LEGAL ISSUES PERTAINING TO LAND TITLING AND REGISTRATION IN AFGHANISTAN

LAND TITLING AND ECONOMIC RESTRUCTURING IN AFGHANISTAN (LTERA) PROJECT

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Written by:

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The authors' views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government.

Cover: A training session with LTERA's reorganization team and court officials on registration books (Kondas) in the Makhzan of Jalalabad. September 2005.

Photos by Andre Hernandez (LTERA).

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EXECUTIVE SUMMARY

The objective of the USAID LTERA's Land Titling and Registration Project is to assist the Government of Afghanistan to secure property registration, simplify land titling procedures, and clarify the legal framework related to property rights to assure cost effective land administration that will support equitable economic growth, improve land use efficiency and equity, enable low cost land transactions, protect the rights of the poor, and improve livelihoods.

This report sets forth an analysis of existing laws pertaining to informal settlements, land adjudication, registration and related areas. The report addresses legal issues related to the formalization of property rights, development of land adjudication and registration law.

The system of Afghanistan property rights is broadly divided into two categories: formal, and informal. Afghanistan land law defines ownership of immovable property as private, public, or *Mowat* land. Private ownership may be acquired through purchase, land allocation from the Municipality, and through transfer of ownership. Land may also, in theory, be acquired through the application of the principle of "dead land" or "*zameen-e-bayer*." The excessive judicial and administrative steps and archaic modes of operation that exist in the system of transfer of real property rights are cumbersome, inefficient and often riddled with corruption. Additionally, the burden of the real property transfer tax is quite high relative to personal incomes, and consequently acts to discourage legally recognized title registration. More often than not, individuals resort to using the informal system.

In urban areas, as a result of years of conflict, many residents live in informal settlements, or areas considered unplanned by local municipalities, and where residents do not hold registered title. Property in informal settlements may have been acquired by squatter settlements built on public lands; settlements built on privately owned land; settlements built on grabbed land or land bought from land grabbers; and settlements that otherwise have a murky legal history. In order for residents in informal settlements to obtain formal deeds, the legal issues surrounding the mode of land acquisition must be clarified.

Afghanistan's land tenure situation may best be described as chaotic. Many properties are occupied on the basis of customary deeds; others are based upon multiple claims. The existing registration process is also an adjudication process. Afghanistan needs a separate coherent land registration law. It also needs a land adjudication law that establishes a process by which claims of interests over land are evaluated, conflicting claims resolved and customary settlements recognized/formalized. In addition, and critical to the registration process, is the necessity to clarify the legal authority for land mapping, surveying and related activities in Afghanistan. Improvement of land tenure security is an essential element to peace building in Afghanistan.

INTRODUCTION

In addition to its work on economic restructuring and privatization, the USAID LTERA's Land Titling and Registration Project takes a holistic approach to land administration in Afghanistan. The Project's goal is to improve land tenure security for Afghans. Our approach involves analyzing the existing legal framework of land administration, including issues related to property adjudication and registration, mapping and land surveying, and the formalization of informal property rights, identifying gaps in the framework, and making appropriate recommendations to the Government of Afghanistan to improve land administration.

This preliminary report seeks to clarify some of the main issues identified within Afghanistan's legal framework and institutions. It highlights the main issues, problems, and suggests some tentative solutions that will be considered during the life of the Project.

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LTERA's Land Titling Team brings to this Project its substantial experience and knowledge in land titling around the world. The project is implemented by the Emerging Markets Group, an independent firm associated with Deloitte Touche Tohmatsu: www.emergingmarketsgroup.com

1. TYPES OF OWNERSHIP UNDER AFGHAN LAW

In order to ensure that all urban landowners are granted formally registered or recognized deeds, it is imperative to understand the actual legal situation of a given plot of land. Generally speaking the ownership of land located in planned urban areas is formally recognized or recognizable, while land in most urban informal settlements is irregularly possessed. Under Afghan law, property rights are divided into two categories: 1) Formal, and 2) informal. As in most legal systems, property rights under the formal legal system constitute both real and personal rights. Regarding real property, a person may enjoy or exercise rights at different levels: usufruct, possession or ownership. Possession and usufruct, according to the formal laws, ought to emanate only from a right of ownership. Besides real right, a person may also enjoy personal rights through contract concluded with other holders of right. More specifically, pursuant to the laws of Afghanistan, ownership of immovable property is divided into public ownership and private ownership. The USAID LTERA Project has identified a typology of irregular property rights useful to categorizing underlying legal issues.

Public Property

Pursuant to Article 482 of the Civil Code, public property consists of:

- Movable and immovable property owned by the state;
- Movable and immovable property of public juridical persons;
- Movable and immovable properties that have been allocated for public interests; and
- Movable and immovable properties that are recognized by law as public property.

In addition to the above, cultivable land which has no owner is deemed to be public land. The law prohibits acquisition of such land without the permission of the government in violation of the law (Article 1991 Civil Code). Government permission is necessary for acquiring any type of land. Even barren land (*zameen-e-bayer*) that does not have an owner may only be acquired with the permission of the government. The person who acquires and develops barren land with the permission of the government shall own the land (Article 1992 Civil Code). Any property shall cease to be public property upon the expiry of its designation for public use. Such expiry of the period of public utility is determined either by a successive law or when the purpose for staying under public ownership ceases to exist (Article 483 Civil Code).

The state has recently strengthened its grip over land based on a statute of limitation created pursuant to a recent Presidential Decree (Issue 83 dated 18/8/382), which states that all individual claims to land that has been held by the state for a period exceeding 37 years shall be barred and the state shall be considered the owner of the property (Article 2). Moreover, the decree provides that all land in which the ownership of individuals is not established legally shall be considered the property of the state (Article 3.)

Private Property

According to Article 481 of the Civil Code, immovable property that is owned by individuals is considered private property. The Civil Code does not envisage private property owned by a group of individuals or body corporate. However, according to Islamic Law, private property can be held either individually or collectively. Article 1900 of the Afghan Civil Code confers an entitlement on the owner to use and exploit his property to the exclusion of all others. This right is construed to mean that the owner may, within the limits of law, use and dispose of his property freely.

2. ACQUISITION OF URBAN LAND AND LEGALIZING OWNERSHIP

Private ownership may be acquired through purchase, land allocation from the Municipality, and through transfer of ownership. Moreover, in theory, land may be acquired through the application of the principle of "dead land" or "*zameen-e-bayer*."

Allocation of Land

The distribution of state land in Kabul is governed by a Presidential Decree on the Distribution and Sale of State Owned Land for Residential, Commercial, and Multi-Storied Buildings in Kabul City (OG, No. 794, 25/6/1421, 2000). According to this decree, individuals who do not own a residential house, apartment or plot of land are eligible to purchase land from the Municipality. Further the law provides that the spouse and minor children of a person who applies to purchase land must not own any house, apartment, or land in order to be eligible for land allocation from the state (Article 3, paragraph 1).

The decree regulates how and where different classes of applicants should submit their application for purchase of land for a residential house. Pursuant to Article 4 paragraph 2, a person *who is not a public servant* may submit written application to the Municipality. The same procedure is applicable to legal entities that are interested in obtaining land for commercial and multi-storied buildings (Article 4, paragraph 4). The decree provides a different application process for *civil servants*. Civil servants, according to this decree (Article 4, paragraph 1), may apply for land allocation through their employer Ministry or government agency. However, in practice, this rule does not seem to have been applied.

The process of land distribution involves several offices at the Municipality including the Municipal Head, Malkiat-ha Department, Land Distribution Directorate, and the relevant district office of the Municipality. Normally, the process of land distribution is lengthy. After an applicant has completed an application form in the relevant administration offices, the Land Distribution Directorate registers the applicant's name on a list. In this regard Article 5 of the decree provides that identification of applicants shall be registered in a special book containing a serial number according to the date of issuance of order and the applicant shall receive a receipt. This list is submitted to the Supreme Commission for Urban Development (established in 2004) which is authorized to determine the eligibility of applicants and distribution of lands. According to Article 6 of the Decree, the Commission is composed of the followings persons:

1. Mayor of Municipality, President;
2. Deputy Mayor, Deputy President;
3. President of the Planning and Architecture Department, Member;
4. President of Malkiat- ha Department, Member; and
5. President of relevant District Office, Member.

If an application is granted, upon the advice of the Tahsile-Amlaki, Property Acquisition Directorate, within the Malkiat-ha, Property Department of the Municipality, the applicant shall then appear before the Revenue Department to obtain the price for the purchase of the land. According to Article 16 of the Decree, a plot of land is distributed to an eligible person who pays the specified price. The land is given to the eligible person within six months from the time the applicant fulfills the formalities, including the payment of the purchase price. As a matter of administrative practice, the Land Distribution Directorate gives the owner of the property a temporary ownership document prior to handing over the land. Upon submission of the temporary ownership document by the applicant to the relevant district office (Nahiya), the district office allocates the land to the applicant.

However, allocation of land and temporary ownership does not automatically enable the grantee to obtain a legal deed. There are several requirements that must be fulfilled before a formal deed is granted. First, the Municipality must grant permission for construction of a building on the allocated land (Article 19 of the Decree.) Second, 50% of the construction work must be completed in accordance with an approved design to qualify for a

legal deed.[1] After completion of 50% of the construction work, the Municipality then grants the purchaser a temporary document of ownership, which must be submitted to the provincial governor together with an official letter of approval for formal ownership. According to the Law on Local Administration and subsequent order on its enforcement (OG, No. 753, October, 7, 1991), the provincial governor is authorized to sell state owned land as well as purchase land on behalf of the state. Finally, a legal deed is prepared by the competent primary court and signed by the governor as the seller on behalf of the government.

Formal Transfer of Property Ownership

Land grabbing, squatting and other forms of irregular occupation of land are widespread throughout the country. A large percentage of real estate transactions take place through informal market mechanisms. Land grabbing particularly in urban areas, has given rise to an extensive informal real estate market. Individuals have appropriated, sub-divided, and distributed public land using the informal market. The ease with which informal land transactions take place discourages formalization of property titles and makes provision of services in urban areas very difficult and complicated for the Municipality. On the other hand, the formal property titling system does not facilitate the efficient use of land or promote the operation of a real estate market. Given its current corrupt and inefficient nature, the formal land titling process does not provide a suitable mechanism to accommodate the potential demand for real estate transactions. The rates of transfer tax accompanied by the unavoidable illegal fees that are required of applicants at every step through the process also operate as a disincentive to the formalization of property transfer.

In Afghanistan, the function of accrediting ownership of land is vested in the judiciary and is exercised through the jurisdiction of the district courts. Inefficiency and uncertainty in the titling process are to a great extent the result of weaknesses in the administration of justice. In addition, the property transfer process also involves the municipal government and other administrative governmental offices, which also contribute to the institutional delay and cost in the transfer process.

The two most common means of property transfer are through inheritance and sale. The formal property transfer process is perceived by many citizens as lengthy, too costly, and riddled with corrupt practices. One or several of these reasons cause people to circumvent the legal process. The real property transfer tax rate in Afghanistan is higher than the regional average and considerably higher than the rate in most developed countries. In the process of property conveyance, the buyer and/or seller – depending on their agreement – is required to pay 1% of the estimated value of the property to the Revenue Collection Office of the Ministry of Finance (*Mustofiat*), a 5% transfer tax to the district court (or 6% when the value of the property is estimated to exceed one million Afghani), and 1% to the Municipality, or a total of 7-8% of assessed value. These taxes are widely regarded as exorbitant and unfair. According to the Operational Manual of Writing Legal Documents, unless the parties agree otherwise, taxes are paid by the recipient of the document. The only exception is the recipient of a promissory note, who is not required to pay a court tax. It is not therefore uncommon for a buyer and seller of a property to conclude a customary sales agreement to avoid paying taxes and fees associated with property transactions.

Corruption is another factor that discourages both buyers and sellers of property from meeting the legal formality of property conveyance. Unlawful fees that are associated with the web of administrative and judicial processes of property transfer are equally discouraging, as is the high legal transaction costs of formal sales of land and houses in the city. In addition to the legal and unlawful exorbitant transaction costs, the inefficient court system and bureaucracy make the whole transfer process intolerably long for buyers and sellers to complete the formal property transfer procedure.

The administrative and legal process for the transfer of property ownership is guided by what is commonly referred to as the "circular" form (see figure 1) that was approved by the High Council of the Supreme Court (Shura-e-Aali). This form may be modified by the same council when deemed necessary. The form requires the applicant for property transfer to go through a lengthy process involving multiple government offices. At the onset, the seller must file an application at the primary court in the relevant district in which the land is located. Once the application is filed, the validity of the property's legal deed must be verified in the Court of Appeals

[1] See the Decree on the Implementation of the Kabul Master Plan, Article 11(2).

registry by the Head of the Makhzan. After verification of the deed, the seller must appear before the Property Office and the Valuation Committee in the district office (Nahiya). The Property Office will check and certify the geographic and ownership description of the property, and the Valuation Committee will estimate the value of the property for taxation purposes. The applicant must then pay 1% of the estimated property value as a Municipality tax in the Property Office.

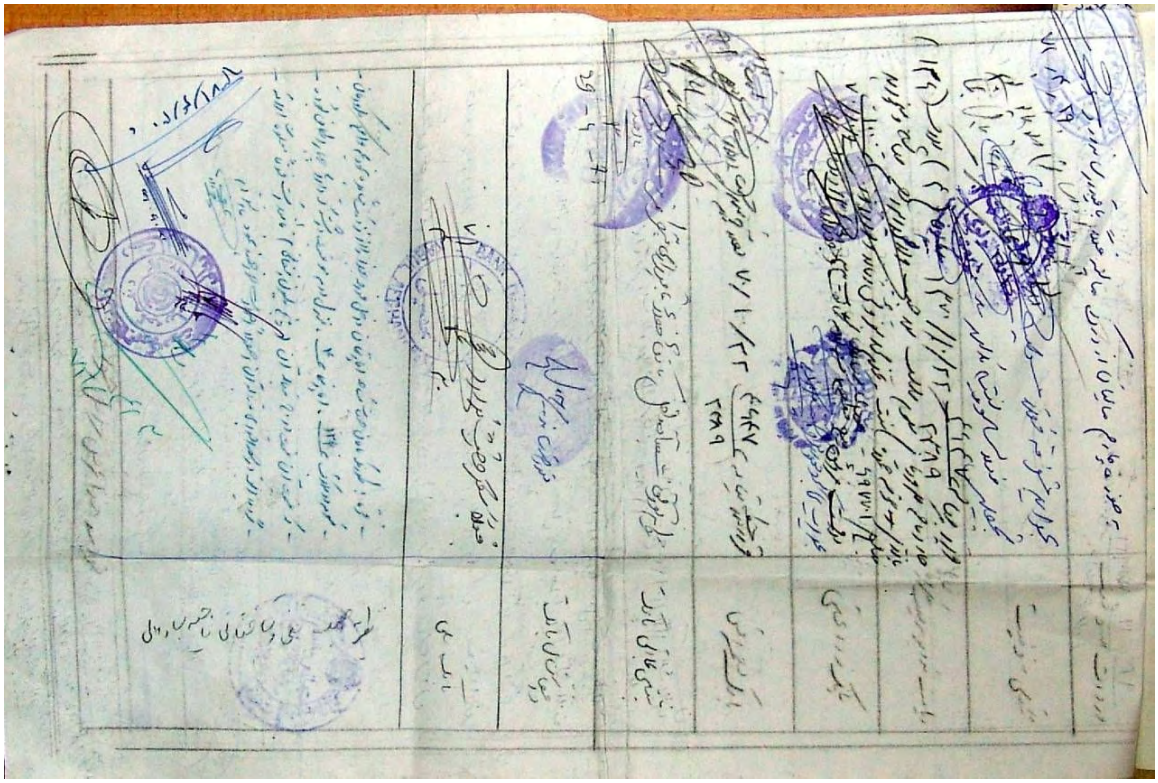

Figure 1: A circular form.

Any property encumbrance or debt to the government must be cleared in the transfer process. After the applicant (seller) pays the municipality tax, the Revenue and Collection Office of the Provincial Branch of the Ministry of Finance (Mustofiat) will determine whether the seller owes the government any debt with respect to the property. A Taxation Committee in the same Provincial Mustofiat office will reassess the value of the property (normally, quadruple the property value estimated by the Municipality) in accordance with a presidential decree. The rationale behind this practice is based upon the presumption that the valuation system at the municipal government level is riddled with corruption. For example, after the Mustofiat Office checks whether the seller is indebted to the government, a question may arise as to whether the relevant employees are real or current employees of the Mustofiat office. In this case, the Human Resource Administration of Mustofiat must verify the employment status of the relevant officials.

Once an applicant has completed his/her transaction at the Mustofiat, the applicant must obtain certification on the circular form from the *Microyan* Maintenance Department that the house being sold is not an apartment. This step is required of all applicants, including those who are transferring the ownership of their house, even though the applicant must have already obtained certification from the district office and the municipality that the property being sold is a house. The most recent addition to the circular form is a step that involves the *Edara-e-Amour* (Office of Administrative Affairs in the office of the President.) This office checks whether the relevant house is under the custody of the government or not. This recently added step appears to be redundant because the purpose of going to this office was already dealt with by the district office and the Department of Property at the Municipality. It remains to be seen whether this step is meant to be temporary or not.

The judicial function of the transfer process resumes after the *Edara-e-Amour* ascertains that the property is not subject to the custody of the government. At this point, the seller and buyer must appear before the Primary Court, so that the judge or judges can ensure that the fundamental elements of a valid contract are met. For this purpose, the seller, the buyer, and two witnesses must testify before the court. If the court is satisfied that the basic elements of a valid contract are satisfied, it then approves the transfer of ownership, subject to the payment of the required taxes.

In the process of formal transfer of ownership, registration of a property in the Makhzan provides the greatest legal security to formalization of property rights. While the property deed transfers ownership rights from one owner to another person, registering the property should ensure those ownership rights against claims by third parties. However, due to various factors such as collapse of government institutions, corruption, illegal land sales to multiple individuals, multiple allocations of a plot of land and fraud, there have been many instances when multiple claimants were able to support their claims over the same property with formal deeds, which prima facie carry equal validity.

The property adjudication and registration process must be streamlined or retooled. As initial steps, the USAID LTERA Project is 1) reorganizing the land documents stored in the provincial Makhzans, and 2) is establishing a process and capability within the court system to create electronic copies of existing land documents, in order to both protect the documents and prevent forgery. Remaining steps that will be addressed related to the property adjudication and registration process include 1) reducing the time and costs involved in registering property, 2) establishing a process and capability to detect fraudulent deeds, and 3) upgrading the quality and precision of the information that is recorded.

Figure 2: One of USAID/LTERA's reorganization teams digitalizes deeds in Kabul.

Mawat Land

The word "zameen-e-mawat" or "zameen-e-bayer" means "dead land." In practice, this term refers to land that is not suitable for cultivation. According to Langrodi, the concept of mowat requires three elements: 1)

the ownership history of the land is not known; 2) it has not been cultivated and constructed, and 3) currently the land is not owned by any person. [2]

Islamic law generally recognizes mawat land as property neither owned by a private individual nor by the state and which could be acquired through renovation. Imam Abu Hanifa, the founder of the Hanafi school of thought recognized renovation of mawat as a means of acquiring ownership. Nevertheless, he conditioned such acquisition of ownership on permission from the Sultan (head of state). Consistent with this, mawat land is recognized under the laws of Afghanistan, and whoever wants to acquire mawat land must first secure permission from the head of state (Article 1992 of the Civil Code and Law on Land Management 795, 2000.) In theory, private property may be acquired in accordance with this concept.

[2], M. Jahfer Langrodi, Legal terminology, 27(13TH Edition) 1382.

3. LEGAL SITUATIONS OF INFORMAL PROPERTY OWNERSHIP

In order to ensure that private persons are able to obtain formal deeds for possessed land, it is essential to identify the different legal issues regarding the plot of land. Privately possessed land may be categorized as formal and informal. The formality or informality of property rights is usually viewed in conjunction with the nature of the settlement where the property is located. In reality, however, there are formal property owners in informal areas and property owners with informal rights in formally planned areas. Generally speaking, however, residents of most houses in informal settlements have informal property rights.

Illegal settlements have been defined differently. For example, in Kabul, informal settlements are houses built (a) in violation of the master plan of Kabul, and (b) without meeting formal requirements for access to land. In official circles, the informal settlements in Kabul are often divided broadly into two categories: (i) those settlements built before the eruption of armed conflict in Afghanistan in 1978, and (ii) those settlements with houses built after the eruption of the last armed conflict in the country.

In the context of addressing tenure issues in informal settlements the above classification is of little help because it totally disregards the varying legal sub-divisions of occupants of informal properties. Therefore, classifying settlements with respect to tenure arrangements is imperative for appropriately addressing the specific land tenure problems that are prevalent in different types of informal settlements. Based on the mode of land acquisition, informal settlements can be classified in four categories: squatter settlements on public lands; settlements where most houses were built on privately owned land; settlements where most houses were built on grabbed land or land bought from land grabbers; and settlements where there is a murky legal situation.

Figure 3: An informal settlement in Kabul.

Squatter Settlements

The relative physical security that Kabul offered during the long years of armed conflict induced many internally displaced persons to encroach upon public land and build homes, mostly on the hillsides that run through parts of the city. These once bare hills have sprouted informal settlements that accommodate thousands of households. More recently, many returnees and internally displaced people have built houses on public land without meeting the requirements for lawful access to land. This category of squatters settled in different parts of Kabul mainly in search of better opportunity and access to better social services.

Squatter settlements are by far the most prevalent type of informal settlement in Kabul. Almost all squatter settlements in Kabul have occurred on public lands. The legal status of squatters may be examined in relation to the concept of *zameen-e- bayer*[3]. Pursuant to Article 1992 of the Civil Code, dead land that has no owner shall be deemed to be the property of those who have acquired it based on government permission. The person who makes use of the land shall be considered the owner. However, government permission for the acquisition is *sine qua non* for acquiring ownership right over the property. Otherwise, any squatted upon unused public land would not qualify as barren land.

Informal Houses Built on de Facto Privately Owned Land

Informal houses built on de facto *privately owned land* constitute a significant portion of dwellings in the unplanned areas of Kabul. Private lands are lands on which the ownership of individuals has been proven legally by a valid legal document. Similarly Article 481 of the Civil Code defines private property as property owned by individuals.

In this report, the terms private property and privately owned land are loosely used to denote *de facto* and *de jure* individual ownership of immovable property. Strictly speaking, de facto owners would be more appropriately referred to as 'adverse possessors.' Nevertheless, in this report, the term privately-owned land means all areas of land that are claimed by individuals based on customary deed, traditional ownership, or formal ownership. A preliminary survey of informal settlements in Kabul discloses that a significant number of settlers in the plain areas of the city's informal settlements hold customary deeds for their property. Settlers who hold customary deeds for their property are people who acquired *de facto* ownership of their land through purchase from customary or traditional owners of land. The customary or traditional owners of land are the organic owners of land that were part of villages later urbanized and formed part of the city. The areas of Deh Sabz and Char Dehee in Kabul are good examples of former villages that currently form part of the city.

Settlements on Grabbed Land or Land Distributed by Land Grabbers

Grabbing of private and public land is a phenomenon that is intricately linked to the history of the country's conflict. This phenomenon presents one of the most complex social, legal, and political problems in property rights. According to many accounts, the problem of appropriation of large areas of land by powerful individuals is a phenomenon that emerged after the fall of the communist government in 1992. Land grabbers appropriated land not only to build houses for themselves but also to distribute/sell. Unlike ordinary squatters land grabbers normally appropriate a large piece of land that is significantly more than that needed to build a personal house.

Although statues regarding land grabbing exist, the question of land grabbing is primarily a political problem. There are a series of laws issued to prohibit the grabbing of land. Article 24 of Chapter III of the Decree on Distribution and Sale of Land (OG No. 794 of 25/6/1421 - 2000) provides that any appropriated state land shall be restituted and the perpetrator punished in accordance with the rules of sharia. The Decree on Housing Affairs (OG No. 794 of 25/6/1421 - 2000) prohibits the usurpation of state land. According to Article 13 of this decree, issued by the Taliban, the perpetrator shall be criminally prosecuted in the sharia court. Although the legislative status of these decrees is not clear, there is a recent decree that prohibits the appropriation of state land.

[3] In Dari, *Zameen Bayer* literally means uncultivated or unutilized land.

Disarming armed militias is considered necessary by many before the problem of grabbed land can be addressed in any meaningful way. The consolidation of state power and political will on the part of the government is necessary to protect public and private land from land grabbers. Any legislative measure that aims to address the question of land appropriation should be considered in the context of the aforementioned requirement.

Occupants with Murky Legal Situation

Occupants of houses with cloudy legal issues fall into two categories. The first constitutes *de facto* owners of property who have bought land or a house from legal owners but did not fulfill the legal formalities required to formalize ownership. The transaction was legal but the legal formalities required to obtain a legal deed from the competent court were not completed. In many instances, buyers and sellers conclude customary agreements based on good faith and traditional norms and disregard the need to formalize the sales transaction in a competent court. Many Afghans perceive that a customary deed suffices to prove ownership of their property, especially when the original owner holds a formal document.

Figure 4: Grabbed land in Wardak Province.

The second category includes traditional owners of land. These are individuals who inherited land that their ascendants occupied for more than fifty years. Most of these lands were originally located in villages that were later urbanized and incorporated in the city. The original owners were either individuals who received land grants from the ruler of the time, or the original settlers of the land or their survivors who peacefully occupied the land for many generations. However, because of drought, series of social changes, urbanization and influence of market forces, the agricultural land that belonged to these villages was informally sold and transformed into urban settlements. Some of the former owners of these village lands held formal deeds. In some cases a large area of land that was owned based on a legal title deed was sub-divided and sold or resold to many individuals. Many of the purchasers of these lands hold customary deed.

4. LAND REGISTRATION LAW

There is a conspicuous absence of a coherent land registration law in Afghanistan. For the purposes of this report, a land registration law is a procedural law that mirrors the substantive land tenure of the country. A land registration law typically establishes the operational rules and administrative framework for a land registration system. The following are the main subjects normally governed by a land registration law:

- Administration of registration system;
- Contents of registry records;
- Basic registration unit;
- Definition of registrable interests;
- Process of registration for the first time;
- Standards relating to maps and boundaries;
- The legal implication of registration; and
- Rules governing changes to the registry record.

Administrative Framework of the Registration System

The registration system in Afghanistan is a judicial function, although municipal and other government bodies are also involved in the process. The flow of information between the different bodies involved and their relationship in the registration process is ill defined. Among the questions involved in the administrative framework of the system two issues standout: where the registry should be located, and who should manage the registration system and the registries. The ongoing debate centers on where the responsibility for the overall registration system and individual registries should fall, under the jurisdiction of the judiciary or with an especially created administrative body. The latter option would include the functional and physical merger of various existing bodies including the Makhzans in the appellate courts, the district courts, the relevant office of the municipality office etc. Careful consideration should be given before advancing either of the above options.

Registrable Interests in Land

Land registration law typically provides the types of interests in land that are registrable, as defined by the substantive land tenure law of the country. Generally, there are two types of rights, primary and secondary. Primary rights are interests in land that are formally granted or recognized by the government. Secondary rights are interests in land that affect but do not destroy the primary interest. These include mortgage, easements and rights of way. The rights that are necessary to register can be conveniently defined in a substantive land tenure law rather than land registration law.

Basic Registration Unit

Under the existing deeds system, the basic unit of registration is the document proving transactions in land. The system as it stands now is not adequate to provide complete and accurate information of all transactions in land. The existing deeds system is not linked to a cadastral or maps system. Any future law should carefully consider the merits of tying the registration of documents to cadastral or parcel maps. Nor can the deed be identified by a unique identifier. The cost of maintaining formal records of all allocated parcels of land must be included in any recommendations.

Customarily Owned Land and the Registration Process

The chaotic land tenure situation in Afghanistan calls for a land adjudication law. The process inherent in a land adjudication law enables the evaluation of claims of interests over land and provides a method for resolving conflicting claims. In the case of Afghanistan, the challenge will be how to validate uncontested and/or conflicting customary ownership of land. LTERA's work in this area as well as that of other organizations suggests that community involvement is critical to ensure that the adjudication process includes and weighs local knowledge about the identity of the rightful owners and the location of boundaries. In order to achieve an accessible adjudication and registration process, it is essential to have the land adjudication process governed by a registration law.

5. LEGAL AUTHORITY FOR MAPPING, SURVEYING AND RELATED ACTIVITIES

Rural land surveying is carried out pursuant to the Cadastral Survey Law of 1988. This law was issued to regulate the cadastre survey in Afghanistan, with the purpose of obtaining accurate statistics on agricultural land (irrigated or rain fed.) According to this law, the Afghanistan Geodesy and Cartography Head Office (AGCHO) has the exclusive authority to produce maps and survey plots of land in Afghanistan. The Department of Cadastre Survey is responsible for the survey of private and state owned land through technical measurement of land surface, and preparation of cadastre maps. The Department is also responsible to organize relevant records to determine precise boundaries of land, identify the owner, quality and size of land and the types of rights attached to land. At present, surveying activities of the Department of Cadastre at the national level has been suspended by a presidential decree. However, the Department of Cadastre may carry out local surveying based on a specific governmental order.

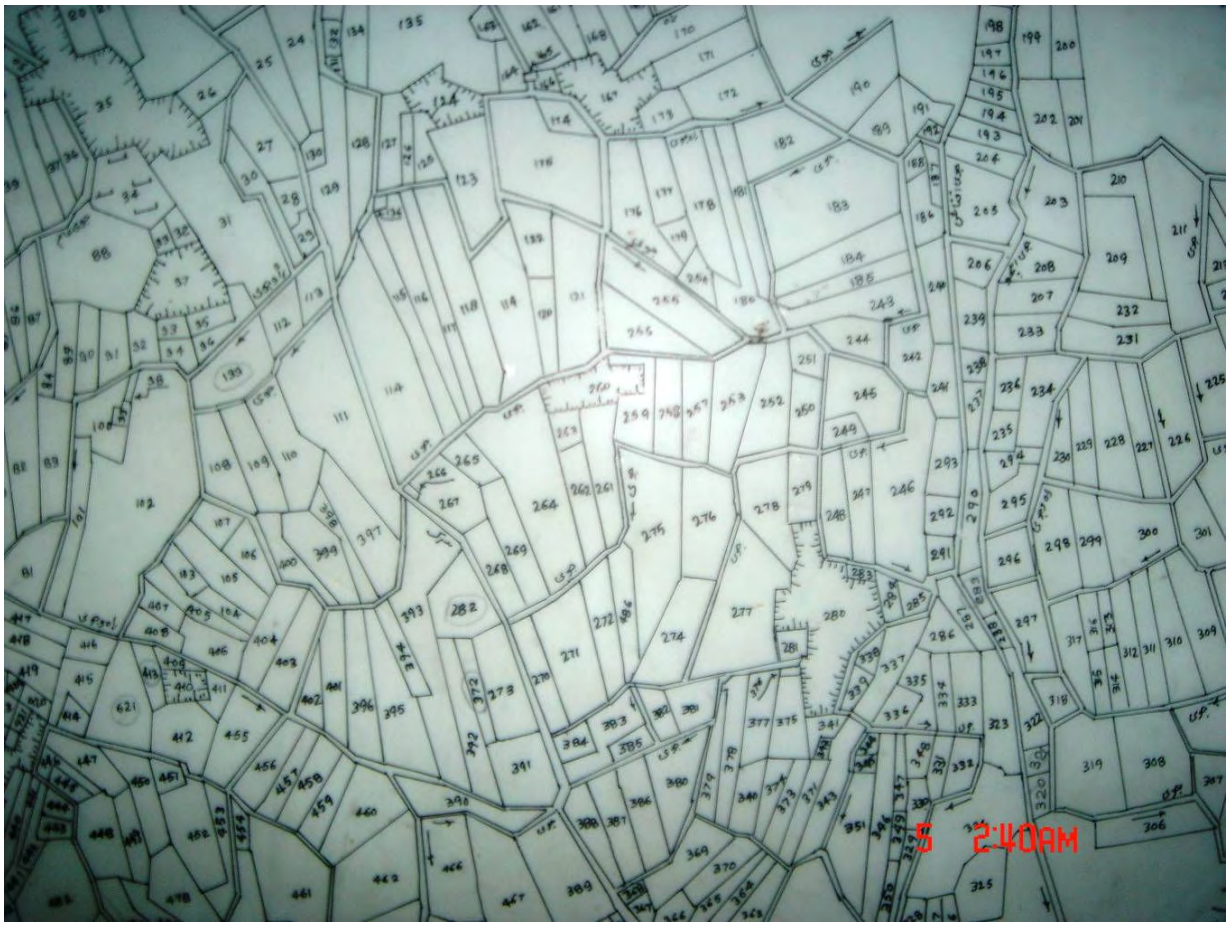

Figure 5: A thirty year old cadastre map of Parwan.

Surveying of urban land is linked with the distribution of land by provincial municipalities. Surveying of urban land is normally initiated by a proposal made by municipalities to the Department of Municipalities and Election Affairs at the Ministry of Interior Affairs. The proposal is then relayed to the Ministry of Urban Development and Housing (MUDH). Based on the proposal, the MUDH assigns a survey and engineering team to prepare topographical maps and a detailed plan for the area. However, the Department of Cadastre Survey is consulted for information on former agricultural lands that are currently located within urban spheres.

6. LEGISLATIVE GAPS AND RECOMMENDATIONS: IMPROVING TENURE SECURITY AND FORMALIZATION OF PROPERTY RIGHTS

Adverse Possession

The legal concepts of adverse possession and anti-eviction, if established in Afghanistan law, could be useful in improving tenure security in some cases. The law of adverse possession is enshrined in the legal systems of many countries. The concept of adverse possession implies gaining of property rights through the peaceful occupation of property for a long and continuous period of time. In most countries, adverse possession can be used only against vacant state-owned land.

Currently there is no law of adverse possession in Afghanistan. Therefore, irregular (illegal) settlers may not obtain formal deeds by proving that they have occupied state-owned land for a certain amount of time and showing that they have used the land as their own.

Some confusion on this issue is created by provisions contained in the civil code and principles of Islamic law that deal with abrogation of contractual rights by lapse of time, which are in themselves, unclear and inconsistent in the law. Pursuant to Article 965(1), no right can be abrogated by lapse of time. According to Article 965(2), however, "a claim for demanding a right against the denier shall not be heard after the lapse of 15 years …". The key point that should be recognized is that, to the extent that a statute of limitations currently exists with regard to disputes over land, this would apply to only to contractual disputes (e.g. over the legality of a land sale contract).

Whether an owner of property, who for various reasons, abandoned his property is barred from claiming his property after the lapse of fifteen years is not very clear to many judges. Judges have interpreted this provision variously. However, there is no provision contained in any Afghan law that allows a person to acquire ownership right to land merely by occupying this land peacefully and continuously for any given period of time. Moreover, the exceptions found in the Islamic fiqh (jurisprudence), such as absence from the area where the property is located, insanity, age of minority and imprisonment makes the probability that a person could legally take over ownership of someone's property by virtue of a lapse of fifteen years very unlikely. In no event is there any current legal basis for a time limitation with regard to contesting illegal occupation of land that occurred without a contract (e.g. by squatting or land grabbing).

The usefulness of establishing adverse-possession based legislation is apparent. Applying the concept of adverse possession could resolve tenure insecurity in certain types of informal settlements. Use of adverse possession procedures to establish legal rights to property, however, would not be appropriate under all circumstances. Land tenure solutions that are applied to informal settlements should be tailored to the specific situations and circumstances. Put differently, the physical and qualitative aspects of a given community or representative communities must be evaluated before deciding on the actual path to be followed. When applying this model, conditions ought to be set to determine the circumstances of occupation that would warrant the transfer of title to the adverse possessor. Habitability of an area is, among others, a factor that should be considered by adverse-possession based legislation.

Anti-Eviction

At present, there is no law that protects property owners from forcible eviction. There is an immediate need for legislation that suspends all forcible eviction until the government formulates a clear policy on tenure security in informal settlements. Such a law should attempt to strike a balance between the state's right of eminent

domain and the property rights of individuals. In other words, it is imperative to suspend all forcible evictions of informal settlement residents, unless the measure is absolutely necessary for development and the affected households are provided with alternative shelter or land.

Formalization and Legislation

An additional gap in the existing legal framework is the lack of a statutory process to legalize the rights of some classes of possessors of immovable property who have a valid claim of ownership but who do not hold formal deed. These may include: 1) traditional (original) owners of land who do not hold formal deed; and 2) purchasers of property from legal owners who failed to take steps to formally transfer the property and who are not currently aware of the whereabouts of the seller. The case of legitimate owners with customary deed represents a substantial proportion of landowners and demands careful consideration. Under certain conditions, the validation of customary deeds would help clarify property rights for large numbers of people.

There is, however, a recently enacted decree that constrains efforts directed at formalizing de facto ownerships that are supported by non-formal evidence. Pursuant to Article 7 of the 2004 Presidential Decree on Land, ownership of private property may only be proven by legal documents. This law supersedes all previous laws relevant to proving ownership of property rights. Although it would be unrealistic to presume that all customary deeds are legitimate, providing that all ownership of private property can only be established by producing legal deed disregards the reality of the existing regime of property ownership. It is a widely known fact that many people are holding fraudulently made customary deeds, but this fact should not completely destroy the validity and weight of customary deeds. A standard must be established by which customary deeds could be authenticated under certain conditions.

The Constitution of the Islamic Republic of Afghanistan embodies few articles pertaining to property rights. Article 14 of Chapter 1 of the Constitution provides that the state shall take necessary measures to provide housing and land to eligible citizens in accordance with the law. The implementation of this provision is conditioned on the financial capacity of the state. Unfortunately, this provision is dead wood, as there is no enabling law that mandates or encourages relevant authorities to formalize informal ownership of immovable property, and the lack of financial capacity of the state precludes the provision of housing to all citizens who are in need of decent shelter. However, this Constitutional provision should not be construed as a roadblock for adopting an equitable housing and land management policy that acknowledges the existing reality of urban dwellers.

Registration System

Currently being debated is the question of whether Afghanistan should continue its deed-based registration system or replace the system with another system such as the Land Book system. This issue requires careful examination in light of the significant number of uncertain legal situations and actual/potential disputes relating to immovable properties in the country. The high cost of a replacement system must be weighed against the available resources in the country. The lack of a functioning adjudication system, existence of large numbers of conflicting legal claims, and the substantial cost of replacing the current system argue for a retooling of the existing system designed to achieve transparency and legal land tenure security.

Such a retooling would demand that the existing adjudication and registration system be clearly regulated, streamlined, and defined by a new land registration law. A registration law should specifically aim both at reducing the transfer taxes and other associated taxes and fees, and at streamlining the existing adjudication and registration process.