). The only organ that can acquire registry fees are courts. However, these cannot be kept in court accounts, it has to be sent to MoF because they don't have the permission to use their revenue. Although, courts are able to gain registry fees but it is not enough to cover all their expenses. The only organ that uses its revenue is the municipalities, all other public sectors send their revenue to MoF and then MoF distribute the revenue in form of the national budget. All the other organs dealing with land ownership registry do not gain any fees from their activities in relation to land registration.

The service fee collected by the Cadastre is specified in the Bill of Cadastral Service Fees. Cadastre is the only organization having such a list of fees. The cadastral service fees are not connected to the land registration but are rather payments for different services such as provision of certain information, copies of the documents etc. These, however, does not match the operation costs of Cadastral Department<sup>286</sup>.

Despite numerous efforts by the international community (IGOs, INGOs, NGOs, etc.) to support this sector, the capital investment in land administration is not sufficient. Based on the Afghanistan Statistical Yearbook prepared by Central Statistics Organization (CSO), total budget for ARAZI, for instance, was 194 millions Afs, of which 15,5 millions Afs was on development budget and 178,5 on operating budget. ARAZI's operating budget constitutes only 0.06% of overall Afghan operating budget<sup>287</sup> and 0.01% of overall development budget. Considering the financially demanding tasks ARAZI is (or should be) undertaking (such as land surveys and clearance processes, frequent state land lease contracts monitoring etc.), the capital investment in primary land administration organization in Afghanistan is, according to the views of technical experts consulted for this study, insufficient<sup>288</sup>.

#### **Fees are determined transparently to cover the cost of service provision**

***Fees have a clear rationale, their schedule is public, and all payments are accounted for.***

Cadastral Survey Department was the first state organization in the country to introduce cadastral service charges. Cadastral services fees are set and clear; however, they are not publicly accessible. The Bill of Cadastral Survey services fee is only available at Cadastral Survey Offices. In courts there is no list of fees available to public. No other land related organization has a list of fees that is publicly available.

The receipts are issued for all the transactions because the individuals have to go to the bank to process the payments of court registration fee and MoF transaction tax. The receipt is issued in the bank, which then serves as a proof of the payments, based on which the process of registration can continue. When it comes to the receipts for service fees, the issuance is not that consistent.

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<sup>285</sup> Discussion with officials at ARAZI.

<sup>286</sup> Based on discussion with ARAZI officials.

<sup>287</sup> For comparison purposes, the National Olympic Department received 0.06% of operational budget.

<sup>288</sup> Please see the participants' lists of the Panel Workshops in the Annex IV.

Additionally, since the taxes are not paid based on these receipts, there is no motivation to issue receipt regularly.

***Informal payments are discouraged.***

Informal payment is widespread within government institutions. There are measures and policies in place for monitoring civil servants and dealing with corrupt issues. For instance, MEC (Monitoring and Evaluation Committee) and High Office of Oversight are the most prominent organisations that deal with the issues of corruption. Nonetheless, due to limited capacities of these institutions and rare internal audits in some of land related organizations, corruption remains rampant in the country.

The issue of corruption and informal payments was already mentioned in the previous sections within various land administration institutions. It is important to note, however, that ARAZI was considered by the Asian Foundation as the least corrupt institution in Afghanistan. Internal audits are conducted on monthly basis or in urgent cases. The Monitoring and Evaluation unit provides, although often not in timely manner, their reports. When the report is developed, it is up to CEO to take appropriate measures. In the past some employees of ARAZI were fired, paid a fee or the cases were forwarded to the General Attorney's Office.

Nevertheless, the Operational Strategy of ARAZI does not address the issue of corruption and it contains no measures to ensure transparency and accountability.<sup>289</sup> While ARAZI claims "Client Orientation" to be one of its main organisational values, there are no procedures in place to get feedback from the clients based on which the organisation can assess service delivery.

Finally, ARAZI is the only organ among public institutions dealing with land issues that has certain service standards written in its Strategic Plan. There are several values and virtues that are followed such as client orientation, equal treatment of similarly situated customers and preferential treatment of women. Standards are set for a specific activity to be completed within certain period of time. ARAZI publicly provides all information about their achievements in their official website.

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<sup>289</sup> ARAZI, Operational Strategy to Become a Modern Public Land Services Institution.

## 9.7 Land Valuation and Taxation

PANEL 7: Land Valuation and Taxation				
<i>LGI 1: Transparency of Valuations</i>				
7	1	1	There is a clear process of property valuation.	
7	1	2	Valuation rolls are publicly accessible.	
<i>LGI 2: Collection Efficiency</i>				
7	2	1	Exemptions from property taxes payment are justified and transparent.	
7	2	2	All property holders liable to pay property tax are listed on the tax roll.	
7	2	3	Assessed property taxes are collected.	
7	2	4	Receipts from property tax exceed the cost of collection.	

### Introduction

Taxing land and properties began in the early 1930s by the Ministry of Finance (MoF). Around 1960, King Zahir Shah's land policies emphasized the documenting of land titles to facilitate tax collection mainly to enable the collection of state revenues, as well as to increase the tenure security. Initially, a land department, AMLAK, situated in the Ministry of Finance was established for this purpose.<sup>290</sup> It was a system of progressive taxation, with the land being divided into three categories depending on the production. The lands with the highest production paid higher taxes<sup>291</sup>. The tax was introduced also for the transactions and "stamp duty". Since then, a record of land and properties had evolved. Many landholders retained receipts of their land/ property tax and later these receipts have been used as documents indicating land ownership. The receipts contained<sup>292</sup> limited information such as the name of the payee, the year, the village and the number of *jeribs* for which the tax had been paid.<sup>293</sup> There was no other indication on where the land is located, nor the link to the cadastral maps. The land registration books were updated every 10 years<sup>294</sup>.

In 1973 the Daud Khan regime set the effective system of taxation as a main priority and the information in the land registration books has expanded. By 1978 land registration books contained significant amount of information. The Books of Integrated Land Size and Progressive Taxation (commonly referred to as Books of Ownership) include lists of owners, village and size of their properties. This 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."<sup>295</sup> These books were referred to as the "Principal Books" or "Basic Books," and they contained updated information on owners. The books were sent from the provinces to AMLAK in Kabul.<sup>296</sup> During the wars, records of the properties were destroyed. Allegedly, according to Wily (2013:28), some influential community members destroyed records such as Books of Ownership to grab more land, particularly during the Mujahidin era of the 1990s.<sup>297</sup> However, it cannot be estimated how many books are destroyed and in which parts of the country they were destroyed. Almost three decades of war in Afghanistan after 1979 have contributed to the difficulties with the maintenance of the system of the taxation as it was in Daud Khan era.

Tax collection from 1979-2001 was very limited since the country was struggling with the wars and violent conflicts. For instance, the Mujahidin's government (1992-1996) was not able to collect

<sup>290</sup> Mohammad Yasin Safar and David Stanfield, "Cadastral Survey in Afghanistan, Capacity Building for Land Policy and Administration Reform" (Kabul: ADB/DFID, 2007).

<sup>291</sup> Interview with ARAZI employees, Kabul, 3 August 2015' and interview with employee of the MoF - DG for Revenue Collection, Kabul, 4 August 2015.

<sup>292</sup> Based on interview with employee of ARAZI (August 3, 2015, Kabul), the format of the tax receipts has not changed since the introduction of the taxation in Afghanistan.

<sup>293</sup> Wily, "Land, People, and the State," 25.

<sup>294</sup> Interview with ARAZI employees, Kabul, 3 August 2015.

<sup>295</sup> Wily, "Land, People, and the State," 28.

<sup>296</sup> Wily, "Land, People, and the State," 28.

<sup>297</sup> Wily, "Land, People, and the State," 28.

land/property tax. Nonetheless, some land and property owners paid taxes to either *Mustofiat* or the Governor's office (in the provinces). Since the tax was nominal, the owners willingly paid the tax to retain receipts as proof of land/property ownership regardless of whether they had title deeds or not.<sup>298</sup>

Since 2001, there have been efforts to reform the land/property tax system in the country. The international community has been helping the Afghan government to restart property and land taxation, mainly to generate revenue for the country. Certainly the tenure security was another reason behind these efforts to build a strong central administration, which was perceived to be crucial to creating the rule of law and peace needed to nurture land-based investment and growth.<sup>299</sup> The current government also views tax collection particularly from both rural and urban areas, as a significant means of revenue. For example, President Ashraf Ghani's Manifesto, states: "by expanding cities we can collect hundreds of millions of dollars through municipalities and since municipalities have the legal right to spend, it is our pledge that we will create the widespread participation of citizens... so that people take part in creating and boosting conditions for urban living."<sup>300</sup> However, tax collection faces a number of challenges and it is not done uniformly.

*Land tax (from agricultural land both in rural and urban areas):*

Land tax is the tax paid for owning a agricultural land and is fixed, calculated based on the size and grade of the land, as per the Land Tax Law. Land tax collected from rural areas is usually done at the district level. A receipt is given to the tax payers which states the amount of the tax paid. In rural areas, the tax officers deliver tax slips to the rural land owners, the landowners then have an obligation to go to the district MoF office (*mustofiat*) and pay land taxes yearly.<sup>301</sup> The tax is collected in cash through *mustofiat* and then the money is deposited into the provincial bank account.<sup>302</sup> The land tax collected in rural areas is kept in the provinces and used for provincial development projects including the districts. The provinces send a report to Kabul informing the center about the amount of tax they have collected. MoF then deducts the equivalent amount of money from the provincial budget, which is normally transferred from MoF to the provinces.<sup>303</sup> If someone does not pay the land tax, they have to pay a fine of 1% in the first year, 2% in the 2<sup>nd</sup> year and so forth. However, there is not adequate enforcement mechanism to pursue tax evaders.

*Safayi tax (from all the properties only in urban areas):*

*Safayi* or sanitation tax differs from the land tax significantly. Firstly it is collected only in urban areas and only from properties including buildings (not land only properties). It is only the municipalities that are allowed to collect and spend local revenues from sanitation taxation (*Safayi*), however, the MoF does not make information on how much tax do municipalities collect per year public. The municipality provides property owners with *Safayi* notebooks, which indicates the amount of taxes they have to pay. *Safayi* is paid once a year and a fee increases should the owner fail to pay tax on time.<sup>304</sup> The information from the *Safayi* notebooks is collected centrally by the organizations when introducing the project (such as UN-HABITAT and Democracy International), however after the project is finalized, the government takes over and the collection of the data is not systematic<sup>305</sup>.

*Tax on the transfer of property and land:*

Art. 25, 30 of (ITL) 2005 sets the transfer tax at 1% of the market value of the property and is administered and processed by courts.<sup>306</sup> A committee comprised of MoF, MoJ, Municipality, ARAZI (occasionally more members are present depending on the area - rural- urban) and verifies the accuracy of the price written on the title deed and market value of the property/land by acquiring

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<sup>298</sup> Based on email correspondence with WB expert.

<sup>299</sup> Wily, "Land, People, and the State," 44.

<sup>300</sup> Ashraf Ghani Ahmadzai, "Manifesto and Change and Continuity Team," (2014) 71.

<sup>301</sup> Interview with ARAZI employee, Kabul, 3 July 2015.

<sup>302</sup> Interview with ARAZI employees, Kabul, 3 June 2015.

<sup>303</sup> Interview with ARAZI employees, Kabul, 3 June 2015.

<sup>304</sup> Interview with ARAZI Officials, Kabul, 8 June 2015.

<sup>305</sup> Interview with UN-HABITAT employee, Kabul, 6 August 2015.

<sup>306</sup> Interview with ARAZI employees, Kabul, 3 June 2015.

information from local property dealers and community members. Currently, MoF is working on new draft of ITL.

#### *Tax on rents:*

The Income Tax Law 2005 makes some provisions regarding taxing property based on income from the land and property. Art. 17 and 27 that rent received from renting and leasing the immovable property and gain from sale, exchange or transfer, except by inheritance is subject to income tax.

Property dealers are required to send a copy of the rental agreement to the Ministry of Finance for taxing purposes. Art 65 (6) of ITC 2005 stipulates that the “Property dealers are required to send a copy of the agreement to the Ministry of Finance as soon as it is signed. If a property dealer makes a false agreement or delays sending the agreement, the Ministry of Finance will officially notify the Ministry of Justice to take necessary action.”

According to Art. 65 (5), if it is proven that the rent in a lease agreement is more than 20% lower than the market value, the Ministry of Finance calculates the rent according to the market value by an authorised panel. This is applicable if the Ministry of Finance finds evidence and documents, which show that the rent in the contract is less than the rent actually paid (Article 65 (7)).

### **Transparency of valuations**

#### ***Process of property/land valuation***

In Afghanistan, there are only four instances, when the land valuation through the establishment of impartial commission is used - during the acquisition of the private land by the state in order to estimate the amount of the compensation, when transferring the state land from one governmental entity to another, when leasing the state land to the private investors and when estimating land and property transaction tax. In none of these cases is the land valuation used for the land/property taxation purposes.

#### *Valuation during the process of acquisition, transfer of state land to other governmental entity and some cases of state land leases including leases for development project purposes:*

There are clear legal provisions for the assessment of “land values”, particularly when it come to the topic of land and property expropriation. Once a person or an organization requests an assessment of a land/property value, ARAZI forms a commission to evaluate and set the price of land/property. Art. 69 of LML, lays out the structure of this commission as mentioned in the section 9.5.

To determine the market value of the land, the commission gets quotations from three local real estate dealers, verifies the price of land located next to the land/property, and requests courts to share information about the most recent transactions in the area.<sup>307</sup>This valuation commission does not evaluate property or land for taxation purposes.

However, in practice, a number of issues are associated with land assessment and evaluation process<sup>308</sup>:

- The commission takes longer than one month to set the price, as it is not easy to get all the members for meetings. The process can only be on time, if there is pressure from the leadership or those who have some economic interest.
- Sometimes members of the commission do not cooperate and refuse to share information with each other. For example, the courts often refuse to cooperate and send an assessment of the price.
- The whole process, from the time the price has been set by the commission until an individual gets his land, can take more than a year (in cases where an individual’s land has been appropriated for state projects). Hence, by the time the individual is compensated, the compensation amount is less than the current market value.
- Real estate dealers might not provide accurate assessment of the price.

<sup>307</sup>Interview with ARAZI employees, Kabul, 11 March 2015.

<sup>308</sup>Interview with ARAZI employees, Kabul, 27 March 2015.

- Corruption can lead to valuation, which is not necessarily based on market values. Also as discussed earlier, corruption can influence tax valuation.
- Strongmen and powerful individuals whose economic interests are at stake can put pressure on the commission so that the set price benefits them. This means that the valuation price cannot necessarily be based on market values.

For the above-mentioned reasons, the price set does not necessarily reflect the market value of the property and tax valuation.

*Valuation for cases of land lease (telecommunications and agricultural land leases):*

In case of the land valuation for above mentioned cases of state land lease, when the bigger commission based on Art.69 cannot be formed, the simplified procedure is used. Land lease prices are determined based on the type, grade (quality) and size of land by the Leasing Committee (see point 3 of the ARAZI Land Lease Procedure) comprised of local representatives of ARAZI, MoF (*Mustofiat*) and MAIL. The market value of the land is not taken into account in this procedure.

*Valuation for land and property transaction tax:*

1% property transaction tax is paid when the property/land is sold during the process of land registration in courts. A committee comprised of MoF, MoJ, Municipality, ARAZI (occasionally more members are present depending on the area - rural- urban) and verifies the accuracy of the price written on the title deed and market value of the property/land. The committee asks the community, local property dealers and relevant land offices of the latest buying and selling price. Then the seller of the land receives the receipt from the court, which is then deposited to the bank account of MoF.

*Calculation for land taxation purposes:*

The calculation for taxation purposes is determined according to the fixed calculation schemes based on the size and the grade of land. The market values of the land are not used in this procedure. Based on Land Tax Law, the grades of the land are:

- First grade land (e.g. orchard or vineyard), factor 1.00
- Second grade land (e.g. land that can be cultivated for two seasons), factor 0.85
- Third grade land (e.g. land that can be cultivated for one seasons), factor 0.67
- Fourth grade land (e.g. land that can be cultivated for one seasons, however only 50% of the land can be cultivated), factor 0.40
- Fifth grade land (e.g. rain-fed land which is cultivated every other year), factor 0.20
- Sixth grade land (e.g. rain-fed land which is cultivated every two year), factor 0.15
- Seventh grade land (e.g. rain-fed land which is cultivated once every three, or more years ), factor 0.10.

Tax based on size is calculated as follows: <sup>309</sup>

- Up to jerib is taxed 45 Afs per jerib
- 10-20 jerib is taxed 60 Afs per jerib
- 21-50 jerib is taxed 85 Afs per jerib
- 51-100 jerib is taxed 120 Afs per jerib
- 101-200 jerib is taxed 175 Afs per jerib
- 201-500 jerib is taxed 235 Afs per jerib
- 501-1000 jerib is taxed 310 Afs per jerib
- 1000+ jerib is taxed 400 Afs per jerib

The calculation for taxing land is done based on the records of the land. This is mainly applicable to the registered land. Since the procedure for tax valuation is fixed, there is no proper updating of the tax values.

*Calculation of Safayi taxes by municipalities:*

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<sup>309</sup> , 1355 (367) Ministry of Justice.

All properties within the municipal boundaries should pay *Safayi* tax, which is calculated based on the combined assessed value of land and improvements.<sup>310</sup> The value is calculated as land area (m<sup>2</sup>) multiplied by value + building volume (m<sup>3</sup>) + boundary (m) multiplied by value. The value of land depends on location, so for each city a land value zoning map is needed. Distance to the city center, main road, area of mainly commercial land are also influencing the value. The value of the improvement of the building depends on the volume, use (e.g. residential, commercial) and quality and type of material (e.g. concrete, bricks, mud)<sup>311</sup>.

In the absence of a land cadaster, the *Safayi* system relies on onsite surveys. When the implementing agencies and the municipality decide to introduce the *Safayi* system to a certain district, the teams of surveyors go house by house and record the physical characteristics of each property. The surveyors use a standard form and then enter the information to digital property database including in Geographic Information System (GIS). The district offices (*Nahyia*) use the property information to calculate the tax and then issue an invoice to the property and then the invoices are hand delivered to the properties or the residents are informed to collect their tax invoices.<sup>312</sup> The residents then pay their tax. Until 2012, residents used to pay taxes in cash, however since 2012, they need to pay the tax in Municipal account at the local bank and receive a receipt from the bank. Then “the *Nahyia* offices register payments and issue a “*Safayi Certificate*” as proof of payment.”<sup>313</sup>

Once one area is surveyed they move to another area and so on. The surveying is not done regularly such as annually or monthly, but only to survey the identified areas with outdated information, which after the project has been implemented, are left for the government to manage.<sup>314</sup>

The information collected in GIS system, together with the Integrated Financial Management System (IFMS) contains the information to build a approximate “book of rights”, however this information does not have the legal recognition in Afghanistan. It can certainly help for the person claiming the ownership over land in the land registration procedure and acquisition of the land title, however it is not a proof of ownership<sup>315</sup>.

It is important to note that only the implementing agencies and one municipality - Kandahar are using the GIS maps. The majority<sup>316</sup> of the municipalities don't have the capacities to update the GIS maps themselves, so they use printed maps, while putting red dots on the properties that already have paid the taxes<sup>317</sup>. The GIS maps are being updated by the implementing agencies themselves, while working in the area. After the project's end, the updating is not happening because the government does not have the capacities to do so.

### ***Accessibility of valuation rolls***

There are no legal provisions that would require making the valuation rolls public. State organizations can provide information regarding the value of land or property upon request as long as an individual have a legal basis for such a request such as a land dispute case that he/she is involved in.

For example, the municipalities can provide generic information regarding the price of property/land in urban areas. This list (*Laya*) identifies zones in urban areas with corresponding land prices estimated based on accounts of local property dealers For instance, Kabul is divided in to 5 zones and each zone has different land value written in *Laya*. If an individual intends to buy a parcel of land from zone 3 he/she goes to Kabul municipality to get the value of lands in zone 3. The municipalities update this

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<sup>310</sup> “*Safayi Mahsool Regulations: Independent Directorial for Local Governance, (Guidelines for Safayi Taxation)*”, (Kabul: Government of Afghanistan, 2012).

<sup>311</sup>“*Managing Land, Mobilizing Revenue: Strengthening Municipal Finance and Land Administration through Property Registration and Taxation*”(Kabul: UN-Habitat, discussion paper 3, 2015).

<sup>312</sup>“*Managing Land Mobilizing Revenue.*”

<sup>313</sup> *Managing Land Mobilizing Revenue.*”

<sup>314</sup>“*Managing Land Mobilizing Revenue;*” and interview with UN-Habitat employee, Kabul, 6 August 2015.

<sup>315</sup>Interview with UN-Habitat employee, Kabul, 6 August 2015.

<sup>316</sup>UN-Habitat is working in five big cities of Afghanistan (Kandahar, Mazar-i-Sharif, Herat, Jalalabat, Lashkar Gah). Only in Kandahar is the Municipality using the GIS maps.

<sup>317</sup>Interview with UN-Habitat employee, Kabul, 6 August 2015.

list each year. These are however not used for taxation purposes, because it only provides generic information on the prices of land in certain area.

Based on the accounts of various government officials involved in this project, given the prevalence of corruption in the country and the fact that powerful individuals can easily use information to promote their economic interests, lack of public availability of valuation rolls is rather a protective measure. This assumption, however, can be challenged (similarly to the same argument related to the information about cadastral survey) by the fact that although the information on valuation rolls is not made public, the prevalence of corruption is still high.

In general, information regarding valuation of land/property, particularly in cases of expropriation, is collected. However, there is no consolidated national database for this information and no national database for taxation exist.

### **Collection efficiency**

#### ***Exemptions from property taxes***

Currently tax exemption is applicable to those owning less than 2 *jeribs* of land and whose land/property has been affected by natural disasters. For example, Art. 21 of the Presidential Decree 1365, states that if arable land is destroyed by natural disasters, until the land is restored, the owner is exempted from tax. Accordingly, the MoF and the Provincial Administration decide the tax exemption period, which can be up to three years, which can be renewed if more time is needed. There is also legal provision for exemption of tax on agricultural produce. Art. 23 of the same law gives the MoF and the Provincial Government Administration, the authority to exempt the farmers, whose produce has been completely or partially destroyed as a result of natural disasters.

The prevalence of corruption among the civil services can prevent transparent implementation of policies of tax exemption. For example, land, which cannot meet the criteria to be exempted from tax, can be recorded as exempted from tax if the landowner makes a deal with the civil servants. A farmer can extend the exemption period by paying off state officials. Furthermore, farmers who genuinely qualify for tax exemption might be asked for bribes so that their land is exempted from tax. Corrupt practices can continue and increase in rate, particularly in the absence of public's awareness of the tax exemption policies.<sup>318</sup>

#### ***Tax rolls***

Most of the property and land owners are not registered with MoF taxation provincial offices because they didn't wish to go through the formal procedures to register their land, which requires payments and taxation, or the information sharing between courts, ARAZI and MoF is not happening in consistent manner. It is also possible that they did not view registering their land being necessary as customary deeds and transactions are more common in Afghanistan. Hence, tax rolls can be incomplete. Furthermore the capacity of the MoF provincial and district offices to update records and to collect taxes is limited. There is not always enough staff to pursue cases of tax evasion. In some areas, there are no MoF district offices at all because of the lack of security or simply such offices are not formed yet. This means that in certain areas, the land transactions are not recorded and land tax books are not modified.

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<sup>318</sup> Interview with ARAZI employees, Kabul, April 2015.

Various projects have attempted to facilitate the process of registration and tax collection (aiming to regularize the tenure recognition) particularly in the urban areas such as UN-HABITAT in Herat, Kandahar, Mazar-e-Sharif and Jalalabat, as already mentioned in the section 9.1. As mentioned above, the house-to-house onsite surveys are conducted based on the decision of the municipality and implementing organizations to introduce the *Safayi* system. In this manner, over 100,000 parcels have been entered into the municipal system of Kandahar through this mechanism. These notebooks are not ranked as provisional entitlements and 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. The person still has to go through the regular legal procedure of acquiring the land title, however the *Safayi* Notebook can help this process, particularly in case of the government's decision to distribute that land<sup>319</sup>. Each parcel is awarded a unique number and a map of its location drawn from satellite images of the neighborhood.<sup>320</sup> This data is updated based on the information of the district and property manager responsible for *Safayi* who see the changes, when they are happening, and reporting to the central office. People also can come and self-report the changes<sup>321</sup>.

Another example is the 2004-09 USAID-funded LTERA project, also mentioned in the section 9.1. LTERA carried out upgrading and regularisation of tenure for 59,100 households in Kabul, Mazar-i-Sharif, Kunduz and Taloqan. The project "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."<sup>322</sup>Pursuant to LTERA is the USAID programme, LARA project, which similarly works through community-based organizations 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 *Safayi* Notebooks described above are not being awarded this status. It is not clear that ARAZI is aware of their existence."<sup>323</sup>

#### ***Amount of property taxes collected***

Since not all property holders are registered as it was discussed earlier, collecting taxes from these property owners faces challenges. Taking into account the scale of urban informality reaching an estimated 70% of Afghan cities.<sup>324</sup>, not all taxes that are supposed to be paid in reality are. Based on the survey done by MAIL, in 2011 from 2 million *jeribs* of taxed land 120 Millions Afs in taxes should have been collected. The actual tax collected by MoF in 2014 was only 20 Million, lower than 50% of the total amount of land taxes to be collected. How much in taxes was collected for transaction tax is not clear.

In terms of the *Safayi* tax, there is no accurate data available on how much tax is collected yearly through this system. Additionally, *Safayi* system has its own challenges as outlined below:

- There is a low tax collection because citizens do not see the benefit of how their tax is being spent
- Poor surveying or deliberate mis-surveyings have been reported to reduce tax calculation.<sup>325</sup>

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<sup>319</sup>Ibid.

<sup>320</sup>Wily, "Land, People, and the State," 61.

<sup>321</sup>Interview with the UN-Habitat employee, Kabul, 6 August 2015.

<sup>322</sup>Wily, "Land, People, and the State," 61.

<sup>323</sup>Wily, "Land, People, and the State," 61.

<sup>324</sup>"Managing Land Mobilizing Revenue."

<sup>325</sup>"Managing Land Mobilizing Revenue."

- Because there is still certain portions of the properties in certain districts not surveyed and because the *Safayi* system itself went through some changes in 2009 in the ways of the tax calculation, some *nahyias* (districts) within cities are using the old manual system, and some the new system. Taking into account that the old method of tax calculation from the prize noted on the land title document mentioned above, there can be different tax rates for similar properties. This can be confusing for citizens, and makes tax collection and enforcement difficult for municipal staff.

### ***Cost of collecting taxes in Afghanistan***

The costs of collecting transaction taxes is relatively low, because apart from the establishment of the pricing committee, it does not require any further activities by the state. People go to the bank to precede the payment themselves based on the price of land on the legal title deed.

The cost of collecting land tax in Afghanistan, in particular in rural areas, is high because the system is manual, giving space for administrative duplication. Data registry is done manually and the high number of departments and institutions such as ARAZI, MoF with its Small-Owned Enterprises Department, Properties Department, Directorate General for Revenues, which has four different departments e.g. small, medium and large tax payers office and non-tax revenue office, involved in the process make it time consuming and inefficient.<sup>326</sup>

There are two tax collectors per district (finance and revenue collection clerk).<sup>327</sup> Their salary is approximately 15,000 Afs for both persons per month. Since the cash collected from taxing has to be transported from the districts to provinces usually by cars, there are certain minimal expenses for the fuel, together with the per diem of tax collectors transporting the cash. When calculating the expenses for all 366 districts in Afghanistan, the collecting taxes in rural areas costs approximately 66 millions Afs. Taking the amount of taxes collected for instance in 2014 amounting to 20 millions Afs it is not rentable for Afghan government to collect land taxes.

Collecting taxes in residential areas and, generally, in urban areas is rather easy and straightforward. *Safayi* has proven to be a cost-effective and relatively straightforward intervention with multiple benefits.<sup>328</sup> According to the UN-Habitat report, the average cost of survey and registration of the property is 8 USD, while the net income per residential property per year is 17 USD, and the average annual *Safayi* tax is 25<sup>329</sup> USD.<sup>330</sup>

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<sup>326</sup>Interview with ARAZI employees, Kabul, 27 March 2015.

<sup>327</sup>Please note that they are not solely responsible for taxation, therefore their remuneration corresponds to more tasks.

<sup>328</sup>“Managing Land Mobilizing Revenue.”

<sup>329</sup>This figure includes the average from all the properties - residential, commercial, governmental and industrial.

<sup>330</sup> “Managing Land Mobilizing Revenue.”

## 9.8. Dispute Resolution

PANEL 8: Dispute Resolution			
<i>LGI 1: Assignment of Responsibility</i>			
8	1	1	There is clear assignment of responsibility for conflict resolution.
8	1	2	Conflict resolution mechanisms are accessible to the public.
8	1	3	Mutually accepted agreements reached through informal dispute resolution systems are encouraged.
8	1	4	There is an accessible, affordable and timely process for appealing disputed rulings.
<i>LGI 2: The Share of Land Affected by Pending Conflicts is Low and Decreasing</i>			
8	2	1	Land disputes constitute a small proportion of cases in the formal legal system.
8	2	2	Conflicts in the formal system are resolved in a timely manner.
8	2	3	There are few long-standing (> 5 years) land conflicts.

### Introduction

Although land disputes are the most common cause for conflict in Afghanistan from all the other types of conflicts (42%)<sup>331</sup>, they seem to proceed to the formal justice system infrequently<sup>332</sup>. Some court personnel also appear to feel that they are less capacitated to adjudicate land claims than are non-state dispute resolution providers, as the latter possess superior local knowledge and evidence-gathering capacity. As a result, the low percentage of land cases in government forums does not constitute evidence of a low number of land cases.

### *Formal justice system in Afghanistan*

The Afghan judiciary is an independent organ of the Islamic Republic of Afghanistan comprised of Islamic, statutory and common law. No law should contravene the tenets and provisions of Islam<sup>333</sup>. The courts are the primary formal organs for addressing disputes. The court system consists of approximately 540<sup>334</sup> primary courts in each district or municipality, 34 provincial courts of appeal in each province, and the National Supreme Court including courts with specialised jurisdiction whose organisation and authority are regulated by the law<sup>335</sup>. Additionally, there are other dispute resolution forums addressing land issues within the formal justice system. These include well-established bodies such as the Ministry of Justice Department of Huqooq and Department of Government Cases. Finally, the informal dispute resolution mechanisms such as *shuras*, *jirgas*, Community Development Councils (CDCs) and other ad hoc and permanent bodies, including armed opposition groups' justice system, exist to deal with land disputes in Afghanistan.

The key role of the Supreme Court is dispute resolution as it is the highest judicial organ of the state. However, it carries out certain administrative roles such as land registration, land transfer and issuing title deeds, which among certain experts is considered as creating a conflict of interest in terms of Supreme Court's judicial role. In the latest rounds of the donor meetings in summer 2014, discussions were held on the possibility of the transfer of the authority for land registration from the Supreme Court to the Afghanistan Independent Land Authority (ARAZI). Recently, concrete steps have been taken by the National Unity Government in the form of Cabinet Resolution #5, dated 5<sup>th</sup> February 2015, to acknowledge the land registration and issuance of the title deeds as an administrative rather than a judicial process. ARAZI is currently working closely with the Second Vice President and MoF on how this

<sup>331</sup>Warren, "Afghanistan in 2014."

<sup>332</sup>Please see the statistics in the Introduction.

<sup>333</sup>*Constitution of Afghanistan*, Article 3, 2004 (SY 1382).

<sup>334</sup> According to the provisions of the LOJJ, the Supreme Court may establish district primary courts in each district (there are approximately 400 districts in Afghanistan) and family, commercial, juvenile and military primary courts in each province (4\*34 provinces of Afghanistan); as additionally, there are four municipal primary courts in Kabul. Due to the remoteness of certain areas some of the primary courts have not yet been established; however, the statistics on the precise number of not-yet-established primary courts is not available.

<sup>335</sup>*Constitution of Afghanistan*, Article 116, 2004 (SY 1382).

role and function can be taken out of the Courts system and absorbed into ARAZI with corresponding budgetary implications. The Presidential Decree necessary for the transfer of responsibilities was already drafted by ARAZI awaiting the President's approval. ARAZI is preparing to launch a pilot project in Herat to try out the functioning of the new mechanism in late 2015.

The Appeal Courts located in the capitals of each province are responsible for general criminal, security, civil and family, public rights, commercial and juvenile cases, while having the jurisdiction over primary courts such as Central Provincial Primary Court, Juveniles Primary Court, Commercial Primary Court, District Primary Court and Family Issues Primary Court. These adjudicate general criminal, civil, public rights and security and traffic criminal cases.

#### *Formal justice system - other dispute resolution forums*

Other dispute resolution forums address land issues within the formal justice system. These include well-established bodies such as the Ministry of Justice Department of *Huqooq* and Department of Government Cases. Since ARAZI is the afghan land authority addressing property claims of refugees and returnees, expediting property disputes resolution, and identifying and verifying of forgery documents, the dispute resolution function constitutes a vital part of their portfolio<sup>336</sup>. Huqooq (Rights) Department is an organ of the MoJ established to adjudicate and settle land disputes arising from debts, properties, commercial or family issues between the citizens and legal persons. It aims to do so through the engagement of tribal elders and other community leaders similarly to the informal justice system mechanism, referring the cases to courts in case of the lack of evidence or willingness to settle the dispute. Government Cases Department of MoJ serves similarly to the Department of Huqooq as a bridge between public and courts, while protecting and safeguarding movable and immovable properties of the government. However, to this point, these institutions have not significantly affected the primacy of the courts and informal justice mechanisms and serve more as channels through which some cases are referred to the formal system.

#### *Afghan informal justice system*

Before engaging in the discussion about informal justice system in Afghanistan, it is important to clarify the terminology. The informal justice system will be at times called informal dispute resolution mechanism(s) without denying the courts the final decision power as the only organ which can legally resolve disputes and give final decision to the case in Afghanistan. However, since the informal justice system indeed at times resolves disputes, as opposed to only addressing them, it will not be called "mechanism for addressing land disputes".

Although notable improvements were made in Afghanistan's formal justice system after 2001, the informal non-state justice sector still handles what appears to be the majority of disputes in the country. According to the Survey of the Afghan People, conducted by the Asia Foundation in 2015, 47% of people approached elders of local shura in the case of a land dispute, though the total number of land related court cases in the formal system varies between 10-50% per region. People taking the dispute to the informal dispute resolution body are mostly from rural areas, while nearly half of the disputes are land disputes (42.2%). When asked which type of justice (formal - courts, and *Huqooq* or informal) is fair and delivers the best results, the majority of Afghans preferred *jirgas/shuras*, followed by the *Huqooq* Department, and Courts were the least preferred venue<sup>337</sup>.

A great profusion of actors are mediating land disputes within the non-state informal justice sector. Even though this briefing paper will treat the non-state justice sector in a fairly unitary fashion, in reality the non-state sector is better understood as an institution of multiple actors (e.g., registered and non-registered Shuras/Jirgas, Community Development Councils (CDCs), Commissions on Conflict Mediation (CCMs) - a joint initiative in South-Eastern provinces, tribal elders, local commanders and other influential individuals), who at times cooperate with one another in order to form the informal

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<sup>336</sup>Decision of the Cabinet Ministers #24, 2009; Decision of the Cabinet Ministers #23, 2010.

<sup>337</sup>Warren, "Afghanistan in 2015."

justice mechanism to solve the dispute. Due to a dearth of reliable information on their operations, this paper will not consider forums of dispute resolution provided by armed opposition groups<sup>338</sup>.

### Assignment of Responsibility

Afghanistan's court system enjoys competence to address land disputes, and de facto principles of territorial jurisdiction generally determine which court will address the dispute at the primary and first appellate levels.<sup>339</sup>As designated by the Constitution of Afghanistan, the Supreme Court is the country's chief judicial organ (Arts. 116 and 120) with provincial courts of appeal (LOJJ, Art. 52; and Constitution of Afghanistan, Art. 116), and primary courts located in each provincial center and in each district (LOJJ, Art. 62). District primary courts, particularly the Civil *dewan* of the central primary court (when both parties to the dispute are natural persons), and the Public Rights *dewan* (when at least one party is a legal person) are responsible to address land disputes (LOJJ, Art. 63). The Public Security *dewan* could also conceivably handle particularly aggressive instances of land grabbing (LOJJ, Art. 63). While district primary courts are capacitated to address only land disputes within their district (LOJJ, Art. 68), central primary courts are able to address disputes both inside and outside their particular geographical area (LOJJ, Art. 63). Nevertheless, despite the above mentioned provisions of the LOJJ, there exist other governmental and non-state entities engaged in dispute resolution efforts in Afghanistan.

In Pashtun and non-Pashtun areas, many parties pursue their claims through an ad hoc dispute resolution body known as a *jirga* or a *maraka*.<sup>340</sup> All adult men are in theory able to participate in the *jirga/maraka*. However most commonly tribal elders compose these bodies, although, religious leaders are also involved in some instances. Certain persons fitting these descriptions have developed a reputation as particularly effective mediators, and participate in more *jirgas* than do other persons of similar status. These individuals are known as *jirgamaran*. Individual government officials, most commonly District Governors or District Chiefs of Police, also mediate disputes in some instances, as do some commanders or other non-state armed actors.<sup>341</sup> Outside of the core Pashtun areas of Eastern and Southern Afghanistan, mediation by individual non-state leaders such as commanders, *maliks/arbabs* and religious leaders is very common<sup>342</sup> using the forums called *jalasas* or *marakas*.

*Shuras* additionally mediate disputes in many areas, Pashtun or non-Pashtun. Unlike *jirgas*, these are permanent bodies with a fixed membership. *Shuras* are most often either organised around a common identity (e.g., a tribal *shura* or *ulema shura*) or a common activity (e.g., a *shura* to promote development). The latter includes a significant number of *shuras* with donor or other outside support, such as District Coordination Councils (DCCs) put in place pursuant to the since-ended Afghan Social

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<sup>338</sup>For more information please see: Antonio Giustozzi, Claudio Franco and Adam Baczko, "Shadow Justice: How the Taliban Run their Judiciary?" (Kabul: Integrity Watch Afghanistan, 2012).

<sup>339</sup> The LOJJ does not in fact specify principles of territorial and subject-matter jurisdiction, except in the division of *dewans* in the Central Primary Court. One could nevertheless read the Civil Procedure Code, at Arts. 81-82, as establishing principles of territorial jurisdiction. In any event, territorial jurisdiction appears to predominate in practice, and disputes over jurisdiction between various courts based on territory seem quite rare.

<sup>340</sup>See, e.g., "The Customary Laws of Afghanistan" (New York: International Legal Foundation, 2004); Ali Wardak, "Jirga - a Traditional Method of Conflict Resolution in Afghanistan" (unpublished working paper; University of Glamorgan, UK: 2003)(please note that, although the terms are usually used interchangeably, Prof. Wardak suggests a slight distinction, with *maraka* more often referring to village-level processes, and *jirga* to either village-level or supra-village processes (e.g., Loya Jirga).

<sup>341</sup>See, e.g., "Customary Laws," 53-54 (on role of commanders in dispute resolution in northern Afghanistan).

<sup>342</sup>See, e.g., "Justice and Security: Practices, Perceptions, and Problems in Kabul and Nangarhar" (Kabul: The Liaison Office and Cordaid, forthcoming 2014)(noting the prominent role of Imams and Mirabs for dispute resolution in Istalif); "Customary Laws," 51 et seq. (giving information on the prominent role of commanders in northern Afghan dispute resolution); Thomas Barfield, Neamat Nojumi, and J. Alexander Thier, "The Clash of Two Goods, State and Non-State Dispute Resolution in Afghanistan" (Washington, DC: United States Institute of Peace, 2006), 12 (noting the prevalence of *arbabs* as mediators among Afghan Arabs, and that the Pashtun *jirga* is characterised as being more theorised and regimented than other Afghan non-state dispute resolution systems).

Outreach Program. Dispute resolution is part of the DCC mandate<sup>343</sup>, as it is for other donor-supported *shuras*.

Furthermore, there were (some still continue) various initiatives from NGO community such as NRC's ICLA project running Information and Legal Assistance Centers (ILACs), PEACE project focused on Kuchi communities, a pilot project of USIP and ARAZI supporting ARAZI's mechanism of addressing land disputes and LC project that are using various mediation mechanism to support conflict resolution within local communities.

### ***Accessibility of conflict resolution mechanisms to the public***

The majority of Afghans lack access to conflict resolution mechanisms for land disputes.<sup>344</sup> However, the level of access varies dramatically between demographic groups.

Adult men of majority populations<sup>345</sup> enjoy the greatest degree of access, whether it is to formal or informal justice systems. They face the least social stigma in accessing state dispute resolution services (see below for contrast with women's situation) and have the greatest capacity for travel in case the dispute requires so. Additionally, most sources indicate that costs associated with their use are low enough so as to not constitute a general barrier to access. Technical issues nevertheless impede the access such as the absence of state judicial presence in remote and insecure areas<sup>346</sup> and lack of financial means for private legal counseling<sup>347</sup>. Young people experience limitations in relation to the access to conflict resolution forums claiming that the elders or other non-state leaders do not consider the youths' arguments or evidence.

Men from marginalised population groups face additional barriers to accessing conflict resolution services. Because court access requires possession of the ID document *tazkera* (Civil Procedure Code, Art. 13(1)), minority groups thus found themselves cut off from state conflict resolution mechanisms. This is notably the case for Jogi and Chori Frush populations; none of the former and only a few of the latter possess any form of identification from the Afghan state<sup>348</sup>. Additionally, access to non-state forums depends upon disputants' social integration in the area. New migrants, refugees and IDPs have thus significantly greater difficulty in accessing non-state forums than long-term residents.

By contrast, women in Afghanistan have extremely limited access to both state and non-state dispute resolution forums.<sup>349</sup> In both instances, strong and strictly enforced social norms discourage women from approaching any dispute resolution forum. As such, the only way to access any conflict resolution forum is through their male relatives or when accompanied by a *mahram* (intermediary or "chaperone; in all known cases a male relative"). In both instances, a woman's ability to access dispute resolution forums strongly depend on the support of her family members. Given the fact that Afghan women often become the owners of the property only through inheritance, the possibility for women to use the dispute resolution mechanism in order to gain property is virtually non-existent<sup>350</sup>.

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<sup>343</sup>AECOM, "Afghanistan Social Outreach Program (ASOP) Annual Report: July 2010-July 2011" (Washington, DC: United States Agency for International Development, 2011).

<sup>344</sup>See Tim Luccaro and Erica Gaston, "Women's Access to Justice in Afghanistan: Individual versus Community Barriers to Justice" (Washington, DC: United States Institute of Peace, 2014), [http://www.usip.org/sites/default/files/PW98\\_Women's-Access-to-Justice-in-Afghanistan.pdf](http://www.usip.org/sites/default/files/PW98_Women's-Access-to-Justice-in-Afghanistan.pdf), (detailing how most women do not have access to any dispute resolution forum. More precisely, if virtually no women have access to dispute resolution forums, then only a small number of men lacking access would constitute a majority).

<sup>345</sup> Given that Afghanistan's demographics vary by region, and reliable statistics to establish them do not generally exist, here we use "majority" to mean the population locally perceived to be the majority.

<sup>346</sup>For example, until a recent deployment of judges from the provincial center, most districts of Khost province lacked a sitting judge.

<sup>347</sup>Some NGOs and civil society organisations are offering legal aid for land issues - among these, the Norwegian Refugee Council's Information, Counseling, and Legal Awareness program is certainly the most well-known.

<sup>348</sup> See for instance "Assessment of Out of School Children and Jogi communities" (Kabul: Samuel Hall, UNICEF, 2011).

<sup>349</sup> For this section, please refer to: Luccaro, Tim; and Erica Gaston, "Women's Access to Justice in Afghanistan: Individual versus Community Barriers to Justice"(Kabul: USIP, 2014).

<sup>350</sup>There are some exceptions, such as widows and old well-accepted women in the community, who can approach non-state leaders without an intermediary. Additionally, a small number of women in urban areas who became

### ***Effectively and equitability of informal justice system - recognition of informal justice mechanisms***

Even though the informal justice system is widely used in Afghanistan, it does not enjoy full legal recognition and the evidence and rulings are shared between state formal mechanisms such as *Huqooq* and courts and formal mechanism and non-state dispute resolution venues only on an ad hoc basis. Often it happens that the court decides the case differently than the *shura* or *jirga*, creating obstacles for the implementability of any decision.

1 in 5 people prefer avoiding the formal justice system and solving their disputes (not only land disputes) in the non-state system in its entirety<sup>351</sup>. Based on the Civil Code and Civil Procedure Code's provisions, the decision of the informal justice system can assume legal status, when it was registered with a court from the beginning of the case and court referred it to the informal justice system. Since in a high number of cases Afghans do not approach formal justice system at all, when the decision is made in informal justice system, under Afghan legal provisions, it is not eligible to be registered by courts<sup>352</sup>. Additionally, there is a huge difference in opinions between judicial practitioners about this issue. Some judges claim that as long as the case is settled in a non-state system before the start of the court proceeding, it can be registered with the court; others believe that it is not their legal obligation, however they can do it depending on their workload and available time to do so. Finally, some judges say that registering cases that were brought to an end by the informal justice system is not legal at all<sup>353</sup>.

Nevertheless, the linkages and ad hoc cooperation between formal and informal justice systems do exist. The Civil Code and Civil Procedure Code of Afghanistan contain specific rules that give legal recognition to non-state system dispute resolution. Both lay out basic rules that all Afghans should follow in their relations with each other encouraging people with personal disputes, including land disputes, to use reconciliation in order to find compromise<sup>354</sup>. Based on this, the decisions of the informal justice system can be perceived as an agreement (contract) between two people that can indeed be enforced by a court. Additionally, according to the both laws, the non-state system of dispute resolution decisions have the same status as court decisions, as long as the dispute is registered with the courts from the beginning and the court recommends it to be referred to an informal or traditional justice body, such as a *shura* or *jirga*. Taking this into account, the non-state system's decisions can gain legal status as valid contracts recognised by court. However, certain preconditions apply such as that all parties must voluntarily agree to the non-state system's decision<sup>355</sup>, while courts will not accept a non-state system decision for some types of cases, such as criminal cases.

Additionally, recently a new wave of interest in the possible linkages of formal and informal justice system has arisen among Afghan political circles and international community. The debate started around the possibility of the revival of the draft "*Law on Dispute Resolution, Shuras and Jirgas*" that was initiated in 2010 and is still pending at the Ministry of Justice. The main purpose of this draft law is to regulate the operation of *shuras/jirgas*. Moreover, the draft law aims to create the linkages

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community leaders due to individual circumstances or efforts have the ability to move about with a significantly greater degree of freedom, and mediate disputes to which a woman is a party, or at least directly lobby men's leaders on a woman disputant's behalf.

<sup>351</sup>Warren, "Afghanistan in 2014."

<sup>352</sup> Although there are some indications in the Civil Code giving the possibility to register the dispute as a contract. Please see the next paragraph for more details.

<sup>353</sup>Ali Wardak "Civil Dispute Resolution in Afghanistan" (Kabul: UNDP, JHRA Project, 2015).

<sup>354</sup>Article 1297 of Afghan Civil Code states that the reconciliation (compromise) is a contract which resolves a dispute and ends hostility on the basis of disputant's mutual consent. Further, the Article 1306 explains when one person claims a specific property and the other person agrees, reconciliation (compromise) over the specified property is valid and this shall be deemed as a sale contract. Finally, Article 1313 points out that when reconciliation (compromise) is satisfactorily concluded, the dispute ends and what is agreed upon (monetary compensation, etc) becomes the claimant's property which could not be returned to the defendant.

<sup>355</sup>If the settlement is in the form of the claimant's property, he/she becomes the owner. However, if the other party refuses to pay the claim, he/she is illegally holding the claimant's property, as if it was stolen from the claimant.

between formal and informal justice system. A number of international actors, including UNDP<sup>356</sup>, UNAMA<sup>357</sup>, USIP<sup>358</sup> and others, reflected on this debate by producing reports and policy papers on the topic. Currently, two versions of the draft law (one containing criminal, another one only civil cases) were submitted to the Ministry of Justice awaiting the final decision.

Secondly, the first draft of Land Dispute Resolution Regulation for ARAZI, supported by USIP, is currently being drafted. The aim of this regulation is to address land disputes that are outside the court system via community councils (*shuras*), district and provincial ARAZI offices and local governance structures, which will operate under common district and provincial commissions. Additionally, it shall support maintaining the social order and justice via disputes resolution, strengthening relation between *shuras* and ARAZI district and provincial offices and local governance structures, engaging the *shuras* and reinforcing their role in land dispute resolution, cooperating with judicial bodies to prevent accumulation of cases and registering the outcomes of the land disputes in ARAZI principal books and database. The outcome of the current debate on the possibilities to link formal and informal justice system still remains to be seen.

At the practical level, there is a general ambiguity in terms of the legal recognition and the use of informal justice system based on how various government officials relate to informal dispute resolution. Some government entities encourage their use; others discourage it, while at the provincial level the officials are generally more supportive. This ambiguity is only exacerbated by certain provisions of the Civil Code and Civil Procedure Code that, according to some jurists, imply that the decision of the informal justice system can acquire legal value as long as it was registered in the court from the beginning of the case. However, in practice most Afghans solve their disputes entirely outside of the formal legal system and treat the state as a kind of appeals mechanism when the informal system fails. After multiple failed informal resolution attempts, these parties will bring their dispute to state authorities, who then might bring it to the court system or, in a likely larger number of cases, supervise the conduct of further informal processes.

Currently, in Kabul, stakeholders such as the Ministry of Border and Tribal Affairs are willing to work with non-state dispute resolution forums, while others, such as the Ministry of Women's Affairs, severely criticise their continued proliferation, and seek their curtailment. Possibly due to the lack of a law or policy sanctioning the use of non-state forums, of those persons interviewed for this briefing only one mentioned the state registering informal decision<sup>359</sup>; the rest were explicit that this practice does not occur, while being equally explicit that non-state authorities resolve the majority of land conflicts in their area.<sup>360</sup>

At the provincial and district levels, and especially as regards executive branch officials, responses to non-state forums appear more diverse. In some cases, provincial and district governors and chiefs of police regularly refer land disputes to non-state forums, and encourage these forums' use. Some judges also engage in this practice, at both the first instance and appeals level, although among judges the practice appears less widespread. Finally, in some instances, state officials may participate as members of non-state dispute resolution forums, or themselves mediate disputes on an individual basis. In all instances, state officials are more likely to cooperate with non-state dispute resolution forums for land and other civil disputes than they are for criminal cases.<sup>361</sup>

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<sup>356</sup>See Dr Ali Wardak's paper on "Civil Dispute Resolution in Afghanistan."

<sup>357</sup>"Stolen Lands."

<sup>358</sup>The Policy Note is in the process of finalisation. The expert in his capacity as a consultant of USIP has access to the draft of the policy note.

<sup>359</sup> Interview with a non-state community leader, PD 13, Kabul, 25 June 2014.

<sup>360</sup>See, e.g., Interview with a non-state community leader, PD 13, Kabul, 25 June 2014, (estimating 80% of land disputes in his area are resolved through non-state processes); Interview with a Non-State Community Leader, Guzara District, Herat, 21 June 2014 (estimating only 2% of land disputes in his area are resolved through the court); interview with a non-state community leader, Arghandab, Kandahar, June 8, 2014 (likewise estimating 80% of disputes in his area were resolved via non-state authorities)

<sup>361</sup> Compare Deborah Smith, "Community-Based Dispute Resolution in Nangarhar Province" (Kabul: Afghanistan Research and Evaluation Unit, 2009)(noting cooperation between state and non-state dispute resolution providers for both civil and criminal issues); with Thomas Barfield, "Informal Dispute Resolution and the Contemporary Legal

In most rural areas, the District Governor and Chief of Police are the best-resourced officials, with other government persons typically facing a significant deficit of resources. For this reason and others (e.g., persistent insecurity aggregating authority to the executive), these officials often take the lead even in areas outside their technical legal mandate. For dispute resolution, this means that executive branch officials often spearhead working with elders and/or other non-state leaders, broadly taking one of two forms. In some cases, executive branch officials will route cases to non-state leaders, to a degree supervising their work. In other cases, the official will himself sit on a non-state dispute resolution forum, working alongside non-state leaders. However, these sorts of involvement are not systematic, and depend upon the individual initiative and temperament of both the officials and non-state leaders in question.

Finally, some judges, at either the primary or appellate level, encourage parties to resolve their disputes through non-state instances. Indeed, courts appear to particularly seek non-state assistance for land disputes, as local non-state leaders often far better know the parties and history of the area, and possess greater capacity for the investigation of claims.

Provincial or district Huqooq officials enjoy official mandate for linking state and non-state dispute resolution capacities through referral of disputes (See Art. 17 Civil Procedure Code<sup>362</sup>). When Huqooq recognizes the decision of *shura* or *jirga*, it is only an administrative recognition, because only courts can provide the legal recognition. In some areas, the Huqooq actively plays this role (under the supervision of the District Governor). In other areas, the Huqooq is not willing or does not possess the resources, including human resources, to play this role adequately.

### ***Accessibility of process of appeal***

After primary courts, two layers of appellate courts exist. Each province has one appellate court (LOJJ, Art. 52; Art. 116 Afg. Const.), and the Supreme Court serves as the country's highest appellate authority (Afg. Const. Arts. 116, 120; LOJJ Art. 23). In many areas, appeal against primary court decisions appears near-universal, including for land disputes. This pattern indicates appellate procedures that are accessible to similar degree than the primary courts, though this high rate of appeal itself creates systemic difficulties.

An appellate court sits in each of Afghanistan's 34 provinces (LOJJ, Art. 52). These courts receive cases from all first instance courts across the province, including all *dewans* of the central primary court. They also receive cases from Commercial, Juvenile, and Family courts (LOJJ, Art. 61). Provincial appellate courts may review both the factual and legal aspects of the disputes brought to them.

In turn, the Supreme Court is Afghanistan's highest judicial authority (Afg. Const. Art. 116; LOJJ Art. 23). The ability of the Supreme Court to revise lower court judgments appears more or less limited to legal aspects of the case.

In practice, parties appeal almost all primary court and appellate court decisions. This pattern has two potential implications for costliness. First, it might indicate that parties do not find accessing court procedures too costly. However, this conclusion would contradict most other evidence, which indicates that many parties do find court procedures to be unreasonably costly. Thus the more plausible interpretation is the second: that, given near-universal appeal, parties factor the cost of appellate procedures into their initial calculations, before embarking on primary court litigation. Conversely, if parties believe appellate procedures to be too costly, they will avoid court proceedings altogether, instead of "dropping out" after primary court litigation has finished.

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System in Contemporary Northern Afghanistan" (Washington, DC: United States Institute of Peace, 2006) at 2 ("While actors in the formal sector claim a monopoly over criminal cases, they saw this monopoly as restricted to the "Rights of God" (Huquq Allah), that is in criminal matters those general overarching offenses against the state (as God's agent). But local communities have jurisdiction over the "Rights of God's servants" (Huquq al-'Ibad), the ability of individuals to seek personal redress in criminal matters.").

<sup>362</sup> More specifically, the referenced article seems to empower to Huquooq office to transfer cases to the court in case out of court resolution has failed. However, Afghan law does not elaborate on the powers of the Huquooq, which is nevertheless an office of long standing.

Closely related to cost, dispute parties also consistently report state proceedings as too costly.<sup>363</sup> However, as explored in greater length later in the report, parties seem to weigh this factor more in their decision to pursue a primary court verdict than in their decision to pursue an appeal.

Additionally, the process of appeal for ruling takes long (at times 3-4 years) if it's done without any informal payment and/or good network. The legal process for appealing stipulated in the law is 15 days<sup>364</sup>, however judges and other employees of the court often make it long in order to be able to collect informal payments for the speedy resolution of the case.

Within non-state systems, appellate procedures appear substantially less common than in the state system, where most of the land disputes are resolved by village elders (who may be understood as being the forum of first instance). However, if village elders do not succeed in resolving a dispute or disputants are not satisfied with the outcome of the dispute resolution, various informal appeals-like procedures exist.

In a very rough typology extremely dependent on the area, it has been observed that, once village-level dispute resolution processes have not been successful, parties often take recourse to non-state leaders well-known for dispute resolution prowess at the district-, provincial-, or even regional level. In one notable example, the tribes of southeastern Afghanistan have over the years developed an inter-tribal regional *jirga* (the *tokhm jirga*), employing specialised procedures to address those disputes where multiple previous attempts at resolution have failed.

Most sources report that pursuing these informal appeals is less costly than the formal system. Yet they are clearly not costless, especially if one takes into account that informal processes might take place over the course of decades, albeit with long lulls in the conflict. In some instances, parties have indeed seemed to abandon a dispute less because of satisfaction with the dispute resolution outcome than because the costs of further pursuing the dispute at that time outweigh the positive outcome.

#### Share of Land Affected by Pending Conflicts

Due to the lack of comprehensive or systematic data, it is impossible to estimate with any certainty the amount of land in Afghanistan subject to dispute. However, from the data that does exist, the disputes related to land cause over 42% of conflicts (the most common cause for conflict in Afghanistan from all the other types of conflicts) and are decreasing. According to an Asia Foundation survey, almost 53% of cases in 2009 were related to land disputes, while in 2014 and 2015 we see the drop of approximately 11%. It is also important to note that, considering that approximately 43.2% of all disputes are resolved by the informal justice system<sup>365</sup>, the latter is carrying significant responsibility for land disputes in Afghanistan.

Having said the above, it is important to note that the frequency of land disputes is somewhat dependent on migration patterns. During the Soviet invasion to Afghanistan in 1979 and the Civil war of 1992 - 1994, millions of Afghans migrated to Pakistan, Iran and other neighboring countries. After the military operation by the international armed forces in 2001, people started returning to their homeland only to find out that their land had been grabbed, the boundaries had been altered and the land was occupied by other ethnic groups. This created societal tensions in the communities, providing the incentives for land conflicts. However, since 2001 some sources report a lessening of land conflicts linked to patterns of migration. In provinces such as Khost, Afghanistan experienced a surge of land disputes as displaced persons returned to their home areas and sought to re-claim property occupied during the years of their absence, as mentioned above. However, as repatriation of the refugees to Afghanistan is slowing down, the amount of land subject to disputes is slowly being reduced<sup>366</sup>.

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<sup>363</sup>See, e.g., interview with a non-state community leader, Arghandab, Kandahar, 8 June 2014 (stating that the court would take up a dispute should non-state processes founder).

<sup>364</sup>Civil Procedure Law

<sup>365</sup>Warren, "Afghanistan in 2015."

<sup>366</sup>Note that there are certainly other factors contributing to the occurrence of land conflicts, therefore this report does not aim to claim in any way that with the slowing down of migration patterns the land conflicts will decrease dramatically. However, a certain decrease can be expected.

Despite the best efforts of our team we were not able to acquire nationwide statistics on the nature of disputants, types and reasons for land conflicts in Afghan courts. We were informed that the Supreme Court in partnership with USAID implemented a Case Management System (CMS) designed to collect on the type of disputes that came before it. However, when we attempted to access this information we were informed that a condition of the agreement made between the judiciary and the donor was that the data collected would not be released to the public. We also approached the Afghan partner working on the project and were informed that the system is not yet in place. However, based on personal communication with Norwegian Refugee Council's (NRC) Information, Counseling and Legal Assistance (ICLA) project<sup>367</sup>, GIZ Rule of Law project in Kunduz and land titling studies conducted by PTRO and TLO in Khost and Kunduz in 2014, we were able to acquire anecdotal data.

In terms of the typology of disputant parties, most of the land disputes brought in front of the court are between the families, communities and tribes, while cases between individuals tend to be resolved by traditional mechanisms, especially those within the tribes and families<sup>368</sup>. The cases between individuals and government are rare and tend to occur in urban or semi-urban areas, where the government enjoys at least minimum presence. The types of conflict range from disputes over inheritance rights, ownership and possession rights and money recovery to conflicts over forest and constructible land<sup>369</sup>.

Despite the decrease in land disputes, several causes point toward the share of disputes of conflicted land in relation to other types of conflicts continues to be high (42%). In rural areas, lands such as mountains, forests, and pastures tend to be communally held. Frequent migration and displacement in recent decades accompanied by dramatic population increase have created pressure over resources, particularly constructible land such as housing plots and land used for any type of constructions. This, combined with the lack of documentation on both communal and private land and unclear boundaries demarcation, has created situations particularly susceptible to land disputes. Land in peri-urban areas also appears particularly prone to frequent disputes involving large lands in size. In these rapidly urbanising areas, land records are likewise scanty, while, due to their proximity to major cities, the last ten years has witnessed a rapid increase in land values. For these reasons peri-urban areas appear particularly prone to land-grabbing<sup>370</sup> by significant power-holders. In some instances, communities report the seizure of hundreds of hectares of land. If another power-holder contests control of the land, land disputes over very large tracts can thus emerge. In addition, while communities themselves

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<sup>367</sup>NRC ICLA project has seven Information and Legal Assistance Centers (ILACs) in Kabul, Herat, Kunduz, Nangarhar, Balkh, Faryab and Kunar provinces and additional ten provinces across the country are covered through outreach activities from these bases.

<sup>368</sup> Please note, however, that regional differences may occur in different areas of Afghanistan due to various factors such as presence of the state (or lack of thereof), availability of informal dispute mechanisms, cultural practices etc.

<sup>369</sup> "Major Land Disputes and Land Titling Systems of Khost Province: Implications for Collaboration between Traditional Dispute Resolution Mechanisms and ARAZI" (Kabul: The Liaison Office, 2014); representative of NRC, pers. comm., 16 March 2015; and Afghan civil society actor, pers. comm., 18 March 2015.

<sup>370</sup>The term is defined as "use, control, occupation or ownership of land by one without bona fide right" (in "The Stolen Lands of Afghanistan and its People: The state land distribution system" (Kabul: UNAMA, Rule of Law Unit, 2015). The definition includes different ways the land grabbing is performed, such as "use of physical force, intimidation or violence by powerful people to remove others from land, occupation of empty lands; obtaining the title through a land allocation scheme that fails to meet the legal requirements [and] obtaining the title through fraud" (in Policy Advisory Group on Land, "Draft Policy Paper on Addressing Land Grabbing through Criminal Justice System, 2014). According to the statistics compiled by ARAZI, more than 1.2 million *jeribs* of land (a *jerib* is equal to 2000 square meters or 0.2 hectares) were grabbed in the past decade (in Independent Joint Anti-Corruption Monitoring and Evaluation Committee, "Public Inquiry into Land Usurpation, Kabul: MECC, 2014) by over 15,000 individuals (in "The Stolen Lands of Afghanistan and its People: The state land distribution system" (Kabul: UNAMA, Rule of Law Unit, 2015).

rarely confront power-holders over land seizure, research has uncovered instances of original owners raising land disputes when the land is re-sold to less powerful third parties<sup>371</sup>.

Although land disputes most likely constitute the plurality of disputes in the country, they seem to proceed to the formal justice system infrequently. Research from various parts of the country has indicated that land disputes in any given court make less than 10% to about 50% of disputes.<sup>372</sup> The history of land administration in a given area goes toward explaining this variation. For example, some dispute parties seek out the court to undo communist-era land distributions, where these have remained in place. Other parties seek out the court because they possess land documentation issued by the Karzai government. In other words, in those instances where the state itself has been active in land administration, parties appear relatively more likely to turn to it for land dispute resolution. Field research for this study thus indicated a significantly greater percentage of land cases in the court for Herat City<sup>373</sup>, a traditional government stronghold, than for those rural areas examined.<sup>374</sup> By contrast, parties across the country bring criminal issues to courts with far greater regularity, and in most courts these make up a much more substantial percentage of formal system cases.

Some courts appear to route land disputes away from the resolution in state forums because they feel that they have less capacity to adjudicate land claims than non-state dispute resolution providers, as the latter possess superior local knowledge and evidence-gathering capacity. More specifically, many judges appear reluctant to rely on the sort of oral evidence on which land cases, particularly in rural areas tend to rest, therefore they prefer leaving the decisions to be made by the non-state actors.

#### *Timelines of the dispute resolution system*

The Civil Procedure Code of 1990 prescribes a time period of roughly 8 months from the filing of a lawsuit until its final resolution at the Supreme Court level: 2 months from the initiation of the lawsuit to its resolution in the court of first instance (Art. 200 Civil Procedure Code); 1 month in which to file an appeal (Art. 365 Civil Procedure Code); “final appeal” not more than 2 months after primary court judgment (Art. 437 Civil Procedure Code); and the Supreme Court may take up to three months to issue a judgment after it has received the objection of one of the parties (Art. 489 Civil Procedure Code). However, the reality differs from the legal prescriptions<sup>375</sup>.

The time to file a first appeal, and the time for the court to consider that appeal seem to run concurrently: thus, a party who waits two weeks to file an appeal will have left the court with two fewer weeks to consider his objection (see Art. 200 Civil Procedure Code). In turn, the Civil Procedure Code at Art. 437 appears to refer to the consideration of courts of appeal as the “final appeal”, while nevertheless later prescribing Supreme Court processes. And, finally, the Civil Procedure Code, at Art. 437 et seq., does not appear to specify any time limit for the filing of an appeal before the Supreme Court, after having received judgment from an appellate court. When combined with provisions explicitly conferring discretion on courts to lengthen the time for certain filings (e.g., Art. 201 giving

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<sup>371</sup> “Major Land Disputes and Land Titling Systems of Khost Province: Implications for Collaboration between Traditional Dispute Resolution Mechanisms and ARAZI” (Kabul, The Liaison Office, 2014); representative of NRC, pers. comm., 16 March 2015; and Afghan civil society actor, pers. comm., 18 March 2015.

<sup>372</sup> See The Liaison Office, “Formal and Informal Justice in Paktia and Nangarhar: a TLO Working Paper” (noting especially a high number of land conflicts in the court of Mohmand Dara district); and The Liaison Office, “Formal and Informal Justice in Southern Afghanistan: Evidence from Helmand, Uruzgan, and Nimruz” (noting that the court of Grishk district appears to hear exclusively criminal matters).

<sup>373</sup> Interview with a non-state community leader, Herat, PD 15, 14 June 2014 (estimating 50% of land disputes in his area are addressed to the court); interview with a non-state community leader, Herat, PD 5, 15 June 2014 (estimating 40% of disputes in his area are addressed to the court).

<sup>374</sup> E.g., Interview with a non-state community leader, Guzara District, Herat, 21 June 2014 (estimating only 2% of land disputes in his area are resolved through the court); interview with a non-state community leader, Balkh, Shor Tepa District, 15 June 2014 (estimating a “very small” percentage of disputes in his area are addressed to the court); interview with a non-state community leader, Arghandab, Kandahar, June 8, 2014 (likewise estimating 80% of disputes in his area were resolved via non-state authorities)

<sup>375</sup> For example, in 2012 there were 3,992 land cases referred to the Huqooq Department. Only 5% were resolved in the same year (“Report of the Public Inquiry into Land Usurpation,” Independent Joint Anti-Corruption Monitoring and Evaluation Committee, 2014).

the court of first instance the ability to lengthen time to file an objection to be considered on appeal), significant ambiguity might exist for however long primary and appellate court procedures are to take.

With that said, the most straightforward reading of these provisions would suggest primary and appellate judicial processes (except perhaps for a ruling from the Supreme Court) taking place within more or less one year after the initiation of a claim. In reality, judicial proceedings seem to rarely conclude in this amount of time. Both state officials and dispute parties describe resolution within 3-5 years as more typical, with the resolution in the first instance court taking place approximately within one year or 18 months, however varying from province to province and district to district. In Kabul the time to reach the decision in the court of first instance seem to be approximately one year for most of the cases, whereas in other provinces the closing of a case might take longer. According to the information from the Norwegian Refugee Council (NRC), the land disputes take up to 3 years to resolve (including other than first instance courts) in the formal sector. Generally it takes a shorter time in the informal sector; while the average number of days it takes NRC to resolve a case is currently about 390 days<sup>376</sup>. Indeed, respondents for a great range of studies have identified the length of court proceedings as a primary reason to avoid them<sup>377</sup>.

Several factors appear to increase the length of court proceedings. Firstly, the adversarial court proceedings disrupt community relations and relations between plaintiff and defendant, triggering a sort of (non-violent) cycle of revenge. This phenomenon obviously increases length, but would not necessarily account for exceeding statutory maximum periods at each level of adjudication. Secondly, courts often mention a big workload and report an inability to adjudicate in a timely manner. Many sources also report courts delaying proceedings in lieu of bribes, although, as with information on corruption more generally, this is very difficult to substantiate and cannot be taken at face value, as parties unfamiliar with the legal system might conflate full procedural due process with bribe-seeking delay. At the least, the perception that courts delay processes in an attempt to extract bribes is quite widespread, and probably influences how parties interact with the court system.

There appear to be relatively small number of long-standing conflicts lasting longer than 5 years in Afghanistan. Although the nationwide data on this indicator does not exist, the case studies from Kunduz and Khost, as well as personal communication with NRC and GIZ, can serve as an anecdotal evidence.

Our research has uncovered few land disputes remaining in government instances for this length of time.<sup>378</sup> As mentioned above, most of the land disputes spend approximately three years in the formal system, while outside of formal system it is generally less<sup>379</sup>. However, this should not be taken as evidence of an absence of long-term land disputes in Afghanistan<sup>380</sup>. Rather, Afghanistan witnesses a profusion of long-term land disputes, of decades, or even over a century, in length, while the disputes typically cycle through a series of government and non-government forums, not remaining with any one forum for the length of time implicated in this indicator. However, one should also not take the absence of long-term disputes in government forums as evidence of these forums' efficiency. If a

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<sup>376</sup>Representative of NRC, pers. comm., 16 March 2015.

<sup>377</sup>See for instance The Liaison Office, "Major Land Disputes and Land Titling Systems of Khost Province" (Kabul: The Liaison Office & USIP, 2014) (forthcoming), The Liaison Office, "Justice and Security: Practices, Perceptions, and Problems in Kabul and Nangarhar" (Kabul: The Liaison Office and Cordaid, forthcoming 2014); interview with a non-state community leader, Daman District, Kandahar, 3 July 2014; interview with a non-state community leader, Kabul, PD 13, 25 June 2014.

<sup>378</sup>See, e.g., "Major Land Disputes and Land Titling Systems of Khost Province" (Kabul: The Liaison Office & USIP, forthcoming 2014) (detailing land disputes cycling through a variety of dispute resolution forums over time); "USAID Country Profile: Property Rights and Resource Governance: Afghanistan" (Washington, DC: United States Agency for International Development, undated [post-2010]) (noting a high incidence of land disputes; a profusion of forums addressing them; and that government institutions are playing a limited role).

<sup>379</sup>Representative of NRC, pers. comm., 16 March 2015.

<sup>380</sup>We are using the word "disputes" rather than "cases" in this report because the word "case" refers to a dispute presented to one instance (e.g., court) and the period between the opening and the closure of the case (not necessarily meaning that the dispute was resolved). In Afghanistan, "dispute" is more accurate word to be used due to the fact that the disputes move from one instance to another without being resolved for long periods of time.

government (or other) forum does not prove efficient, parties usually remove their cases from that forum.

In urban areas, disputes of such a character lasting longer than five years tend to relate to land distributions, settlements, or acquisitions that local parties allege to have been fraudulent. First, those local residents alleging displacement might seek to confront the power-holder<sup>381</sup> and re-acquire their land. Because of the extreme power differential between the two power-holders and the persons displaced, this sort of dispute tends to remain sub rosa, with displaced persons waiting for more favorable circumstances to confront the power-holder directly - thus lengthening the dispute. Second, especially in crowded peri-urban areas, the interests of power-holders might overlap. In these instances, power-holders will among themselves dispute the ownership of the land. Because each party possesses substantial resources, they do not necessarily have strong incentives to resolve the dispute quickly. Third, displaced residents might have a land dispute with those persons who acquired the land from the power-holder. Here, current residents have in some cases actually followed proper procedures in acquiring their land, and possess legally valid land title (even as those persons originally displaced might also have legally valid title). In other cases, current residents will continue to enjoy the protection or patronage of the power-holder from whom they acquired their land. Either of these circumstances might account for the lengthening of the dispute.

Long-term disputes in rural areas usually present a different set of circumstances. These disputes often take place between groups of persons, for example tribes or villages. They also often implicate off-farm resources, such as pastures or forests. In these cases, the disputants will often both be located adjacent to the disputed land, or will have habitually used it (e.g., for the gathering of firewood) in the past. Periodic clashes over this land, with attendant short-term resolutions, might have taken place for years, if not decades, with the dispute going through hot and cold phases. As such, outside observers might more accurately characterise the dispute in question as a rivalry between the groups, i.e., one of several ways in which these groups compete. Each party in turn possesses enough other resources that they prefer not to risk losing standing in the community by giving up the dispute. In some of these long-term land cases, third parties will themselves intervene as mediators. But such intervention tends to occur only if the dispute is manifesting in a way that tends to destabilise the broader area.

Recent research in the southeastern province of Khost, for instance, indicates that some of the major inter-tribal land conflicts in the area have been ongoing for decades, with tensions periodically reigniting over the extension of traditional boundaries of territories tribes consider as their own, the use of natural resources, or construction over contested land. These conflicts however, are only occasionally introduced to the formal system - notably as most take place over land legally owned by the government. The rising price of land, the value of resources available on it, tribal rivalries and a history of violence contribute to complicating the resolution of the conflict. Similar trends have been observed in other areas in the southeast, notably in Paktika and Paktia, and there are strong indications that the existence of protracted inter-communal conflicts, fuelled by historical rivalries, is a likely phenomenon across rural Afghanistan. Another notorious example is the decades-long conflict between Hazaras and Kuchi tribes in the Hazarajat.<sup>382</sup>

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<sup>381</sup>The influential person either from the political, social or military status point of view in a particular area such as warlords, strongme, etc.

<sup>382</sup> See, among others, Foschini, "Social Wandering."

## 9.9 Review of Institutional Arrangements and Policies

PANEL 9: Institutional Arrangements and Policies					
LGI 1: Clarity of Mandates and Practice					
9	1	1	Land policy formulation, implementation and arbitration are separated to avoid conflict of interest.		
9	1	2	Responsibilities of the ministries and agencies dealing with land do not overlap (horizontal overlap).		
9	1	3	Administrative (vertical) overlap is avoided.		
9	1	4	Land right and use information is shared by public bodies; key parts are regularly reported on and publicly accessible.		
9	1	5	Overlaps of rights (based on tenure typology) are minimal and do not cause friction or dispute.		
9	1	6	Ambiguity in institutional mandates (based on institutional map) does not cause problems.		
LGI 2: Equity and Non-discrimination in the Decision-making Process					
9	2	1	Land policies and regulations are developed in a participatory manner involving all relevant stakeholders.		
9	2	2	Land policies address equity and poverty reduction goals; progress towards these is publicly monitored.		
9	2	3	Land policies address ecological and environmental goals; progress towards these is publicly monitored.		
9	2	4	The implementation of land policy is costed, matched with benefits and adequately resourced.		
9	2	5	There is regular and public reporting indicating progress in policy implementation.		
9	2	6	Land policies help to improve land use by low-income groups and those who experienced injustice.		
9	2	7	Land policies proactively and effectively reduce future disaster risk.		

### Clarity of mandates and practice

#### ***Separation of policy formulation, implementation and arbitration - possible overlaps***

Despite the uncertain status of the Land Management Law of 2008<sup>383</sup>, it remains the primary legal reference for issues related to the division of land policy formulation, implementation and arbitration. Policy formulation rests with the Ministries and ARAZI for the development of proposals, the President, the Council of Ministers, High Council on Water and Land and the Parliament for approval and amendments. Implementation differs according to the legislation but is most commonly the responsibility of the ministries, ARAZI and/or the local municipalities. The Law further details in Articles 13-28, the arbitration system for land conflicts. The responsibility rested with the Ministry of Agriculture and Livestock (Article 13) until a 2013 cabinet decision shifted the responsibility to ARAZI as the government representative. ‘Practical work’ (not further defined) related to arbitration of land issues rests with the ‘Settlement Commission’, which has not yet been established..Furthermore, the courts also adjudicate the land disputes.

Having said that, ARAZI figures in policy formulation, implementation and arbitration. With the decision of Council of Ministers 23 of 2009 and 11 of May 2013, ARAZI is aiming to become an independent “one-stop-shop” for land issues in Afghanistan. However, concentrating all the responsibilities for land issues in ARAZI, although making the administrative procedures more effective and management of land issues more coordinated, risks to blur the lines between land policy formulation, implementation and arbitration. Additionally, ARAZI makes decisions about both the leasing of the state land, as well as it is responsible for its monitoring. This significantly compromises the impartiality of the monitoring.

<sup>383</sup>Wily, “Land Governance at the Crossroads,” 4.

Furthermore, greater clarity over the role over dispute resolution between ARAZI, courts, Huqooq and other dispute resolution bodies is needed. ARAZI's Department of Addressing Land Disputes provides necessary documentation when a case comes before a court. Additionally, it can informally resolve the dispute, which is then recorded at ARAZI. This adds to the myriad of conflict resolution bodies existing in Afghanistan creating further complexity to the arbitration mechanisms.

Secondly, the President enjoys great decision-making powers over land issues. Decisions on distribution and donations of state land to disadvantaged people, on transfer of arid and virgin lands, on conducting land surveys and making the information public (national or on demand) and on exceptional cases of acquisition of public lands are contingent upon his approval.

Thirdly, the policy formulation and its implementation is further very much fluid in the responsibilities of the municipalities. The 'control and supervision of implementation of Master Plans is the responsibility of Master Plan designer (MUDA) and municipalities'<sup>384</sup> as a joint task, while the implementation of the plan is fully under the responsibility of the municipality. The obvious legal issue existing here is that the implementing body- municipalities - is also responsible for their own control and supervision. This becomes further muddled when looking more carefully at the Municipality law, which notes, that '[m]unicipalities can formulate their own Master Plan and submit them for Government approval'<sup>385</sup>.

Finally, a perceived conflict of interest exists between courts administrative function of registering land and providing the formal title deeds and judicial function of resolving land related disputes. Currently, ARAZI is working together with the President, Vice President, MoF on the mechanism of transfer of administrative responsibilities to ARAZI.

Horizontal overlaps also exist between authorities dealing with land governance. As "[t]here is no 'Ministry of Lands' to lead, coordinate or monitor ... [administrative responsibilities] are dispersed among ministries and municipalities'<sup>386</sup>. The High Council on Land and Water, chaired by the President and comprising of 16 members from all institutions dealing with the land governance was established to this end. Being it only a couple months of its establishment, the results of this coordination body remain to be seen.

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<sup>384</sup>Wily, "Land Governance at the Crossroads," 19.

<sup>385</sup>Wily, "Land Governance at the Crossroads," 8.

<sup>386</sup>Wily, "Land and the Constitution: Current Land Issues in Afghanistan", (Kabul: Afghanistan Research and Evaluation Unit, 2003), 3.

In urban setting, significant horizontal overlap exists between the Ministry of Urban Development Affairs (MUDA) and local municipalities, leaving processes applied by the institutions without integration. The process of urban expansion and infrastructure development is shared between local urban municipalities (Kabul, Jalalabad, Kandahar, etc.) as well as the MUDA, formally tasked with developing urban policy for the country. Actual collaboration has developed informally and depends heavily on the individual municipal and ministerial objectives and ideologies. When shared ideology and objective is weak, urban expansion and infrastructure development remains primarily outside of the formal realm. Planning objectives differ by municipality and the MUDA, with no specific planning objective existing across the board in either group. Objectives remain overly individualised and often in conflict with one another, resulting in numerous stalemates in policy planning. However, certain efforts are being made to rectify this. In 2011, for instance, the MUDA signed an MoU with the Independent Directorate of Local Governance accompanied by a 2012 technical MoU. The joint MoUs agreed to cooperate on a number of important land issues, including meeting the basic needs of the urban sector, improvement policy enforcement, and updating the master plans of the largest cities in the country (Kunduz, Kandahar, Herat, Jalalabad, Mazar-e Sharif) with the notable exception of Kabul. The clarification of roles between the actors and commitment to improve cooperation on specific actions is a positive step towards reduced horizontal overlap.

In rural areas, the main actors - the MRRD and MAIL - have a track record of impressive cooperation and little horizontal overlap. While programming may occasionally diverge, cooperation exists (i.e., MAIL relies heavily on the MRRD-initiated NSP to implement some of its local agricultural and irrigation projects). The MRRD and MAIL not only rely on each other for technical assistance, and on-the-ground support, but also cooperate on projects in agricultural development in rural areas (with grants offered to NABDP through MAIL for livestock projects) without significant issue. Nevertheless, the level of cooperation between government line departments in rural areas is highly based on their individual capacity and technical knowledge. Cooperation exists in some areas between government line ministries whereas, in other areas, competition and a lack of cooperation exist between agencies.

Despite the current overlap that exists, promising strides have been made through the establishment of the Afghanistan Independent Land Authority (ARAZI) and High Council on Land and Water. ARAZI's current main purpose is to address the very overlaps listed here on the issues of land. A gradual evolution of ARAZI from an inter-ministerial institution to an independent institution from 2007 to 2013 marks a promising achievement in enabling the authority to tackle all relevant land issues in rural and urban areas. ARAZI currently reports directly to the Presidential Office in order to streamline decisions and efforts.

High Council on Land and Water, mentioned above, is chaired by the President and has members - Afghanistan CEO, Special Senior Advisor to the President on reform and good governance, MoF, MoJ, MUDA, MoFA, MAIL, MoWE, MRRD, Ministry of Economy and Industry, IDLG, NEPA, Ministry of Mines and Petroleum, ARAZI CEO, President's Advisor on Agriculture, Afghanistan Chamber of Commerce and Industries (ACCI), Administrative Office of the President, Central Statistics Organization, representative of civil society. Its main aim is to coordinate between various land administration agencies and approve and monitor the implementation of their policies.

To sum up, a high degree of autonomy among municipalities, tensions between and within ministries and the overly centralised legal framework results in significant conflicts of role between public institutions that work on land issues. The blurred lines between their responsibilities open a window for the relevant public institutions to blame each other and to defer responsibility of real issues. The autonomy also gives way to conflicts of interest, corruption, nepotism and bribery. Because the roles of public institutions are unclear, it further becomes easier to sidestep responsibility in front of the public eye, with intra-government bodies deferring blame or responsibility for action (in i.e., the upgrading of infrastructure in communities) to one another.

In terms of vertical overlap, Afghan government offices are highly hierarchical. While overlap exists horizontally between departments and agencies, administrative - or vertical - overlap is avoided. Clear organisation hierarchies exist with well-established division of labor. Some duplication of responsibilities and lack of information sharing exists due to excessive bureaucracy, but roles are generally well separated. Organisational structures are top-down pyramids with headquarter offices, regional coordination offices and provincial management units. The field staff reports to provincial staff, they report to regional staff, who then report to headquarters. The management and implementation structure thus generally lacks overlap of responsibilities and focuses on clear role delineation between bodies.

#### ***Public accessibility and reporting on land right and use information***

In section 9.6. we were talking about public accessibility of land information that is scattered across various land administration institutions. Although available to individuals, complicated, costly and time-consuming processes (in particular in courts), renders the access to information difficult for private persons. Due to better social networks and leverage, government officials can access information lot easier, even when requiring the information as private, not public persons, for their personal use. Lacking an adequate data collection and established linkages between various land governance institutions though, is making the process of information sharing difficult. As such, various land registries are for most part not interconnected, creating major overlaps in certain types of information, however gaps in other. Land information is not widely publicly available, mostly limited to the owners of the particular land; third persons are mostly not provided the access to information. Information on state land is particularly well protected and certainly not publicly available. Finally, no reporting on land rights and use by public institutions exists in Afghanistan.

#### ***Overlaps on right based on tenure typology***

Private ownership of land was introduced under the reign of King Amanullah Khan (1919 - 1929) as part of a greater effort towards tax regularisation<sup>387</sup>. Since then, the legal framework on right to land and property has been severely disrupted with overlapping regulations, the existence of long-standing informal settlements in urban centers, and mass internal and external migration which has led to multiple (equally legitimate) owners to a single piece of land or property. Three primary types of ownership can be identified: (1) private ownership, (2) state ownership, (3) public ownership. These types of ownership are well differentiated, with the exception of public land, already mentioned in this report.

Duplicate ownership issues can arise in various situations such as former refugees returning to Afghanistan only to find out that somebody else uses the land. Both sides have the legal document of some sort proving the ownership leaving them with seemingly equal rights to the land. In other instances, perhaps different courts issue title deeds to two different families due to the unavailability of records or simply the corruption. While many histories exist in the realm of duplicate ownership, what remains is that the issue has not been resolved in a comprehensive manner, with the government often opting to handle the issue on a case-by-case basis within the formal or informal justice sector.

#### **Equity and non-discrimination in the decision-making process**

#### ***Development of land policies - stakeholders involvement***

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<sup>387</sup> Jawad Peikar, "Historic and current intuitional developments in Afghanistan's land sector" (Kabul: Afghanistan's Independent Land Authority, 2014), paper presented at 2014 World Bank Conference on Land and Poverty, Washington, D.C., 24-27 March 2014, 7.

Following the establishment of the goal to develop a national land policy in the Afghanistan National Development Strategy (Volume 1, item 14), the National Land Policy was adopted in 2007 after extensive but informal consultations with public institutions over a two-year period<sup>388</sup>. No formal public consultations took place during the development of the Land Policy. Nevertheless, the contents of the policy are largely considered to hold up to international best practices<sup>389</sup>. The inter-ministerial working group tasked with the policy development was chaired by a representative from the MAIL with participation from the MoJ and MUDA<sup>390</sup>. It was signed jointly by the Minister of Agriculture, Minister of Urban Development and Minister of Justice<sup>391</sup>. Following the initial signing of the draft land policy, six working groups consisting of the representatives of above mentioned ministries on Land Law, Land Registration, Land Dispute and Adjudication, Land Grabbing, Informal Settlements and Rangeland and Forests were established to review elements of the land policy and prioritize its activities<sup>392</sup>. The Land Policy required changes in the legal framework, noting even in the policy document that ‘land management in Afghanistan is governed by an ineffectual and inadequate legal framework’<sup>393</sup>.

Most of the pledges of the National Land Policy of 2007 have not yet been ‘absorbed’<sup>394</sup> into the legal framework of the country. The ‘current legal framework still has remnants of past land rights reforms’ and ‘customary law ... remains poorly integrated with formal law and policy’<sup>395</sup>. The Land Policy, while developed in a semi-participatory manner (only among public institutions) has been left without a matching legal framework to support it, and thus remains as an aspirational reference document.

The regulations related to urban and rural land were developed in top-down manner with little to no input from the general public, the issue exacerbated by the fact that public institutions are not required by law to consult the public. The lack of a requirement translates to a lack of action, and the most relevant actors - the affected public - are often left out of the consultation and drafting process. The affected public may be involved in small-scale rural projects (i.e., through the NSP) but they are not widely included in the process of drafting regulations related to the programs themselves. This is particularly visible in the case of urban planning where the on-the-ground realities of cities like Kabul are not considered in drafting plans.

### ***Equity and poverty reduction in land policies - public monitoring***

Some sections of the National Land Policy pay homage to international sources (i.e., Article 17 of the Universal Declaration of Human Rights, which notes that ‘Everyone has the right to own property alone as well as in association with others’ and ‘No one shall be arbitrarily deprived of his property’), as well as to the Constitution (which is not only explicitly evoked in the land policy but also whose language from Articles 40 and 41 below, are visible in the land policy.

Article 40 of Afghan Constitution states that the “Property shall be safe from violation. No one shall be forbidden from owning property and acquiring it, unless limited by the provisions of law. No one’s property shall be confiscated without the order of the law and decision of an authoritative court. Acquisition of private property shall be legally permitted only for the sake of public interests, and in exchange for prior and just compensation. Search and disclosure of private property shall be carried out in accordance with provisions of the law.”

Similarly, the National Land Policy is a “flexible, equitable and transparent policy that serves the diverse interests of the Afghan society”<sup>396</sup>. It stipulates that all Afghans should have the opportunity to legally access land resources and the right to maximise their social welfare. No individual or group

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<sup>388</sup>Wily, “Land Governance at the Crossroads,” 9.

<sup>389</sup>Ibid, 9.

<sup>390</sup>“Islamic Republic of Afghanistan: Capacity Building in Land Policy and Administrative Reform”(Scanagi Denmark A-S, Asian Development Bank, 2007).

<sup>391</sup>Ibid, 39.

<sup>392</sup>Ibid, 39-42.

<sup>393</sup>*Rationale for a Land Policy*, Draft Land Policy, 2007 (SY 1386), Government of the Islamic Republic of Afghanistan, 1.1.

<sup>394</sup>Wily, “Land Governance at the Crossroads,” 1.

<sup>395</sup>Ibid, 1.

<sup>396</sup> Article 1.4.1. of National Land Policy 2007.

should be barred from ownership. Additionally it says that the “Transparency, accountability and community participation are critical for effective land administration and must be applied at all levels, from communities to the highest levels of government. Local communities must take responsibility and the government must acknowledge its role to serve the people.” Finally, the policy also aims to address a portion of the citizenry’s most pressing concerns by allowing for the formalisation of land rights in informal settlements. The policy notes the following objective in Art. 1.3: “Ensure that land markets are efficient, equitable, environmentally sound and sustainable to improve productivity and alleviate poverty”.

Additionally, the land policy aims to support the poor and marginalised in Afghanistan. It makes special mention of landless farm workers (Art. 2.3.2), recognising that “poor farmers have mortgaged their land in such a manner that their livelihood and land ownership is at risk” (Art. 2.3.2). It further notes that the land market does not operate to the benefit of all citizens (Art. 3.1.3), explaining that “people with limited financial resources find themselves excluded from acquiring land through purchases” and that the “poor must be able to access land markets” (Art. 3.1.3). It upholds an overall principle to “protect the poor” (Art. 1.4.14) and allow for greater inclusion and equitably targeting the poor and marginalised in land affairs.

While the policy is generally intended to alleviate poverty and increase equity among citizens of Afghanistan, the goals of the policy have not been sufficiently incorporated into the legal framework, nor have the monitoring mechanism put in place to measure those.

The Land Management Law of 2008, for instance, is not pro-poor apart from an indirect mention in its objectives to the poor and marginalised, stating that it aims to provide “opportunity for people to access land” (Article 2). However, neither the Law’s section on restitution (Chapter 4) nor its section on state commitment to the poor is noticeably pro-poor. The section on restitution containing a government obligation to allocate lands to the poor was removed from the 2008 LML, the definition of eligible persons to include large landowners was expanded and remained “silent on the need to include urban dwellers in need of housing in its purview”<sup>397</sup>. It also provides no support for informal dispute resolution (an important avenue for resolution among the poor who may not be able to afford to resolve problems in court), and the poor and marginalised are never directly mentioned in the law. Other laws, including the Presidential Decree #104, which legalised the distribution of land to IDPs and returnees, have simply not been successfully implemented.

Additionally, existing land laws have been inconsistent on the issue of discrimination against women and girls. Women and girls, often deprived of their inheritance rights to land and property (although the Article 40 of Afghan Constitution is stating their right to inheritance), are left without sufficient protection. They are further more vulnerable to domestic violence within greater conflicts on land. However, some notable attempts of incorporation of the Land Policy of 2007 and rectification of the women equity have been made. The Elimination of Violence against Women (EVAW) law was decreed in 2009 aiming to protect property rights of women. Additionally, ARAZI have conducted a review of the Land Management Law of 2008 in light of the policy of 2007, and developed a series of proposed amendments<sup>398</sup>. The draft amendments are expected to go to Parliament for review in 2015, however it did not happen until now.

### ***Ecological and environmental goals of land policies - public monitoring***

The Land Policy notes in its objectives (Art. 1.3) to develop the “land markets [that] are efficient, equitable, *environmentally sound* and sustainable to improve productivity and alleviate poverty”. It further recognizes the dangers to the environment in informal and unplanned developments (Art. 2.2.4), noting that the “relevant municipality in consultation with the Ministry of Urban Development shall determine the habitability of an area taking into account clearly defined environmental and planning criteria...” (Art. 2.2.4). It prioritises environmental protection (Art. 2.2.6), noting it as a primary issue (Art. 3.1.9).

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<sup>397</sup>Wily, “Land Governance at the Crossroads,” 29.

<sup>398</sup>Jawad Peikar, “Historic and current intuitional developments in Afghanistan’s land sector” (Kabul: Afghanistan’s Independent Land Authority, 2014), paper presented at 2014 World Bank Conference on Land and Poverty, Washington, D.C., 24-27 March 2014, 15.

A whole section in the National Land Policy is dedicated to environmental sustainability. It stipulates that “Land management systems have not traditionally assigned priority to environmental issues with regard to the sustainability of natural resources including forest conservation and prevention of desertification. Degradation of land, from overgrazing, lack of flood controls, poor mining techniques, deforestation, to name only a few has negatively impacted Afghanistan’s greatest natural resource. Environmental protection campaigns are most successful when supported and implemented by the general public, however public awareness of environmental issues is negligible.” (Art. 3.1.9). Further the policy explains that “It is national policy that land is a natural resource and fundamental to the livelihoods of our people which shall be protected for present and future generations. Land management issues shall consider the environmental impact in all aspects related to land use, regulation, allocation, resource use and management.” Also “It is national policy that a campaign of public awareness be initiated to ensure that all citizens develop a level of environmental awareness in order to support and implement environmental protection measures, individually, at the community and national level.”

In practice, however, the similar issue as with the equity and poverty reduction goals happens. While the land policy addresses ecological and environmental goals and concerns, the policy lacks corresponding laws to ensure proper implementation and contains no provisions for public monitoring. In practice, the environmental and ecological concerns are typically overlooked by government agencies and private individuals in the interest of other objectives (such as construction and expansion).

#### ***Budgeting and adequate resources for land policies***

The communication with the MoF in terms of the financial resources needed has been limited or non-existent in the drafting of policies resulting in the absence of a cost-benefit analysis or accompanying review of resources and institutional capacity for the implementation. Additionally, the donor priorities lie in other sectors such as security and health, not providing adequate resourcing opportunities for Afghan land administration. Therefore the land policies in Afghanistan are not properly costed and lack adequate financial resources for their implementation.

#### ***Public reporting on progress in policy implementation***

The Land Policy was drafted to “serve as a general guidance to inform the revision and modification of the legal framework for land”, aiming to encourage the Ministry of Agriculture, Irrigation and Livestock as well as the Ministry of Urban Development to “formulate or adjust their strategies and plans of action to tackle challenges”<sup>399</sup>. While ARAZI has used the Land Policy (among other documents and information from consultations) to develop draft amendments to the Land Management Law of 2008, the amendments have not yet been reviewed by Parliament<sup>400</sup>. Neither the Land Management Law of 2008 nor the Land Policy of 2007, however, contains a requirement for public reporting indicating process of implementation.

Public reporting has thus far occurred at the initiative of the relevant government agencies. Furthermore, challenges related to high rates of administrative corruption and an overly centralised bureaucracy further limit the public’s access to information.

#### ***Disaster Risk Reduction in land policies***

The National Land Policy makes significant strides in laying the foundation for disaster risk reduction (DDR) language in its text. Of utmost risk in Afghanistan is the threat of natural disasters such as floods, droughts and landslides. While the land policy does not mention disasters directly, section 2.2.4 indicates that land must be assessed to determine its habitability according to environmental criteria. It further indicates that “access to land resources (must) be clarified and secured as part of an integrated natural resource management” (Art. 2.2.6) to ensure environmental sustainability (Art. 3.1.9).

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<sup>399</sup>National Land Policy, Introduction.

<sup>400</sup>Jawad Peikar, “Historic and current intuitional developments,” 15.

While the section's focus is on environmental protection, clear linkages to disaster risk exist (i.e., reference to floor controls and mining techniques). However, the laws aiming to improve the disaster risk management have not been developed following the adoption of the National Land Policy.

Non-governmental organisations and the Afghanistan National Disaster Management Authority (ANDMA) have implemented most recent efforts related to DDR. Their efforts are of particular importance given that an estimated 250,000 Afghans suffer from natural disasters on an annual basis, with more than 23,000 displaced per year on average between 2008 and 2014<sup>401</sup>. Between 2000 and 2010, the top disasters that affected Afghanistan were droughts (in 2000, 2006 and 2008, affecting more than 4 million people) and a storm in 2008 that affected approximately 170,000 people<sup>402</sup>. Large DRR projects aim to mitigate the risks of disaster while building the capacity of ANDMA to undertake such work in the future. ANDMA has developed several guidelines, including:

- Disaster Management Plan for Herat Province
- Natural Disaster Mitigation Policy
- Disaster Response Procedures
- Policy and Coordination Guidelines on Formulation of National Disaster Management Plan

ANDMA's resources, however, remain severely limited with its practice thus containing corresponding limitations. Additionally, taking into account the fact that the Land Policy 2007 was not reflected in LML 2008, the policies that would reduce the risk of future disasters are virtually non-existent in Afghanistan.

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<sup>401</sup>“Major New Disaster Risk Management Program for Afghanistan”(International Organization for Migration, 10 March 2015), <http://afghanistan.iom.int/press-releases/major-new-disaster-risk-management-programme-afghanistan>

<sup>402</sup>Takeshi Komino, “Disaster Risk Reduction National Platform and Strategic National Action Plan in Afghanistan, in Civil Society Organization and Disaster Risk Reduction: The Asian Dilemma”(Tokyo: Springer, 2014), 30.

## 10. Policy Issues and Recommendations (per thematic area)

### Land Rights Recognition

#### *Recognition of continuum of rights*

The main issue in the recognition of rights in Afghanistan is the discrepancy between the existing legal framework and the reality of land tenure in the country, which is overwhelmingly informal. The tendency of current Afghan legal framework to prioritize landowners with formal documentation excludes the majority of Afghan population from ownership rights. Additionally, the lack of awareness of general public, as well as Afghan National Police and Army, on land issues and land rights contributes, in certain cases, to the limited land rights recognition in Afghanistan.

Article 5 of the LML of 2008 recognizes the validity of customary deeds under the condition that it was prepared and submitted before August 1975 and the land seller owns valid title deed. Additionally, customary deeds in order to be formally recognized have to contain all the details such as name and signature (or fingerprints) of the owner, signatures (or fingerprints) of witnesses, description of boundaries of the land, price and date. Although no comprehensive research of the customary deed documents was conducted for this study, based on the accounts of various technical experts involved in this project, the format of customary deed documents is not unified across the country and people have limited information what the customary deed document should entail. Thus the customary deed documents often lack all the necessary information.

In terms of undocumented rights, long term unchallenged possession is ensured in Art. 8 of LML 2008. The Art. 5 sets up certain requirements for the legal formalization of ownership limiting claims to land acquired after 1973. Considering the occurrence of wars in the period after 1973, this article is in reality of limited usage for those not possessing any (formal or customary) documentation.

Lastly, Afghan land laws do not protect collective ownership, very commonly used in Afghanistan.

Having said that, through the enactment of the LML 2008 and Presidential Decree 83 in 2003, which are strongly pro-formal ownership documentation and supersede all previous laws relevant to establishing ownership property rights including through customary documents, the majority of land in Afghanistan falls under state, depriving the majority of Afghans their rights to land tenure.

In urban setting, the tendency to prioritize formal ownership documentation has similar effects as in rural areas, however with some specificities. Due to the lack of tenure security combined with large influx of returnees and IDPs, the phenomenon of extensive land grabbing and irregularized building of informal settlements became very common practice in Afghan cities.

For the purposes of this report, we have defined indigenous tenure rights as rights of Kuchi nomadic and Jat communities to own and use the land, because due to overly informal tenure in Afghanistan and specific life style and social organization, the vast majority of population could be considered as indigenous in Afghanistan. Although some regulations exist in Afghan legal framework to provide ownership and user rights to nomadic communities<sup>403</sup>, in practice, when translated into state policies of settlement of nomadic tribes and land distribution plans, these efforts are often met with the resistance of local populations who are using the land and claim ownership over it. Consequently, Kuchi communities are not able to secure their tenure and user rights because of the contradicting claims over pastures.

The situation of Jat communities is distinct from that of Kuchis<sup>404</sup>. Considered as stateless, most are refused citizenship by the Afghan authorities. As such, studies indicate approximately 80% of households are not registered and do not hold any form of identification document, inhibiting, among

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<sup>403</sup> Article 14 of the 2004 Afghan Constitution provides for “improving ... the settlement and living conditions of nomads” and the Environment Law (2007) requires demarcation of “areas appropriate for use of pastoralists” (rangeland), including migration corridors, and consultation with nomadic communities in land use and resource management plans (Ch. 1).

<sup>404</sup> The categorization of Jats (also known as Jogi and Chori Frush) in an ethnic category is also contested, and the denominations “jat”, “Jogi” and “Chori Frush” are exogenous to the communities themselves. Cf. “Assessment of Out of School Children and Jogi communities,” (Kabul: Samuel Hall, UNICEF, 2011).

other things, their legal access to land ownership.

*Recommendations:*

a) Short term

- The minimal limit of continued ownership and cultivation of the land needed in order for the long term unchallenged possession be formally recognized should be decreased through the amendment of current LML.
- Customary deed documents prepared after August 1975 but otherwise meeting all the other requirements as per Art. 5 of LML 2008 should be formally recognized through the amendment of current LML.
- The provisions clarifying the status, legal recognition and ways of registration of collective rights should be amended in current LML.
- Awareness of public, Afghan National Police and Army on the land issues and land rights has to be increased. The land governance has to be included in the teaching and training curricula for these target groups.
- ARAZI's plans to initiate a telephone line that would allow people to call ARAZI, record their complaints and ask questions on different land issues such as how to record the land should be promptly materialized and adequately financed.
- The efforts of various NGOs (such as TLO and Checci) to capacitate Afghan citizens on what information a customary deed document should include in order for it to be formally recognized should be further enhanced involving the government in these efforts.
- As an interim measure, community-based land recording system should be developed, which will be later on connected to ARAZI registering system (when transferred from courts to ARAZI) and their Principal Books.
- Creation of centralized (gradually computerized) system at ARAZI as one-stop-shop for land registration.
- Relevant authorities should work together to operationalize already existing efforts to incorporate a provision on land usurpation into the Criminal Code. Where appropriate donors and civil society stakeholders should provide technical assistance to the drafting process.
- Approval and support of the draft Restitution Policy on Land Grabbing.
- Prosecution of land grabbers should be made a priority within the Attorney General's office. Similarly investigation and technical capacity to do so should be enhanced within the Afghan National Police (ANP) with the possibility to establish a special police force tasked with the protection of lands against the land grabbing.
- The Presidential Decree 104 enacted in 2005, which puts the provisions in place on the distribution of land for housing to eligible returnees and IDPs, and the National Policy on Internal Displacement, approved in November 2013, which addresses the right to adequate housing and access to land (Article 7.1.3), should be adequately implemented.
- Policy on Upgrading Informal Settlements, currently awaiting Cabinet approval, should be promptly enacted.
- The implementers of various upgrading projects (including NGO community) should create an adequate coordination mechanism to share the information and lessons learned. Municipality with technical support of international community should develop a database including all information about upgrading in each area, which will be publicly available on municipalities' website.

- The provisions of the Afghan Constitution and the Environment Law 2007 to give land user rights to nomadic communities should be promptly implemented, coupled with the capacity building of the local communities about the issues of settlement and usage of lands by the nomadic tribes. Community-based conflict resolution mechanisms should be used to solve the disputes between nomadic tribes and local communities unless involving criminal justice elements. If so, those cases should be immediately brought before courts for adequate dispute resolution.
- Prompt approval of the Draft Rangeland Law, which provides the framework for the management of private, community and public rangeland. In particular it states that nomadic or semi-nomadic people may acquire pastureland for grazing their livestock through application to the local authorities stating the need for land, and through the identification of vacant land (mawat).
- The request by ARAZI to establish a technical working group comprised of MAIL, MRRD, MEW, Independent Directorate of Kuchi Affairs and members of the Commission for Dispute Resolution for Kuchi and Nomad Affairs, the parliament and ARAZI to provide technical inputs on adequate solutions to the issues of Kuchi communities in Afghanistan should be promptly approved.

b) Long term

- Increase incentives for individuals in rural areas to formally record their title, for example by reducing costs associated with acquiring title, should be devised. Possible measures can include discounts for low-income individuals or vulnerable groups.

**Respect for enforcement of rights**

Although opportunities for tenure individualization exist (basically only through regular venues of land registration), they exhibit various challenges. There are two fully valid and third “provisional” possibilities of land registration in Afghanistan.

Registration in ARAZI Principal Books is one of the most valid types of registration in Afghanistan. Only way, how to get the land registered with ARAZI is through the land clearance process *Tasfia*. However, currently *Tasfia* is conducted only in cases when a major dispute over land exists, a big development or mining project is planned to be implemented, when land is located near the state land or when powerful people are involved. It is very difficult for ordinary Afghan citizens to get his/her land cleared by ARAZI, hence to be registered in it Principal Books.

Secondly, it is a registration and subsequent acquiring of the title deed at courts that is considered as a valid proof of ownership. Although the courts are legally bound to accept all the seven types of legal documents proving the ownership as listed in LML 2008, in current Afghan realities, often the judges refuse to accept the tax and water payment receipts, as well as *Sanad Rasmee Mulkyet* - documents proving the ownership during the period of the Democratic Republic of Afghanistan (1978 - 79) - because of fears of accepting forged documents.

Having said that, it is not possible in Afghanistan to formalize customary title deed without actually transacting (selling) the land or having the land cleared by *Tasfia* (which is virtually impossible). In other words, there is no mechanism established, where one could go and after meeting all the necessary requirements, the customary deed document will be turned to formal title deed. Only the buyer, buying the land based on the customary deed document of the seller after going through the court registration will acquire formal title deed. Similarly, land that went through the *Tasfia* will get registered in ARAZI Principal Books. Also, the process of formalizing of a long-term possession based on non-documentary evidence does not exist in Afghanistan. Similarly to the customary deed documents, one has to transact the land in order for the buyer to acquire formal title deed or the land has to go through *Tasfia* process.

Third way of having the land registered, however only “provisionally<sup>405</sup>” is cadastral survey. Last

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<sup>405</sup>Cadastral survey provides only “probable” proof of ownership.

national cadastral survey was conducted between 1970-78, while only 30% of land was surveyed. The records were not updated since then, except for additionally 4% of land surveyed in last 5 years, based on various presidential decrees. The surveying of Afghan land was suspended completely by the Presidential Decree 83 in 2003. Since then, it is possible for the individual to have his/her land surveyed on demand; however the approval of the ARAZI CEO is needed. In cases of large tracts of land such as whole villages, the approval of the President has to be sought. This is done by submitting a letter of request to the Administrative Office of the President. The fate of the approval usually rests with the amount of informal payments or number of personal connections. Additionally, due to high fees, when done on demand (2% of actual property value) and general reluctance during the Karzai regime to conduct the cadastral survey fearing the misuse of the land information, the land inventory happens rarely in Afghanistan.

Apart from the procedural problems mentioned above, one of other reasons mentioned for low registration and formalization is reportedly the widespread corruption of government institutions, which require the payment of bribes. According to agencies involved in addressing land issues, most rural residents prefer the use of customary deeds as the process for formalization and registration requires the payment of informal fees. Customary deeds are thus considered cheaper, do not require travelling to the nearest centre, and include little or no payment of debts<sup>406</sup>. Another reason mentioned was the perceived complexity of the administrative process. According to the World Bank Doing Business in Afghanistan report of 2015 it takes approximately 250-360 working days for the completion of land registration in Afghanistan<sup>407</sup>. Paying taxes also deter people from registering their property, in particular when adding the informal fees, which often have to be paid in addition to regular land taxes fees. People try to avoid paying taxes due to the lack of financial resources or because they do not believe that the government will spend the money to their benefit. Some high-ranking officials and rich people do not pay taxes knowing they will not be pursued. Finally, it is a limited knowledge of particularly rural Afghan population about their rights and the exact steps of the administrative process that can discourage them to register their property, although the limited knowledge in the context, when the rights to land are often not recognized, must be considered as a secondary factor.

The registration, or lack of thereof, is of particular importance. Studies found almost all land is registered in the name of the male head of household: less than 2% of women own land and most of those women are widows<sup>408</sup>. The reasons for this trend are strong social and customary barriers to property ownership by women, where patriarchal structures remain prevalent.

Due to the largely customary tenure of Afghan land with only minimal portion being recorded or mapped and high levels of corruption in formal system, the opportunities for illegal land transactions are enormous. Illegal land sales are most commonly known in Afghanistan as “land usurpation” or “land grabbing.” A recent report by Independent Joint Anti-Corruption Monitoring and Evaluation Committee identified that one of the most common means of land usurpation is forgery of documents.<sup>409</sup> In particular, forgeries carried out by court employees have been identified as one of the main forms of land usurpation. Despite the extensive nature of the problem, the current legal framework does not adequately address the crime of land grabbing.<sup>410</sup>

### *Recommendations*

#### a) Short term

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<sup>406</sup> Although the information on payments in informal system is difficult to acquire, this information is based on accounts of various technical experts involved in this study.

<sup>407</sup> “Registering property,” <http://www.doingbusiness.org/data/exploreeconomies/afghanistan/#registering-property> (accessed 4 September 2015).

<sup>408</sup> Wily, Land and the Constitution.”

<sup>409</sup> “Public Inquiry into Land Usurpation,” 9.

<sup>410</sup> See “Stolen Lands of Afghanistan,” 9.

- ARAZI's plans to implement National Demarcation Project identifying the boundaries of villages and *Gozars* (administrative units smaller than districts in urban areas) should be materialized. As a follow-up step the land clearance process on large scale should be restarted. The judge should be included in Tasfia delegation to deal with the land disputes, if necessary. In case of more complex land disputes, the fact that the ownership of land is disputed, should be indicated on the Tasfia report and forwarded to courts. Adequate financial resources should be allocated for this purpose from the national budget. The support in form of financial means, as well as technical expertise should be sought with international community and civil society.
- The possibility of a first-stage land clearance done by communities to enable nationwide land identification should be explored.
- The regulation proposed by ARAZI that allows for registering of urban properties should be approved promptly.
- Draft Customary Deed Registration Law, drafted by the Judicial Reform Commission in 2005, should be reviewed and approved, as well as new law, stipulating the possibilities of formalization of non-documentary land ownership evidence should be enacted.
- The process of gradual cadastral (or inventory) survey should be restarted, together with the land clearance process Tasfia on a large scale.
- As an interim step, the option should be explored to establish a community-based identification of the boundaries of the lands belonging to one community (e.g. village) together with the acceptance of judges to use these boundaries to locate the lands registered with courts and of ARAZI during Tasfia process.
- More information about the physical characteristics, type of the land, its exact location and a cadastral map (or sketch) should be included in formal and customary title deed documents to decrease the possibility of illegal land transactions.
- ARAZI should take over administrative responsibilities of establishing the title deeds of courts and become a one-stop-shop for the registration of private land. Simultaneously, the registration system should be replaced by a computerized one, including the GPS coordinates, GIS imaginary and the cadaster map. This will also enable to compare the names of the seller and buyers in previous transactions of the same plot of land to prevent the acceptance of forged documents<sup>411</sup>. Extensive public campaigns should be conducted to inform ordinary citizens about the new system and the steps required for registration of your property.
- The expenses for computerized registration system have to properly budgeted taking account the licensing fees.
- The benefits of collecting taxes for the community should be clearly communicated to the citizens, in particular in rural areas. The government has to assure proper spending of collected taxes back to the community. The plans for such public campaign were already planned by the MoF, however, they need to materialize.
- Awareness about legal provisions and women rights should be raised in particular within rural communities.
- ARAZI should take steps to facilitate increased registration of land by women by, for instance, providing discounts to women on the range of fees involved.

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<sup>411</sup> Although this technical solution to corruption might alleviate the low-level corruption, it might not prevent corruption linked to powerful and well-connected persons

- Relevant authorities should work together to operationalize the already existing efforts to incorporate a provision on land usurpation into the Criminal Code. Where appropriate donors and civil society stakeholders should provide technical assistance to the drafting process.
- Support the draft Restitution Policy on Land Grabbing.
- Prosecution of land grabbers should be made a priority within the Attorney General's office. Similarly investigation and technical capacity to do so should be enhanced within the Afghan National Police (ANP) with the possibility to establish a special police force tasked with the protection of lands against the land grabbing.

b) Long term

- Fighting corruption should become the priority of the NUG. The Anti-Corruption Strategy established by the President Karzai in 2008 should be implemented through the stronger engagement of the President himself and increased results-based support of the international donor community. Additionally, the past and yet unaddressed cases of corruption should be the priority of the Attorney's General Office.
- Courts should develop the technical capacity to detect forged documents and establish proper procedure of verification. Unless the document fails to pass the procedure, the judge has to recognize the validity of the document, as it is prescribed by the law. Failing to do so, penalties should be introduced. For this purpose, internal and external audits of the courts should be conducted on regular basis.
- Penalties should be developed in Afghan Criminal Code for those holding and/or developing forged documents.

### Right to Forest and Common Lands & Rural Land Use Regulations

#### *Rights to Forest and Common Land*

Although the identification of forests and their usage is clear in Afghan legal framework, in praxis, management of forests faces a number of issues. Lack of security and the inability of the government to implement rule of law throughout the country often leads to destruction of the forests, cutting down the trees, smuggling and conversion to residential areas.

Common lands are considered equal to public lands in Afghanistan, however, the current body of laws does not provide a clear definition of public lands. This is particularly problematic when it comes to the ownership rights of virgin and arid lands. Virgin and arid land can be a pastureland<sup>412</sup>, hence it cannot be sold nor leased<sup>413</sup>. However, based on the concurrent articles 46 - 49 of LML 2008, the state, providing certain conditions are met, can allocate and distribute arid and virgin land to individuals and other legal persons. In the current body of laws, it is not clear, which arid and virgin land is considered pasture land<sup>414</sup>, hence public land that cannot be sold nor leased, and which is considered state land that can indeed be distributed to individuals and other legal persons. Due the ambiguity of the definitions, although the Afghan legal code provides certain clarity in the relation to the access to key natural resources, in reality there are numerous conflicts over the usage of pasture and forest lands in Afghanistan.

Furthermore, no process of legal recognition of "the public" as an owner of public lands was established in Afghanistan. This means that even though the general understanding is that public lands are owned by the public, there is not legal way to prove that during *Tasfia* (land clearance) processes or before courts. Therefore according to the Art.2(8) LML 2008, stipulating that all the lands, which ownership cannot be legally proven, belong to state, all these lands legally belong to the state. Weak legal understanding of common property particularly undermines the interests of those who own small

<sup>412</sup>Based on the definition of pastureland in Art. 3(9) LML 2008

<sup>413</sup>LML 2008, Art. 82(1): "Pastures shall be kept unoccupied for the sake of public requirements of local villagers (for cattle grazing, graveyard, threshing ground and etc.)" and Pasture Law 2000, Art. 6: "Buying, selling and leasing a pasture is prohibited."

<sup>414</sup>Hence the very unclear definition of the pastureland in Art 3 (9.2).

farms or no farms at all. The rights of this group of people are endangered by people with influence and that legal standards are not able to protect their rights. Disputes over outlying lands such as rain-fed agricultural lands and pasturelands are commonplace, putting into conflict the rights of individuals versus the local population as well as the interests of different ethnic groups.<sup>415</sup>

Similarly to public land, collective property rights are not provided for in the current body of laws in Afghanistan, nor the definition of communal land exists. Even though the National Land Policy (2007) defines the term “community land”, this term is not embedded in any other existing law related to land management. It is only the Pasture Law 2000 that mentions the communal pastures (not communal land). Since the cadastral survey was conducted only on 34% of Afghan territory, while communal lands, nor pastures were identified, the boundaries are not clearly demarcated.

In terms of multiple rights over common and private lands, this is a regular occurrence in Afghanistan and the rights can legally coexist. Multiple venues (formal and informal) exist in case of disputes; however, there are numerous examples of lengthy and complicated unresolved disputes, raising questions about the efficiency of dispute resolution venues. Multiple rights over land and mining resources can also legally coexist in Afghanistan and the rights and obligations of the licence holder and the state (owner of the land) are stipulated clearly in Minerals Law 2015 including the dispute resolution mechanisms. Whether or not the government is able to implement the Minerals Law 2015 remains to be seen, however past experience illustrate the government’s inability to monitor the application of the mining contracts.

#### *Recommendations:*

##### a) Short term

- Identifying mechanisms to promote forest management in areas which are currently out of reach of the government such as developing and empowering community based adjudication groups (comprising of elders and influential figures in the community) to address rural land use restrictions’ violations. One possible option would be channelling the rural land management through CDCs.
- Raising awareness of the local population about the importance of forests and other natural resources and the negative impacts of deforestation in order to encourage communities to take part in maintaining the forests particularly in the areas where the presence of the central government is limited.
- Communities should be capacitated on the provisions of Water Law of 2009 stipulating their rights and obligations. District MAIL offices should ensure the adequate implementation of the law.
- Addressing contradictory legal codes in terms of definition of public lands including clear distinction between arid & virgin lands and pasturelands by approving existing new draft of LML developed by ARAZI and Pastureland Law by MAIL.
- The process for the recognition and most importantly registration of public lands has to be established to protect rights of public through amendment of current LML.
- The clarification of the status, recognition and ways of registration of collective rights should be embedded in Afghan legal framework through the amendment of current LML.
- Prompt approval of the draft Rangeland Law, which provides the framework for the management of private, community and public rangeland. In particular it states that nomadic or semi-nomadic people may acquire pastureland for grazing their livestock through application to the local authorities stating the need for land, and through the identification of vacant land (*mawat*).

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<sup>415</sup> Liz Alden Wily, “Looking for Peace on the Pastures,” (Kabul: Afghanistan Research and Evaluation Unit, 2004).

- Prompt approval of the request by ARAZI to establish a technical working group comprised of MAIL, MRRD, MEW, Independent Directorate of Kuchi Affairs and members of the Commission for Dispute Resolution for Kuchi and Nomad Affairs, the parliament and ARAZI to provide technical inputs to the adequate solutions of the issues of Kuchi communities in Afghanistan.
- The possibility of community-based pasture land administration (for example as used by RLAP or SALEH projects) should be considered, as well as reconsideration of the Land Administration Management Project (LAMP) prepared in cooperation with MAIL in 2007.
- Prioritizing the cadastral survey of disputed lands where interests of local communities are at stake. In the absence of a comprehensive survey, in the short -term combining satellite images with GPS coordinates is a cost-effective method to demarcate boundaries of communal pastures.
- Identifying mechanisms to promote protected areas management in areas which are currently out of reach of the government such as developing and empowering community based adjudication groups (comprising of elders and influential figures in the community) to address rural land use restrictions violations
- The process of gradual cadastral (or inventory) survey should be restarted, together with the land clearance process Tasfia on a large scale.
- Effective anti-corruption measures should be introduced and capacity-building programmes conducted for the judges and other court officials to prevent lengthy proceedings.
- Establishing clear monitoring system of application of mining contracts, with participation of local communities, under the auspices of the Ministry of Mines and Petroleum.

b) Long term

- Community discussion and dialogue regarding conflicts over access to natural resources should be encouraged. Traditional structures such as various tribal bodies and new structures such as community, district and provincial development councils can play an important role in this regard.

***Effectiveness and equity of rural land use regulations***

Although restrictions on rural land use are clearly stipulated in Afghan legal code, in practise, rural lands are often used for the purposes not specified by the law. Residential buildings, for instance, are not allowed to be built in disaster prone areas. However the monitoring of the compliance of these restrictions is not available. Due to unclear definitions of pastureland (and public land in general), as well as often illegal usage of rural lands including the forests, the transferability restrictions are not always enforced and followed either.

In terms of rural land use change, certain rural lands such as pastures, forests, agricultural land, protected areas and other public land<sup>416</sup>, the restrictions over their use change exist. In fact, the changes are not allowed in most of the cases according to the Afghan law. It is only arid and virgin land that can encounter the land use change, however no clear mechanism for this purpose exists. Finally, rural land use plans do not exist in Afghanistan to regulate the usage of rural lands.

Despite various efforts by MAIL such as National Resource Management Strategy launched in 2006, natural resources including forests, pastures and protected areas are affected by the lack of a comprehensive mechanism for effective and sustainable use of natural resources. For this purpose, programmes have been developed in 2014 to manage and protect natural resources in co-operation with the public so as to build community capacity in the area of sustainable utilisation, promote a sense of ownership among the people and motivate people to contribute to the survival of these resources. Communities and local governments, however, need further knowledge and skills through practical training for user communities, in order to develop their ability and capacity for the management of natural resources.

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<sup>416</sup> Please note the unclear definition of public land.

Afghanistan's protected areas require special attention here. Afghanistan has only two national parks and the suggestions for creation of more protected areas such as in Nuristan province, Badghis Forest and Buddha Monuments in Bamyan were put forth to NEPA in 2002, however still pending. Furthermore, the lack of enforcement of the protective regulations leads to the degradation of protected rural areas in Afghanistan and although the mechanism of conversion of land to protected area exists, it is cumbersome and takes long time.

*Recommendations:*

a) Short term

- Identifying mechanisms to promote forest management in areas which are currently out of reach of the government such as developing and empowering community based adjudication groups (comprising of elders and influential figures in the community) to address rural land use restrictions violations
- Raising awareness of the local population about the importance of forests and the negative impacts of deforestation in order to encourage communities to take part in maintain the forests particularly in the areas where the presence of the central government is limited.
- Prompt approval of the Draft Rangeland Law, which provides the framework for the management of private, community and public rangeland.
- Addressing contradictory legal codes in terms of definition of public lands including clear distinction between arid & virgin lands and pasturelands by approving new draft LML prepared by ARAZI and Rangeland Law prepared by MAIL.
- Clear mechanism for arid and virgin land use change should be established. The database should be developed within ARAZI to collect the data about the arid and virgin land use changes.
- Adequate monitoring mechanisms should be established to monitor the compliance with land use restrictions in disaster prone areas.
- Expediting the process of land change to protected areas by mainstreaming the steps and organizations responsible.
- Prioritizing surveying of natural resources identified as in high risk of degradation.

b) Long term

- Explore the possibilities of allowing for a clear, transparent and publicly accessible process of rural land use change for other types of rural land
- The development of the rural land use plans by the MRRD through the participatory and transparent process, where public voice can be heard and the burdens are shared.
- Increased human and financial resources to NEPA in order to be able to implement its policies regarding Afghan national parks and protected areas.

### **Urban Land Use, Planning and Development**

***Restrictions on rights***

Restrictions on the land use prescribed by the Kabul Master Plan are often not enforced. It is illegal to convert residential to industrial area or construct buildings on arable land. However, the rampant corruption in the ranks of government and land management authorities allows for uncontrolled usage of the land. Examples of informal settlements built on the mountain slopes within and at the outskirts of the cities is another example of the friction with urban use restrictions. Mountains and hills are considered pastureland, as such being for the usage of the public. By appropriating technically public land to private interests deprives other people from using the lands for grazing.

Although regulations on disaster risk management are developed on national level, these regulations are not specific to each municipality. Additionally, MUDA, municipalities and MAIL put limited efforts

to implement DRR policies. Although Kabul Municipality stated that efforts are currently underway to develop a policy on land use for disaster risk, they provided no further information.

Additionally, due to a thriving black market for looted historical and cultural artifacts coupled with generally poor enforcement of protection measures, much of Afghanistan's physical cultural heritage can be considered at risk. Such legal measures are key in providing a legal foundation for heritage protection. While natural heritage regulations exist in Afghanistan's urban areas, little focus has been put by the main urban actors - namely, the respective municipalities and representatives of the MUDA and MAIL - towards the actual implementation of disaster risk regulations due to a presumed lack of resources, high rates of corruption, focus on other issues (such as the lack of sufficient urban infrastructure) and so on.

Finally, urban planning particularly in Kabul is irregularized because the most current Third Master Plan for Kabul was abandoned on the request of MUDA by the Karzai administration; hence no Master Plan to regulate the urban development in Kabul exists. President Ghani's decree allowing no construction on arable land also complicates the urban expansion in major cities. Since certain arable lands are included in the city master plans dating sometimes 50 years back, the decree limits the implementation of the master plans.

#### *Recommendations:*

##### a) Short term

- Clear mechanism for use change of each type of urban land should be devised including the requirement of permits to do so. Municipalities should establish a monitoring mechanism for this purpose, as well as a database of land used changes, which will be updated regularly including new spatial information.
- Zoning Law both for national and municipal purposes should be enacted.
- Recourses must be allocated towards restrictions on urban land use related to disaster risk. Government personnel should be trained in not only managing disasters but also in taking preventive measures in light of the available laws and regulations. Long-term, systematic training is also required together with the future recruitment of new employees and their training.
- A feasibility study for different cities in Afghanistan should be undertaken by MUDA to identify the enforcement mechanisms of National Disaster Risk Strategy.
- A feasibility study for different cities in Afghanistan should be undertaken by MUDA to identify possible enforcement mechanisms for protection of Afghan cultural heritage and prevention of looting.
- Long awaited National Urban Policy and new Municipality Law has to be enacted.
- New Master Plans have to be developed for biggest cities in Afghanistan as per MUDAs commitments within "Big Cities Master Plan" initiative with the support of international community.
- By devising new master plans for the biggest cities, the issue of the ban on constructions on arable lands has to be taken into account and the provisions of the Master Plan should be written in line with the Presidential Decree.

##### b) Long term

- Public should be capacitated on community-based disaster risk preparedness.

### ***Transparency of land use restrictions***

The process of urban expansion and infrastructure development is shared between local urban municipalities (Kabul, Jalalabad, Kandahar, etc.) as well as the Ministry of Urban Development, formally tasked with developing urban policy for the country. However, due to unclear delineation of the responsibilities of these two main actors, actual collaboration has developed informally and depends heavily on the individual municipal and ministerial objectives and ideologies. When shared ideology and objective is weak, urban expansion and infrastructure development remains primarily outside of the formal realm. Planning objectives differ by municipality and MUDA, with no specific planning objective existing across the board in either group. Objectives remain overly individualized and often in conflict with one another, resulting in numerous stalemates in policy planning. In Kabul city, for instance, the responsibility is shared with the Municipality's Plan Implementation Office and the Ministry of Urban Development<sup>417</sup>. Due to a fundamental disagreement in the implementation of the third and final Master Plan of Kabul between the Office and the Ministry, partially upheld by the formal suspension of the Master Plan in 2005 through a Presidential Decree, urban expansion in Kabul is littered with irregularities. Despite efforts to develop a fourth plan, no plan for the urban space inside Kabul's city limits has been established<sup>418</sup>. Focus has instead been placed on developing legal mechanisms to change the urban landscape of Kabul, with a 2009 plan for urban expansion *outside* of the city ('Kabul Jadid' - New Kabul City) attempting to incentive Kabul residents to move outside of the city in hopes of reducing the population of the city to a more manageable amount. The lack of a legal framework has resulted in a process that lacks transparency and can be dismissive of the facts on the ground.

Formal planning mechanisms of the Ministry are to be shared with the public through official announcements, and through local authorities such as the municipality, respecting all citizen rights outlined in the Land Management Law of 2008, Constitution of Afghanistan and relevant articles in the Civil Code. However, the information is not always shared with public in consistent manner. While occasional announcements about urban expansion exist, these are limited to major urban changes (i.e. the release of the plans for the new Kabul city) and are generally not detailed. The public is generally unable to obtain more information about planned urban expansion without previously established social networks with individuals working in relevant municipal or ministerial departments. Most discussion on expansion and development thus remain inaccessible to the public. When people are not informed about the planned urban expansion, those landless, returnees, IDPs or rural migrants are considerably more tempted to build informal settlements outside of the Master Plan, as if the information was available. Additionally, with the absence of the publicly available information on planned urban expansion, the oversight in form of public scrutiny is missing when planning and implementing urban expansion projects.

The decisions on changes in urban land use plans do not involve public in Afghanistan either. Construction projects are developed based on the legal documents giving permission to the particular organ for changing urban land use. The lack of public involvement in the decisions about land use change often renders the implementation of the project impossible, due to the lack of ownership among original landowners to allow the implementation.

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<sup>417</sup>Calogero, "Planning Kabul," 79.

<sup>418</sup> Calogero, "Planning Kabul," 80.

The uncertain status of the Land Management Law of 2008 mentioned above, coupled with disputes over the implementation of the Third Master Plan, and relatively weak authority of the government has rendered the legal framework for changes in urban land use convoluted, under-developed and disregarded by enforcement authorities. While exact figures of land use change and requests are not possible to obtain<sup>419</sup>, requests for change in land use do not have a process to be followed, nor has the proper land use changes mechanism or database been developed. Disputes between the Ministry of Urban Development and local municipalities make it difficult to distinguish the appropriate authority for such requests. Urban land use changes are most commonly visible through informal processes, with formal requests hardly being the case in Afghanistan. Requests for changes in urban land use rarely come from the public, and are typically put forth only by power-brokers who are able to manipulate or better navigate the request process. Such changes thus provide little benefit to society in general. Those lands with restrictions on land use change are in reality converted to different use by illegal means.

*Recommendations:*

a) Short term

- An inter-agency commission between MUDA and municipalities should be established to clearly delineate the responsibilities between these two institutions in relation to the formulation, implementation and monitoring of the master plans. In future, this commission can serve as a forum for discussion various pressing issues such as status of informal settlements in Afghan cities.
- Focus of urban land authorities should shift from the “outsourcing” of urban space development outside of the city, to finding affordable and effective housing opportunities inside of the city. These efforts should be supported by the development of new master plans for the biggest Afghan cities.

b) Long term

- Efforts need to be put in place to streamline public input into all major initiatives, including providing platforms through which the public can get the information about projects, propose new projects, make complaints and so on.

***Efficiency in the urban land use planning process***

Currently, no clear commitment to low-cost housing and services for the poor exists apart from broad declarations to the right to land. The provisions do not specify low-cost housing offers to the poor, but instead rely on installment schemes that typically amount to the normal (not low) cost of the land. Lack of payment can result in evictions. Focus has instead been placed on providing incentives for families living in informal urban settlements to move outside of urban centers and into semi-urban areas, rural lands or ‘new towns’ (such as the new Kabul city) or ‘small towns’ near urban centers (locally known as *sharaks*).

Although, state land distribution schemes were developed by the government through the Presidential Decrees 104 and 1091 during President Karzai regime, these are rather an exception from the general policy of not distributing the state land. Additionally, the implementation of the distribution policies, mirrored with rampant corruption and conflicts caused by unclear ownership claims of distributed land, does not serve the interests of poor Afghan population.

In Kabul, the issues with rapid urban expansion persist. Given the reality of Afghanistan’s biggest city population today (with estimated hovering between 5 and 5.5 million), it is reasonable to note that there does not exist effective urban spatial expansion in Kabul. Kabul Municipality currently employs a 2011 Master Plan developed by JICA in partnership with the Afghan government related to the New City Development Area (in Deh Sabz) as well as to the current boundaries of Kabul city. The status of this plan, however, remains tenuous and is not implemented by the Ministry of Urban Development. Due to absence of the updated Master Plan, rampant corruption, extensive land grabbing and a great influx of

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<sup>419</sup>Please see the explanation for the lack of data in the introduction.

refugees, IDPs and rural to urban migrants, building in Kabul throughout the 1990s and, more recently, the 2000s largely remain outside of the Third Master Plan, and are thus considered ‘informal’ in nature. Indeed, with the suspension of the Third Master Plan by then-President Karzai at the request of the MUDA, the city has no clear functioning reference for planning purposes.

Other big cities of Afghanistan such as Herat, Jalalabad and Mazar e Sharif, suffer from an outdated urban plan as well. Additionally, the carrying capacity of infrastructure has been long overloaded in Afghan big cities. While proposals for piecemeal infrastructure development have been proposed internally to the Government and by INGOs, no comprehensive strategy for the provision of new infrastructure and services has been adopted or considered by the government primarily due to the unresolved issue of informal settlements.

This being said, most new residential building construction in Kabul (and other big cities) today is considered informal (constructed outside of the Third Master Plan framework). A range of settlement types and deeds reveals a complicated landscape with squatters on public land, informal homes on private land, grabbed land and more. The unregulated urban expansion, where people are building their houses without an official building permit, is resulting in the decrease of available green spaces and agricultural land in Afghan cities, myriad of informal land ownership claims and consequently a high number of land disputes.

### *Recommendations*

#### a) Short term

- A policy on low cost housing for the poor should be adopted. The policy should be developed in a consultative manner, with input from all stakeholders including civil society representatives, the government and the public in question itself. Additionally, anti-eviction laws should be designed (based on Forced Eviction Guidelines already existing within the National IDP Policy) with constitutional protections in mind and, in the case of eviction, a legal commitment to fair compensation should be established.
- Proposed new LML stipulating a creation of a Distribution Delegation (with representatives from ARAZI, AGCHO and MAIL) intending to provide housing opportunities for the poor should be promptly approved.
- The Presidential Decree 104 has to be amended (or annulled and new law should be adopted) that tackles the shortcomings of the Presidential Decree 104 such as the allocation of non-viable land and cumbersome eligibility criteria. National IDP Policy (including Forced Eviction Guidelines) has to be adequately implemented.
- The initiatives like Maslakh, where IDPs are given the land titles, should be supported and if possible reproduced.
- Electoral promises of NUG and current statements in particular by the Minister of MUDA stating that the focus of his term in the office will be to provide adequate low- cost housing for people, have to materialize such as, for instance, in form of a broader national housing programme that provides lower income populations with access to water wells, land and affordable financing strategies.
- Consideration should be given to the most appropriate planning and whether such a process is the best possible planning option for Afghanistan’s cities. In the case of Kabul, for instance, a more flexible planning and formalization of informal settlements mechanisms may be more suitable. A feasibility study to this end should be conducted.
- New Master Plans have to be developed for biggest cities in Afghanistan as per MUDAs commitments within “Big Cities Master Plan” initiative with the support of international community.

- With the development of new master plans for the biggest cities, the infrastructural needs of the population and the current state of the cities (considerably changed in comparison to 1990s) needs to be taken into account and adequate mechanism to provide necessary infrastructure have to be developed.
- The policy on Upgrading of Informal Settlements has to be approved and implemented.
- General Directorate of Informal Settlements within each municipality should be established to mainstream the issues of the upgrade of informal settlements.
- The implementers of various upgrading projects (including NGO community) should create an adequate coordination mechanism to share the information and lessons learned. Municipality with technical support of international community should develop a database including all information about upgrading in each area, which will be publicly available on municipalities' website.

b) Long term

- The corruption in state land distribution efforts has to be curbed by increased efforts to implement the Anti-Corruption Strategy established by the President Karzai in 2008 and increased results-based support of the international donor community. Additionally, the past and yet unaddressed cases of corruption should be the priority of the Attorney's General Office.
- Community savings and loan system should be introduced to mobilize the community and make the upgrading sustainable.

***Speed and predictability of enforcement of restricted land uses***

The current legal framework for building permits remains convoluted and no national-level policy has been identified for residential building permits that are technically justified, affordable and complied with. Compliance to land-related regulations have thus far remained tenuous at best, primarily due to a lack of incentive, high government bureaucracy and corruption (thus resulting in relatively high financial and temporal investment by local populations), and a lack of awareness of the procedures and requirements related to building. The convoluted legal framework related to building permits - legal text often littered with holes and opportunities for bribery (including texts like the LML which outlines general requirements and goals but lacks specific procedures for implementation) - renders it rare that building permits are obtained in strict compliance to the regulations in place.

Building permits are generally granted in three months in corruption-free environments, but the on-the-ground realities in Afghanistan render the process filtered with corruption and typically extend the required time.

***Recommendations:***

a) Short term

- A review of the effectiveness of the process for obtaining a building permit should be conducted.
- A mechanism for monitoring the existence of building permits should be established and non-compliance should be sanctionable by law. This however should be implemented only after the status of informal settlements is resolved.

b) Long-term

- The long-standing issue of corruption pervasive in administrative procedures in Afghanistan must be addressed in order to ensure that building permits are reviewed and fairly judged within a reasonable period of three months.

### ***Tenure regularization schemes in urban areas***

As mentioned above, residential dwellings in Afghan cities are mostly informal while owners do not have any legal documentation proving their ownership. Since the policy on Upgrading Informal Settlements has not yet been approved by the Cabinet, the formalization of informal residential dwelling is at best difficult, if not impossible. While strategies and, to an extent, regulations exist to reduce incentives for new informal occupations (including leaving those in informal settlements in a state of tenure insecurity and threatening informal settlers with forced eviction), the high demand for urban housing and lack of understanding of regulations among the public counteracted some efforts towards regularization. The imbalance between formal and informal residential dwellings in Afghan cities has led to most informal homes lacking basic infrastructure.

Finally, apart from limited references in the LML, no regulations for the specific classification or record-keeping, development or management of condominiums were identified. Legal regulations fall short of detailed management guidelines, and are limited to the recognition of common property under condominiums.

#### ***Recommendations:***

##### **a) Short term**

- The Land Policy Draft of 2007 aiming to offset the ‘ongoing failure of the formal land allocation, adjudication and registration systems’ that have ‘caused uncontrolled informal developments in urban and rural areas’ (see Draft Land Policy, 2.1.1) should be operationalized by the enactment of new laws grasping the realities in Afghanistan.
- The Policy on Upgrading Informal Settlements has to be approved and implemented.
- With the development of new master plans for the biggest cities, the infrastructural needs of the population and the current state of the cities (considerably changed in comparison to 1990s) needs to be taken into account and adequate mechanism to provide necessary infrastructure have to be developed.
- A specific policy on common property under condominiums should be developed and enforced through a consultative process. Such a policy should encourage citizens to partake in the maintenance of common property through positive measures (i.e. incentives) instead of penalties.

##### **b) Long term**

- Community saving and loan system should be considered as an effective way to mobilize the community and make the upgrading activities sustainable.

### **Public Land Management**

#### ***Identification of Public Land and Clear Management***

Although no clear definition of public lands exist in Afghan legal framework, based on the accounts of various Afghan technical experts consulted for this study, public lands are the lands that have been allocated for public use and are neither the property of the state nor the property of the individual. The problem arises with the Art.3(8) of LML 2008, which stipulates that any land that is deemed public but is not registered in the book of government lands, is considered state land. Additionally the Presidential Decree 83 further blurs the boundaries between state and public land by putting emphasis on formal documentary proofs of ownership. The fact, that Afghan legal framework does not define public land and does not provide provisions on how to register public land and the registration of land in general occurs rarely in Afghanistan, public land can be easily interchanged for the state land. In other words, land that is under public use and not registered can easily be claimed by the state as its property and be reassigned subsequently.

This is particularly problematic when it comes to the ownership rights over virgin and arid lands. As mentioned already, virgin and arid land can be a pastureland<sup>420</sup>, hence it cannot be sold nor leased<sup>421</sup>. However, based on the concurrent articles 46 - 49 of LML 2008, the state, providing certain conditions are met, can allocate and distribute arid and virgin land to individuals and other legal persons. In the current body of laws, it is not clear, which arid and virgin land is considered pastureland<sup>422</sup>, and often, visual characteristics are used to distinguish pastureland from arid and virgin land. However, in extremely wet and similarly dry season for instance, arid and virgin land can look similar to pastureland<sup>423</sup>. In this case the testimonies of witnesses are used to distinguish between these two types of land. However, the distinguishing factors being the visual characteristics and the testimonies of witnesses, provides considerable room for corruption and creates a situation where, although public land cannot be sold nor leased, it can indeed be distributed to individuals and other legal persons.

Another important feature of the definition of public land is the fact that the public lands are allocated only for public use to serve the common interests and welfare of the residents of a particular area. Using public lands for purposes that have not been set out by the law is not permitted. For example, pastures that have been allocated for the grazing of animals and to be used as graveyards must not be used for a different purpose. However, the current body of laws (LML 2008, Land Acquisition Law (LAL) of 2000 with its amendments) does not clearly define the terms “public interest”, “public need”, “public purpose”, “public reasons” or “public welfare”. The law uses these terms interchangeably, which creates space for numerous interpretations. Unclear definitions of public lands and the restrictions on their ownership and consequently on their transferability and use results in various illegal sales, leases and transfers of public land to private, at times, illegal use.

Even though the level of government responsible for the public land seems to be appropriate, public land management faces a number of problems in the country. In general, land management is a low priority for the government. A major issue across all ministries and ARAZI is lack of skilled human and financial resources required to manage public land.<sup>424</sup> Furthermore, widespread corruption in the government hampers transparency and accountability in land management in general.<sup>425</sup> To mention one example, powerful individuals, often state actors themselves, acquire public land for lucrative housing projects through “land grabbing.”<sup>426</sup>

In terms of recording and mapping of public land, between the years 1966 and 1977 a national cadastral survey was conducted which included 30% of all the land in Afghanistan. Since then 4 more per cent of land was surveyed, while remaining 66% of Afghanistan’s lands have not been surveyed so far at all. Additionally, the classification of different types of public lands in LML is not clear, making the identification on the ground impossible. Furthermore, the determination of the limits and the understanding of pastureland based on the audibility of the human voice are not compatible with present-day conditions.

The information on public land in Afghanistan is not made public. Firstly, an unclear definition of public lands and the fact that the public land cannot be registered as such based on current Afghan framework renders access to information impossible. Secondly, the Presidential Decree 99, 2002 halted survey and mapping of Afghan lands previously conducted by the Survey Department of the Afghan Cadastre. President Karzai allowed the Survey Department to conduct surveys only on his request and/or after his approval for the surveys done on demand (Article 15 (1)) and the Cadastre could not make any survey information public (Article 15 (2)). This, however, led to the complaints that the

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<sup>420</sup>Based on the definition of pastureland in Art. 3(9) LML 2008

<sup>421</sup>LML 2008, Art. 82(1): „Pastures shall be kept unoccupied for the sake of public requirements of local villagers (for cattle grazing, graveyard, threshing ground and etc.)“ and Pasture Law 2000, Art. 6: “Buying, selling and leasing a pasture is prohibited.”

<sup>422</sup>Hence the very unclear definition of the pastureland in Art 3 (9.2).

<sup>423</sup> Arid and virgin land can grow plants in wet season, so as the pastureland can dry out significantly during the dry season.

<sup>424</sup>Interview with ARAZI employees, Kabul, 11 March 2015.

<sup>425</sup> In this regard, the opinions of low-ranking government officials, particularly ARAZI officials working on forests and pasturelands and defending the public property, have been taken.

<sup>426</sup>Wily, “Land Governance at the Crossroads,” 20.

survey offices were making records available to elite persons who then used the information to change the ownership in their favour. This practice did not necessarily stop until today, adding to the extreme gathering of power over land matters in the hands of the President.<sup>427</sup>

While the responsibility over management of different types of public land is more or less unambiguously assigned (taking into consideration a unclear definition of public lands and its different types), lack of professional land experts and financial resources in Afghan land administration for the implementation of day-to-day activities are some of the challenges that make it difficult to put in practice their strategic and action plans. In ARAZI, for instance, although merging the Department of Cadastral Survey of the Directorate of Geodesy and Cartography with ARAZI strengthened the latter's professional capacity, ARAZI continues to lack a sufficient technical structure that can address countrywide land affairs. In specific terms, ARAZI's provincial capacity is limited in terms of human resources and integrated cadastral maps.<sup>428</sup> Other problems facing ARAZI include the lack of modern technical equipment for cadastral survey, insecurity in some provinces and the lack of provincial departments of cadastral survey. For these reasons, the establishment of some new departments have been proposed in ARAZI's *tashkil* (organisational structure) for the coming year; in the estimation of current ARAZI employees these departments are needed to effectively address land affairs in the country.<sup>429</sup>

Only state land can be allocated (leased) to private and public interest in Afghanistan: private land can be acquired by the State (through the acquisition) for public interest. Public lands, cannot be allocated (sold, leased, transferred or exchanged) to private interests under any circumstances. However, the ambiguity of the definition in particular of virgin and arid lands gives room for their illegal allocation to private hands. According to the Article 46-49 of LML 2008, the state can allocate and distribute arid and virgin land to individuals, while pasturelands can be arid and virgin lands at the same time without any clear distinction between those two land types in Afghan legal code.

#### *Recommendations:*

##### a) Short term

- Newly proposed amended LML addressing the shortcomings of the public land definition, classifying 4 types of land including “land specific to village(s)”, containing a clear definition of “public interest”, classifying types of public land and delineating responsibilities between the institutions responsible for different types of public land should be enacted.
- Public land management should be prioritized on the government's agenda.
- The plans of ARAZI to restart the cadastral survey of the remaining 66% of lands should be implemented promptly and adequately financed. The survey, as planned by ARAZI should start in Bamiyan province no later than end of 2015.
- A community-based management of public lands should be put in place (potentially thorough *shuras*, *jirgas*, CDCs), when the definition of public lands is clarified including raising awareness of the public about the public land, laws and regulations associated with its use.
- Criminalisation of land grabbing and other illegal use of public lands should be put on government's agenda and operationalized.
- The capacities of public institutions including on provincial and district level dealing with public land such as ARAZI, MAIL and municipalities should be built.
- The activities of public land institutions dealing with public land should be adequately financed.

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<sup>427</sup>Wily, “Land, People, and the State,” 33.

<sup>428</sup> Strategy to promote the Afghanistan Independent Land Authority as a modern state institution in the field of land services, Afghanistan Independent Land Authority, 1392, p. 6.

<sup>429</sup>Interview with ARAZI employees, Kabul, 11 March 2015.

- ARAZI should take over administrative responsibilities of establishing the title deeds of courts and become a one-stop-shop for the registration of private land creating a central land registry. Later on, this system should be computerized and made publicly available providing all information related to land.

### ***Justification and Time-Efficiency of Acquisition Processes***

The current Land Expropriation Law 2005 has numerous deficiencies that limit the justification and time-efficiency of land acquisition processes in Afghanistan. Firstly, the current LEL does not require the expropriating authorities to estimate the least amount of land needed for their projects. Secondly, the state organisation is required to announce the implementation of project only 3 months before the project start. Thirdly, the current law is not transparent as to which departments have powers of expropriation or the limits of the powers of implementing officials, which encourages corrupt practices.<sup>430</sup> Finally, no third party monitoring exists for verifying the compliance of the implementing organization with the destined usage of the land.

There is no accurate statistical information on lands that have been acquired and whether or not these acquired lands have been transferred to destined use in a timely manner. Various projects are underway in various parts of the country and the lands acquired are recorded per project, but there is no specific institution to gather and keep these records nation-wide. Although, ARAZI is in theory the responsible institution to monitor the transfers of state land every six months to make sure that the land is used for the purpose it was acquired, no regular monitoring takes place due to the lack of financial and human resources and bad security in certain areas of Afghanistan. Furthermore, this creates conflict of interest since ARAZI is both the transferring and the monitoring authority.<sup>431</sup>

In some cases, land acquisition faces resistance from landowners, prolonging the three-month period and delaying the implementation of public welfare projects. There are number of reasons for the resistance to occur. Firstly, the LEL 2005, does not make any provisions for public consultation in regards to the public welfare projects. This undermines the principle of transparency and accountability as the local communities, who are most affected by the project, have no say in the process. Secondly, “the owners cannot appeal against the expropriation, to receive payments 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.”<sup>432</sup> If the owners are not willing to give up their land, the acquisition process starts and based on the transparency of the acquisition process, satisfaction with the compensation and resettlement measures, the actions of the private owners is determined. Thirdly, when the owners are not satisfied with the compensation, the acquisition process can be lengthy and complicated and can create many conflicts with evicted owners. In such cases, people try to obstruct the implementation of development projects and at time the residents even refuse to vacate their houses to put pressure on the government to reach an agreement on a better compensation price.

### ***Recommendations:***

#### **a) Short term**

- The proposed Land Acquisition Law (LAL), currently under review by the MoJ, including lists of 19 different categories of public projects that can be implemented through the acquisition process, requirement that the organisation estimates the least amount of land required for the implementation of the project, announcement period of minimum of 9 months before the start of the project to all people affected by the acquisition directly or indirectly, provision of third-party monitoring, which can assess whether the leased and transferred land is used for their destined purposes and suggestion of public consultations before acquisition process should be promptly ratified.

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<sup>430</sup>Wily, “Land, People, and the State,” 49.

<sup>431</sup> Interview with ARAZI employees, Kabul, 11 March 2015.

<sup>432</sup>Wily, “Land, People, and the State,” 49.

- An IT-based database system where all acquired land together with the cadastral maps and other related land documents will be recorded should be developed, kept with ARAZI and shared with other land institutions.

### ***Transparency and fairness of acquisition procedures***

Although the for land, residential buildings and fruit-bearing trees and other samplings is legally prescribed in Afghanistan, in the majority of cases, the paid compensation is not sufficient for the individual whose land has been acquired to be able to maintain his/her previous status of life.<sup>433</sup> The cases when the acquired land has been located in a central part of the city, but the exchanged land is situated on the outskirts can serve as an example of this. Another problem in the applicable law is that there is no deadline for the payment of compensations. Compensations may be made three or four years after the acquisition. When the land prices go up in this time period, the landowner might find himself not being able to afford the same standard of living as before. In light of the Art. 40 of the Afghan Constitution, which states that the private land can be expropriated only in exchange for a prior and just compensation, it can be argued that most of the acquisition processes in Afghanistan are unconstitutional.

Furthermore, if grazing land is (by mistake or illegally) used for a construction of a public project (i.e., an airport), people who have formerly used the land as grazing land cannot use it any more, however no provisions in the current legislation stipulate the provision of compensation for the loss of grazing rights. Similarly, LEL does not have any provisions for providing fair resettlement options for people whose land has been appropriated.

Finally, the acquisition process is lengthy in itself. It can take up to 120 weeks until the completion of acquisition process. Since the actual payment of the compensation requires the landowner(s) to have their land titles verified by court<sup>434</sup>, it takes a few weeks to even call up all land valuation committee members and convene a meeting. Since the price is rarely set up during one meeting and no clear method is prescribed for how the committee sets the prices<sup>435</sup>, the actual payment can turn out to be inadequate and can come very late.

In terms of rights to compensation in case of land use change outside of acquisition process, none of the land related laws include any provisions that would stipulate the rights for compensation. For example, issues such as conversion of rural land to urban land and how this would affect secondary rights such as access to grazing are not considered in the laws. Little is known about how land use change influences the livelihood of citizens.

What is of particular importance is also the fact, that there is no particular authority where individuals can lodge their complaints against acquisition and the compensation that has been paid to them. Although those affected can ultimately approach the court system, resorting to courts should be the last instance to launch a lawsuit as opposed to only present a common complaint. Furthermore, rampant corruption and lengthy processes in the judiciary leaves lawsuits filed by such individuals unaddressed for long time. At the same time, individuals whose lands have been acquired cannot easily defend their rights against powerful figures and/or state institutions.

### ***Recommendations:***

#### **a) Short term**

- The amended LAL containing clear provision on fair and just compensation process including compensation paid prior to the project start, compensation of grazing and other rights, identification of the suitable exchanges for acquired land and provisions on resettlement of individuals who face losses as a result of acquisition of their lands should be promptly enacted.

<sup>433</sup>Interview with ARAZI employees, Kabul, 11 March 11 2015.

<sup>434</sup>Peikar, Olsen, Upadhyay, "Proposed Law on Land Acquisition."

<sup>435</sup> Please see the detailed issues with the setting up the prices of land in the section 9.7.

- Proposed LAL stipulating the creation of a complaints hearing committee comprised of land experts, an expert engineer, a representative from the appropriating organization, a representative of the pricing committee and the person/or his/her representative whose land/property has been appropriated should be adopted and public awareness campaigns informing complaint hearing policies and regulations should be conducted.
- Establishment of a comprehensive dataset that keeps records of complaints regarding land acquisition and the outcome of those cases.
- Research and collecting information on unrecorded secondary rights, such as grazing, rights of passage and collecting forest products to determine how land acquisition can influence these rights should be conducted. Policies addressing issues related to unrecorded rights should be devised taking into account the recommendations of the study.

### **Transfer of large tracks of land to investors**

#### ***Transfer of state land to private use***

There are various challenges when transferring state land in Afghanistan. The ambiguity of the Afghan legal framework as to the sales of state land create situation where state land sales are happening in unregulated manner with various state agencies such as AISA or powerful figures and warlords selling previously acquired state land<sup>436</sup> despite the presidential decree forbidding it.

Nevertheless, the leases of the state land are a major venue for providing large tracks of land to investors. These are not always happening in an open and transparent manner through public auctions.

The valuation of state land intended for lease also encounters various problems. Although provisions stated in Afghan legal framework set clear procedures for the land valuation, delays in assessing the land and setting a price is an issue as the members of the valuation delegation often take time to present themselves for the land valuation committee meetings. Sometimes it takes longer than one year to get the lease contract signed off by both parties. Additionally, due to the high level of corruption in Afghanistan, powerful strongmen and public officials at times put pressure on the valuation committee to decrease the value of the land compromising the setting of the price of the land based on market value. Finally, the results of the valuation are not publicly accessible creating transparency issues within the process.

Finally, the implementation of relevant policies to enable public capture of benefits arising from changes in permitted land use has largely been ignored; thereby resulting in some members of society unduly benefitting from these. The benefits are not captured in real time mainly because the land value assessment is not done systematically and regularly.

#### ***Recommendations:***

##### **a) Short term**

- The possibility for state land sales should be clarified through the Cabinet Regulation clarifying current legal provisions on this matter. Clear categorization should be developed based on which the restrictions on transferability will be applied.
- The status of AISA and its activities should be clarified by clear rules of engagement interlinked with ARAZI Investment Policy.
- Increased financial resources, coupled with on the job long-term trainings should be provided to High Office of Oversight and Anti-Corruption to be able to better perform its duties such as verifying the usage of public auction for every land lease procedure.
- Devising mechanism for assessing performance of members of the valuation commission, with poor performance being addressed immediately.
- Addressing corruption in land valuation process.

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<sup>436</sup> In the case of warlords the state land is often acquired illegally.

- The results of land valuation for land lease purposes and the information about the land leases for various projects particularly where it concerns the public should be made publicly available.
- Establishing clear monitoring system of application of lease contracts and benefit-sharing mechanisms, with participation of local communities.

### ***Private investment strategies***

Public consultations with the local communities regarding the lease of land and private investment does not have any strong legal backing and does not take place. Hence, secondary right holders can potentially be left out of the process.

Additionally, ARAZI has built-in some safeguards to prevent negative effects from large scale investments into the requirements for bidders. However, due to the minimal monitoring that takes place, the compliance with the safeguards is not possible to verify.

Based on the Art. 61 LML 2008 and Art. 31 of ARAZI Land Lease Procedure, the lease contractor is obliged to consider and apply environmental protection principles. Also, it is one of the monitoring obligations of ARAZI to assess environmental impacts and make sure that the project is not a threat to the environment.<sup>437</sup> However, although the environmental considerations are taken into account when selecting the investment, rules for compensation of environmental damages have been changed to apply only to owners of land, not the lease, compromising the leverage of ARAZI towards the leesee actually using the land.

Although ARAZI is a main organization responsible for the lease of state land, various other state organizations continue leasing state land on ad hoc basis without following proper procedures.

Furthermore, no regular monitoring by ARAZI takes place due to the lack of financial and human resources and limited security in certain areas of Afghanistan. This means that there is little information about whether the land is used for the purpose that it was leased for and if the terms of the agreement are followed. The remedial action is almost never taken.

Finally, afghan legal framework does not provide for the resettlement and rehabilitation of people affected by state land leases, despite the fact that many large-scale development projects, for example in the mining sector, can lead to mass displacement of local communities.

### ***Recommendations:***

#### **a) Short term**

- Identifying practical mechanisms on how to involve local communities in the process of leasing state land for investment projects.
- Study to devise environmental and social impact assessment tools to identify best practices applicable in Afghanistan should be conducted. Based on the results, the mechanisms should be established and incorporated in ARAZI Land Lease Procedure.
- ARAZI should be established as only organization responsible for leasing state land.
- An in-house assessment should be conducted by ARAZI to find out what factors have prevented the organisation from monitoring land lease contracts so far including the study on alternative monitoring possibilities available in places where access is limited due to bad security situation.
- Based on the outcomes of the assessment, a clear monitoring system of application of lease contracts and benefit-sharing mechanisms conducted at least every six months and with participation of local communities should be established.
- Newly proposed LAL including the provisions for resettlement and rehabilitation should be adopted.

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<sup>437</sup>Land lease procedure page 108 article 13.5.

b) Long term

- Based on the assessment, training policies for ARAZI staff for effective monitoring of lease contracts should be devised. Additionally, people's awareness regarding land lease procedures will have to be increased.

***Policy implementation is effective, consistent and transparent***

Although new ARAZI Land Lease Procedures have simplified the process to less time consuming one, these steps cannot always be completed in the time required. In practice, it takes longer time than specified due to corruption, limited technical capacities of ARAZI personnel and incomplete, incorrect or missing information. One explanation for missing or incomplete information can be the fact that not all the information related to land leases is on ARAZI website, rendering the access to information difficult.

Finally, there is a gap between the legal framework in relation to benefit sharing of the state land leases and practice due to many reasons such as the weak local governance at the provincial and district level and absence of rule of law in many parts of the country. This is mainly because of corruption, lack of public knowledge regarding the land lease procedure and inaccessibility of the contracts to the public.

***Recommendations:***

a) Short term

- The newly proposed LML, which includes provisions for lease procedure such as determined prices for all types of land based on land size, type, category, grade, proximity to the road, market value and the province in which land is located should be adopted.
- Guidelines regarding bidding requirements should be easily made accessible to investors (preferably online) so they are able to provide complete project proposals at once, decreasing the time of the land lease procedure.
- Providing on the job training to increase capacity of ARAZI district and provincial officials to process applications in faster and more efficient manner and to be able to identify missing information before sending it to the higher levels.
- All investment contracts including benefit sharing modalities should be made publicly available. This should be done through different venues, such as online, public meetings and provision of hard copies upon request.
- A clear monitoring system of application of lease contracts and benefit-sharing mechanisms conducted at least every six months and with participation of local communities should be established.

b) Long term

- Public awareness about the state land lease procedures and investments strategies should be increased.

***Contracts involving state land are public and accessible***

Spacial information and duration of contracts are not publicly available. Spacial information is at times not available to the contracts at all because not all the leased lands have been surveyed. GPS Department of ARAZI should take at least the GPS coordinates of each land before the transaction, however this doesn't happen in consistent manner.

No third monitoring of land lease contracts currently exists, therefore it is difficult to objectively verify the compliance with contractual obligations and environmental and socio-economic safeguards. Furthermore, due to the rare ARAZI monitoring of the compliance with contractual obligations, the avenues to deal with non-compliance are very limited.

***Recommendations:***

a) Short term

- All investment contracts, including spacial and duration information, should be made publicly available. This should be done through different venues, such as online, public meetings and provision of hard copies upon request.
- A clear monitoring system of application of lease contracts and benefit-sharing mechanisms conducted at least every six months with participation of local communities and venues for dealing with non-compliance should be clearly established.
- Comprehensive policies should be devised to allow for third party monitoring, such as community monitoring and monitoring by the civil society.

b) Long term

- Public awareness about the state land lease procedures and investments strategies should be increased.

### Public provision of land information: Registry and Cadastre

#### *Mechanisms for recognition of rights*

Formal registration seems to be the privilege of wealthy and well connected in Afghanistan, where it is difficult to formalize land possession by the poor, mainly due to the largely informal nature of land tenure in the country<sup>438</sup> and the lack of opportunities for land possession formalization<sup>439</sup>.

One of the main and most valid ways to formalize land ownership (although of the new owner) is through the courts when transacting the land. The registration with court while acquiring the title deed during land transactions is a complicated process. When registering the property, the existing circular form has to go through at least five different offices. This lengthy and time-consuming process can be expedited by informal payments, however people who cannot afford or refuse to engage in corrupt practices have to follow the proper procedure, which can take over a year to finalize. Additionally, there are no effective and proper safeguard requirements for recoding rights to prevent the costs and abuse.

Each step of the circular form verification process itself is often difficult to pass for ordinary Afghan citizens.

1. The circular form goes first to the court archive (*makhzan*), where it is verified with the court records (*konda*). When title deed of the seller does not exist in *kondas*, the process of registration cannot continue. Taking into account that the majority of Afghan population does not possess formal title deeds, most of the population cannot go through courts to proceed with the land transaction. Additionally, based on the numerous accounts of land experts interview for this report, in recent praxis, the courts do not accept tax and water payments as a valid ownership documents although prescribed by the law due to fears of accepting forged documents.
2. Then, the circular form is taken to ARAZI, where the certification based on their Principal books is conducted. However, since the change of the owners of the land (who acquired new title deed through the court registration when buying the land) is not communicated in consistent manner to ARAZI (either by court or by actual owners voluntarily), ARAZI often cannot certify the ownership because often only the previous owner figures on their records. When one or part of a plot of land is sold more times using the court registration, ARAZI often does not have the information on current owner nor the size of land. However, based on accounts of ARAZI officials, as long as the seller has the tax or water payment receipts, the Presidential Decree or valid customary deed

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<sup>438</sup>Although different levels of formaliaation exist between provinces.

<sup>439</sup> As mentioned in the first part of this section, the mechanism for formalization of customary land possession does not exist, apart from when the owner is ready to sell the land. In this case, the new owner receives the formal title deed document. The second way of formalizing land ownership is also not feasible, because the land clearance Tasfia currently is conducted only in case of large development projects or when powerful people involved.

document based on which the ownership is claimed, they can proceed with the verification of the circular form.

3. After the circular form is certified by community experts, then it is taken to the Revenue Office of MoF (*mustofiat*) to verify if all taxes were paid. However, since the MoF tax records haven't been updated since 1978 after Doud Khan's assassination<sup>440</sup>, and the communication between the courts when issuing title deeds to new land owners (either by sending an official letter or by actual land owners voluntarily) happens sporadically, most of the tax payers are not registered in MoF taxation books. If the tax payments are not registered, no certification can be accorded.
4. It is important to note as well, that the certification of the Cadastral Department is not necessary posing the questions about the land spatial information. In the past, the certification of the Cadastre was required (old circular form), however this requirement was abolished. Sometimes, however, when the person is not willing to pay a bribe or does not have good social connections or also, when the land is next to state land, the judges decide to use old circular form and the person needs to get the certification of Cadastre. Similarly the certification of Ministry of Energy and Water and was required in the past to verify the existence of water rights. Currently, the verification of MoEW is not required.

This is a very time-consuming and costly (mainly due to informal payments) process, not affordable for considerable part of the Afghan population. Furthermore, while the formal registration of rights has been compulsory in previous versions of the LML, this is not explicitly the case in the 2008 version or in current proposed amendments of the law.<sup>441</sup> In the absence of an explicit legal obligation, people prefer other venues of land registration (customary) or do not register their land at all.

As mentioned above, the majority of Afghan poor has only customary deed documents, or do not possess any documents at all. The main issues with the formalization of customary deed documents and ownership based on non-documentary evidence such as long term unchallenged possession was already explained in the first part of this section. In theory, customary deed documents and long-term possession, when meeting all the requirements stipulated by law, can facilitate valid ways of formalizing the ownership. This process however, requires testimonies of at least two witnesses. Due to the extensive migration of population caused by the decades of war, it does not provide effective way to secure the ownership. There are many cases when the witnesses have moved from their place of origin and the claimants for land ownership do not have any means to contact them.

#### *Recommendations:*

##### a) Short term

- The required information to be written on the title deed should be increased (such as cadastral map (or sketch), GPS coordinates, exact location (village, district, province), type of land) and columns for transfers to provide adequate specification of the land and prevent corruption. The format should be unified across all provinces and districts.
- Different registries in Afghanistan should be mainstreamed and interlinked (more details below) in order to prevent overlaps, outdated and missing information. ARAZI should be established as "one-stop-shop" for registering the land (both within or outside of the Master Plan): The land clearance process *Tasfia* should be done on large scale and should always include the members of the Cadastral Department to conduct the survey. Then the land is recorded to ARAZI Principal Books and formal title deed is given to the owner. Technical and financial support to ARAZI's pilot project in Herat that, if successful, will be extended to all 34 provinces, should be accorded. This process should be later computerized to allow for the inter linkages with other registries such as in courts and MoF tax books.

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<sup>440</sup> During the Doud Khan's regime (1973 - 1978) the so called *Izharnamas* -Land Declarations - were collected for taxations and tenure security purposes. People had to declare (although often providing smaller size of the land to prevent paying high taxes) how much land they own and based on that MoF tax books were developed. This process stopped after Doud Khan's death.

<sup>441</sup>Wily, "Land Governance at the Crossroads," 15.

- An Independent monitoring body should be created that will monitor the process of land formalization in order to maintain the process effective and transparent.
- In-house procedures and anti-corruption policies of ARAZI should be reviewed to prevent lengthy and costly process of land registration.
- Until ARAZI is established as one-stop-shop for the registration of land, as an interim measure the circular form should include column for cadastral verification.
- The registration of land should be made obligatory in newly amended LML.

### ***Completeness of Land Registry***

Although the total cost of recording of the property is low, the necessity of informal payments increases the costs considerably.

Furthermore, the information held in registries are for most part not linked to updated maps. The only office in Afghanistan which records the location with spatial information and maps is the Cadastral Department. As mentioned already in this reports, only 34% of the land in Afghanistan has been registered with its spatial specifications. Cadastral surveying information, however, have not been updated since 1978. Taking into account that much of the land recorded and mapped have changed drastically in recent years, such as currently 75% of the arable land is changed<sup>442</sup> to residential areas, the records available in Cadastre cannot be considered reliable nor complete. Additionally, when registering the land with courts, the courts are using two types of circular forms. One is the latest version approved by Supreme Court and one is the old circular form. The decision is with the court to which one they choose. The new circular does not include cadastral certification, whereas the old one has the cadastral certification column. The fact that the new circular form does not contain the exact spatial information about the land, provides room for corruption for potential land grabbers and illegal usurpants. The old form is more often used, when the land transaction is happening adjacent to a state land, where the courts are paying more attention to prevent the corruption.

Private encumbrances, such as conflicts over land and mortgage are recorded during surveying process in cadastral ownership lists. The surveyors mark the forms as “not finalised”. However, since only 34% of the lands is surveyed and recorded and yet not updated, the information cannot be considered reliable. Also ARAZI and municipalities records all the information about land or houses including encumbrances such as existence of the mortgage over the land. In case someone wants to buy a property than they verify with ARAZI and municipality. The buyer can also verify with MoF if the property is free of any charges or taxes. However, the obligation to verify the existence of any encumbrances in not legally binding for the offices certifying the circular form during the process of land registration. Therefore unless the individual proactively seeks this information, the possibilities of buying the land with encumbrance is very high. Finally, public restrictions and charges are not recorded in Afghan land registries.

For accessing records on land ownership people have to go to different public institutions for each type of information or a copy of a document. The information is accessible to individuals, albeit often only after informal payment is made; however the accessibility to information for third persons (e.g. information about somebody else’s private land or state land) is rarely granted (unless it is a powerful person acquiring the information).

The process, particularly in courts (2-3 months), is time-consuming and cumbersome due to the high informal payments that have to be made to keep the process going. Additionally, the records are only available for manual search, prolonging the access to information even more. To facilitate an easy access to land records, the USAID LTERA project initiated computerisation of some of the archives in courts. However, the land tenure records in Cadastral Survey Department and ARAZI are yet to be computerized.

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<sup>442</sup> Interview with ARAZI official, Kabul, 1 September 2015.

### *Recommendations:*

#### a) Short term

- Increased financial resources, coupled with on the job long-term trainings should be provided to High Office of Oversight and Anti-Corruption to be able to better perform its duties, in particular to provide external audit of courts' land registration procedure.
- ARAZI's plans, based on their Operational Strategy, to establish national comprehensive cadastral registration programs should be technically and financially supported.
- Cadastral records have to be connected to both ARAZI Principal Books and courts title deed registration in consistent manner. Furthermore, uniform and standard format of circular form including the verification of the Cadastre should be developed stating all the personal information of the buyer and seller, photos, signatures (or fingerprints), physical specification of land etc.
- As an interim measure, all cadastral maps should be scanned, to expedite the manual search happening at present in the Cadastral Department, however with aim to be later included in the computerized system.
- When certifying the circular form by ARAZI, the absence of encumbrances should be verified at the same time.
- Newly amended LML included provisions to record the violations and charges should be adopted.
- As an interim measure, while awaiting fully computerized system, the process of acquiring the information from courts should be mainstreamed, clear step by step process should be developed and monitoring mechanism should be established to enforce the compliance with the process and curb corruption.

#### b) Long term

- Creation of centralized computerized system at ARAZI as one-stop-shop for land registration and information to mainstream the access to land information. People will be able to access the information through the website (without possibility of changing the information).
- Completing the computerization process that started in courts and proceeding to Cadastre and ARAZI.

### ***Reliability of registry information***

Afghanistan does not have one single registry and the information is scattered across various registries with different ministries and agencies. Although there are at least 6 different registries collecting various information, in reality only two of them serve as a uncontested prove of ownership - ARAZI Principal Books and courts' Title Deed Registry (*Konda*). Most of the registry books are not interlinked in any way, causing overlaps and outdated or missing recordings:

1. Even though the ARAZI Principal Books are in a way connected with the court Land Title Registration Book (*Konda*) through the circular form (the process of acquiring of a title deed can only be finalized, when circular form is certified by ARAZI e.g. when ARAZI has the record of particular land in their Principal Books), courts do not inform ARAZI (nor Cadastre) about new owners of the land when new title deed is accorded consistently. Nor the actual new owners voluntarily go and inform ARAZI of a landowner change. ARAZI certification is therefore mere verification if the land is private (not state land) due to often missing information about new owner and size of owned land, which can also be sold only partially. Hence, it can happen that ARAZI cannot certify the circular form at all.
2. The Land Statistics Registration Book (cadastral registration) is only connected to ARAZI (based on current Cadastral Law, it is a responsibility of the Cadastral Department to send a copy of the survey report to ARAZI, when survey is done) not any other registries.

3. The MoF land taxation books are interlinked with other land registries only sporadically, are often outdated and don't have an effective mechanism in place to update the records. Provincial district finance offices (*mustofiat*) of MoF collect land tax based on their taxation books, which contain information about eligible tax payers based on land declaration forms (*Izharnamas*) dating back to Doud Khan regime (1973 - 1978), sporadic exchange of official letters between courts and MoF informing about new landowners and even more rare voluntary reporting by new owners. Due to these reasons, the tax records are often not accurate. Additionally, a considerable number of Afghans do not go through official land registration channels, completely circumscribing the updating mechanism of courts and ARAZI. No effective enforcement mechanism exists to search for not registered tax eligible persons, people have themselves responsibility to go to *Mustofiat* offices and pay taxes. Therefore, when the land is transacted outside of the close family<sup>443</sup>, nor record is written in MoF taxation books, nor the new owner registers with *Mustofiat* office, the MoF cannot trace the eligible tax payers, hence the land taxes are not paid in full.
4. When land clearance process (*Tasfia*) is conducted by ARAZI, the members of MoF and Cadastre are present, therefore certain sharing of information exist in that case, although the actual process of information sharing is unclear.
5. Nor are Municipal *Safayi* taxation books interlinked with MoF taxation books mainly because municipalities are allowed to spend their own revenues, standing outside of the whole tax collection process of MoF.

Furthermore, the reliability of registries is mainly compromised by the out-dated information it contains. The cadastral survey records and maps have not been updated since 1978, as well as the MoF tax records and ARAZI Principal Books lack an adequate mechanism for updating the data. Taking into account that approximately 66% of the land is not surveyed yet at all and the customary land tenure is often not formally registered, only further aggravates the situation. Finally, the fact that some documents were destroyed during years of wars and forgery of documents are a recurrent issue, renders updating of registries difficult compromising the reliability of registry information.

It is important to note, that even though the changes in land records, sometimes occur in the provinces, they are not necessarily forwarded to the centre. Hence no centralized database of land records exist in Afghanistan.

*Recommendations:*

a) Short term

- Before the creation of ARAZI as one-stop-shop is fully operationalized, as an interim measure, various registration books should be compared and the proper linkages should be developed including with the central level. This will also help to establish full database of land information, when ARAZI takes over as one-stop-shop.
- A formal mechanism has to be developed for courts to inform ARAZI and MoF about the new titled deeds they have accorded to new owners of the land.
- A formal mechanism has to be developed to connect MoF taxation books to ARAZI Principal Books.
- ARAZI's plans, based on their Operational Strategy, to establish national comprehensive cadastral registration programs should be technically and financially supported.

***Cost-effectiveness and sustainability of Land Administration Services***

The fees collected by the land administration authorities are very limited (excluding the informal payments). The only organ that can acquire registry fees are courts. These cannot be kept in court accounts; however, the fees collected have to be sent to MoF central treasury account where they are redistributed back to various state institutions (including courts). Although, the courts are able to gain

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<sup>443</sup> When the land stays in the family, the tax payments can be traced back based on the father's or grandfather's name. When the transaction happens outside of the family, this is not possible.

registry fees (4% of the total value of the property being registered), it is not enough to cover all their expenses.

The service fee collected by the Cadastre are not part of the land registration fees but are rather payments for different services such as provision of information, copies of the documents etc. These, however, does not match the operation costs of Cadastral Department<sup>444</sup>.

Finally, despite numerous efforts by the international community (IGOs, INGOs, NGOs, etc.) to support this sector, the capital investment in land administration is not sufficient. Based on the Afghanistan Statistical Yearbook prepared by Central Statistics Organization (CSO), total budget for ARAZI, for instance, was 194 millions Afs, of which 15,5 millions Afs was on development budget and 178,5 on operating budget. ARAZI's operating budget constitutes only 0.06% of overall Afghan operating budget<sup>445</sup> and 0.01% of overall development budget.

*Recommendations:*

a) Short term

- ARAZI should devise a comprehensive financial strategy, which aims at securing stable, short-term financial solutions. It has already done so, however, this plans mainly aimed at securing funding from donors. The strategies such as introduction of service fees (similar to Cadastral service fees) and negotiating with the MoF to keep a portion of the revenues could be the option.
- An increase in a portion of National Budget accorded to land administration, in particular ARAZI, should be negotiated and further financial support should be ensured from the international community.

***Fees are determined transparently***

Cadastral Survey Department was the first state organization in the country to introduce cadastral service charges. Cadastral services fees are set and clear; however, they are not publicly accessible. The Bill of Cadastral Survey Services Fees is only available at Cadastral Survey Offices. In courts there is no list of fees available to public.

The receipts are issued for all the transactions because the individuals have to go to the bank to process the payments of court registration fee and MoF transaction tax. The receipt is issued in the bank, which then serves as a proof of the payments, based on which the process of registration can continue. When it comes to the receipts for service fees, the issuance is not that consistent.

Informal payments are widespread within government institutions. There are some measures and policies in place for monitoring civil servants and dealing with corrupt issues. For instance, MEC (Joint Commission for Monitoring and Evaluation) and High Office of Oversight and Anti-Corruption are the most prominent organisations dealing with the issues of corruption. Nonetheless, due to limited capacities of these institutions, HOO and MEC are not able to reduce rampant corruption in the country. Additionally, the Operational Strategy of ARAZI, as the main organ responsible for land in Afghanistan, does not address the issue of corruption and it contains no measures to ensure transparency and accountability.<sup>446</sup> While ARAZI claims "Client Orientation" to be one of its main organisational values, there are no procedures in place to get feedback from the clients based on which the organisation can assess service delivery.

In terms of the existence and public availability of service standards, ARAZI is the only organ among public institutions dealing with land issues that has certain service standards written in its Strategic Plan and published them on their website. Other land administration organizations do not possess any service standards.

*Recommendations:*

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<sup>444</sup> Based on discussion with ARAZI officials, 25 August 2015.

<sup>445</sup> For comparison purposes, National Olympic Department received 0.06% of operational budget.

<sup>446</sup> ARAZI, Operational Strategy to Become a Modern Public Land Services Institution.

a) Short term

- The Bill of Cadastral Service Fees should be made public and available online.
- All the other land related organs charging fees for their services (or forms) such as courts should have such a list of fees that is publicly available. ARAZI can provide their website, in case other institutions do not have the technical capacities.
- Increased financial resources, coupled with on the job long-term trainings should be provided to High Office of Oversight and Anti-Corruption to be able to better perform its duties, in particular to provide external audit of courts' land registration procedure.
- The Operation Strategy for ARAZI should be amended to contain anti-corruption provisions.
- Establishing a system to receive customers' feedback on land services within public land institutions.
- Setting service standards for all institutions dealing with land governance and making them public to ensure transparency and accountability of services provided.

### Land Valuation and Taxation

#### *Transparency of valuations*

There are four instances, when the valuation of land through the commission (of different members and sizes) is conducted: a) land acquisition, b) transfer of state land to other governmental entity, c) lease of state land to investors and d) land and property transaction tax. However, the actual valuation processes are mirrored with various shortcomings. The valuation commission for acquisition and transfer of state land, for instance, takes longer than one month to set the price, as it is not easy to get all the members to attend the meetings. The process is only on time, if there is a pressure from the leadership or those who have some economic interest. Sometimes members of the commission do not cooperate and refuse to share information with each other. For example, the courts often refuse to cooperate and send an assessment of the price. Additionally, when the real estate dealers provide information about the land prices (also in the case of lease of the state land and property transactions), they not always provide accurate assessment of the price. Corruption in all cases can lead to valuation, which is not necessarily based on market values and strongmen and powerful individuals whose economic interests are at stake can put pressure on the commissions to set the price that benefits them. For the above-mentioned reasons, the land/property valuation does not necessarily reflect the market value of the property/land.

The additional problem with the valuation for acquisition purposes is the fact that the process of acquisition is announced and the budgets for the acquisition are approved one year in advance. The moment the community is informed about the acquisition process, the people take various pre-emptive measures (such as selling the land, lands are being grabbed etc.) for higher prices. Consequently, the budgets are not enough to pay for the compensation.

The valuation when transacting land or property is conducted is sporadic, at times corrupted manner, often leading to the discrepancies between prices written on the title deed and actual value of the land. Many cases are brought to the Supreme Court when the actual price of the land is not written in the legal title deed with aim to decrease the amount of taxes to be paid.

The calculation for land taxation is done based on the records of the land (*Izharnamas*) and sporadic information from courts and ARAZI. This is mainly applicable to the registered land. Since the procedure for tax calculation is fixed (based on size and grade of the land and does not involve the valuation commission, nor the market value evaluation), there is no proper updating of the tax values based on market prices.

Process of valuation of *Safayi* tax seems to be working well, when the implementing agencies are still present in the area. When the implementing agencies finish the surveying, the majority<sup>447</sup> of the municipalities don't have the capacities to update the GIS maps themselves. They use printed maps, while putting red dots on the properties that already have paid the taxes<sup>448</sup>. Often this information is not brought to the center for the update in the central GIS system.

Finally, there are no legal provisions that would require making the valuation rolls public. State organizations can provide information regarding the value of land or property upon request as long as an individual have a legal basis for such a request such as a land dispute case that he/she is involved in. Based on the accounts of various government officials involved in this project, given the prevalence of corruption in the country and the fact that powerful individuals can easily use information to promote their economic interests, lack of public availability of valuation rolls is rather a protective measure. This assumption, however, can be challenged (similarly to the same argument related to the information about cadastral survey) by the fact that although the information on valuation rolls is not made public, the prevalence of corruption is still high.

#### *Recommendations:*

##### a) Short term

- There are four instances, when the valuation of land through the commission (of different members and sizes) is conducted. Mainstreaming of land valuation for different purposes through the Cabinet Resolution bringing all valuation practices under one regulation should be performed and the land valuation process should happen regularly, with each transaction.
- Increased financial resources, coupled with on the job long-term trainings should be provided to High Office of Oversight and Anti-Corruption to be able to better perform its duties, in particular to provide external audit of land valuation procedures.
- A clear mechanism should be developed for the activities of the various valuation commissions to expedite the valuation process. Additionally, performance-based evaluations should be introduced for the members and corresponding monitoring mechanism should be established to verify the compliance.
- Land valuation for acquisition should be done before the acquisition process is announced to prevent rapid increase of the land price and possible land grabbing by powerful individuals.
- *Safayi* collection of taxes should be made more sustainable by providing the adequate resources and capacity building for district and provincial municipal officers.
- Valuation rolls should be compiled in one national database and made public only after the adequate actions against land grabbing are implemented to prevent empowering the land usurpers from benefiting from this action.

##### b) Long term

- The procedure for land valuation for taxation purposes should include the assessment of the market value of the land.

#### ***Collection efficiency***

The prevalence of corruption among the civil services can prevent transparent implementation of policies of tax exemption. For example, land, which cannot meet the criteria to be exempted from tax, can be recorded as exempted from tax, if the landowner makes a deal with the civil servants or simply writes lower amount of land on the title deed. A farmer exempted from the tax due to the natural disaster, can extend the exemption period by paying off state officials. Furthermore, farmers who genuinely qualify for tax exemption might be asked for bribes so that their land is exempted from

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<sup>447</sup>UN-Habitat is working in five big cities of Afghanistan (Kandahar, Mazar-i-Sharif, Herat, Jalalabat, Lashkar Gah). Based on the interview with UN-HABITAT employee, only in Kandahar, the Municipality is using the GIS maps.

<sup>448</sup>Interview with the UN-Habitat employee, Kabul, 6 August 2015.

tax. Corrupt practices can continue and increase in rate, particularly in the absence of public's awareness of the tax exemption policies.<sup>449</sup>

As mentioned above, MoF tax rolls are often outdated and not all property/land holders are on the tax rolls because they are either selling land outside of formal process (not through the courts), which means that the MoF has only *Izharnamas* from 1978 as the last reference point or due to the limited information sharing between the courts (who register new owners) and MoF or ARAZI district offices. In some areas ARAZI or MoF offices are not present at all due to bad security situation. Since not all property holders are registered and no enforcement mechanism exists to make new land owners to pay taxes, not all the taxes are collected. Furthermore, tax evasion in land transaction (land and property transaction tax) happens frequently, which is a major cause of revenue loss.<sup>450</sup>

In terms of the *Safayi* tax, there is a relatively low tax collection (although higher percentage than land tax collection) because citizens do not see the benefit of how their tax is being spent. Additionally, poor surveying or deliberate mis-surveyings have been reported to reduce tax calculation.<sup>451</sup> Finally, because there is still certain portions of the properties in certain districts not surveyed and because the *Safayi* system itself went through some changes in 2009 in the ways of the tax calculation, some *nahias* (districts) within cities are using the old manual system, and some the new system. Taking into account that the old method of tax calculation was based on the prize noted on the land title document, while the new system calculates the tax amount based on the physical characteristics of the land, there can be different tax rates for similar properties. This can be confusing for citizens, and makes tax collection and enforcement difficult for municipal staff.

In addition to relatively low tax collection, the cost of collecting land tax in Afghanistan, particularly in rural and remote areas of Afghanistan is high. Tax collection is done manually and the high number of departments and institutions involved in the process make it time consuming and inefficient.<sup>452</sup> Additionally, long transportation routes from remote areas increase the costs considerably. For these reasons, land taxes in rural areas are often not collected at all.

#### *Recommendations:*

##### a) Short term

- Responsible authorities should be capacitated on tax exemption procedures and legal provisions in different parts of the country to ensure consistency.
- Raising awareness of the local population of tax exemptions to increase accountability and transparency on the part of officials should be a priority.
- Devising and implementing effective anti-corruption policies is the major challenge in relation to the tax exemptions.
- A study should be conducted on the current state of tax collection in Afghanistan and its deficiencies. Clear policy recommendations and guidelines should be devised to establish a well functioning system that is suitable for Afghan context. Lessons learned from other countries should be used as a guideline.
- The Land Taxation Law of 1988 should be reviewed, drafted by MoF and approved by MoJ taking the findings of the study into account.
- Formal mechanism has to be developed for courts and ARAZI to inform MoF about the changes in ownership and land sizes and adequate enforcement mechanism have to be devised aiming to pursue possible tax evaders.
- Developing clear national framework/guidelines for *Safayi* taxation including proper monitoring to prevent deliberate mis-surveyings to increase transparency and accountability.

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<sup>449</sup> Interview with ARAZI employees, Kabul, April 2015.

<sup>450</sup> Interview with ARAZI employees, Kabul, 11 March 2015.

<sup>451</sup> "Managing Land, Mobilizing Revenue."

<sup>452</sup> Interview with ARAZI employees, Kabul, 27 March 2015.

b) Long term

- Formalization of largely informal land tenure in Afghanistan is a prerequisite for successful tax collection efforts (see the sections above for more details on land tenure recognition).
- The improvement of security situation is rather essential for the functioning of tax collection.
- Increasing public's awareness regarding the taxing system, its benefits and how it works paired with affective anti-corruption policies mentioned above.
- Computerizing the tax system can expedite the process and become a cost-effective means of tax collection.

### Dispute resolution

#### ***Assignment of responsibility***

There are multiple venues for conflict resolution that can exist in parallel in Afghanistan. The courts were given the primary responsibility for conflict resolution, however other formal dispute resolution forums exist such as *Huqooq* department and Government Cases Department in MoJ, while ARAZI land clearance (*Tasfia*) delegations can also resolve the disputes between the claimants of the land. However, to this point, these institutions have not significantly affected the primacy of the courts and serve more as channels through which some cases are referred to the courts. However, due to various reasons such as corruption, absence or lack of access to courts, costliness and perceived distance from the community, the majority of Afghans prefers solving their disputes in informal dispute resolution fora such as *shuras* and *jirgas*. The sharing of evidence and rulings between formal and informal justice systems occurs rarely and on ad hoc basis.

The majority of Afghans lack access to conflict resolution mechanisms for land disputes.<sup>453</sup> However, the level of access varies dramatically between demographic groups. Adult men of majority populations<sup>454</sup> enjoy the greatest degree of access, whether it is to formal or informal justice systems, while men from marginalised population groups and women face additional barriers to accessing conflict resolution services. Strong and strictly enforced social norms discourage women from approaching any dispute resolution forum.

Even though the informal justice system is widely used in Afghanistan, it does not enjoy full legal recognition. Various state justice providers such as judges and *Huqooq* officials differ in their opinions about accepting the decisions made by non-state justice mechanisms, consequently actual praxis differs considerably from district to district.

Finally, the process of appeal for ruling takes long (at times 3-4 years) if it's done without any informal payment and/or good social network. The legal process for appealing stipulated in the law is 15 days<sup>455</sup>, however judges and other employees of the court often make it long in order to be able to collect informal payments for the speedy resolution of the case.

#### ***Recommendations:***

a) Short term

- Computer Management System (CMS) - implemented by the USAID is already being rolled out, however this system needs internet and it does not connect all the conflict resolution bodies such as police. The adequate solutions for remote areas should be found to be able to benefit from this system. Additionally, the access to this system should be granted to all conflict resolution institutions such as *Huqooq* and ARAZI.

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<sup>453</sup> See Luccaro and Gaston, "Women's Access to Justice in Afghanistan," [http://www.usip.org/sites/default/files/PW98\\_Women's-Access-to-Justice-in-Afghanistan.pdf](http://www.usip.org/sites/default/files/PW98_Women's-Access-to-Justice-in-Afghanistan.pdf), (detailing how most women do not have access to any dispute resolution forum. More precisely, if virtually no women have access to dispute resolution forums, then only a small number of men lacking access would constitute a majority).

<sup>454</sup> Given that Afghanistan's demographics vary by region, and reliable statistics to establish them do not generally exist, here we use "majority" to mean the population locally perceived to be the majority.

<sup>455</sup>Criminal Procedure Law

- Computer databases such as Oracles that are cheaper and take less time to implement, should be considered as an interim measure before fully operational computerized system is in place to create a database of all land disputes within each formal conflict resolution body's central office.
- Fighting corruption, particularly in courts, should become the priority of the NUG. The Anti-Corruption Strategy established by the President Karzai in 2008 should be implemented through the stronger engagement of the President himself and increased results-based support of the international donor community. Additionally, the past and yet unaddressed cases of corruption should be the priority of the Attorney's General Office.
- The auditing capacities of the High Office of Oversight and Anti-Corruption should be increased by the provision of technical and financial support and internal audits should be conducted to prevent corruption within formal justice system.
- Internal audits of all land administration institutions should be conducted on regular basis.
- Mechanisms to encourage women to approach formal justice system, while sensitizing the rest of the community about the right of women to equal access to justice should be devised.
- The law devising more effective linkages between formal and informal conflict resolution mechanisms (taking into account lessons learned from projects like NRC's Information and Legal Assistance Centers (ILACs), PEACE, LC Project and USIP/ARAZI sponsored pilot) should be broadly and inclusively consulted with the public and approved<sup>456</sup>.
- Capacity building of ARAZI employees and community Shura and Jirga members on land dispute resolution mechanisms, women's rights, relative laws and regulations including the Land Dispute Resolution Regulation needs to be conducted.
- In order to prevent the accumulation of cases in front of courts and provide an accessible, affordable and timely appeals process, the decision to take the role to issue title deeds from the Supreme Court should be promptly operationalized.
- The draft Land Dispute Resolution Regulation prepared by ARAZI, which includes provisions on appellate procedures establishing the district level commission as a first instance and the provincial level commission as an appellate stage, should be promulgated and effectively implemented taking into account the new draft law on Shuras and Jirgas.

b) Long term

- The measures should be taken by the National Unity Government of Afghanistan in order to improve the security situation in remote and insecure areas so as to facilitate the presence of the state justice system.
- The focus should be put on the establishment of well-capacitated special courts on land dispute resolution, while taking into account past lessons learned of similar courts, with an accessible, affordable and timely appeals process.
- If necessary, mobile courts should be established consisting of land clearances (*Tasfia*) teams and judges in order to be able to deal with land disputes on the spot and in timely manner.

***Share of land affected by pending conflicts***

The most common reason for disputes in Afghanistan is land. Despite the decrease in land disputes, several causes point toward the share of disputes of conflicted land in relation to other types of conflicts continues to be high (42%). In rural areas, lands such as mountains, forests, and pastures tend to be communally held. Frequent migration and displacement in recent decades accompanied by dramatic population increase have created pressure over resources, particularly constructible land such

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<sup>456</sup> As mentioned in this report already, there are currently two draft laws with this objective at the MoJ awaiting the decision. The efforts to adequately publicly consult the content of both draft laws is of utmost importance as the enactment of such law is a highly sensitive and political issue.

as housing plots and land used for any type of constructions. This, combined with the lack of documentation on both communal and private land and unclear boundaries demarcation, has created situations particularly susceptible to land disputes. Land in peri-urban areas also appears particularly prone to frequent disputes involving large lands in size. In these rapidly urbanising areas, land records are likewise scanty, while, due to their proximity to major cities, the last ten years has witnessed a rapid increase in land values. For these reasons peri-urban areas appear particularly prone to land-grabbing<sup>457</sup> by significant power-holders. In some instances, communities report the seizure of hundreds of hectares of land. If another power-holder contests control of the land, land disputes over very large tracts can thus emerge. In addition, while communities themselves rarely confront power-holders over land seizure, research has uncovered instances of original owners raising land disputes when the land is re-sold to less powerful third parties<sup>458</sup>.

Although land disputes constitute the plurality of disputes in the country (not more than 50% but 42%, which is the highest percentage from all the other disputes), they seem to proceed to the formal justice system infrequently. Research from various parts of the country has indicated that land disputes in any given court make up less than 10% to about 50% of disputes.<sup>459</sup>

Based on legal provisions of Afghan Civil Procedure Law, primary and appellate judicial processes (except perhaps for a ruling from the Supreme Court) should take place within more or less one year after the initiation of a claim. In reality, judicial proceedings seem to rarely conclude in this amount of time. Both state officials and dispute parties describe resolution within 3-5 years as more typical, with the resolution in the first instance court taking approximately 1 year, however varying from province to province and district to district.

Several factors appear to increase the length of court proceedings. Firstly, the adversarial court proceedings disrupt community relations and relations between plaintiff and defendant, triggering a sort of (non-violent) cycle of revenge. Secondly, courts are reporting to be over-burdened and lack the capacity to adjudicate in a timely manner. Many sources, however, also report courts delaying proceedings in lieu of bribes influencing how parties interact with the court system.

Finally, there are few long standing land disputes in Afghan formal justice system. However, long-term land disputes that exist can drag on for decades or even over a century in length, while the disputes typically cycle through a series of government and non-government forums, not remaining with any one forum for the prolonged length of time. However, the absence of long-term disputes in government forums as evidence of these forums' efficiency. If a government (or other) forum does not prove efficient, parties usually remove their cases from that forum and proceed with another one.

#### *Recommendations:*

##### a) Short term

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<sup>457</sup>The term is defined as “use, control, occupation or ownership of land by one without bona fide right” (in “Stolen Lands.” The definition includes different ways the land grabbing is performed, such as “use of physical force, intimidation or violence by powerful people to remove others from land, occupation of empty lands; obtaining the title through a land allocation scheme that fails to meet the legal requirements [and] obtaining the title through fraud” (in Policy Advisory Group on Land, “Draft Policy Paper on Addressing Land Grabbing through Criminal Justice System, 2014). According to the statistics compiled by ARAZI, more than 1.2 million *jeribs* of land (a *jerib* is equal to 2000 square meters or 0.2 hectares) were grabbed in the past decade (in Independent Joint Anti-Corruption Monitoring and Evaluation Committee, “Public Inquiry into Land Usurpation, Kabul: MECC, 2014) by over 15,000 individuals (in “Stolen Lands of Afghanistan”).

<sup>458</sup>“Major Land Disputes and Land Titling Systems of Khost Province: Implications for Collaboration between Traditional Dispute Resolution Mechanisms and ARAZI” (Kabul: The Liaison Office, 2014); representative of NRC, pers. comm., 16 March 2015; and Afghan civil society actor, pers. comm., 18 March 2015.

<sup>459</sup>See The Liaison Office, “Formal and Informal Justice in Paktia and Nangarhar: a TLO Working Paper” (noting especially a high number of land conflicts in the court of Mohmand Dara district); and The Liaison Office, “Formal and Informal Justice in Southern Afghanistan: Evidence from Helmand, Uruzgan, and Nimruz” (noting that the court of Grishk district appears to hear exclusively criminal matters).

- The newly drafted Rangeland Law, containing provisions on usage of pastures should be approved and implemented.
- Relevant authorities should work together to operationalize already existing efforts to incorporate a provision on land usurpation into the Criminal Code. Where appropriate donors and civil society stakeholders should provide technical assistance to the drafting process.
- Approval and support of the draft Restitution Policy on Land Grabbing.
- In order to prevent the accumulation of volume of work in front of courts and to provide accessible and timely process, the decision to take the role to issue title deeds from the Supreme Court should be promptly operationalized. Additionally, a capacity building of ARAZI is needed if the administrative tasks will be transferred from the Supreme Court to ARAZI.
- The National Unity Government should initiate a national land survey and registration in the country (the 66% of land still needs to be surveyed and registered) in order to determine the state, private and public land and to establish clear boundaries.

b) Long term

- Establishment of well-capacitated, transparent and accountable special courts on land dispute resolution in the country, which address only land and property disputes in an effective and timely manner.
- If necessary, mobile courts should be established consisting of land clearances (Tasfia) teams and judges in order to be able to deal with land disputes on the spot and in timely manner.

#### **Institutional Arrangement and Policies**

##### ***Clarity of mandates and practice***

There is reportedly good enough division of responsibilities between policy formulation, implementation and arbitration. The issue arises when it comes to the supervision and monitoring of policy implementation. ARAZI, for instance, makes decisions about the lease of the state land, as well as it is responsible for its monitoring. The ‘control and supervision of implementation of Master Plans is the responsibility of Master Plan designer (MUDA) and municipalities’<sup>460</sup> as a joint task, while the implementation of the plan is fully under the responsibility of the municipality. The obvious conflict of interest exists here, when the implementing body- municipalities - is also responsible for their own control and supervision. This significantly compromises the impartiality of the monitoring. This becomes further muddled when looking more carefully at the Municipality law, which notes, that ‘[m]unicipalities can formulate their own Master Plan and submit them for Government approval’<sup>461</sup>. Finally, a perceived conflict of interest exists between courts administrative function of registering land and providing formal title deeds and judicial function of resolving land related disputes.

Additionally, greater clarity over the role over dispute resolution between ARAZI, courts, Huqooq and other dispute resolution bodies is needed. ARAZI’s Department of Addressing Land Disputes provides necessary documentation when a case comes before a court. Additionally, it can informally resolve the dispute, which is then recorded at ARAZI. This adds to the myriad of conflict resolution bodies existing in Afghanistan creating further complexity to the conflict resolution mechanisms.

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<sup>460</sup>Wily, “Land Governance at the Crossroads,” 19.

<sup>461</sup>Wily, “Land Governance at the Crossroads,” 8.

In urban setting, significant horizontal overlap exists between the Ministry of Urban Development Affairs and local municipalities. The process of urban expansion and infrastructure development is shared between municipalities and MUDA, However, actual collaboration has developed informally and depends heavily on the individual municipal and ministerial objectives and ideologies. Shared ideology and objective is weak, often in conflict with one another, resulting in numerous stalemates in policy planning. This is particularly true for MUDA and Kabul Municipality, where strong disagreement exists about the implementation of Third Kabul Master Plan, resulting in lack of regularized urban expansion in Afghanistan largest city.

In terms of public availability of land information, although information on land right and use is available to individuals, complicated, costly and time-consuming processes (in particular in courts), renders the access to information difficult for private persons. Due to better social networks and leverage, government officials and prominent individuals can access information lot easier, even when in case of government officials requiring the information as private, not public persons, for their personal use. Lacking an adequate data collection and established linkages between various land governance institutions though, is making the process of information sharing difficult. As such, various land registries are for most part not interconnected, creating major overlaps in certain types of information, however gaps in other. Land information is not widely publicly available, mostly limited to the owners of the particular land; third persons are mostly not provided the access to information. Information on state land is particularly well protected and certainly not publicly available. Finally, no reporting on land rights and use by public institutions exists in Afghanistan.

The types of ownership are well differentiated, with the exception of public land. The lands that have been allocated for public use and are neither the property of the state nor the property of the individual are considered as public lands based on accounts of various technical Afghan experts involved in this project. The issue arises with the Art.3(8) of LML 2008, which stipulates that any land that is deemed public but is not registered in the book of government lands, is considered state land. Additionally the Presidential Decree 83 further blurs the boundaries between state and public land by putting emphasis on formal documentary proofs of ownership. The fact, that Afghan legal framework does not define public land and does not provide provisions on how to register public land and the registration of land in general occurs rarely in Afghanistan, public land can be easily interchanged for the state land. In other words, land that is under public use and not registered can easily be claimed by the state as its property and be reassigned subsequently<sup>462</sup>. This can lead to numerous land claims over one plot of land, leading to long lasting protracted conflicts.

Additionally, the land tenure in Afghanistan is rarely based on formal ownership documents. A majority of people claim rights over land based on customary land tenure, which often contributes to the overlapping ownership claims. However, no comprehensive solution has been developed for duplicate ownership (i.e., two individuals having valid ownership claims for a single piece of land), an important issue given the history of wars in Afghanistan and the culture of land grabbing throughout the country. Based on the account of some experts, this is because the legal framework has been unable to find a way to address the discrepancies between the tenure typology of previous regimes and current one such as the collective/communal ownership based on decrees of the past regimes (i.e. Kuchis and various Afghan tribes that were given the land, collective tenure particularly in rural areas with customary claims on land etc.).

#### *Recommendations:*

##### a) Short term

- An inter-agency commission between MUDA and Municipalities should be established to clearly delineate the responsibilities between these two institutions in relation to the formulation, implementation and monitoring of the master plans. In future, this commission can serve as a

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<sup>462</sup> Please note that the conversion of public land into private land (not only state land) , especially in the peri-urban areas is happening as well.

forum for discussion various pressing issues such as status of informal settlements in Afghan cities.

- The newly proposed LML, including clear delineation of responsibilities between land governance institutions including ARAZI, which was not mentioned in the current LML 2008, should be promptly ratified.
- The role of ARAZI as a dispute resolution body has to be decided making sure not to replicate the same conflict of interest as currently courts inhibit (being the issuer of title deeds as well as the adjudicator of land conflicts)
- Addressing contradictory legal codes in terms of definition of public lands including clear distinction between arid & virgin lands and pasturelands by approving existing new draft of LML developed by ARAZI and Pastureland Law by MAIL

b) Long term

- Creation of centralized computerized system at ARAZI as one-stop-shop for land registration and information to mainstream the access to land information. People will be able to access the information through the website (without possibility of changing the information).
- A comprehensive solution must be found to develop the current tenure typology further in such a way that addresses the realities of Afghanistan (e.g. collective ownership).

**Equity and non-discrimination in the decision-making process**

The contents of the National Land Policy (NLP) 2007 are largely considered to hold up to international best practices<sup>463</sup>. Although various inter-ministerial and technical working groups were established aiming at development of NLP, no formal public consultations took place. Additionally, most of the pledges of the National Land Policy of 2007 have not yet been ‘absorbed’<sup>464</sup> into the legal framework of the country. The ‘current legal framework still has remnants of past land rights reforms’ and ‘customary law ... remains poorly integrated with formal law and policy’<sup>465</sup>. The Land Policy, while developed in a semi-participatory manner (only among public institutions) has been left without a matching legal framework to support it, and thus remains as an aspirational reference document.

Public institutions are not required by law to consult the public. The lack of a requirement translates to the situation where the most relevant actors - the affected public - are often left out of the consultation and drafting process. The affected public may be involved in small-scale rural projects (i.e., through the NSP) but they are not widely included in the process of drafting regulations related to the programs themselves. This is particularly visible in the case of urban planning where the on-the-ground realities of cities like Kabul are not considered in drafting plans.

While the National Land Policy is generally intended to alleviate poverty and increase equity among citizens of Afghanistan, the objectives of the policy have not been sufficiently incorporated into the legal framework, nor have the monitoring mechanism put in place to measure those. The Land Management Law of 2008, for instance, is not pro-poor apart from an indirect mention of the poor and marginalized in its objectives. The section on restitution containing a government obligation to allocate lands to the poor was removed from the 2008 version of LML, the definition of eligible persons to include large landowners was expanded and did not include housing needs of urban citizens. It also provides limited support for informal dispute resolution, an important avenue for resolution especially among the poor who may not be able to afford to resolve problems in court. Other laws and policies, including the Presidential Decree 104 and National IDP Policy, which legalised the distribution of land to IDPs and returnees, have simply not been successfully implemented.

Additionally, existing land laws have been inconsistent on the issue of discrimination against women and girls. Women and girls, often deprived of their inheritance rights to land and property (although the Article 40 of Afghan Constitution is stating their right to inheritance and EVAW law stipulates the

<sup>463</sup>Wily, “Land Governance at the Crossroads,” 9.

<sup>464</sup>Wily, “Land Governance at the Crossroads,” 1.

<sup>465</sup>Ibid., 1.

right to property), are left without sufficient protection. They are further more vulnerable to domestic violence within greater conflicts on land.

While the land policy addresses ecological and environmental goals and concerns, the policy lacks corresponding laws to ensure proper implementation and contains no provisions for public monitoring. In practice, the environmental and ecological concerns are typically overlooked by government agencies and private individuals in the interest of other objectives (such as construction and expansion).

The communication with the MoF in terms of the financial resources needed has been limited or non-existent in the drafting of policies resulting in the absence of a cost-benefit analysis or accompanying review of resources and institutional capacity for the implementation. As a result, Afghan land policies often remain under-resourced with limited capacities to implement the policies and regulations.

Neither the Land Management Law of 2008 nor the Land Policy of 2007, contains a requirement for public reporting indicating process of implementation. Public reporting has thus far occurred at the initiative of the relevant government agencies (ARAZI reports their achievement in their website, for instance).

The National Land Policy makes significant strides in laying the foundation for disaster risk reduction (DDR) language in its text. While the section's focus is on environmental protection, clear linkages to disaster risk exist (i.e., reference to floor controls and mining techniques). However, the actual laws aiming to improve the disaster risk management have not followed the adoption of the National Land Policy. Additionally, Afghanistan National Disaster Management Authority (ANDMA)'s resources, remain severely limited.

#### *Recommendations:*

##### a) Short term

- The current draft of LML 2014 should be promptly ratified by the Afghan Parliament and enforced by the Afghan National Unity Government because it builds on the National Land Policy 2007. If necessary, the law should be adopted through the Presidential Decree.
- The new Land Acquisition Law should be ratified promptly to address the undue evictions and loss of moveable and immoveable property of the poor.
- Criminalization of land grabbing in Afghan Penal Code should be promptly put in place and perpetrators have to be brought to justice.
- The National Land Policy 2007 that includes the provisions for the ecological and environmental objectives should be promptly enforced by implementing existing and enacting new laws, if necessary, mirroring its objectives.
- The implementation of Environment law should be enforced.
- The expenses for the implementation of National Land Policy should be fully and properly budgeted in Afghanistan National Budget through the extensive consultations with the Ministry of Finance.
- It is of utmost importance that a land policy be enforced, and associated with mechanisms for monitoring the adherence to the policy by the government and non-governmental actors.
- The obligation of public reporting on the land policy implementation should be amended in new draft of LML.
- Prompt ratification of the 2014 draft on the LML that builds strongly on the Land Policy 2007, which included DDR in its purview is recommended.
- The Plans of ARAZI to conduct a conference on Land Policy 2007 and its possible amendments should be supported.

##### b) Long term

- Any policy and law related to land in the future should be developed with the extensive formal and informal consultations with the land governance stakeholders including the public.
- Greater prioritization of ecological and environmental issues must be established across the board by the Afghan government, and accompanied by monitoring and enforcement measures.
- The continuous support of the international development community in the field of land governance should be ensured.

## 11. Policy Matrix

*\*Please note that the list of issues and indicators is not exhaustive. The issues and corresponding policy recommendations were selected based on the priorities identified during the Technical Validation Workshop and Policy Dialogue.*

	Policy issue	Proposed action	Responsible agency	Monitoring indicator
<b>Recommendations on Panel 1</b>				
<i>LG1: Recognition of continuum of rights</i>				
1	Customary and undocumented rights recognized only into certain extent, hence the majority of people do not possess valid ownership documents.	<p>The minimal limit of continued ownership and cultivation of the land needed in order for the long term unchallenged possession be formally recognized should be decreased through the amendment of current LML.</p> <p>Customary deed documents prepared after August 1975 and meeting all the other requirements as per Art. 5 of LML 2008 should be formally recognized through the amendment of current LML.</p> <p>The efforts of various NGOs (such as TLO and Checci) to capacitate Afghan citizens on what information a customary deed document should include in order for it to be formally recognized should be further enhanced involving the government in these efforts.</p> <p>Awareness of public, Afghan National Police and Army on the land issues and land rights has to be increased. The land governance has to be included in the teaching and training curricula for these target groups.</p> <p>Creation of centralized (gradually computerized) system at ARAZI as one-stop-shop for land registration.</p> <p>As an interim measure, community-based land recording system should be developed, which will be later on connected to ARAZI registering system (when transferred from courts to ARAZI) and their Principal Books.</p>	ARAZI, MoJ and parliament (if not possible through Presidential Decree), CDCs, shuras, jirgas, religious figures, civil society, media	Increased % of land recognized and registered.
	Extensive land grabbing and lack of measures to prevent and/or punish it compromises land tenure security, particularly in urban areas.	<p>Relevant authorities should work together to operationalize already existing effort to incorporate a provision on land usurpation into the Criminal Code. Where appropriate donors and civil society stakeholders should provide technical assistance to the drafting process.</p> <p>Approval and support of the draft Restitution Policy on Land Grabbing.</p> <p>Prosecution of land grabbers should be made a priority within the Attorney</p>	MoJ, ARAZI; Mol, courts, international donor community, civil society; Attorney's	The increased number of cases of land grabbing resolved in courts

		General's office. Similarly investigation and technical capacity to do so should be enhanced within the Afghan National Police (ANP) with the possibility to establish a special police force tasked with the protection of lands against the land grabbing.	Genera Office, ANP	
<b>LGI 2: Respect for and enforcement of rights</b>				
4	Land clearance process ( <i>Tasfia</i> ) allowing for land registration in ARAZI Principal Books is conducted rarely.	<p>ARAZI's plans to implement National Demarcation Project identifying the boundaries of villages and <i>Gozars</i> (administrative units smaller than districts in urban areas) should be materialized. As a follow-up step the land clearance process on large scale should be restarted. The judge should be included in <i>Tasfia</i> delegation to deal with the land disputes, if necessary. In case of more complex land disputes, the fact that the ownership of land is disputed, should be indicated on the <i>Tasfia</i> report and forwarded to courts. Adequate financial resources should be allocated for this purpose from the national budget. The support in form of financial means, as well as technical expertise should be sought with international community and civil society.</p> <p>The possibility of a first-stage land clearance done by communities to enable nationwide land identification should be explored.</p> <p>The regulation proposed by ARAZI that allows for registering of urban properties should be approved promptly.</p>	ARAZI, MoF (for budget allocation), courts; IDLG, MUDA, MRRD, CDCs, MoBTA, UN-HABITAT, UNHCR	Increased % of land cleared
<b>Recommendations on Panel 2</b>				
<b>LGI 1: Rights to Forest and Common Lands</b>				
	Management of forests in Afghanistan faces a number of issues.	<p>Identifying mechanisms to promote forest management in areas which are currently out of reach of the government such as developing and empowering community based adjudication groups (comprising of elders and influential figures in the community) to address rural land use restrictions violations. One possible option would be channelling the rural land management through CDCs.</p> <p>Raising awareness of the local population about the importance of forests and the negative impacts of deforestation in order to encourage communities to take part in maintain the forests particularly in the areas where the presence of the central government is limited.</p>	MAIL, ARAZI, IDLG, NEPA, MoBTA; MRRD, CDCs, Shuras	Mechanisms for promotion for forest management in areas out of reach of government control devised including establishing of community-based adjudication groups
<b>LGI 2: Effectiveness and equity of rural land use regulations</b>				
	There are no rural land use plans existing in Afghanistan.	The development of the rural land use plans by the MRRD through the participatory and transparent process, where public voice can be heard and the burdens are shared.	MAIL, IDLG, MoF, NEPA, MRRD	% of rural land covered by rural land use plans

	The lack of enforcement of protective regulations leads to the degradation of protected rural lands.	Identifying mechanisms to promote protected areas management in areas which are currently out of reach of the government such as developing and empowering community based adjudication groups (comprising of elders and influential figures in the community) to address rural land use restrictions violations  Prioritising surveying of natural resources, which are identified as in high risk of degradation.  Expediting the process of land change to protected area by mainstreaming the steps and organizations responsible.	NEPA, MAIL, IDLG, Cadastral Department of ARAZI	% of rural land brought under NEPA protection regime
<b>Recommendations on Panel 3</b>				
<i>LGI 1: Restrictions on rights</i>				
	Restrictions on the land use prescribed by Master Plans of big cities are often not enforced.	Clear mechanism for use change of each type of urban land should be devised including the requirement of permits to do so. Municipalities should establish a monitoring mechanism for this purpose, as well as a database of land used changes, which will be updated regularly with new spacial information.  Municipality Law should be amended and unified practices of each municipality should be anchored in the law.  Zoning Law both for national and municipal purposes should be enacted.	MUDA, Kabul Municipality, ARAZI, IDLG, MoJ, NEPA, UNHCR	% of land used in line with new Master Plans for Afghan biggest cities
	Urban planning in Afghan largest cities does not follow a clear reference for urban planning.	New Master Plans have to be developed for biggest cities in Afghanistan as per MUDAs commitments within “Big Cities Master Plan” initiative with the support of international community.  Long awaited National Urban Policy has to be enacted.	MUDA, Municipalities, UN-HABITAT and the World Bank	% of land used in line with new Master Plans for Afghan biggest cities
<i>LGI 2: Transparency of land use restrictions</i>				
	Unclear delineation of the responsibilities of the municipalities and MUDA	An inter-agency commission between MUDA and Municipalities should be established to clearly delineate the responsibilities between these two institutions in relation to the formulation, implementation and monitoring of the master plans. In future, this commission can serve as a forum for discussion various pressing issues such as status of informal settlements in Afghan cities.	MUDA, Municipalities (Kabul Municipality in particular)	% of land used in line with Kabul Master Plan
<i>LGI 3: Efficiency in the Urban Land Use Planning</i>				
	Currently, no clear commitment to low-cost housing and	A policy on low cost housing for the poor should be adopted. The policy should be developed in a consultative manner, with input from all stakeholders including civil society representatives, the government and	ARAZI, MoJ, MUDA	Increased number of low-cost housing

	services for the poor exists.	the public in question itself. Additionally, anti-eviction laws should be designed (based on Forced Eviction Guidelines already existing within the National IDP Policy) with constitutional protections in mind and, in the case of eviction, a legal commitment to fair compensation should be established.		
	Kabul urban expansion largely remain outside of the Third Master Plan.	<p>The policy on Upgrading of Informal Settlements has to be approved and implemented.</p> <p>The Presidential Decree 104 has to be amended (or annulled and new law should be adopted) that tackles the shortcomings of the Presidential Decree 104 such as the allocation of non-viable land and cumbersome eligibility criteria. National IDP Policy (including Forced Eviction Guidelines) has to be adequately implemented.</p> <p>The initiatives like Maslakh, where IDPs are given the land titles, should be supported and if possible reproduced.</p>	MUDA, Kabul Municipality; MoRR, ANDMA, UNHCR	% of land used in line with Kabul Master Plan
	The carrying capacity of infrastructure has been long overloaded.	With the development of new master plans for biggest cities, the infrastructural needs of the population and the current state of the cities (considerably changed in comparison to 1990s) needs to be taken into account and adequate mechanism to provide necessary infrastructure have to be developed.	MUDA, Municipalities	% of land used in line with Kabul Master Plan (including necessary infrastructure)

#### Recommendations Panel 4

##### *LGI 1: Identification of public land and clear management*

	Unclear definition of public land is resulting in illegal transactions and uses.	<p>Newly proposed amended LML addressing the shortcomings of the public land definition and classifying 4 types of land including “land specific to village(s)”, containing a clear definition of “public interest” classifying types of public land and delineating responsibilities for different types of public land should be ratified.</p> <p>The plans of ARAZI to restart the cadastral survey of the remaining 66% of lands (including public lands) should be implemented promptly in stepwise manner and adequately financed. The survey, as planned by ARAZI should start in Bamiyan province no later than end of 2015.</p> <p>A community-based management of public lands should be put in place (potentially thorough shuras, jirgas, CDCs), when the definition of public lands is clarified including a raising awareness of the public about the public land, laws and regulations associated with its use.</p>	High Council on Land and Water, ARAZI (Cadastral Department), MAIL, MoJ; MoF; IDLG; MoI, ANP, international community	<p>% of public land surveyed</p> <p>% of public lands used according to the regulations</p>
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##### *LGI 2: Justification and Time-Efficiency of Acquisition Processes*

	There is no accurate statistical information on lands that have been acquired.	An IT-based database system where all acquired land together with the cadastral maps and other related land documents will be recorded should be developed, kept with ARAZI and shared with other land institutions.	ARAZI, Municipalities, MUDA	% of acquired land entered into the database
<b>LGI 3: Transparency and fairness of acquisition procedures</b>				
	In majority of cases, paid compensation is not sufficient for the individual to be able to maintain his/her previous status of life.	Prompt ratification of the amended LAL containing clear provision on fair and just compensation process.	ARAZI, MoJ	% of land acquisition cases where the adequate and timely compensation was provided
	There is no deadline for the payment of compensation for land acquisition.	Prompt ratification of the amended LAL containing compensation paid prior to the project start.	ARAZI, MoJ	% of land acquisition cases where the adequate and timely compensation was provided
	No provision on compensation for the loss of grazing rights exists.	Adoption of the proposed LAL, that provides for the compensation of grazing and other rights, which incurred losses due to acquisition.	ARAZI, MoJ; MAIL	% of land acquisition cases where the adequate and timely compensation was provided
<b>Recommendations on Panel 5</b>				
<b>LGI 1: Transfer of state land to private use</b>				
	State land sales are happening in unregulated manner.	The possibility for state land sales should be clarified through the Cabinet Regulation clarifying current legal provisions on this matter. Clear categorization should be developed based on which the restrictions on transferability will be applied.  The status of AISA and its activities should be clarified by clear rules of engagement interlinked with ARAZI Investment Policy.	ARAZI, Ministry of Commerce and Industries, AISA, Municipality	% of state land sold
	State Land Leases are not always happening through the public auction.	Increased financial resources, coupled with on the job long-term trainings should be provided to High Office of Oversight and Anti-Corruption to be able to better perform its duties such as verifying the usage of public auction for every land lease procedure.	ARAZI, Council of Ministers, HOOAC	% of state land leases which happened based on public auction
	Land valuation encounters delays and the results are not made public.	Devising mechanism for assessing performance of members of the valuation commission, with poor performance being addressed immediately.  Addressing corruption in land valuation process.  The results of land valuation for land lease purposes and the information about the land leases for various projects particularly where it concerns the	ARAZI, President, NUG, Municipalities,	% of land valuations happening in timely and transparent manner

		public should be made publicly available.		
<b>LGI 4: Contracts involving state land are public and accessible</b>				
	No ARAZI, nor third monitoring of land lease contracts currently exists.	A clear monitoring system of application of lease contracts and benefit-sharing mechanisms conducted at least every six months with participation of local communities and venues for dealing with non-compliance should be clearly established.	ARAZI	Third party monitoring conducted at least once a year per each lease contract.
<b>Recommendations on Panel 6</b>				
<b>LGI 1: Mechanisms for recognition of rights</b>				
	The registration with court while acquiring the title deed during land transactions is lengthy and complex process.	<p>Different registries in Afghanistan should be mainstreamed and interlinked (more details below) in order to prevent overlaps, outdated and missing information. ARAZI should be established as “one-stop-shop” for registering the land (both within or outside of the Master Plan): The land clearance process <i>Tasfia</i> should be done on large scale and should always include the members of the Cadastral Department to conduct the survey. Then the land is recorded to ARAZI Principal Books and formal title deed is given to the owner. Technical and financial support to ARAZI’s pilot project in Herat that, if successful, will be extended to all 34 provinces, should be accorded. This process should be later computerized to allow for the inter linkages with other registries such as in courts and MoF tax books.</p> <p>An Independent monitoring body should be created that will monitor the process of land formalization in order to maintain the process effective, consistent and transparent.</p> <p>In-house procedures and anti-corruption policies of ARAZI should be reviewed to prevent lengthy and costly process of land registration.</p>	ARAZI; courts; MoF, MoJ, courts, international community; High Council on Land and Water	Increased % of land registered
<b>LGI 2: Completeness of Registry</b>				
	Cadastral surveying information, have not been updated since 1978 and took place only on 34% of Afghan land.	<p>ARAZI’s plans, based on their Operational Strategy, to establish national comprehensive cadastral registration programs should be technically and financially supported.</p> <p>Cadastral records have to be connected to both ARAZI Principal Books and courts title deed registration in consistent manner. Furthermore, uniform and standard format of circular form including the verification of the Cadastre should be developed stating all the personal information of the buyer and seller, photos, signatures (or fingerprints), physical specification of land etc.</p> <p>As an interim measure, all cadastral maps should be scanned, to expedite</p>	ARAZI - Cadastral Department, MoF, NUG, international community, courts	% of land surveyed

		the manual search happening at present in the Cadastral Department, however with aim to be later included in the computerized system.		
<b>LGI 3: Reliability of Registry Information</b>				
	Afghanistan does not have one single registry. Additionally, changes in land records are not necessarily forwarded from the provinces to the centre. Hence no centralized database of land records exist in Afghanistan.	Before the creation of ARAZI as one-stop-shop is fully operationalized, as an interim measure, various registration books should be compared and the proper linkages should be developed including with the central level. This will also help to establish full database of land information, when ARAZI takes over as one-stop-shop.	High Council on Land and Water, ARAZI	Increased % of land registered
	The synchronization of data from various registries does not happen in consistent manner hence the registries contain out-dated information.	A formal mechanism has to be developed for courts to inform ARAZI and MoF about the new titled deeds they have accorded to new owners of the land.  A formal mechanism has to be developed to connect MoF taxation books to ARAZI Principal Books.	ARAZI, courts, MoF	Increased % of land registered
	Informal payment is widespread within government institutions.	Mainstreamed process (in form of ARAZI as one-stop-shop) of land registration and computerized land register will decrease the opportunities for corruption.  Increased financial resources, coupled with on the job long-term trainings should be provided to High Office of Oversight and Anti-Corruption to be able to better perform its duties, in particular to provide external audit of courts' land registration procedure.	ARAZI, HOOAC	Increased % of land registered
<b>Recommendations on Panel 7</b>				
<b>LGI 1: Transparency of valuations</b>				
	Process of land valuation for different purposes does not happen with each transaction	Mainstreaming of land valuation for different purposes should be performed through the Cabinet Resolution bringing all valuation practices under one regulation and the land valuation process should happen regularly, with each transaction.	MOF, ARAZI, Municipalities, MAIL, IDLG, MUDA	% of land valuations happening with each transaction
	The process of land valuation for various	A clear mechanism should be developed for the activities of various valuation commission to expedite the valuation process. Additionally,	High Council on Land and	% of land valuations happening in timely and transparent manner

	purposes is mirrored with shortcomings.	performance-based evaluations should be introduced for the members and corresponding monitoring mechanism should be established to verify the compliance.	Water, ARAZI	
	People take various preemptive measures after the process of acquisition is announced.	Land valuation for acquisition should be done before the acquisition process is announced to prevent rapid increase of the land price and possible land grabbing by powerful individuals.	High Council on Land and Water, ARAZI	% of land valuations happening in timely and transparent manner
	Valuation rolls are not made public.	Valuation rolls should be compiled in one national database and made public only after the adequate actions against land grabbing are implemented to prevent empowering the land usurpers from benefiting from this action.	High Council on Land and Water, ARAZI	% of valuation rolls made public
<b>LGI 2: Collection Efficiency</b>				
	MoF tax rolls are often outdated and not all the property/land holders are on the tax rolls.	A study should be conducted on the current state of tax collection in Afghanistan and its deficiencies. Clear policy recommendations and guidelines should be devised to establish a well functioning system that is suitable for Afghan context. Lessons learned from other countries should be used as a guideline.  As an interim measure, formal mechanism has to be developed for courts and ARAZI to inform MoF about the changes in ownership and land sizes and adequate enforcement mechanism have to be devised aiming to pursue possible tax evaders.	MoF, ARAZI, courts	% of all eligible tax payers included in tax rolls
	Not all the taxes are collected.	The formalization of largely informal land tenure in Afghanistan is a prerequisite for successful tax collection efforts (see the sections above for more details on land tenure recognition).  The Land Taxation Law of 1988 should be reviewed, drafted by MoF and approved by MoJ taking the findings of the study into account.  The improvement of security situation is rather essential for the functioning of tax collection.	NUG, High Council on Land and Water, ARAZI, courts, MoF, MoJ, Mol, MUDA, Municipalities, international community	% of taxes land and property taxes collected
<b>Recommendations on Panel 8</b>				
<b>LGI 1: Assignment of responsibility</b>				
	Although land disputes constitute the majority of disputes in the country, they seem to	Computer Management System (CMS) - implemented by the USAID is already being rolled out, however this system needs internet and it does not connect all the conflict resolution bodies such as police. The adequate solutions for remote areas should be found to be able to benefit from this	ARAZI, MoJ, MoF, international community	% of land disputes in formal justice system

	proceed to the formal justice system infrequently.	system. Additionally, the access to this system should be granted to all conflict resolution institutions such as Huqooq and ARAZI.  Computer databases such as Orcles that are cheaper and take less time to implement, should be considered as an interim measure before fully operational computerized system is in place to create a database of all land disputes within each conflict resolution body's central office.		
	Alleged corruption in courts and consequently costliness is most commonly cited among Afghan population, preventing them from reaching to formal justice system.	Fighting corruption, particularly in courts, should become the priority of the NUG. The Anti-Corruption Strategy established by the President Karzai in 2008 should be implemented through the stronger engagement of the President himself and increased results-based support of the international donor community. Additionally, the past and yet unaddressed cases of corruption should be the priority of the Attorney's General Office.  The auditing capacities of the High Office of Oversight and Anti-Corruption should be increased and internal audits should be conducted to prevent corruption within formal justice system.  Internal audits of all land administration institutions should be conducted on regular basis.	NUG, President, HOOAC, MEC, international community, Attorney's General Office	% of land disputes in formal justice system
	Men from marginalised population groups and women face barriers to accessing conflict resolution services.	Mechanisms to encourage women to approach formal justice system should be devised while sensitising the rest of the community about the right of women to equal access to justice.	MoJ, MoWA	% of land disputes including women in formal justice system
	Informal justice system does not enjoy full legal recognition.	The law devising more effective linkages between formal and informal conflict resolution mechanisms (taking into account lessons learned from projects like NRC's Information and Legal Assistance Centers (ILACs), PEACE, LC Project and USIP/ARAZI sponsored pilot) should be broadly and inclusively consulted with the public and approved.	MoJ, ARAZI	% of land disputes resolved by the informal justice system registered in the formal justice system
<b>Recommendations on Panel 9</b>				
<i>LGI 1: Clarity of Mandates and Practice</i>				
	Greater clarity over the role over dispute resolution between ARAZI and other dispute resolution bodies is needed.	The role of ARAZI as a dispute resolution body has to be decided making sure not to replicate the same conflict of interest as currently courts inhibit (being the issuer of title deeds as well as the adjudicator of land conflicts)  The draft Land Dispute Resolution Regulation prepared by ARAZI, which includes provisions on appellate procedures establishing the district level commission as a first instance and the provincial level commission as an appellate stage, should be promulgated and effectively implemented taking	ARAZI, MoJ, courts, IDLG, MAIL, Shuras, Huqooq	Roles of ARAZI and courts clearly defined

		into account the new draft law on Shuras and Jirgas.		
	Complicated, costly and time-consuming processes render the access to information difficult for private persons.	Creation of centralized (gradually) computerized system at ARAZI as one-stop-shop for land registration and information to mainstream the access to land information.	President, ARAZI, courts, MoF, international community	Increased % of land registered
<i>LGI 2: Equity and Non-discrimination in the Decision-Making Process</i>				
	Most of the pledges of the National Land Policy of 2007 have not yet been 'absorbed' into the legal framework of the country.	The current draft of LML 2014 should be promptly ratified by the Afghan Parliament and enforced by the Afghan National Unity Government because it builds on the National Land Policy 2007.  The Plans of ARAZI to conduct a conference on Land Policy 2007 and its possible amendments should be supported.	ARAZI, MoJ, international community	% of National Land Policy pledges turned to laws

## 12. Conclusion and next steps

Afghanistan went through a number of changes related to the land governance in the course of its modern history. With each change in the administration, different sets of rules applied as to how the land issues were dealt with. The three decades of war resulting in the destruction of a considerable number of documents, also contributed to the myriad of land related issues. Although in recent years, various legal texts and drafts were produced, aiming to rectify the shortcomings of current land administration, the legal framework falls short of corresponding to the Afghan realities.

There is number of factors that affect the recognition of tenure rights in reality:

- The impact of conflict over the past three decades on land administration and management remain to be acknowledged and addressed. Return of exile populations,<sup>466</sup> internal displacement of populations,<sup>467</sup> the rapid urbanization of the country, and on going conflict over rights to pasturelands between nomadic and settled communities have drastically impacted the tenure situation.
- Widespread land grabbing by power holders was reported as one of the greatest challenges faced by land authorities, according to ARAZI and municipalities interviewed for the study. Current estimates suggest that over 1.5 million jeribs of land, including nearly 15% of all arable land has been illegally usurped in Afghanistan.<sup>468</sup> The lands were usurped by a range of actors including local armed commanders, ethnic leaders, village leaders, wealthy individuals, Afghan National Police as well as government officials. Land has been usurped both through the use of force, as well as through forged documents and corrupt practices with the involvement of government officials.<sup>469</sup> ARAZI has proposed legislative reforms to prohibit land grabbing as part of the reforms to the LML. Proposed amendments aim to define land grabbers and specify punishments for land grabbers; however, the relevant provisions were removed by Taqin department of MoJ. Additionally ARAZI has developed a draft five year strategy for prevention of land grabbing and restitution policy both of which were sent to cabinet for approval.
- Rampant corruption present at all levels of government including the institutions dealing with the land management. Afghanistan is on 172nd place (out of 175 countries participating in the survey) in the Transparency International Corruption Perception Index 2014<sup>470</sup> being perceived among the three most corrupt countries in the world. The perceptions of people in Afghanistan deteriorated in comparison with past years. According to the 2014 Integrity Watch Afghanistan (IWA) National Corruption Survey, respondents reported increase in their experience with corruption in 2014 and stated that the corruption is the second biggest problem in Afghanistan after the security<sup>471</sup>. The justice sector and police is perceived among the most corrupt public institutions<sup>472</sup>.

Unless Afghan land administration recognizes the importance of these (some of them relatively new) factors and takes them into account in its land policies, the land tenure security in Afghanistan will remain tenuous at best.

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<sup>466</sup>It is estimated that there are 5.7 million former refugees that are in-need of reintegration in Afghanistan, see Caroline Howard and Jelena Madzarevic, “Security of tenure and the forced eviction of IDPs and refugee returnees in Afghanistan” (Kabul: Internal Displacement Monitoring Centre and Norwegian Refugee Council, 2014), 5.

<sup>467</sup>In 2014, 630,000 Afghans were estimated to be internally displaced, see Ibid.

<sup>468</sup>UNAMA Rule of Law Unit, “The Stolen Lands of Afghanistan and its People The Legal Framework Part 1 of a 3 Part Series” (2014), 10. There is currently no data available on how many people are affected by the issue of illegally usurped land.

<sup>469</sup>Ibid.

<sup>470</sup>Corruption Perception Index 2014: Results, <http://www.transparency.org/cpi2014/results> (accessed on 3 September 2015).

<sup>471</sup>Corruption was considered the third biggest problem in 2012. See Mohammad Razaq Isaqzadeh, “National Corruption Survey 2014” (Kabul: Integrity Watch Afghanistan, 2014), 2.

<sup>472</sup>Ibid.4.

The goal of this project was to establish a consensus and priority actions for each of the nine land governance areas about a) gaps in existing evidence as to the strength of Afghan land governance; b) areas for regulatory or institutional change; c) new approaches to be piloted, interventions to improve land governance on a broader scale (e.g. by strengthening land rights and improving their enforcement); and d) criteria to assess the effectiveness of these measures. Below is the summary of main points, as established through the national Technical Validation Workshop:

*Gaps in existing evidence as to the strength of Afghan land governance*

There are number of areas, where the evidence and sufficient data does not exist to be enable the policy-makers and other stakeholders such as practitioners and NGO community to adequately devise, plan and implement their policies and actions. One of these areas is the rural land use change. There is no data available on the amount of the rural land which undergone a use change, how long this process takes and if the lands are changed to destined use. Similarly, there is limited information on the rural lands, the use of which is identified for rehabilitation, are the swiftness of the transfer to the destined use. Finally, little is known about if approved requests for change in urban land use are swiftly followed by development on these parcels of land.

Secondly, an opacity of Afghan land acquisition procedures coupled with lack of data seriously undermines the transparency of state acquisition processes. Although the acquired lands cannot be transferred to private interests according to the Afghan Land Expropriation Law, due to the lack of appropriate monitoring and rampant corruption in Afghan land administration institutions, the development of these parcels of land remains murky. Due to the illegal character of these transfers, no data is available on transfer of acquired land to private interests. Additionally, due to the non-existence of a single central database of acquired land, limited information exists about the timeliness of the land transfers to its destined use. People losing their user and ownership rights through acquisition processes are not consulted about future development projects and there is no specific complaint-response mechanism to challenge the acquisition process. Thus little is known about what is the impact of these arbitrary decisions on actual population.

Finally a need for a number of studies was identified in the course of this project in order to provide evidence-based information to inform policy decisions:

- A feasibility study for different cities in Afghanistan should be undertaken by MUDA to identify the enforcement mechanisms of National Disaster Risk Strategy and for protection of Afghan cultural heritage and prevention of looting.
- Consideration should be given to the most appropriate planning and whether Master Planning process is the best possible planning option for Afghanistan's cities. In the case of Kabul, for instance, a more flexible planning and formalization of informal settlements mechanisms may be more suitable. A feasibility study to this end should be conducted.
- Research and collecting information on unrecorded secondary rights, such as grazing, rights of passage and collecting forest products to determine how land acquisition can influence these rights should be conducted. Policies addressing issues related to unrecorded rights should be devised taking into account the recommendations of the study.
- Study to devise environmental and social impact assessment tools to identify best practices applicable in Afghanistan should be conducted. Based on the results, the mechanisms should be established and incorporated in ARAZI Land Lease Procedure.
- An in-house assessment should be conducted by ARAZI to find out what factors have prevented the organisation from monitoring land lease contracts so far including the study on alternative monitoring possibilities available in places where access is limited due to bad security situation.

- A study should be conducted on the current state of tax collection in Afghanistan and its deficiencies. Clear policy recommendations and guidelines should be devised to establish a well functioning system that is suitable for Afghan context. Lessons learned from other countries should be used as a guideline.

#### *Areas for regulatory or institutional change*

There has been numerous land related laws enacted in last couple of years (such as LML 2008), however the provisions not always mirror the Afghan realities. As a reaction to this, various laws and policies (such as amended LML, LAL etc.) were drafted, those, however, were never properly promulgated and put in practice. In 2007, Afghan National Land Policy that meets international best practices was developed, lacking corresponding laws and regulations for its operationalisation. Based on the accounts of various land experts consulted in the course of this study, the current draft of LML 2014 should be promptly ratified by the Afghan Parliament and enforced by the Afghan National Unity Government because it builds on the National Land Policy 2007. If necessary, the law should be adopted through the Presidential Decree. The expenses for the implementation of National Land Policy should be fully and properly budgeted in Afghanistan National Budget through the extensive consultations with the Ministry of Finance.

The enactment of this important piece of legislation such as LML, will, however, not be sufficient. Customary land tenure, widely used in rural Afghanistan, is recognized only to a certain extent in Afghan body of law, prescribing the requirements that are difficult to attain. Due to the inability of Afghan government to deal with rapid expansion in urban cities and provide adequate housing for the poor, most of the urban land tenure rights remain unrecognized, keeping the citizens living in informal settlements at risk of eviction. Numerous conflicts over ownership and use of lands also exist between Kuchi nomad tribes and local communities, not having the opportunities for indigenous populations to secure their rights. Furthermore, collectively held lands are very common in Afghanistan, however Afghan legal framework does not provide for the collective rights. Public lands, available for the usage of the public are not clearly defined in Afghan land laws, resulting in lack of clarity over their ownership, transferability and usage restrictions.

Widening of the scope of customary land tenure recognition (while preventing extensive land grabbing) and clarifying the status, legal recognition and ways of registration of collective rights is necessary to be able to increase the land tenure security of the majority of the Afghan population. Additionally, draft Customary Deed Registration Law, drafted by the Judicial Reform Commission in 2005, should be reviewed and approved, as well as new law, stipulating the possibilities of formalization of non-documentary land ownership evidence should be enacted. Furthermore, the Presidential Decree 104 enacted in 2005, which puts the provisions in place on the distribution of land for housing to eligible returnees and IDPs, and the National Policy on Internal Displacement, approved in November 2013, which addresses the right to adequate housing and access to land (Article 7.1.3), should be adequately implemented and policy on Upgrading Informal Settlements, currently awaiting Cabinet approval, should be promptly enacted.

The ambiguity between the definitions of state and public land in Afghan body of law and the absence of the public lands registration mechanism puts land user rights of a considerable part, mainly landless, population at risk. The Draft Rangeland Law, which provides the framework for the management of private, community and public rangeland, should be promptly adopted. Additionally, contradictory legal codes in terms of definition of public lands including clear distinction between arid & virgin lands and pasturelands should be by addressed by approving existing new draft of LML currently blocked at MoJ. The process for the recognition and most importantly registration of public lands has to be established to protect rights of public over public lands.

Finally, the enactment of long awaited National Urban Policy and new Municipality Law as well development of New Master Plan for Kabul and other big cities has to be prioritized by MUDA in cooperation with Kabul Municipality, while the responsibilities over its formulation and implementation have to be clarified. By devising new master plans for the biggest cities, the issue of the ban on

constructions on arable lands has to be taken into account and the provisions of the Master Plan should be written in line with the Presidential Decree.

The opportunities for formal tenure regularization are limited in Afghanistan as well. There are two possibilities for individual land registration in Afghanistan - through land clearance (*Tasfia*) or courts, when transacting (selling, buying or mortgaging) the land. Taking into account that the customary land tenure rights are recognized in the formal justice system only into limited extent and land clearance (*Tasfia*) is conducted mostly in cases of major transfers of land such as state land leases, the opportunities for ordinary Afghan citizens to record their land are limited. The national cadastral survey, that was paused in 1978 and surveyed only 30% of land (later 4 more per cent were surveyed), can currently be conducted only on an approval of the president and provides only the proof of "probable" ownership. Furthermore, no single mechanism for recognition of formal and customary land rights exists without having to transact the land (at courts). This, combined with the tendency of Afghan land laws to prioritize formal land tenure documentation, leads to the large number of lands falling into hands of state (including public lands), numerous illegal sales (land grabbing) and leases. Women property rights are not recognized fully of those of men, despite the existence of clear laws providing for fair and equal rights for women in Afghanistan. The reliability of registry information is also compromised by outdated and missing information, mainly because of limited information sharing between different land registries, lack of formalized updating mechanism and prevalence of informal land transactions outside of formal registration system.

In order to mainstream the formalization of land tenure in Afghanistan, ARAZI should take over administrative responsibilities of establishing the title deeds of courts and become a one-stop-shop for the registration of private land. Simultaneously, the registration system should be gradually replaced by a computerized one, including the GPS coordinates, GIS imaginary and the cadaster map. This will also enable to compare the names of the seller and buyers in previous transactions of the same plot of land to prevent the acceptance of forged documents. The expenses for computerized registration system have to properly budgeted taking account the licensing fees. Extensive public campaigns should be conducted to inform ordinary citizens about the new system and the steps required for registration of your property. Additionally, ARAZI's plans to restart the land clearance process (*Tasfia*) and cadastral (or inventory) survey gradually conducted on large scale should be materialized. The support in form of financial means, as well as technical expertise should be sought from National Budget, international community and civil society.

Finally, relevant authorities should work together to operationalize already existing efforts to incorporate a provision on land usurpation into the Criminal Code. Where appropriate donors and civil society stakeholders should provide technical assistance to the drafting process. Additionally, the draft Restitution Policy on Land Grabbing has to be promptly approved and prosecution of land grabbers should be made a priority within the Attorney General's office. Similarly investigation and technical capacity to do so should be enhanced within the Afghan National Police (ANP). By doing so, the land tenure security of most vulnerable population will be increased and land usurpers will be adequately sanctioned, increasing the trust and ultimately legitimacy of the population towards the government.

Another big area of regulatory change is acquisition. Acquisition procedures are also mirrored with shortcomings, such as lack of transparent land valuation process, late compensation payments, absence of opportunities for appeal and no compensation for loss of rights resulting from the land use change (such as grazing rights). Nevertheless, lease of state land to investors is one of the areas that has made a good progress in identifying clear and transparent procedures, although not always implemented in such way missing the provisions for adequate and fair resettlement and rehabilitation. The proposed Land Acquisition Law (LAL), currently under review by the MoJ, including lists of 19 different categories of public projects that can be implemented through the acquisition process, requirement that the organisation estimates the least amount of land required for the implementation of the project, announcement period of minimum of 9 months before the start of the project to all people affected by the acquisition directly or indirectly, provision of third-party monitoring, which can assess whether the leased and transferred land is used for their destined purposes, suggestion of public consultations before acquisition process, compensation paid prior to the project start, compensation of grazing and

other rights and the creation of a complaints hearing committee should be promptly ratified to rectify above mentioned shortcomings.

Land is the most cited reason for disputes in Afghanistan. Although there is a myriad of dispute resolution mechanisms (formal and informal) existing in parallel, they share the information in ad hoc manner and informal dispute resolution fora do not enjoy full legal recognition, despite the fact that used by the considerable number of Afghan citizens. Formal justice system is considered costly (often due to the need of informal payments), time-consuming and cumbersome; hence few cases make it to courts. The law aiming at creating more effective linkages between formal and informal justice system has to be broadly and inclusively open to public discussion, approved and implemented by all relevant institutions to create practical and more effective linkages between formal and informal conflict resolution mechanisms (taking into account lessons learned from projects like NRC's Information and Legal Assistance Centers (ILACs), PEACE, LC Project and USIP/ARAZI sponsored pilot).

Finally, land taxation constitutes one of main problems in revenue collection in Afghanistan, lacking clear procedures for updating of tax rolls and enforcement mechanisms preventing tax evasion. This combined with relatively low investment in land administration and low prioritization of land issues on the side of the National Unity Government, results in limited financial and human capacities of land administration institutions. Furthermore, more clarity is needed in division of responsibilities between certain land administration institutions mainly ARAZI and courts in terms of land registration and dispute resolution and MUDA and municipalities in formulation and implementation of Master Plans. One way to address these issues would be a clear communication strategy explaining the community benefits of collecting taxes to the citizens, in particular in rural areas. The government has to assure proper spending of collected taxes back to the community. The plans for such public campaign were already planned by the MoF, however, they need to materialize.

During this LGAF exercise, some of the crosscutting recommendations transpired:

1. An increase in a portion of National Budget accorded to land administration, in particular for ARAZI, should be negotiated. The continuous support of the international development community in the field of land governance should be ensured.
2. Fighting corruption should become the priority of the NUG. The Anti-Corruption Strategy established by the President Karzai in 2008 should be implemented through the stronger engagement of the President himself and increased results-based support of the international donor community. Additionally, the past and yet unaddressed cases of corruption should be the priority of the Attorney's General Office. Furthermore, the auditing capacities of the High Office of Oversight and Anti-Corruption should be increased and internal audits should be conducted to prevent corruption within formal justice system.
3. The measures should be taken by the National Unity Government of Afghanistan in order to improve the security situation in remote and insecure areas so as to facilitate the presence of the state.
4. Increased capacity-building of land administration personnel particularly on district and provincial level in the field of legal provisions related to land including dispute resolution, land valuation and taxation, public land management and land lease and acquisition procedures.
5. Increased capacity building of Afghan population on their obligations and rights related to land including the ways of registering the land and benefits of taxation.

*New approaches to be piloted, interventions to improve land governance on a broader scale*

The above mentioned regulatory and institutional actions to rectify the shortcomings of the current land administration are not to be finalized in short term, although their implementation has to start urgently. To accelerate the implementation of various complex processes mentioned above and to fill the gap before the formal processes will be put in place nationwide, the possibility of innovative and community-based mechanisms should be considered. A possibility of a pasture land administration (for example as used by RLAP or SALEH projects) should be studied, as well as Land Administration

Management Project (LAMP) prepared in cooperation with MAIL in 2007 should be reconsidered to prevent numerous conflicts over pastures in Afghanistan.

Also as an interim measure, community-based land recording and boundaries demarcation system, which will be later on connected to ARAZI registering system and their Principal Books should be established. Efforts need to be undertaken to ensure the acceptance of judges to use established boundaries by the community to locate the lands registered with courts and during *Tasfia* process. Additionally, the possibility of a first-stage land clearance done by communities to enable nationwide land identification should be explored.

*Criteria to assess the effectiveness of these measures.*

Based on the specific methodology, the aim of this report was to broadly assess the state of land governance in Afghanistan without going into much details and district variations, although those would certainly reveal new realities and different sets of issues. A collection of policy recommendations was established, with the inputs from Afghan land experts, aiming to provide guidance for Afghan land governance stakeholders on possible ways forward. Clear indicators for each recommendation and suggested action are included in the Policy Matrix (please see the section 11).

*Next steps*

Various stages of LGAF implementation identified a number of issues that require immediate attention. Clear policy recommendations and responsible institutions for implementing these recommendations were also identified to provide the ways forward on each of the pressing issues. Monitoring indicators of success/failure of the approaches were devised as well. All of this information was put in one Policy Matrix (section 11 of this report), which will serve as a Roadmap for Afghan policy-makers and international community to improve the land governance in Afghanistan.

Based on the discussions during the Policy Dialogue, the participants suggested the following steps for the future implementation of LGAF recommendations:

1. Follow-up meetings with ARAZI to internalize the Policy Matrix document
2. Presentation of the document to the High Council on Land and Water chaired by the President by ARAZI
3. Review of the measuring indicators and the capacities of the institutions to perform the monitoring. If needed, new measuring system should be devised (lead by ARAZI with the participation of all related land administration institutions).
4. Review conference of the progress of the Policy Matrix implementation conducted by ARAZI every 6 months

### 13. Annexes:

#### 13.1 Annex I - Glossary

<i>Aabi</i>	Irrigated agricultural land
<i>Alafchar</i>	Pastureland
<i>Arbab</i>	Head of a village (Malik)
<i>Asnad-e urfi</i>	Customary deed documents
<i>Bogi</i>	Land used for gardening purposes
<i>Burqa</i>	A type of Hijab worn by women in Afghanistan covering all the body and face
<i>Chamani</i>	A type of a green land used for animal grazing, playground or as a protected area
<i>Khermanjay</i>	a special field for separating wheat from hay by using cows or tractors
<i>Daftar-i-amlak-i-dawalati</i>	Principal books of state land
<i>Dewan</i>	Registry book or book of accounts
<i>Farmaan</i>	Presidential decree
<i>Gozar</i>	Administrative units smaller than districts in urban areas
<i>Haqaba</i>	Water rights documents
<i>Heba</i>	Donation
<i>Huqooq</i>	Law
<i>Izharnama</i>	Land declaration
<i>Jabazar</i>	Rangeland
<i>Jalsa</i>	Meeting or gathering
<i>jerib</i>	Measurement of land equal to 2000 square meters
<i>Jirga</i>	Traditional assembly of leaders making decisions by consensus and according to the teachings of Islam.
<i>Jirgamaran</i>	Mediator, a person who solves disputes brought to Jirga/Shura
<i>Jungalzar</i>	Forestry
<i>Konda</i>	Court records (archive documents) or Land Title Registration Book
<i>Lalmi</i>	Rain feed agriculture land, mostly located in rural areas
<i>Loya Jirga</i>	“Grand assembly” - is a special type of jirga mainly organized for making a strategic decisions such as choosing a new head of state in case of sudden death, adopting a new constitution, or to settling national or regional issues.
<i>Madrasa</i>	A college for Islamic instruction
<i>Mahram</i>	Based on Islamic sharia legal terminology, a mahram (Arabic also transliterated mahrim or maharem) is an unmarriageable kin with whom sexual intercourse would be considered incestuous and punishable
<i>Makhzan</i>	Court archives
<i>Malik</i>	Head of a village
<i>Malkiat-i-auma</i>	Public ownership
<i>Mara'a</i>	Not clearly defined in Afghan law; it roughly equates to pastureland.
<i>Maraka</i>	Interview
<i>Maylati</i>	Tax documents
<i>Mawat</i>	Vacant lands
<i>Mena</i>	Specific parcels of land
<i>Mesherano Jirga</i>	Is the upper house of the bicameral National Assembly of Afghanistan, alongside with the House of the People (Wolesi Jirga)
<i>Mowzeyee</i>	Based on need or necessity
<i>Mujahidin</i>	Guerrilla fighter in Islamic countries, especially those who are fighting against non-Muslim forces
<i>Mullahs</i>	Muslim man or woman educated in Islamic theology

<i>Mustofiat</i>	A branch of MoF in districts and provinces
<i>Nahya</i>	Area or district
<i>Naizar</i>	Land located near to a river growing plants (straw or cane, which was used for writing with ink before the invention of a pen)
<i>Naaqilin</i>	People who during Zahir Shah regime's were displaced from some part of the country and moved to other part for agriculture purposes.
<i>Qabala-e Qatae</i>	Official deed proving a land ownership issued after a legal settlement of the land
<i>Qabele Sharayee</i>	Legal title deed documents
<i>Safayi</i>	Land/property "sanitation" taxes collected by Municipality from houses located in urban areas
<i>Sanad Rasmee Mulkyet</i>	Legal ownership documents
<i>Sharak</i>	Small town near an urban center
<i>Shari'a</i>	Shari'a is an Arabic word meaning "path" or "way." Today the term is used most commonly to mean "Islamic law," the detailed system of religious law developed by Muslim scholars in the first three centuries of Islam and still in force among fundamentalists today.
<i>Shuras</i>	A consultative council
<i>Tanazul</i>	Practice of renunciation
<i>Tapaha</i>	Hills
<i>Taraka</i>	Division of ownership
<i>Taraka Khatt</i>	Document of division
<i>Tasfiya</i>	Land clearance process
<i>Tashkil</i>	Organizational structure
<i>Taqnin</i>	Department of Legislative Drafting (MoJ)
<i>Tazkera</i>	Identification Card (ID)
<i>Tokhm jirga</i>	An inter-tribal regional <i>Jirga</i>
<i>Urfi</i>	Customary documents
<i>Qawm</i>	Solidarity group which can signify the entities of different sizes, from the small group such as individual's family to big entities such as tribes, clans and sub-clans.
<i>Wakil-e- Gozar</i>	<i>Person</i> who attends to some of the needs of the residents of the area under his responsibility, such as certifying identities and residence locations, mediating land and construction disputes, informing people about their responsibilities to the Municipality and to public utilities, and assembling needs of the community for communication to the Mayor's office.
<i>Waqf</i>	Is an inalienable religious endowment in Islamic law, typically donating a building or plot of land or cash for Muslim religious or charitable purposes with no intention of reclaiming the assets
<i>Waseqa Shari'a</i>	Title Deed
<i>Wolesi Jirga</i>	The House of the People - is the lower house of the bicameral National Assembly of Afghanistan, alongside the House of Elders.
<i>Zamin-e khususi</i>	Private land
<i>Zamin-e lalmi</i>	Non-irrigated agricultural land

### 13.2 Annex II - Revised LGAF Definitions Regarding Concepts and Terminology

Dimension/Indicator	Modifications/Definitions
<p><i>LGI: 2.1 Rights to forest and common lands</i></p> <p>2.1.9. Boundary demarcation of communal land</p>	<p>The Afghan legal framework does not provide the definition of communal lands, even though in the past, the concept of communal lands existed and at times the communal lands were allocated to different tribes or clans. Currently, despite the absence of the communal land as such in Afghan land terminology, the Pasture Law 2000 mentions the communal pastures<sup>473</sup>. Art. 2(2) provides the definition of communal pastures: “Arid land which, in accordance with section (9) of the land management law does not fall within bounds of villages or towns.” According to Art. 3 of the same law, “the communal pasture can be used for grazing cattle belonging to the communities” and it cannot be brought, sold or leased (Art.6). For the purposes of this report, the communal land equals to communal pastures. Common land, however, equals to public land, to prevent limiting ourselves to communal pastures only.</p>
<p><i>LGI: 4.1 Identification of public land and clear management: public land ownership is clearly defined, effectively serves the public purpose, is inventoried, under clear management responsibilities, and relevant information is publicly accessible.</i></p>	<p>All the indicators falling under this dimension suffer from the absence of clear definition of public lands in Afghan body of land laws. Public lands are not adequately defined in current Afghan statutory law. Given that the Art. 3(8) of LML 2008 stipulates that any land, which is deemed public and is not registered in the book of government lands, is considered state land and the fact, that registration of land occurs rarely in rural areas, public land can be easily interchanged for the state land. Therefore the management, surveying and public access to information on public lands cannot be objectively assessed. Most of the analysis on public land is derived from the analysis of the all Afghan land (private, public and state).</p>
<p>4.1.1. Criteria for public land ownership are clearly defined and assigned to the right level of government.</p>	<p>This indicator in particular suffers from an unclear definition of “public interest”, “public good”, “public welfare” etc. So as no clear definition of public land is provided in Afghan legal framework, nor the definitions of how the public lands should be used for the provision of “public goods”.</p>
<p>4.1.6. All essential information on public land allocations to private interests is</p>	<p>Albeit no clear definition of public land is provided in Afghan legal framework, a general understanding of public lands is that the public land is the land that has been allocated for</p>

<sup>473</sup> Certain experts advocate that the communal land equals to *mara’a* land. However, in Art. 82 of LML (Dari version), the translation used for all types of pasturelands is *mara’a*, being it grazing land, graveyard, hills etc. Since the term *mara’a* encompasses all types of pasturelands, communal lands can be certainly considered as part of *mara’a* land; however, not equal to *mara’a* land. Liz Alden Wily considers *mara’a* land as equal to public land (“Land, People, and the State in Afghanistan: 2002 - 2012,” Kabul: AREU/USIP, 2013), however, due to the absence of a clear definition of public lands in Afghanistan, this does not have a legal back-up.

publicly accessible.	public use and is neither the property of the state nor the property of the individual, hence it cannot be sold nor leased to private interests. <sup>474</sup> However, since the public land can be easily interchanged for the state land, which can indeed be allocated to private interests in Afghanistan, the analysis of this indicator will be based on the analysis of the state land allocations to private interest (particularly arid and virgin land).
<p><i>LGI: 4.2 Justification and time-efficiency of acquisition processes: the state acquires land for public interest only and this is done efficiently</i></p> <p>4.2.1. There is minimal transfer of acquired land to private interests</p>	In Afghanistan the state can acquire land from individuals only for public purposes. Therefore from the legal point of view the acquired land cannot be transferred to private interests. This indicator will be analyzed based on the realities on the ground, where the transfer of acquired land to private interest might occur.
<p><i>LGI: 5.1 Transfer of public land to private use follows a clear, transparent, and competitive process and payments are collected and audited (with the exception of transfers to improve equity such as land distribution and land for social housing</i></p> <p><i>LGI: 5.4 Contracts involving public land are public, easily accessible, with agreements monitored and enforced.</i></p>	All of the indicators under this dimension had to be modified to the realities of Afghanistan due to the fact that the public land, although not clearly defined, cannot be sold nor leased because it is a property of the public. Therefore, the analysis of the state land in relation to these indicators was used in cases where Afghan legal provisions clearly provide certain limitations on the public land transactions.

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This understanding is also currently being proposed in the new draft of LML, Art. 6.3. The article stipulates that public land is not the property of the <sup>474</sup> government or individuals.

### 13.3 Annex III - List of Experts and Qualifications

#### Panel 1 : Land Tenure Recognition

<b>Expert Investigator</b>	Khalid Bahrami
<b>Qualifications</b>	Mr. Bahrami has earned his Bachelor Degree (L.L.B) in Law and Political Science Faculty of Kabul University and his L.L.M from Kateb University. Recently, he has worked with ARAZI as Legal Specialist in the development of land polices. His areas of work include land dispute resolution and land reform.

#### Panel 2 : Rights to Forest and Common Lands & Rural Land Use Regulations

<b>Expert Investigator</b>	Ghulam Dastageer Sarwaree
<b>Qualifications</b>	Ghulam Dastageer Sarwaree is head of the Rangeland Department of the Ministry of Agriculture Irrigation and Livestock (MAIL). He has graduated from Horticulture and Natural Resources Department of the Faculty of Agriculture in Kabul. Mr. Sarwaree was previously a General Manager of Analysis and Planning for Environment, as well as a manager of Artificial Forest Program with MAIL.

#### Panel 3 : Urban Land Use, Planning and Development

<b>Expert Investigator</b>	Jamshid Habib
<b>Qualifications</b>	Mr. Habib studied architecture at Kabul University and subsequently in Kansas State University from where he received his Masters Degree in Environment Behavior Studies. Currently he divides his time between teaching at Kabul University and serving as a CEO for a design and consultancy firm.

#### Panel 4 : Public Land Management

<b>Expert Investigator</b>	Ghulam Hussain Rahmani
<b>Qualifications</b>	Ghulam Hussain Rahmani is the Director of Planning and Policy at ARAZI, Kabul. He has graduated from the Social Science Institute of Kabul. Mr. Rahmani has been working with ARAZI for over 30 years in various positions.

#### Panel 5 : Transparent Process and Economic benefit: transfer of public land to private use follows clear, transparent and competitive process

<b>Expert Investigator</b>	Arifullah Arif
<b>Qualifications</b>	Mr. Arif gained his L.L.B (Jurisprudence & Law) and L.L.M (Sharia & Law) from the Law Faculty of Kabul University. His areas of work include the following; Legal Advisory, Rule of Law, Legal Reform/Legislation Drafting/Amending, Land Reform, Anti-corruption, Informal Justice System, Community Based Dispute Resolution (CBDR), Capacity Building and Project Management.

#### Panel 6: Public Provision of Land Information: Registry and Cadastre

<b>Expert Investigator</b>	Yasin Safar
<b>Qualifications</b>	Mohammad Yasin Safar is an Afghan Topographical/Cadastral Surveyor and Land Tenure Specialist and member of Terra Institute. He has more than 40 years professional experience in land surveying, land classification, land clarification, land registration and land administration. He is the former deputy of Afghan Geodesy and Cartography Head Office (AGCHO) and Director of Cadastral Department.

#### Panel 7 : Land Valuation and Taxation

<b>Expert Investigator</b>	Abdul Salam Kohistani
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<b>Qualifications</b>	Mr. Kohistani is a graduate from Animal Science Section of Agriculture Faculty, Kabul University. He is currently working as a Manager of Land transfer and exchange with ARAZI, Kabul. His areas of work are Land management, Land distribution and Management of land Documents Records.
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**Panel 8: Dispute Resolution**

<b>Expert Investigator</b>	Gul Rahman Totakhail
<b>Qualifications</b>	Mr. Totakhail has 10 years of work experience with national and international organization mainly in the areas of legal advisory, Planning and Policy, Drafting Rules and Regulations, Legislative Capacity Building, Legal Research, Technical and Legal Consultancy, Parliamentary Culture and Practice as well as Administration and Managements. Currently he is working as Consultant, Senior Legal Advisor and Rule of Law Officer with United State Institute for Peace (USIP).

**Panel 9 : Review of Institutional Arrangements and Policies**

<b>Expert Investigator</b>	Fahim Hakim
<b>Qualifications</b>	Mr. Hakim is a graduate of Engineering Faculty of Kabul University and he earned his M.A in Post-war Recovery Studies from the University of York, England. Currently he is working as a freelance consultant with various national and international Organizations. His past professional experiences includes: Commissioner and Deputy Chair to AIHRC and Program Coordinator of UNCHS (Habitat).

#### 13.4 Annex IV - Lists of Participants - panel workshops

<b>Panel 1 : Land Tenure Recognition</b>	
<b>Name</b>	<b>Title</b>
Eng. Yousuf Pashtoon	Technical Advisor, Presidential Office
Attaullah	Head of ARAZI Department of Mosahee District, Kabul
Ghulam Ehsan Sultani	Director of Cadastral Survey at ARAZI, Kabul
Ahmad Zia Langari	Commissioner at Afghanistan Independent Human Right commission (AIHRC)
Qudrat	Project Manager, Women and Children Legal Research Foundation (WCLRF)
Eng. Noor Agha	Representative from Nangarhar Municipality
Khalid Bahrami	Formerly with Legal team of ARAZI and the expert investigator of Panel 1
Eng. Abdul Latif	Head of Construction Department, Kandahar Municipality
<b>Panel 2: Rights to Forest and common lands &amp; rural land use regulations</b>	
Arif Rahimi	Representative from Wild Life Conservation Society (WCS)
Zohurullah Yaqeen	Advisor of Cadastral Survey, Cadastral Department, ARAZI, Kabul
Ghulam Dastageer Sarwaree	Head of Rangeland Management Department, MAIL
Mohammad Arif	Director of Rangeland Management Department, MAIL
Ahmad Shah	Head of Forestation and Natural Resources Management Section, MAIL
<b>Panel 3 : Urban land use, planning and development</b>	
Eng. Seyar	Civil Engineer, Herat Municipality
Abdul Satar	Architecture, Nangarhar Municipality
Eng. Ramat	Representative of Mr. Khaliq Nemat from MUDA
<b>Panel 4: Public Land management</b>	
Ghulam Hussain Rahmani	Director of Planning and Policy, ARAZI, Kabul
Abdurrab Samadi	Head of Land Clarification, ARAZI, Kabul
Mohammad Yousuf	Chief of Policy and Planning, Cadastral Department, ARAZI, Kabul
<b>Panel 5 : Transparent process and economic benefit: transfer of public land to private use follows a clear, transfer, and competitive process</b>	
Habibullah Rahmani	Former Administration and Finance Director, Afghanistan Independent Land Authority (ARAZI)
Wahid Rahman Rahmani	Land Leased Director, Afghanistan Independent Land Authority (ARAZI)
Saida Faqirzada	Pro-active Land Lease Manager, ARAZI
<b>Panel 6: Public provision of land information: registry and cadastre</b>	
Yasin Safar	Former Head of Cadastre, Afghan Topographical/Cadastral Surveyor and Land Tenure Specialist and member of Terra Institute.
Ghulam Ehsan Sultani	Director of Cadastral Survey at ARAZI, Kabul
Noor Agha	Instructor at Cadastral Institute, Kabul
Motiullah Nazari	Representative of Provincial of Afghanistan Independent Land Authority (ARAZI), Herat Province
Ghulam Hussain Rahmani	Director of Planning and Policy, ARAZI, Kabul
<b>Panel 7 : Land valuation and taxation</b>	
Hamidullah	Head of Afghanistan Independent Land Authority (ARAZI), Parwan Province
Rohullah Haqdost	Director of Registration and Land Clarification, Ministry of Finance (MoF)
Abdul Salam Kohistani	Head of Land Distribution, Afghanistan Independent Land Authority (ARAZI)
Ahmad Khalid Ekrami	Representative from Directorate of Revenue Recognition Department (MoF)
Ghulam Hussain Bayat	Representative of the Municipal District
Abdullah Murad	Representative of the Revenue Recognition Department, MoF
<b>Panel 8: Dispute resolution</b>	

Ghulam Rahman Totakhail	Legal Advisor at Afghanistan Independent Land Authority (Arazi), Kabul
Ahmad Sayed Ahmadi	Head of Dispute Resolution Department, Afghanistan Independent Land Authority (Arazi)
Sayed Yahya Sultani Stanikzai	Dispute Resolution Manager, Afghanistan Independent Land Authority (Arazi) The Liaison Office (TLO), Justice Section
Noor Afzal Muslih	Leader of Nomad Tribe council, Nangarhar Province
<b>Panel 9 : Review of institutional arrangements and policies</b>	
Kabir Ranjbar	Senior Legal Advisor, Afghanistan Investment Support Agency (AISA)
Gul Rahman Totakhail	Legal Advisor, Afghanistan Independent Land Authority (ARAZI)
Yasin Safar	Former Head of Cadastre, Afghan Topographical/Cadastral Surveyor and Land Tenure Specialist and member of Terra Institute.
Ghulam Hussain Rahmani	Director of planning and policy, ARAZI
Abdul Salam Kohistani	Head of Land Distribution, Afghanistan Independent Land Authority (ARAZI)
Mohammad Asif Seyar	Technical Deputy, Cadastral Survey
Nafisa Kabuli	Member of Appeal Court, Kabul
Khalid Bahrami	Formerly with the Legal Team at ARAZI

13.5 Annex V - List of Participants- Technical Validation Workshop

No.	Name	Position/Organization
1.	Yousuf Pashtoon	Technical Advisor, President's Office
2.	Ms. Najia Zareef	Law Department, Ministry of Justice (MoJ)
3.	Ghayor Ahmad Ahmadyar	Director of Protected Areas Management, Ministry of Agriculture, Irrigation and Livestock (MAIL)
4.	Habibullah Habib	Head of Kabul office, Afghanistan Independent Land Authority (ARAZI)
5.	Motte-ullah Nazari	Representative of Provincial of Afghanistan Independent Land Authority (ARAZI), Herat Province
6.	Haji Sher Ahmad	Representative of Provincial of Afghanistan Independent Land Authority (ARAZI), Heart Province.
7.	Abdurrab Samadi	Head of Land Clearance Department, Afghanistan Independent Land Authority (ARAZI)
8.	Arifullah Arif	Legal Specialist, ARAZI
9.	M. Asif Sayar	Technical Chief, Cadastral Survey, ARAZI
10.	Eng. Ghulam Rasoul Nawabi	Program Director, Kabul Municipal Development Program (KMDP), Kabul Municipality
11.	Ghulam Hussain Bayat	Representative of Municipal District, Kabul Municipality
12.	Zia-ur Rahman	Representative of Afghanistan Investment Support Agency (AISA)
13.	Bilal Waqad	Legal Advisor, United Nations Assistance Mission to Afghanistan (UNAMA)
14.	Abdul Kabir Salehi	ICLA Project Coordinator, Norwegian Refugee Council (NRC)
15.	Suraya Subhrang	Women Department Commissioner, Afghanistan's Independent Human Rights Commission (AIHRC)
16.	Eng. Jaweed	Representative of Humanitarian Assistance and Facilitating Organization (HAFO)
17.	Payton Cook	Rule of Law Officer, United States Institute of Peace (USIP)
18.	Haji Ghulam Hussain Rahmani	Land Conflict Resolution Director, ARAZI
19.	Najibullah Atiqi	Representative of International Rescue Committee (IRC), Aynak site
20.	Shobha Rao	Liaison Officer, UNHCR
21.	Mr. Abdul Latif	Property Manager, Kandahar Municipality
22.	Ms. Claire Van Loveren	Judicial Officer, UNAMA
23.	Ms. Tamana Sharifi	Representative of Women & Children Legal Research Foundation (WCLRF)
24.	Ms. Suraya Ebrahimi	Representative of Women & Children Legal Research Foundation (WCLRF)
25.	Mr. Reza Amiri	head of Knowledge Management Unit, UNEP

26.	Alec Knuerr	Project Coordinator, UNEP
27.	Ms. Farah Diba Karimi	Urban Planning Advisor, GDMA (general directorate of municipal affairs), IDLG
28.	Mohammad Aqa	Assistant FAO Representative, MAIL
29.	Depika Sherchan	HLP Task Force Coordinator, UN-HABITAT
30.	Bernardo Almeida	Representative of UN-HABITAT
31.	Mr. Abdul Qadir Shakiri	Training Officer, UN-HABITAT
32.	Mr. Zabiullah Habib Afroz	Director of policy and legislation, NEPA
33.	Dr. Jalaludin Naseri	Acting Director, NEPA
34.	Maiwand Rahimi	Researcher, PTRO
35.	Mirwais Asr	Social Development Specialist, Ministry of Mines and Petroleum (MoMP)
36.	Noor Katawazi	Director of Human Resources, MoBTA
37.	Maseehullah Farahmand	Senior Program Officer, EPD
38.	Ruhullahm Haqdost	Director of registration and land clarification, MoF
39.	Abdul Salam Kohi	Legal Policy Advisor, ACCI
40.	Sayed Mahmood	Social and Environmental Specialist, Kabul Municipality Development Program
41.	Saleh Mohammad	Manager, AKF
42.	Kabir Zazai	Law Department, Ministry of Justice (MoJ)

### 13.6 Annex VI - List of Participants - Policy Dialogue

No.	Name	Organization/Position
1	Rahim-Ulla Hedayat	Senior Legal Advisor, Office of 2 <sup>nd</sup> Vice-President
2	Zabihullah Habib Afrooz	Director of Policy and Legislation, NEPA
3	Jawad Peikar	CEO, Afghanistan Independent Land Authority (ARAZI)
4	Alim Erada	Deputy CEO, ARAZI
5	Mr. Arya	Chief of Staff, ARAZI
6	Ghulam Hussain Rahmani	Director of Policy and Planning, ARAZI
7	Abdurab Samandi	Director, Land Clearance, ARAZI
8	Ghulam Eshan Sultan	Director of Cadastral Department, ARAZI
9	Gul Rahman Totakhil	Legal Advisor, ARAZI
10	Hashmat Ghafoori	Senior Advisor and Executive Director of Regional Programme, MRRD
11	Najib Fahim	Head of International Agreements Directorate, Ministry of Foreign Affairs
12	Yosuf Pashtun	Technical Advisor, President's Office
13	Mir. M. Anwar Sadat	Head of Department of Legal Cases, MoJ
15	Shobha Rao	Representative of UNHCR
16	Ghafoor Laiwal	Deputy Minister, Ministry of Border and Tribal Affairs (MoBTA)
18	Zia Ul-haq Zahid	Afghanistan Independent Bar Association - AIBA
19	Mohammad Akbar	Representative, UNDP

13.7 Annex VII - Institutional Map

Institutions	Type of Land <sup>475</sup>	Land policy	Responsibility Mandate	Overlapping Mandates/ Issues <sup>476</sup>	Other
<b>National Government</b>					
President	State and Private	Formulation	<ul style="list-style-type: none"> <li>• Formulation of overall land policy, strategies and short and long term goals</li> <li>• Formulation of decrees and promulgation of laws</li> <li>• Decisions on distribution and donations of state land to disadvantaged people</li> <li>• Decisions on transfer of arid &amp; virgin lands</li> <li>• Decision on conducting land surveys and making the information public (national or on demand)</li> <li>• Exceptional cases of acquisition of public lands</li> <li>• Decisions on establishing protection areas</li> </ul>	<ul style="list-style-type: none"> <li>• Parliament should approve promulgated laws by the President, however in practice this requirement is often overlooked. Thus the President and Parliament have a large overlap in their mandates. This is particularly notable as the 2008 LML has never received parliamentary approval.</li> </ul>	
Council of Ministers (incl. CEO)	State and private	Formulation	<ul style="list-style-type: none"> <li>• Approval of strategic decisions based on policies developed by respective ministries and other governmental agencies</li> <li>• Decisions on leasing state land over 1500 jeribs</li> <li>• Decisions on compensation for land acquisition</li> <li>• Approving of welfare projects through the acquisition of large tracts of land</li> </ul>	N/A	
Parliament	State and private	Formulation	<ul style="list-style-type: none"> <li>• Enactment of land laws</li> <li>• Supervision of law implementation</li> </ul>	<ul style="list-style-type: none"> <li>• Overlap with the executive in supervision of law implementation</li> <li>• Lack of capacity in law drafting</li> <li>• Allegations that a large number of parliamentarians are involved in land grabbing</li> </ul>	
High Council on Water and Land	State and private	Formulation	<ul style="list-style-type: none"> <li>• Coordination among various land administration authorities</li> <li>• Approval of strategic policies on land and water reform;</li> <li>• Monitoring and support of proper implementation</li> </ul>	N/A	

<sup>475</sup> Please note that due to the unclear definition and contested nature of public lands in Afghanistan, in this institutional map we will consider public land to be included in the state land.

<sup>476</sup> Please note that the issues such as lack of human resources and financial capacity is not mentioned here because it is similarly applicable to all institutions dealing with land issues in Afghanistan.

			<ul style="list-style-type: none"> <li>of these policies;</li> <li>Addressing urgent land grabbing cases;</li> <li>Providing technical support to land and water affairs in the country;</li> <li>Issuing required orders on land and water affairs;</li> <li>Monitoring ARAZI activities;</li> <li>Rural development from land and water perspective;</li> <li>Creating coordination on land water projects;</li> </ul>	
ARAZI	State and Private	Formulation, Implementation (incl. Monitoring), Arbitration	<p>Land management and administration of land tenure in Afghanistan :</p> <ul style="list-style-type: none"> <li>Enforcement of land law, policies and procedures</li> <li>Implementation of presidential decrees</li> <li>Transfer of the state land for distribution purposes to public (after the transfer, corresponding ministries are responsible for actual distribution depending on who are the beneficiaries)</li> <li>Leasing of state land and the collection and monitoring of revenues from land leases</li> <li>Transfer and exchange of government and private land</li> <li>Refinement of government or private land</li> <li>Returning illegally occupied land</li> <li>Contributing to land survey activities</li> <li>Organizing and deployment of refinement teams to clear disputed lands (<i>Tasfiya</i>)</li> <li>Provide information to the courts about land ownership</li> <li>Protection of state land and prevention of illegal occupation of land</li> <li>Participating in land dispute resolution</li> <li>Allocation of compensatory land in a methodical and transparent manner</li> </ul>	<ul style="list-style-type: none"> <li>Needs greater clarity over its role over dispute resolution - possible overlap exists between the Department of Addressing Land Disputes and the jurisdiction of courts (from legal perspective unclear; in reality when a case comes in front of a court, ARAZI provides necessary documentation about the land; informally the department can resolve the dispute, which is then recorded at ARAZI, if one of the disputants doesn't agree with the decision, the case is forwarded to the court</li> <li>ARAZI makes decisions about both the leasing of the state land, as well as it is responsible for its monitoring</li> <li>Relatively new organization with limited professional capacity, especially at provincial level.</li> <li>Poor coordination among main and regional offices.</li> <li>There are concerns about centralization of authority, especially at the Office of ARAZI CEO.</li> </ul>
Cadastral Department (part	State and	Implementation	<ul style="list-style-type: none"> <li>Conducts geodetic, cartographic and cadastral survey and mapping activities throughout the</li> </ul>	<ul style="list-style-type: none"> <li>Lack of up to date cadastral information (only 34% of the</li> </ul>

of ARAZI since 2013)	Private		country.	<ul style="list-style-type: none"> <li>country has been surveyed) with many records since destroyed.</li> <li>Lack of clarity and gaps in Cadastral Survey Law.</li> <li>The effective functioning of Cadastral Regional Directorates have been questioned, especially after establishment of new ARAZI office.</li> </ul>
Ministry of Finance (MoF)	Private	Formulation, Implementation	<ul style="list-style-type: none"> <li>Land and property taxation</li> <li>Taking part in land valuation for acquisition purposes</li> <li>Recordkeeping in <i>mustofiat</i></li> </ul>	<ul style="list-style-type: none"> <li>Limited capacity to collect taxes in rural areas</li> </ul>
Ministry of Agriculture, Irrigation and Livestock (MAIL)	State	Formulation, Implementation	<ul style="list-style-type: none"> <li>Sustainable management of forests, pastures (incl. deserts, hills, mountains and slopes, marshlands, river banks) and natural resources</li> <li>Taking part in land valuation for acquisition purposes</li> </ul>	<ul style="list-style-type: none"> <li>The ownership of pastures unclear</li> <li>Poor relations with community councils in rural areas.</li> <li>Water Right Law and policies are not implemented in practice.</li> <li>Limited capacity to resolve water conflicts.</li> <li>Inequity in water distribution.</li> <li>Inadequate monitoring and evaluation system</li> <li>Weak legal framework</li> <li>Gap between community and provincial authorities.</li> <li>Conflicts between community based approaches and formal state mechanisms.</li> </ul>
National Environment Protection Agency (NEPA)	State	Formulation, Implementation	<ul style="list-style-type: none"> <li>Improve livelihood and protect the health of humans, fauna and flora.</li> </ul>	<ul style="list-style-type: none"> <li>Poor law enforcement and implementation capacity.</li> <li>Inadequate funding.</li> </ul>
Ministry of Rural Rehabilitation and Development (MRRD)	Private - rural areas	Formulation, Implementation	<ul style="list-style-type: none"> <li>Development and implementation of programs promoting responsible social and financial growth in rural areas, primarily in the non-farm sector.</li> <li>Implementing a made-in-Afghanistan "Pro-Poor" growth strategy.</li> </ul>	<ul style="list-style-type: none"> <li>Poor law enforcement and implementation capacity.</li> </ul>
Ministry of Urban	Private	Formulation,	<ul style="list-style-type: none"> <li>Making, approving and implementing National</li> </ul>	<ul style="list-style-type: none"> <li>Lack of clear legislative</li> </ul>

Development Affairs (MUDA)	and State urban areas	Implementation	<p>Urban Policy.</p> <ul style="list-style-type: none"> <li>• Preparing development strategies for all the zones.</li> <li>• Preparing urban and regional plans for all major urban areas.</li> <li>• Strengthen the capacity of municipalities.</li> <li>• Developing revenue building programs for all municipalities.</li> <li>• Taking part in land valuation for acquisition purposes</li> </ul>	<p>framework for urban planning, and its implementation.</p> <ul style="list-style-type: none"> <li>• Yet to produce a national urban policy.</li> <li>• Overlap with the responsibilities of the Municipalities over control and supervision of implementation of Master Plans</li> </ul>
Municipalities	Private and state urban areas	Formulation, Implementation <i>(Conflict of interest : responsible for formulation, implementation and supervision)</i>	<ul style="list-style-type: none"> <li>• Responsible for urban planning in large cities</li> <li>• Adopt measures for allotment of land-plots for the construction of residential houses and commercial sites in accordance with the relevant law provision.</li> <li>• Expropriate land in accordance with the provisions of the land expropriation law</li> <li>• Adoption of measures for road, playground, hammams and market construction; creation of urban green spaces; public health and upgrading works in cities<sup>477</sup></li> <li>• Taking part in land valuation for acquisition purposes</li> <li>• Management of public lands within city Master Plans</li> </ul>	<ul style="list-style-type: none"> <li>• Overlap with MUDA in relation to formulation, implementation control and supervision of the Master Plan (this is particularly true in case of Kabul Municipality)</li> </ul>
Ministry of Mines and Petroleum	State	Formulation, Implementation	<ul style="list-style-type: none"> <li>• Development of Afghanistan’s natural resources</li> </ul>	<ul style="list-style-type: none"> <li>• Sensitivity of the issue in terms of contracting of investors to develop Afghan natural resources</li> </ul>
Independent Directorate of Local Governance (IDLG)	Private and State	Formulation, of Implementation	<ul style="list-style-type: none"> <li>• To develop sub-national governance policy</li> <li>• To increase people’s participation in sub-national governance</li> <li>• To empower provincial councils</li> <li>• To introduce laws on district councils, municipal councils, mayors, and village councils</li> <li>• To reform public administration and build capacity of the public work force at the sub-national level</li> </ul>	<ul style="list-style-type: none"> <li>• Responsibilities between MUDA and IDLG for developing national urban policy is unclear.</li> <li>• Interference from provincial authorities in the decision making of municipalities.</li> </ul>

<sup>477</sup>Abdul Baqi Popal, “Municipalities in Afghanistan,” (Kabul: General Directorate of Municipal Affairs, 2014), 18.

			<ul style="list-style-type: none"> <li>To institutionalize provincial planning and budgeting</li> </ul>	
Afghanistan Investment Support Agency (AISA)	State	Implementation	<ul style="list-style-type: none"> <li>Sale of the state land to investors</li> <li>Support of private investment</li> </ul>	<ul style="list-style-type: none"> <li>Ambiguity about legality of state land sales (AISA selling the state land transferred to it by ARAZI with high prices, ambiguity of legal framework in this regard)</li> <li>Ambiguity in terms of AISA's status as independent entity (established as a part of the Ministry of Commerce and Industries, currently its status unclear)</li> </ul>
Courts	State and Private	Arbitration	<ul style="list-style-type: none"> <li>Maintaining land related records</li> <li>Issuing title deeds</li> <li>Dispute resolution</li> </ul>	<ul style="list-style-type: none"> <li>Lack of transparency and accessibility of land records</li> <li>Corruption</li> <li>Time consuming and costly process.</li> <li>Perceived conflict of interest between their administrative function and judicial function of resolving land related disputes.</li> </ul>
Ministry of Justice	Private and state	Formulation, Arbitration	<ul style="list-style-type: none"> <li>Development of legal texts</li> <li>Conflict resolution (<i>Huqooq</i>)</li> </ul>	<ul style="list-style-type: none"> <li>Overlap with the Parliament for law drafting (such as <i>Taqnin</i>, but not parliament, is playing a large role in LML revision process).</li> </ul>
Afghanistan Independent Human Rights Commission (AIHRC)	Private and state	Implementation - monitoring	<ul style="list-style-type: none"> <li>To monitor, foster and protect respect for human rights</li> <li>Acceptance of individual complains about the violation of personal human rights.</li> <li>Referral of human rights violations of individuals to legal authorities</li> <li>Assistance in defense of Afghan citizens' rights.</li> </ul>	N/A
Independent Directorate of Kuchi Affairs	State	Formulation, Implementation	<ul style="list-style-type: none"> <li>Protection and advocacy for right of Kuchi tribes and other minorities</li> </ul>	<ul style="list-style-type: none"> <li>Ambiguity between state and publicly owned pastures</li> </ul>
High Office of Oversight and	State and	Monitoring	<ul style="list-style-type: none"> <li>Monitoring and prevention of corruption</li> </ul>	<ul style="list-style-type: none"> <li>Possible overlaps with MEC</li> </ul>

Anti-corruption	private			
<b>Provincial Government</b>				
Huqooq (Law Department of MoJ)	State and private	Arbitration	<ul style="list-style-type: none"> <li>Resolving conflicts civil disputes between government- individuals or between individuals.</li> <li>Play mediation role on conflict resolution.</li> </ul>	<ul style="list-style-type: none"> <li>Time consuming</li> <li>Lots of paper work and bureaucracy</li> <li>Increases community awareness.</li> </ul>
<b>Private Sector Service Providers</b>				
Property Dealers	Private	Implementation	<ul style="list-style-type: none"> <li>Dealing with property transactions.</li> <li>Inputs of land valuation process</li> <li>Own land record-keeping</li> </ul>	<ul style="list-style-type: none"> <li>Their credibility has been questioned.</li> <li>Informal charges are more than what is their mandate according to their formal obligation.</li> <li>At times acts as illegal bridge between government authorities and customers.</li> </ul>
Cooperation for Rehabilitation of Afghanistan (CRA)		Implementation	Facilitates mobilization and empowerment of local communities to ensure sustainable peace, human rights, development and the overall improvement of quality of life.	<ul style="list-style-type: none"> <li>Links community with municipal authorities.</li> <li>Increases community awareness socially and economically.</li> </ul>
Afghanistan Land Consulting Organization (ALCO)	Private	Implementation	The Afghan Land Consulting Organization (ALCO) is a not-for-profit, non-political and non-governmental organization (NGO). ALCO is to “enable a secure and equitable access to land for all citizens and improve the efficiency of land markets”	<ul style="list-style-type: none"> <li>Increases community awareness.</li> </ul>
<b>Non-governmental entities</b>				
Independent Joint Monitoring and Evaluation Commission (MEC)	Private and state	Implementation - monitoring	<ul style="list-style-type: none"> <li>Developing anti-corruption recommendations;</li> <li>Monitoring and evaluating the anti-corruption efforts of the Afghan government and the international community;</li> <li>Reporting on a regular basis to the President, Parliament, and people of Afghanistan, as well as to the international community, about the state of the fight against corruption.</li> </ul>	<ul style="list-style-type: none"> <li>Possible overlaps with HOO</li> </ul>
Provincial Commissions on Conflict Mediation	Private	Mediation	<ul style="list-style-type: none"> <li>Conflict mediation</li> </ul>	<ul style="list-style-type: none"> <li>Various informal justice system mechanisms in Afghanistan create myriad of venues for conflict resolution/mediation</li> </ul>
Shuras & jirgas	Private	Arbitration/Mediation	<ul style="list-style-type: none"> <li>Addressing of land disputes often with aim to bring peace to the community as opposed to</li> </ul>	<ul style="list-style-type: none"> <li>Linkages between formal and informal justice system unclear</li> </ul>

			justice	<ul style="list-style-type: none"><li>• Informal justice system often not recognized by the formal justice system</li><li>• Currently draft law on shuras and jirgas in being developed (two drafts with MoJ - one also including criminal aspects)</li></ul>
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### 13.8 Annex VIII. - Technical concepts' definitions

<b>Acquisition:</b>	Assumption or attainment of rights in property.
<b>Adjudication:</b>	Process of final and authoritative determination of the existing rights and claims of people to land.
<b>Long term unchallenged possession:</b>	Possession of land through long term peaceful occupation as a trespasser or squatter. The right to possession after a statutorily prescribed period of limitation can be gained if there is no legally defensible claim.  <i>NB: In the Afghan context, should not be confused with occupation without explicit state warrant, because the latter is not exceptional, rather the norm in most places (hence not in any strong sense "trespassers" or "squatters")</i>
<b>Assessed tax:</b>	Taxation based on an assessment of the value of the property.
<b>Assessed value:</b>	A value recorded by a public body on the market price of the property.
<b>Building permit:</b>	An approval by the local governing body on land use and planning for construction or renovation to a property.
<b>Building standards:</b>	Regulations or bylaws that set out standards one must conform to when constructing or renovating buildings or immovable objects. Examples include building heights, setbacks from roads or neighbors etc. Where standards are not met the local authority can impose fines or instruct on construction changes.
<b>Cadastral map:</b>	A map showing land parcel boundaries. Cadastral maps may also show buildings.
<b>Cadastral surveying:</b>	The surveying and mapping of land parcel boundaries in support of a country's land administration, conveying or land registration system.
<b>Cadastre:</b>	A type of land information system that records land parcel. The term includes: Judicial Cadastre: a register of ownership of parcels of land; Fiscal cadastre: a register of properties according to their value; Land-use cadastre: a register of land use
<b>Certified copy:</b>	A document copy certified by the official records authority who has affixed his/her certification and seal to the copy.
<b>Chain of title:</b>	A succession of conveyances at some accepted starting point, whereby the present holder of real property derives his or her title.
<b>Classification:</b>	Classification is a land use and management mechanism to assist decision making. Classification is based on the use of the land, not on the type of ownership or necessarily the rights associated with the land/property.
<b>Cloud on the title:</b>	Any document, claim, unreleased lien, or encumbrance that may impair the title to real property or make the title doubtful.
<b>Collective ownership:</b>	Collective ownership of a natural resource is where the holders of rights to a given natural resource are clearly defined as a collective group, and where they have the right to exclude third parties from the enjoyment of those rights.

- Collectively-held land** Based on the Pasture Law 2000, it can be considered as specific pasture (Art. 3 (2)) located in the proximity of the village. However, in the past, various tribes were not only given the land in the proximity of the village, therefore for the purposes of this report, collectively-held land does not equal only to specific pasture land, but includes all the lands irrespective of their proximity to the village that is collectively held. Collective ownership of land constitutes a major pattern of land holding across the country (in all likelihood encompassing the majority of land in Afghanistan). However, this type of land ownership is not recognized under Afghan law.
- Concession:** A concession is a restricted use right granted to a private party for a large parcel of public land that is granted for a specific purpose (for example forestry, bio-fuel, cultural/tourism, etc.)
- Common or public land:** Land over which a community has rights or access to. The community may or may not have legally recognized ownership over the land. In some cases for instance the State may be considered the owner. Please note the ambiguities in the legal definition of public lands in Afghanistan.
- Communal land** The definition of communal land is not provided for in Afghan body of law. Communal lands in Afghanistan can be considered as a public land, taking the issues with their definition and communities' rights recognition mentioned in the previous parts. Nevertheless, the Pasture Law 2000 mentions the communal pastures<sup>478</sup>. Art. 2(2) provides the definition of communal pastures: "Communal pasture: Arid land which, in accordance with section (9) of the land management law does not fall within bounds of villages or towns." According to Art. 3 of the same law, "the communal pasture can be used for grazing cattle belonging to the communities" and it cannot be brought, sold or leased (Art.6).
- Community forest:** Community forests and community forest land care systems are identifiable community groups that use and manage designated areas. In many cases governmental recognition is obtained through the approval of their management plan.
- NB: Not generally applicable in Afghan context, in that most forests seem to be state land over which the state has no effective control, hence community use is technically unauthorized, but uncontested in fact.*
- Condominiums:** A condominium is a collection of individual home units along with the land upon which they sit, also known as strata. Individuals have private rights within the complex/building, but they also have use and access to common facilities, including hallways, stairwells, and exterior areas etc. There are typically common property areas included in the property that require management by the commons.
- Customary tenure:** The holding of land in accordance with customary law. Customs are a set of agreed, stipulated or generally accepted standards, social norms and practices. Customary land law regulates rights to enjoy some use of land that arises through customary, unwritten practice, rather than through written or codified law.
- Decentralization:** Decentralization is the principle of delegating policy-making and authority responsibility to local levels of public authority.

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<sup>478</sup> Art. 82 of LML, Dari version: pasturelands are translated as *mara'a* land, meaning it can be grazing land, graveyard, hills, etc. Therefore, the common pasture can be certainly considered as *mara'a* land.

<b>Deed:</b>	Written or printed instrument that effects a legal action such as a contract for sale
<b>Dispute resolution:</b>	Typically a range of dispute resolution mechanisms is available which could be grouped into formal and informal dispute resolution mechanisms. The formal dispute resolution mechanisms include the formal court system, administrative dispute resolution and state administered or sanctioned alternative dispute resolution (ADR) mechanisms. The informal systems for dispute resolution typically involve community leaders, village elders, village assemblies or committees in resolving disputes. They may or may not have formal recognition by the state or under the law. ADR and informal systems may overlap.
<b>Encumbrance:</b>	A right that adversely affects the land. Many are registerable in formal real estate registration systems; such as restrictive covenants, easements, mortgages and registered leases.
<b>Eviction:</b>	Eviction is the removal of someone from their occupation of land or property. The term is very commonly used in connection with the eviction of squatters, but may also be used in the context of unlawful eviction.
<b>Exemption (tax):</b>	Release from the obligation to pay tax. Property tax exemption is typically based on criteria such as the particular use of the property (such as use as a place of primary residence, public use, agricultural production, etc), ownership (with exemptions for particular types of owners such as investors, government etc.), or other factors (such as the status of improvements on the land, location or size of the holding etc.).
<b>Expropriation:</b>	Expropriation is the act of taking away individuals' land by the state due to public interest but prior to respect of procedures provided for by law and prior to payment of fair compensation.
<b>First instance (Basic tribunal):</b>	This is the first judicial instance (court) which serves as the place of a first hearing of a dispute in the judicial system. Decisions served in such courts can be appealed and raised to a higher level of the judicial court system.
<b>Forests:</b>	The different forest classifications vary with respect to designate uses, management authority levels and with various effective bi-laws. Management regulations typically outline user rights, production rights, extraction rights, hunting and gathering rights etc. In a more general sense, forest classifications can extend to a wide range of natural resource management areas including wetlands, grasslands, desserts, and cleared areas.
<b>Group:</b>	A group is a collection of households residing in a locality and operating under some common organization or set of rules and norms, with or without formal recognition of the state. In rural areas these groups include indigenous, nomadic and pastoral communities. In the urban context these groups include organized informal settlements, collectively organized migrants who cluster in a particular locality and clusters of traditional communities.
<b>Hoqooq:</b>	Law office, Ministry of Justice, charged with the out of court resolution of disputes.

<b>Informal settlements:</b>	Occupation of an area by a group of individuals (households) that is not legally registered in the name of the occupiers. There is great variety in the form of informal settlements ranging from well established, well-built communities that simply lack formal recognition to very heterogeneous groupings of houses that are poorly planned and lack access to infrastructure such as roads, utilities etc.
<b>Improvement:</b>	<p>According to the world Bank definition, « indigenous people are understood as follows (operational directive 4.20, 1991):</p> <p>« Indigenous Peoples can be identified in particular geographical areas by the presence in varying degrees of the following characteristics:</p> <ul style="list-style-type: none"> <li>a) close attachment to ancestral territories and to the natural resources in these areas;</li> <li>b) self-identification and identification by others as members of a distinct cultural group;</li> <li>c) an indigenous language, often different from the national language;</li> <li>d) presence of customary social and political institutions;</li> <li>e) primarily subsistence-oriented production. »</li> </ul> <p>In the Afghan context, this definition may apply to much of the rural population, particularly in some tribal areas (mainly Pashtun, but not only) where customary principles and tribal mechanisms remain strong, tribes retain a strong sense of identity, and the relationship to land and the resources available on it are governed by ancestral customary principles.</p> <p>In order not to create an overlap with the previous indicator concerning customary rights, “indigenous rights to land” will here apply to nomadic and semi-nomadic tribes, whose practice of land use remains distinct from that of the majority of the sedentary rural population.</p>
<b>Jerib:</b>	Unit of land measurement; one-fifth of a hectare (2000) square meters in most of Afghanistan.
<b>Judgment:</b>	The decision of a court or other decision-making body upon the respective rights and claims of the parties to an action or suit.
<b>Land administration:</b>	The processes of determining, recording and disseminating information about tenure, value and use of land when implementing land management policies (UNECE 1996 <sup>479</sup> ).
<b>Land dispute / conflict:</b>	A land dispute is a disagreement over land and occurs where specific individual or collective interests relating to land are in conflict. Land disputes can operate at any scale from the international, between groups and to those between individual neighbors.
<b>Land management:</b>	The activities associated with the management of land.
<b>Land tenure system:</b>	Land tenure refers to the legal regime in which rights in land are exclusively assigned to an individual or entity, who is said to "hold" the land. A land tenure system refers to the regulation for the allocation and security of rights in land, transactions of property, the management and adjudication of disputes regarding rights and property boundaries.

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<sup>479</sup> UNECE, 1996. *Land Administration Guidelines*, United Nations Economic Commission for Europe, Geneva.

<b>Land use plan:</b>	A plan that identifies areas for a designated use for the purpose of land management. Used for classification, resource management planning, identification of areas for future development uses, including road widening.
<b>Land contract:</b>	A contract for the sale of real estate, where the purchase price is paid in periodic instalments by the purchaser, who is in possession of the property even though title is retained by the seller until final payment
<b>Lease:</b>	A lease is a contractual agreement between a landlord and a tenant for the tenancy of land.
<b>Legal framework:</b>	Judicial, statutory and administrative systems such as court decisions, laws, regulations, bylaws, directions and instructions that regulate society and set enforcement processes.
<b>Legal description:</b>	A description of a specific parcel of real estate that is complete enough for an independent surveyor to locate and identify.
<b>Mortgage:</b>	A transfer in the interest of land for the security of a debt.
<b>Parcel:</b>	A parcel is a defined area of land with a unique record of ownership, use, or other characteristics.
<b>Public good:</b>	An asset, facility, resource or infrastructure provided for the benefit of the public.
<b>Public information:</b>	Public access to information is a feature of public policy by which each society defines what information, particularly about private citizens and corporate entities should be available to the public.
<b>Public land:</b>	Public land is the land in the custodianship of the State, municipality, or local authority, as opposed to private land. Please consult the report explaining the ambiguities of the public land definition in Afghan context
<b>Publicly accessible:</b>	Referring to information that can be obtained by the public without any special requirements or certifications placed on the person/body making the enquiry.
<b>Registry:</b>	The term ‘registry’ or ‘register’ is used to denote the organization where the information on registered land rights is held. Information on registered land is typically textual and spatial, with the former typically maintained in a registry and the later in a cadastre office. In some countries there is a combined organization that has both sets of data and in some countries this office is called the cadastral office (in the Balkans, for example). In others there are separate registry and cadastre offices. For the purpose of the LGAF, unless clearly specified otherwise, we use the term ‘registry’ to cover both the registry and the cadastre (if one exists).
<b>Recognition</b>	For LGAF purposes recognition of rights talks about how the rights are recognized legally based on various land related laws and decree

<b>Registration</b>	In applying the LGAF, the term ‘registered’ means that the rights are recorded unambiguously in the land administration system and there are generally few disputes over the recorded information. The term ‘registered’ does not necessarily mean that the final certificate or title has been issued. It is an act of writing down the information about ones land in the Principal Books of ARAZI or courts’ Register of Title Deeds (Kondas).
<b>Recording:</b>	The rights in Afghanistan can be recorded in Land Statistics Registration book of the Cadastral Department, which serves as a “probable” ownership record in Afghanistan.
<b>Regularization / formalization:</b>	Regularization of tenure is where informal or illegal occupation of land is legalized by statute, giving occupiers the legal right to ownership, occupation or use of the land.
<b>Resolution formal:</b>	Resolving a dispute through an administrative or judicial process where the outcome is legally binding.
<b>Resolution informal:</b>	Resolving a dispute through a process where the outcome is not legally binding.
<b>Restrictions:</b>	A limitation on the use of real property, generally originated by the owner or sub divider in a deed. Also termed a deed restriction
<b>Secondary rights:</b>	Rights that are beyond the primary rights to transfer property through sale, gift, exchange or inheritance or encumber property through mortgage, lien or other charge. Secondary rights are typically associated with use rights that may or may not be eligible for registration.
<b>State land:</b>	Property in the custodianship of the Central/National Government.
<b>Title:</b>	(1) the right to or ownership of land. (2) The evidence of ownership of land.
<b>Transaction cost:</b>	Costs associated with an agreement over property rights and the costs of enforcing those rights. For example, purchase of land may require not only payment of the negotiation asking price but also legal land transfer fees to establish who is the rightful owner, survey and valuation costs, arrangement of credit and drafting the legal transfer document. Taxes and duties are not considered part of a transaction cost.  <i>NB: Given the length of formal and informal processes, opportunity costs also might be relevant here.</i>
<b>Transfer tax:</b>	Taxes associated with the transfer of properties payable to the State. The most common is in the form of a stamp duty or capital gains tax.
<b>Typology of tenure situations:</b>	A country-specific typology of land tenure is established during the implementation of the LGAF. It distinguishes Public ownership/use - incl. State land Private ownership/use and Indigenous and non-indigenous community tenure.

<b><i>Tenure Upgrading:</i></b>	A mechanism for increasing tenure security by formalizing interests in property in an incremental process. All or some rights may be registered with varying degrees of restrictions placed on the property.
<b><i>Urban group rights:</i></b>	Refers to identifiable groups in an urban setting. Those which people can be easily classified as members or non-members for the purpose of benefitting from specific rights to an area.
<b><i>Valuation roll:</i></b>	A list of taxable properties and associated property values used in assessing property tax within a jurisdiction (typically a local government authority).

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