

# AFGHANISTAN

## FOOD SECURITY AND LAND GOVERNANCE FACTSHEET

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### ABSTRACT

In Afghanistan, insecurity over land and water rights hampers investments in food production and irrigation. In rural areas, customary tenure systems, partly based on religious law, are the most relevant but suffer from weak recognition and offer little protection to rights holders. The land policy reform is on-going but remains slow. Moreover, land administration capacity is weak and improvements mostly take place in urban areas. In this context, land disputes are common and often violent. They mostly relate to competing claims between internally displaced persons / refugees and settlers, or between farmers and nomadic groups, because of ethnic tensions or fraudulent or overlapping land titles. The skewed distribution of land and the impunity of land grabbing by elites and warlords are additional sources of frustration and potential conflict. The reluctance of the government to change tenure paradigms has special pertinence today given the massive mineral, oil and gas deposits which may be developed on rural lands -now considered government land- in the next few decades.





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### **About IS Academy on Land Governance for Equitable and Sustainable Development**

LANDac, the IS Academy on Land Governance for Equitable and Sustainable Development, aims at bringing together researchers, policy makers and practitioners in the field of land governance and development. It is a partnership between several Dutch organisations and their Southern partners involved in development-related research, policy and practice. LANDac is one of the IS Academies for International Cooperation sponsored by the Netherlands Ministry of Foreign Affairs.

### **About KIT**

The Royal Tropical Institute (KIT) in Amsterdam is an independent centre of knowledge and expertise in the areas of international and intercultural cooperation, operating at the interface between theory and practice and between policy and implementation. The Institute contributes to sustainable development, poverty alleviation and cultural preservation and exchange.

### **Country expert contribution:**

We acknowledge and thank Liz Alden Wily (independent expert), for her insights and comments on the latest development impacting land governance in Afghanistan.

# 1 POLICY AND LEGISLATION

## 1.1 Regulatory Land Governance Framework

Land laws are complex in Afghanistan and have several origins: religious (Shari'a), tribal or community customary law basis, a civil code drafted in the 1970s, and a series of statutory laws in the form of Presidentially-passed decrees and acts passed by Parliament (Alden Wily 2003a, 2004; Allan 2001; Gebremedhin 2007). Some revisions have been made to national (statutory) land laws since 2001, but without affecting the substance and therefore do not differ significantly from when they were first introduced in the 1960s and 1970s.

Legal protection of informal urban occupancy and protection of rural customary rights have not improved since the Bonn Peace Agreement of 2001, especially in respect of off-farm collective resources. Although there are some improvements to the recognition of customarily-defined land documents, these relate only to house and farm lands, and not to the millions of hectares of rangelands which are so critical to livelihood in dry Afghanistan. This is important as most land and resource assets are by traditional communal property, but neither Sharia, nor the Civil Code or modern national laws recognize that such rural assets are owned. Instead these are defined as belonging to the State as either government land or public land which cannot be owned. The reluctance to change tenure paradigms has special pertinence today given the massive mineral, oil and gas deposits which may be developed on rural lands in the next few decades.

At the same time, the law facilitates privatization of some categories of these lands to private investors. Changes made are primarily to ease investor access to lands. Despite legal reforms including in the Constitution (2004), the government continues to issue decrees which allocate government/public land to private individuals. This is in line with new investment promotion decrees which make promotion of commercial land use a priority. However, in practice many of the developments on allocated lands are for private interest purposes. Establishment of housing estates called 'little cities' is common.

In Afghanistan, the land policy was approved in 2007 but until the present remains a paper document, its policy directives are not embedded in laws.

Law	Content
The Constitution of Afghanistan	2004 Does not directly address land rights despite considerable lobbying at the time to introduce a land chapter (Alden Wily, 2003b). Provisions are largely tradition with classical provisions such as guarantee of protection of private property (but with no clear definition of what constitutes private property), of the right to settle anywhere in the country, and provision for the State to compulsorily acquire private land for public purposes. Private property may also only be confiscated by legal order.
The 2007 Land Policy	Land Allows for the formalization of land rights in informal settlements, and addresses bottlenecks in land rights administration as well as the overlap in different institutions' authority over questions of land rights. The Policy also provides for community based management and pledges recognition of community lands.
The 2008 Law on Managing Land Affairs	Land Sets out definitions for various land types and classifications, requirements for land deeds, and principles governing allocations of state land, land leasing, land expropriation, settlement of land rights, and restoration of lands. A main amendment in recent years has been to allow foreigners to lease lands, for up to 90 years. The law recognizes Shari'a.

## 1.2 Land Tenure Forms

In Afghanistan, around one quarter to one third of rural families own no land. A significant number also do not own a house but live in landlord houses. Sharecropping (receiving wheat in return for labour) is a major source of subsistence for many households. Some landless families do own a few sheep and goats.

Land ownership can be acquired through purchase, government land allocation, and transfer of ownership. The most important is inheritance, in which sharia is generally followed thus acknowledging rights of wives and daughters.

Several million people<sup>1</sup> are nomadic or semi-nomadic. To acquire pasture land for grazing their livestock they may approach local authorities for vacant land (*mawat*). However many settled communities now resist their arrival as rangeland is limited, and many resent the control which pastoral nomads have exercised over spring and summer pastures for a century (Alden Wily, 2004a). For an individual application for ownership rights to *mawat* land one needs to show that no one has ownership rights, the land is not cultivated or improved, and agree to cultivate or improve the land (McEwan and Whitty 2006; Alden Wily 2003a; Gebremedhin 2006; World Bank 2005).

War and drought have caused traditional land management practices to break down, leading to insecure and unclear land rights that promote unsustainable use of pasture (DfID, 2007). However, with the assistance of a small number of international NGOs, many communities are actively bringing their rangelands under community based management, and this is well supported by national forest and rangeland policy (2005).

Afghanistan's land is vested: (1) individually in private individuals and entities; (2) communally in families, clans, (3) communities –generally pasture; and (4) in the government. There is some inconsistency among the various legal classifications of types of ownership. The Civil Code, Law on Land Management, Presidential Decrees, Agricultural Master Plan and Sharia all classify land differently. Under the 2008 Law on Managing Land Affairs, all land not proved to be private is deemed to be state land.

Thousands of people now buy land through an informal system, such as buying plots in private housing developments, which are often set up by armed commanders on government lands. They receive receipts for their purchases but not formal title deeds. Many do not consider this a problem indicating how poorly the legal system is viewed. At the same time, Afghans place great store by legal title deeds. Only those with substantial means can now acquire these, given the levels of rent-seeking required. The documentation system is in any event problematic.

Afghanistan has a deeds registration system<sup>2</sup>. Less than 10% of rural property and 30% of urban property is covered by legal deeds. However, archived deeds are often out of date and inaccurate (McEwan and Nolan 2007; Stanfield et al. 2008). In urban areas, recommendations

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<sup>1</sup> within the population of an estimated 40 million people

<sup>2</sup> The difference between a deeds registration and the Torrens systems is that the former involves registration of instruments while the latter involves registration of title. Moreover, though a register of who owned what land and "a chain of title" is maintained, it can be challenged in the courts at any time. The limits of the deeds-registration system is that transfers of land are slow, expensive, and often unable to create certain title.

for the reform of titling was made by a USAID project in 2009 and is being continued by another project which will close in 2013, but has not been adopted in law or procedure. Number of offices involved and taxes to be paid have been reduced. Acquiring property from within the private sector has been reduced from an average of 250 days to 64 days, and the transfer tax is reduced from 7% to 5% of the value.

Ownership	Most common tenure type; may be based on formal or customary law (but only if written deeds are available, proving ownership). Certain land categories such as rangeland and barren lands cannot be made private property except by Presidential Decree.,
Leasehold	Leasing is permitted between private parties, subject to requirements for written leases that describe the land and set forth the agreement of the parties regarding the length of the lease and payment terms (2008 law). The main lessor of lands today is the State, which is leasing Government Lands to private investors, both local and foreign.
Agreed Rights of Access (pasture land, threshing grounds)	Pasture land (rangeland) is public property that neither the state nor any individual can possess (except as otherwise provided by Shari'a), and which must be kept unoccupied for the public use for activities such as grazing and threshing grounds (2008 Law). Customary law and deeds provides that individuals and communities can obtain exclusive or non-exclusive rights of access to government-owned pasture land

(GIRoA 2004, GIRoA 2008; McEwan and Whitty 2006; Gebremedhin 2006)

**Some history on land registration**

Property taxes had been instituted as early as the 1930s. In 1964, the state created AMLAK, a department supervised directly by the Ministry of Finance, to collect land taxes. AMLAK invited voluntary submissions of holding sizes and understandably, most farmers “under-estimated” their farm sizes. Each District and Province still maintains these Land Books. During the 1970s a mild redistributive reform was launched to provide land to landless farm tenants and workers. Surrender of surplus lands was often voluntary if found to be above the (generous) ceiling established.

Around the same time a formal survey of landholdings began to be conducted and by 1978 had surveyed around 30 percent of the total land area, including around 30 percent of private farm lands. This provided a registry of probable ownership, but which has never been verified. Absolute ownership is only obtainable through a court-based system and the courts maintain their own registries of properties.

The communist regime that came to power in 1978 declared a more radical redistribution programme, Landlessness was still rife and the aim was to settle 340,000 families, with certificate of ownership, for which the government expropriated land surplus to a ceiling of 6 ha. The land expropriation was one of the drivers behind the fight against the communist system, resulting eventually in the withdrawing of the Soviets in 1988. Between 1989 and 1992, the country was relatively stable under two regimes, but this collapsed in 1992 with fragmentation of the country under different warlords. The Taliban regime began in 1996 and lasted until the Bonn Agreement in December 2001. An important change in land law for rural communities was recognition by the Taliban in 2000 that community-owned pastures existed, as well as private and state pastures.

### 1.3 Institutional land governance framework

Reconstruction of institutions began to be discussed after the Bonn Agreement 2001 (Reynold, 2006). Currently, all land administration and registration is the responsibility of the Afghanistan Land Authority (ALA, or Arazi) which is part of the Ministry of Agriculture, Livestock and Irrigation (MAIL). ALA does not include the Cadaster Department. The plan is for ALA to become an autonomous institution.

Whereas, municipalities have responsibility for land acquisition and land allocation, village councils (called *shura* or *jirga*) are also active in land issues and disputes settlement in informal ways. However, the *shura* system is criticized for not representing the interests of economically disadvantaged and vulnerable groups but has made major advances since 2001. Community Development Councils have been established in around half all villages and are elected. No decentralization of land administration has been undertaken, despite several important pilot projects which demonstrated that this was fully viable.

ALA's main function today is to recapture lands which it believes belong to Government, to lease those lands to investors, and to generate revenue for the government (Anderson 2010; Beall and Esser 2005). The Interim and Transitional Administrations of President Karzai, lasting until multi-party elections in 2005, were however not especially keen to change land law or policy. Then and since, recapture of lands claimed as belonging to Government has been a main agenda. Many of these lands are customarily owned and occupied. ALA has been quite successful in the latter.

### 1.4 Gender

Women are often denied participation in the main shura although many communities have women's shuras (Beall and Esser 2005). The Constitution states that women cannot be precluded from owning or acquiring property and Islamic law grants widows one-eighth of the property of the deceased spouse; daughters inherit half the share of land inherited by sons. In especially Pashtun communities, daughters tend to relinquish their inherited land rights to their brothers, especially at marriage. Widows who inherit land commonly transfer it to their sons' names. Some studies have suggested that about 2% of women own land, mostly widows (GIROA 2004; Grace 2004; Grace 2005). When registered, most land is in the name of the male head of household. Though in urban settings women are more assertive about their rights to land, they do not register their rights formally because they consider the process as too time consuming and costly (Grace 2005; Beall and Esser 2005). However, other studies find that women own a good deal more land than realized, as found for example in the National Vulnerability Assessment Survey of 2004 (Alden Wily, 2004b).

### 1.5 Foreign Direct Investment

The Afghanistan constitution prohibits foreign individuals from owning immovable property in Afghanistan. Foreign individuals can lease property for the purpose of capital investment (GIROA 2004). Land leasing for up to 90 years is now very common. Many foreign states and companies including from China and India are actively investing in land acquisition for especially mining purposes. Foreign investment in urban areas is significant in the commercial sector.

"Land grabbing" has soared since the Bonn Agreement, 2001. However much of the land grabbing in the private sector is made by local notables, such as commanders, and who routinely help themselves to especially unfarmed lands. Most observers and agencies can see no real end to the land grabbing which has become a norm in the country, with dramatic

governance change. Militarization of land acquisition may also rise, given the high number of arms in the country.

## 2 INTEGRATED WATER MANAGEMENT

### 2.1 Policy framework

Eighty percent of the country’s water resources come from snowmelt from the Hindu Kush Mountains and are contained in three major watersheds. Annual flooding is a problem for many areas of the country (ADB 2002; ADB 2008).

Irrigated farming is important and responsible for a significant part of water consumption. Irrigation infrastructure has been heavily neglected during the past decades of conflict, resulting in low water use efficiency (USAID, 2010).

Law	Content
The 2009 Water Law	One component of the country’s strategy to integrate its water systems and institutions. Provides the basic framework for the sector and enumerates ministerial responsibilities. Based on best practice for integrated water resources management (IWRM) Adopts a river basin approach under which natural river basin boundaries (versus administrative boundaries) govern all aspects of natural resources management and planning

(Wegerich 2009; GIRoA 2007b).

#### 2.1.1 Institutional framework

The Ministry of Energy and Water has overall responsibility for planning, management, and development of water resources. The Ministry of Agriculture, Irrigation and Livestock is responsible for managing irrigation and drainage systems (Wegerich 2009; Ahmed and Wasiaq 2004; ADB 2002; ABD 2008).

The 2009 Water Law also establishes River Basin Agencies (RBAs) and River Basin Councils under the Ministry of Energy and Water (MEW). The five RBAs established under MEW provide a decentralized management structure and are to create basin master plans to guide basins development and management. The transition to RBAs and their full implementation will require a new approach and new skills for MEW.

Customary law often governs the use of water on private land and in private systems, and also supports the resolution of conflicts over water, and water resource conservation. Water governance has traditionally been dealt with at the village level. One example is the kaerez system for the allocation of water, which is constructed and maintained on a community basis (McMurray and Tarlock 2005). The key actor at the village level is the *mirab* who delegates authority to sub-water masters. Agreements between farmers, the *mirab*, and local government determine the distribution of water. The handling of water disputes and the application of customary law rests with village elders (McEwan and Whitty 2006). However, in some regions, military commanders have taken control of water resources (McMurray and Tarlock 2005).

Current policy is attempting to convert traditional arrangements into formal Water User Associations, which involve users paying fees and setting up formal institutions, which not all are able to do. The model is also being applied to forest and pasture management, and at the local level in some regions, fears are being expressed by farmers that they will be excluded because they do not have the money to pay fees to the Association or the means to form a legal body.

Forests represent a small resource in Afghanistan. However, their rehabilitation and especially rehabilitation of vast rangelands are critical to limit flooding and avalanches in the high central and northern zones. Forests are suffering from a breakdown in management regulations. Forest rights are insecure. New forestry legislation is in the process of being enacted (2012) and will award communities use rights and management duties (ADB 2002; UNEP 2003; GIRoA 2007a). The Department of Forestry and Range Management in the Ministry of Agriculture, Irrigation and Livestock is responsible for the management and protection of the country's natural forests, pasture/rangelands national parks and wildlife resources (Shimizu and Trudel 2006; UNEP 2003; ADB 2002).

### 3 REALITIES ON THE GROUND

In rural areas land rights are highly insecure, especially where these refer to rangelands which communities traditionally own communally. Drivers of the insecurity are: (1) a history of inequitable relations within communities with regard to access and rights to land and water; (2) multiple unresolved interests over the same land, including rights of nomads; (3) failure to develop accepted principles governing holdings of non-agricultural land; and (4) continuing violence and disorder, uncontrolled poppy production, warlordism, land invasions, and ethnic disputes, but most of all, the failure of modern Afghan land law to recognize that off-farm resources are also owned (Alden Wily 2004b; McEwan and Nolan 2007; Beall and Esser 2005; Stanekzai 2008; Denmark 2007; World Bank 2005).

The conflict has reached very tense levels with killings in some key foothill areas in the centre of the country as pastoralists attempt to enter the central highlands to access summer grazing. Local resistance is due to a long history of settled communities in the centre and north of the country resenting their colonization by Pashtun nomads over the last century, and now reclaiming their lands as a result of the civil war (Alden Wily, 2009). The fact that many Kuchi joined the Taleban added to tensions. Some projects (such as a USAID-funded PEACE project) have attempted to mitigate these conflicts through peace ambassadors. This has helped solve local disputes but not the larger dispute as to who has primary rights to the central highland pastures and to many northern pastures, which Kuchi have been using since the beginning of the century, often against local will but with the support of the Pashtun rulers. There is also a Presidential Commission mandated to resolve the Hazara-Kuchi crisis. This has so far failed to achieve resolve over the pasture access issue. The Commission and other high level actors are believed to contain armed conflict only through paying bribes to the Kuchi to cease attempting to enter the central highlands. Kuchi settlement schemes have also been initiated but are not proving successful, not least because of the poor selection of settlement areas (Patterson 2004; Alden Wily 2004b; 2009; Foley 2004; Deschamps and Roe 2009).

Land disputes are common and often violent; among the most common causes of land disputes are: the inability to address the land claims of returning refugees and IDPs; land seizures by elites and warlords; ethnic tension between Pashtun and non-Pashtun interests over especially pasture lands; the prevalence of fraudulent land documents; absence of agreements over rights to pasture land and forests and inheritance rights to private property (McEwan and Nolan 2007; Alden Wily 2004a, 2004b; Patterson 2004; Stanekzai 2008; IDMC 2008; Deschamps and Roe 2009).

Actions that are required are the provision of decentralized and deconcentrated services for land and water governance; the integration of customary practices in formal frameworks and strengthening of conflict resolution mechanisms. Informal mechanisms and institutions are essential for the **resolution of land disputes**. Thus aggrieved parties can take disputes to family members, neighbors, and a local notable person or leader, or approach a village council (*shura* or *jirga*) or the head of a wider community area. Alternative dispute resolution has



gained strength since 2001 given the failures of the formal court system. Agencies like the Norwegian Refugee Council which assist individuals and groups to resolve cases find that the vast majority of land disputes are handled through alternative dispute resolution. This includes village shura, district shura, mosques and sometime provincial level mediation services. However, rent-seeking also afflicts these informal forums.

The formal court system has limited capacity, and is seen by many to be corrupt. The Special Land Dispute Court established by government was criticized for failing to perform its mandate and abandoned in 2005. There is no dedicated land court system even though land cases constitute by far the greater proportion of cases brought to the formal court system (Alden Wiley 2003; Beall and Esser 2005; Koser and Schmeidl 2009).

The recapture of lands claimed as belonging to Government has been a main agenda, but many of these lands are customarily owned and occupied. There is much debate in Afghanistan as to whom the President is issuing state lands and for what purposes. Several hundred administrative decrees have been issued by the President, allocating government land to private persons and without endorsement by Parliament. There is also rising concern in the country at the way in which lands deemed to be public or Government Land are being disposed of by the President, Cabinet Ministers, and Provincial Governors. The law itself is weak and rule of law is even weaker. Overlapping responsibility for allocating government lands to families or investors remains problematic in especially urban areas. However, donors are currently encouraging the Government to reform the Land Expropriation Law to make land takings from the private sector fairer, with more significant compensation.

Another problem facing Afghans is the fact that all procedures around land acquisition are subject to rent-seeking by the many agencies involved in the process, from the local municipality or district Amlak/Arazi office to the Supreme Court which issues the final deed.

## 4 RESOURCES AND OTHER INFORMATION

### 4.1 Related country profiles

- USAID: <http://usaidlandtenure.net/usaidltpproducts/country-profiles/afghanistan/>
- FAO: <http://www.fao.org/countryprofiles/index.asp?lang=en&ISO3=AFG>
- FAO/Gender: <http://www.fao.org/gender/landrights/report/en/>
- IMF: <http://www.imf.org/external/country/AFG/index.htm>
- World Bank: <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/AFGHANIS TANEXTN/0,,menuPK:305990~pagePK:141159~piPK:141110~theSitePK:305985,00.html>

### 4.2 Laws, Policy and Regulations search engines

- FAO Lex (Land & NR search engine): <http://faolex.fao.org/faolex/index.htm>
- Water Lex (Water laws search engine): <http://faolex.fao.org/faolex/waterlex.htm>

### 4.3 Maps and Databases

- Land and soils databases/information systems: <http://www.fao.org/nr/land/databasesinformation-systems/en/>
- Water database/information systems: [http://www.fao.org/nr/water/infores\\_databases.html](http://www.fao.org/nr/water/infores_databases.html)
- Land and water maps and graphs: <http://www.fao.org/nr/solaw/maps-and-graphs/en/>  
[http://www.fao.org/nr/water/infores\\_maps.html](http://www.fao.org/nr/water/infores_maps.html)

#### 4.4 Portals and other resources

- [http://landportal.info/search/apachesolr\\_search/afghanistan](http://landportal.info/search/apachesolr_search/afghanistan)
- <http://www.landesa.org/search/?q=afghanistan>
- <http://www.areu.org.af/?Lang=en-US>

#### 4.5 Donor support programs

Over the last decade several donors have invested in institutional and/or piloting land developments.

- ADB for example, with DFID funds, trialed a community based system of land recordation and certification (but which has not been adopted).
- USAID has fielded several major land projects, such as the “land titling and economic restructuring in Afghanistan” (LTERA) from 2004 to 2009) now followed by a US\$ 42 million project known as LARA, and focusing on developing titling procedures and upgrading on one provincial city, and also encouraging land law reform.
- FAO fielded a combined piloting approach to community land tenure security and rangeland conservation (2006-08) and which did impact significantly on the adoption of community based approaches, now mainly followed by international NGOs working in the field.
- The World Bank has focused mainly on urban land developments
- UN-Habitat has sustained important regularization projects in several cities, including Kabul.

Many millions of aid dollars have been spent by various donors to help establish the Afghanistan Land Authority but the mandate of which is not significantly different from its predecessor, AMLAK. Many agencies focus on supporting community based land dispute resolution, ranging from the USAID-funded PEACE project, which works only with nomads and settled peoples, and the Norwegian Refugee Council, which focused on the land and other grievances of returning refugees or rising numbers of internally displaced persons. A number of local and international research groups such as The Liaison Office or the Afghanistan Research and Evaluation Unit carry out periodic research on land related issues.

#### 4.6 Civil society organizations

The International Land Coalition and Asia Land Watch have no members in Afghanistan. Other organisations working on land governance are:

- Afghan Land Consulting Organization (ALCO) - [www.afghan-land.org](http://www.afghan-land.org)
- Afghanistan Research and evaluation Unit (AREU) - <http://www.areu.org.af/?Lang=en-US>
- Cooperation for Reconstruction of Afghanistan (CRA) - <http://cra.af/>

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