



Afghan Land Administration Projects, 2003-14: A Review

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ABSTRACT

This paper reviews and derives some “lessons learned” from 14 pilot community based land administration projects launched in Afghanistan since 2004.

1. Community Based Land Adjudication and Registration (CBLAR)

The CBLAR approach to land administration has been piloted in three contexts since 2004:

- * Informal, urban settlements in need of upgrading of infrastructure such as UN-Habitat's Municipal Governance projects, USAID's LTERA project, and its successor, the LARA project.
- * Various rural communities whose residents and nomadic peoples claim rights to communal pastures, as in FAO's SALEH project the ADB's RLAP, and the USAID supported PEACE Project.
- * Various rural communities which had experienced land conflicts deriving from inheritances, boundary issues, and tribal jurisdictional disputes

2. Capacity Building for Land Administration in municipal and State entities

Some of the projects have also improved the capacities of State land administration entities, such as the judiciary, ARAZI, and selected municipalities

The key message of the paper for donors, government, private sector and civil society is the determination of the Government of Afghanistan to strengthen the land administration institutions of the country, with an important innovation being the shift from a judicial based formal titling and registration system to an administrative land administration system based in ARAZI in collaboration with communities for the administration of land rights.

Key words:

Afghanistan, community, customary, dispute, State

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Afghan¹ Land Administration Projects, 2003-14: A Review²

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1. Introduction

Following independence from British control in 1919 under monarchical governments, a brief experiment in democracy ended in a 1973 coup and a 1978 communist counter-coup. The Soviet Union invaded in 1979, touching off a long and destructive war they withdrew in 1989. A series of subsequent civil wars saw Kabul finally fall in 1996 to the Taliban and an end the country's civil war and anarchy. Following the 11 September 2001 attacks on US targets, a US sponsored coalition of countries aligned with anti-Taliban Northern Alliance initiated military action which toppled the Taliban.

The UN-sponsored Bonn Conference in 2001 established a process for political reconstruction that included the adoption of a new constitution, a presidential election in 2004, and National Assembly elections in 2005. In December 2004, Hamid Karzai became the first democratically elected president of Afghanistan. He was re-elected in August 2009 for a second term. Despite many positive changes and a stable but weak central government, a resurgent Taliban and continuing provincial instability - particularly in the south and the east - remain serious challenges for improving the lives of the Afghan people.

These upheavals have produced massive uprootings of people from their lands and homes accompanied by major disagreements about how the country should be governed. The population uprooting has produced deep insecurities about shelter and survival. The governance chaos is

¹ The views expressed in this paper are those of the authors, and do not represent those of ARAZI or the Islamic Republic of Afghanistan, or Terra Institute

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reflected in inconsistent drafting of laws and ineffective implementation of governmental policies, laws and regulations, particularly those directed toward the sensitive question of how to administer land rights and responsibilities.

The capacity of Afghanistan institutions to carry out the basic functions of land administration (Lemmen, 2010) and provide security of tenure to all Afghans has been challenged by decades of conflict (MEC (2014), resulting in:

- Ambiguous and in some cases contradictory land administration related legislation;
- Out-dated land tax payers lists;
- 34% of agriculture land had been surveyed in 60s, but since then the survey data has not been up updated;
- Strong role of courts in land administration caused corruption to be a routine practice of these courts and resulted in many fake documents; there are cases that one parcel of land has several title deeds from courts;
- Documents and books in ARAZI offices, municipalities and other related institutions were either lost, burned or destroyed during the civil war;
- A high overall level of insecurity;
- Conflicts among village and nomad families over pasture lands;
- Large amounts of land being grabbed by influential individuals;
- A high number of land conflicts and conflicting attitudes among holders of the land as to the importance of customary use rights, differing views on legal and legitimate ownership, boundary locations, tenant-landlord relations.
- Most holders of land claim their rights from informal transactions which lack State protections since the State does not recognize the legal validity of such transactions.
- The massive expansions of informal urban settlements fueled by insecurities in the countryside and lack of opportunities for survival in rural communities plus the internal displacements due to violence. In these informal settlements where millions of Afghan families seek shelter and safety, as in rural communities the State does not recognize the validity of their claims to be legitimate residents and offers little protection against land grabbers.

Following signing of the Bonn agreements in December 2001 a series of land administration projects have been launched to assist Afghanistan in improving the administration of land resources as part of the effort to re-establish the legitimacy and acceptability of governmental institutions.

During the tumultuous years, the energies, creativity and customs of Afghans have kept aspects of land administration functioning in District and Provincial governance entities such as courts, tax and ARAZI offices, Municipalities as well as thousands local councils of respected elders and local leaders in rural communities and urban neighborhoods. These entities have functioned to deal with aspects of land administration, although with uneven effectiveness in a context of simmering conflict and overall governmental instability.

This paper reviews and derives some “lessons learned” from 14 land administration projects launched with foreign financial and technical support since 2003. These projects fall into one or both of two general categories:

1) Titling Legitimized by Communities

The clarification of rights to land through community level consultations in rural villages (pasture land, land involved in conflicts) and consultations in urban neighborhoods (*gozars*) about community and household tenure in informal settlements. Projects also explore how to link that community derived consensus about rights to land with State land management and land administration institutions, such as ARAZI (especially the Cadastral Survey Department), local government, and Municipalities as well as the Primary and Appellate Courts when considering land disputes.

and

2) Formal Land Registration

The improvement of the formal land registration institutions for recording and displaying information about rights to land and property boundaries, in terms of their efficiency (reducing the cost of access in time and money to the formal institutions involved in land transactions) and reliability (minimizing the recording of fraudulent documents) to offer legal security of tenure to all people who engage in land transactions through the legally prescribed documentation of how they acquired rights to immovable properties,

These projects have all had a common intent to help develop the country’s community and State land administration institutions.

2. Community Based Land Adjudication and Registration (CBLAR)

Several projects have developed and tested procedures for clarifying rights and responsibilities of people to land and buildings through community based land adjudication and registration in a few urban and rural sites. The projects avoided formal, judicial adjudication of title for those land holders with customary tenures or otherwise without legally recognized rights to land. Rather, these pilot land titling and registration projects have been community-based, the defining feature of which is recording of community consensus about who in the community holds what rights to what land, buildings, water, trees and commons.

Being community based does not mean community focused, but rather means that these expressions of community consensus on rights to properties are linked to monitoring and support by a governmental entity such as a Municipality, some other Government agency, and courts.

Such an approach departs from the traditional formal, top down, judicial adjudication and registration processes. We call the pilot project initiatives Community Based Land Adjudication and Registration, CBLAR.

Aspects of the CBLAR approach to land administration have been piloted in three contexts since 2004:

- * Various rural communities whose residents and nomadic peoples claim rights to communal pastures, as in FAO's SALEH project (2005-2008), the ADB/DfID Capacity Building for Land Policy and Administration Reform project (RLAP, 2006-7);
- * several informal, urban settlements in need of upgrading of infrastructure such as UN-Habitat's Municipal Governance projects (2003-2014), USAID's Land Titling and Economic Restructuring in Afghanistan (LTERA) project 2004-2009, and its successor, Land Reform in Afghanistan (LARA) project 2011-2014.
- * Various rural communities which had experienced land conflicts deriving from inheritances, boundary issues, and tribal jurisdictional disputes, such as those confronted in the USIP (2014) supported ARAZI land registration project following the community based adjudication of land disputes, and the cases from the AREU Land Conflict project, the NRC's conflict resolution cases, and the cases of farmer-nomad conflicts identified in the PEACE project.

2.1 Community Based Pasture Land Administration

Many formerly viable rangelands have become virtually barren wastelands. The degradation of rangelands has been accompanied by the conversion of some areas formerly used for pastures into rain-fed agricultural cultivation. This conversion in draught years and in low rainfall areas reduces the capability of the land to regenerate a stabilising plant cover.

Adding to these problems of degradation and loss of rangeland in a context of a rural population in continuing need for pastures for their livestock, is the breakdown of the rules governing how communities and families get access to, and use pasture lands. Over many years communities and nomadic groups have negotiated about who uses pasture lands, for what purposes at what times of the year. By law the State considers such land as "Public Lands", these lands can only be used for livestock development by all people, including Kuchis; they have right to use such lands but basically no one can own such lands except these lands can also be used for public welfare projects when there is a cabinet resolution available or issued.. Provincial officials desire an active role in local rangeland uses, but in practice have limited positive influence. The disorder of recent years has weakened both customary and legal rules about pasture land management.

The result of these trends is that the most numerous and problematic conflicts in rural communities are over pasture land use and ownership, including tensions among communities and governmental officials.

Two pilot projects , ADB/DfID supported Rural Land Administration Project (RLAP), 2006-2007) (Scanagri, 2007), and the FAO supported Sustainable Agricultural Livelihoods in Eastern Hazarajat (SALEH) 2005-2008 (Wily, 2008) --dealt with rights to pasture land use and the conflicts which have resulted in part at least, from the weakening of community and governmental rules governing rights to pastures over the past years of disruptions affecting Afghanistan and their implications for sustainable management of fragile rangelands. The RLAP dealt with four pilot communities in Kunduz, Takhar and Herat Provinces, producing 20 pasture use agreements for 19 pastures, while the SALEH project worked with 22 pilot communities in Eastern Hazarajat.

The overall approach of both projects was to seek clarification of rights to pastures through community consultations.

2.1.1 Similarities of RLAP and SALEH/CBPM Community Based Adjudication Models

The RLAP and SALEH projects had several similar features:

- Both used the notion that community identification of rights to pastures use has value.
- Both encouraged community identification of boundaries of pastures used by community members through low cost mapping of each pasture, to which rights defined by communities attach in some way.
- Both incorporated State staff into the exercises of identifying rights to pastures use,
- Both secured official "approvals" of the piloted activities.
- Both incorporated the improvement of pastures as a desirable outcome of the community based rights definition exercise. SALEH made pasture improvement a condition of retaining of rights of use of pastures.

2.1.2 Differences between RLAP and SALEH/CBPM Models

Although both approaches were inspired by Liz Alden Wily (Wily, 2004), and have many common features, there are interesting differences between the two efforts at community based pasture land administration:

Identification of pastures:

The RLAP worked with village elders and leaders in ad hoc shuras (traditional councils of community leaders, also known as jergas in some areas of the country) to identify pastures on satellite imagery through physical observation of the boundaries which were customarily used by community families, those nearby the villages and those distant from the villages.

SALEH formed formal Community Pasture Councils representative of village families to identify “private”, “community” and “public” pastures.

Definition of rights to pastures:

Under RLAP pasture land users come to a consensus about who are the legitimate users of the identified pastures, including nomadic users, pasture by pasture, for what uses and during what times of the year. No mention is made of “ownership”;

For SALEH Community Pasture Councils identify the private or community Custodian-owners of private or community pastures and the Custodian-managers of public pastures. Nomadic users with demonstrated traditional use of the public pastures would be guaranteed seasonal access rights in agreement with sedentary community owners

Enforcement of rules about use of the pastures:

For RLAP,

Each legitimate user monitors the implementation of the user agreement and improvement plan for each pasture, using discussions and persuasion of violators to correct violations.

Where violations become repeated and significant in the opinion of the group of legitimate users they arrange with a local person to be a rangeland guard to monitor the pastures and report violators. Mediation councils can be formed for situations involving legitimate users and violators to find a mutually agreed upon solution, or to take the dispute to the District Judge.

Under SALEH, a Rangeland Council appoints villagers as Rangeland Guards to patrol the rangeland and report those breaking the rules. For Rangeland Rules approved by Provincial authorities, the Council is empowered by law to levy fines on violators.

RLAP has relied on a minimalist organizational consensus approach to produce documentation of rights of legitimate users to pastures, without mentioning ownership. SALEH’s approach requires more formal structures at the village level and builds on community ownership rights.

Core concepts developed in the SALEH project have been adapted and incorporated into the draft of the Rangeland Law (draft 8.0), such as formation of Rangeland Councils, the notion of custodianship of pastures, identification of various types of pastures, and the components of community based rangeland management.

The draft law provides more structure at the community level than the minimal organizational community structures which the RLAP developed, except for the RLAP creation of a Village Recording Secretary for administering the Pasture Legitimate User Agreements, Log Books and corresponding pasture areas maps, which have not been incorporated into the draft Rangeland Law.

2.1.3 Sustainability of the CBPLR Pilot Projects

Concerning the sustainability the RLAP community based pasture land administration, Mercy Corps, an international NGO, committed resources to incorporating RLAP’s field procedures into its operations out of their Kunduz office in 2007. However, the use of those field procedures apparently did not survive a change in Mercy Corps personnel.

The RLAP team worked with Ministry of Agriculture, Irrigation and Livestock (MAIL) officials in Kabul in early 2007 to put together a Concept Paper for a three year, nine provinces capacity building community based land administration, which was signed by the Deputy Minister of MAIL in February, 2007. Subsequently, in May, 2007, the RLAP team with the Dept. of Natural Resources of MAIL prepared a more elaborate project proposal, requested by MAIL, for launching the community based land administration project in 200 village clusters, in eight provinces, envisioned primarily as a capacity building effort prior to a nationwide roll-out. The team then prepared in November 2007 a full 90 page Land Administration and Management Project (LAMP) description with budget.

No subsequent Government or donor actions were taken.

In mid 2015, upon the request of Eng. Yasin Safar who had headed the RLAP field work, the Head of MAIL's Pasture Department in Kabul produced a report on the methods used in the RLAP. He also produced from his files the RLAP produced digital copies of the pasture legitimate user agreements, log books, and delineated satellite images.

However, the Ministry had done nothing more after 2007 to replicate RLAP in other Districts, due (according to the Pasture Department Head) to the very low priority given within the Ministry to improving pasture management.

The Department Head made another point that none of the Pasture Councils created 10 years or so ago under the Pasture Law in effect at that time continued to function after the initial organizational effort. Such outcomes caution against expecting local organizations created by projects to be sustained, unless being valued by communities as being superior to their customary processes for getting people to work together which tend to be ad hoc and limited in scope.

Perhaps due to limited experience in his position, the head of the Pasture Department also said that he had no knowledge or records in the central MAIL files from the SALEH project.

The SALEH project, however, even with limited Ministry interest has had substantial buy-in by various NGOs in Bamyan Province. UNEP, Catholic Relief Services, and AKDN all adopted the approach and the first two in particular are active until the present (2015). A recent email from the Director of UNEP does not indicate the number of villages they are working in, but says they are looking for money to expand; they have one team working full time in Bamyan District. Catholic Relief Services also wrote in 2015, saying they were working in 40+ villages in the southern districts of the province using the SALEH model of community based pasture land management. SALEH piloting has been sustained and expanding and is now no longer considered as piloting, at least for several NGOs.

People from SALEH also have had substantial influence over the drafting of a new (V8.0) Rangeland Law which can help establish a new vision and strategy from the political center of the country for community based pasture land administration and management. How to get buy-in in the Provinces, from government officials, community, clan and tribal leaders has been and will likely continue to be a challenge. Such buy-ins are a precondition for embarking on an ambitious Land Administration and Management Program whose overall strategy would be the rebuilding of

community-state relations where communities' customary rules of access to and use of pastures would be respected by the State, and where the State would provide technical and administrative support to community based land administration and management.

2.2 Land Conflict Resolution Projects

Conflicts over land arise when different people or groups claim rights to possess and enjoy the same land.

Projects reviewed which piloted procedures for better dealing with land conflicts are:

1. Norwegian Refugee Council (NRC) Project on Land Conflicts (Reed and Foley, 2009)
2. Land Conflict (LC) Project, with World Bank support (Deschamps and Roe, 2009).
3. The UC Davis PEACE Project in cooperation with the Sayardee Development Organization, final phase on pasture land dispute resolution involving herder and village leaders and the Independent Directorate of Kuchi Affairs, supported by USAID (University of California-Davis, 2013)
4. The USIP/ARAZI sponsored pilot (Gaston and Dang, 2015; TLO, 2014; Miah, 2014). One purpose of this pilot was to help strengthen ARAZI's capacities to resolve or help avoid conflicts over land.

Peacebuilding in Afghanistan requires that attention be paid to dealing with land disputes, which are contributors to instability and insecurity constraining the equitable and sustainable development of the country. Disputes over land often fester and multiply because both the formal State mechanisms and informal community based mechanisms for land conflict resolution and enforcement have weakened from decades of conflict.

Several pilot projects have explored various Afghan land conflict contexts and means for their resolution:

- The addressing of conflicts experienced by people displaced from their land who subsequently returned (NRC Project)
- Concepts and methods for a mediator of land conflicts to produce positive results (LC Project)
- Development of a cohort of "Peace Ambassadors" for mediating conflicts between Kuchis and settled community members. (PEACE Project)
- Exploration of options for ARAZI to be involved with land conflict resolution (USIP project)

2.2.1 NRC Project for Returning Displaced Persons (2009)

NRC experiences with dealing with conflicts over land involving returning refugees suggest the following guidelines:

- The careful documentation of both sides of cases is important;
- Mediation may be helpful to allow for fair settlement on the use of the land in order to avoid conflict.
- Among those selected for allotments in the new settlement project areas (LAS), many have had difficulty finding funds to pay for the plot. In some cases plots have been purchased for speculation purposes.
- Most returnees who have left their plots and shelters have invested significant funds, yet still lack their own place to live.
- As per Decree 104, the deeding practice is to award a temporary document, such as a certificate of eligibility. A permanent deed is issued after five years, if at all.
- The administration of the titling for the LAS has devolved to the Provincial Departments of Refugees and Repatriation (DoRRs). Most LAS settlers mistakenly believe that documents they possess indicate their ownership of the plot.

- In Chamtala settlement project in Nangarhar Province, people camped with their community groups and many who have been assigned a plot do not know the location of the proposed settlement.
- Some situations involve powerful people who have grabbed land. The justice system can fail to properly address rights that are guaranteed under law, which implies the need for a stronger advocacy approach.
- It is important that customary justice mechanisms are aware of and offer more protection of women's rights as set out in the Afghanistan Constitution and Islam, rather than the application of customary law that might be believed to be based in Shari'a but is not necessarily correct.
- Negotiated settlements cannot be based on privileging one particular ethnic group's right to return over legitimate historical claims to land.
- Policy changes may be required which accommodate competing claims according to principles of fairness and sustainability.

The NRC experiences also suggest how to organize capacities for resolving land conflicts.

- The NRC program attempts to use *jirga* or traditional community councils as a means of conflict resolution for returning refugees and internally displaced persons.
- The NRC has established Information and Legal Assistance Centers (ILACs) in Kabul and another three provinces.
- ILACs are run by Afghan attorneys and judges with legal education and training, many of whom have served in the government judiciary in the past. These legally experienced people have proved adept at crafting durable agreements.
- NRC has a system of filing, evaluation, and investigation of cases and NRC judges and attorneys facilitate the litigants in selecting their representatives to play a third party mediating role.

- The NRC attorneys and judges meet with the local respected individuals who are willing to participate in the *jirga* processes to resolve a dispute. They explain the nature of the case, relevant information, and monitor participation in the meetings as facilitators without any vote.
- During settlement, they provide information and advise parties so as to avoid violations of state law. These facilitators record, and file minutes of the meetings, and produce a document to be kept by the parties once a solution is agreed.
- ILAC's have handled hundreds of disputes, predominantly civil cases, out of which a significant percent have reached out-of-court solutions.

2.2.2 Land Conflict Project (2006-2009)

The Land Conflict (LC) project's overall objective was to help reduce land-related insecurity and vulnerability by strengthening the Afghan government's capacity to resolve or assist in the resolution of land conflict fairly, effectively and legitimately.

Approaches that a conflict manager (such as an ARAZI staff, a respected community member, or a lawyer) may use to help resolve a land conflict differ based on the resolution mechanism used and the particular attributes of a case. Best practice approaches emerged from this project, based on the main dispute-resolution categories used in the report: the general court system (GCS), community-based mechanisms (CBMs), and political advocacy.

Based on experiences with resolution of disputes, the LC Project recommended that in all cases in the GCS and CBM environments:

- Conduct detailed interviews with disputants and other relevant individuals to develop a full understanding of the conflict before determining a resolution approach.
- Work with disputants to understand their desired outcome which helps focus the selection and course of the resolution mechanism and increases disputant buy-in; similarly, explaining the possible outcomes helps keep expectations realistic.
- Allow disputants to express their concerns to a neutral third party without decision making power to facilitate dialogue between the disputants and those involved in resolution.
- Collecting and verifying required documents can often be an onerous process, but it is necessary to allow the disputants to feel that all relevant information has been duly considered.
- Raising awareness among disputants of their rights helps clarify the expectations of all parties involved.

In the general court system (GCS):

- Assist with court procedures by preparing disputant claims, collecting and verifying disputant documentation, and identifying and preparing witnesses.
- Brief officials on applicable civil, sharia and common law to facilitate their accurate implementation.

Through community based mechanisms (CBMs):

- Suggest respected and fair community leaders to represent each side to ensure that disputants' interests are similarly protected.
- Neutral third-party participation in mediation sessions increases efficiency, accountability and transparency.
- Ensure multiple reviews of decisions to guarantee a universal understanding of agreement terms and to promote the durability of the outcomes.
- When possible, registering CBM agreements with the government, usually via the court system, increases the legitimacy of an agreement, improves enforcement and precludes future claims on the same issue.
- Community-based agreements are best sustained by some form of official endorsement to guarantee their outcomes, especially where rule of law is weak.
- There is therefore a clear need to engage with government stakeholders from the outset of any conflict-resolution initiative.
- Supporting both village level institutions and local government is important to achieving lasting resolutions to land conflict and better quality land management in general.
- Recognize shared "rights of use" rather than "ownership" of common property.

Regarding political advocacy:

- When meeting officials, the attendance of neutral third parties encourages the relevant authorities to take action as required by law.
- Involving other organizations to advocate according to their experience increases the effectiveness of advocacy by utilizing existing relationships and areas of expertise.

2.2.3 PEACE Project (2006-2012)

The PEACE project collaborated with the Sanayee Development Organization (SDO), the Independent General Directorate of Kuchi (IGDK), the Presidential Office of Tribal Affairs and 75 Peace Ambassadors.

Peace Ambassador Methods for Peace Building

What were the Peace Ambassadors' (PAs) methods for working on Kuchi-Settled Community conflicts?

- The PAs indicated that they now choose a neutral location for solving problems. In the past the meetings were held in the village where the problem had occurred. They held the discussions in a different location or village, somewhere that is neutral to both sides.
- The Peace Ambassadors also pointed out that prior to any discussions or negotiations both sides must be prepared. Both sides need to be in the correct state of mind and willing to resolve the conflict before joint discussions begin. This is accomplished by first meeting with each side individually so the conflict can be understood from both perspectives. Understanding both perspectives requires that the PA remain neutral and attempt to clearly understand the primary interests of each party.
- PAs also said that they have learned how to select the correct people to address the conflicts. Instead of bringing together a large group of people for addressing a given issue they selected a few people who appeared open and willing to solve the conflict. Such methods are less costly monetarily and with respect to time.
- PAs also mentioned that their communication style has become more effective. They have learned to use language that does not inflame the people participating in the discussions. Word selection is critical in discussing the conflict with participants.
- Peace Ambassadors sometimes worked with the Government Officials to resolve particularly difficult issues. There was an increase in the number of times the District or Provincial Governors asked the Peace Ambassadors for help to resolve a particular issue..
- The Director of the Independent General Directorate of Kuchi (IGDK) in Kabul also asked his Provincial Directors to work together with the Ministry of Agriculture, Irrigation, and Livestock and ARAZI to resolve land conflicts. This was potentially a key step forward for resolving public land conflicts.
- The role of the Provincial Kuchi shuras is large as they are mandated to resolve not only conflicts over rangeland issues but also to resolve and guide communities on livelihoods, security, health care, education, and animal care.

2.2.4 ARAZI Involvement in Community Based Land Conflict Resolution.

The USIP project with ARAZI (Gaston and Dang, 2015, op. cit.) initially envisioned establishing a joint adjudication body between tribal elders and ARAZI, with tribal elders resolving disputes in accordance with ARAZI standards, and with ARAZI reviewing and recording the results of the resolution. However, joint adjudication was ultimately unworkable, in large part because local ARAZI officials were unsure if that degree of cooperation would be permitted under law, even for an exploratory pilot.

But even if ARAZI officials were willing and legally empowered to help resolve inter-community land disputes, “Afghan land law does not recognize many forms of communal ownership or uses that are customary in Afghanistan. For example, tribes in Khost consider themselves to be the communal owners of large areas of forest, mountain, and desert land, which they have been using for long periods. This conception of ownership is not supported under Afghan law, however. Thus, trying to refer intertribal disputes over communal lands to ARAZI or any state actor offers no advantage or benefit to the communities. State actors would have no choice in most cases but to declare the land in question to be

state owned. This would likely exacerbate the immediate conflict and set back efforts to broker trust and encourage greater formalization, registration, and taxation of land in that area in the long term”. (Gaston and Dang 2015, p. 6).

The Land Management Law (LML) of 2008 defines procedures for the clarification of land rights or *tasfeya*, (variously referred to in the law as clarification, settlement, or land rights identification, Wily, 2013) for the purposes of identifying legal owners and settling disputes between the State and individuals.

Wily (2013, p. 56) wrote: “Discussions of the needed amendments to the LML of 2008 have explored to what extent the procedure of *tasfeya* (identifying land owners and recording the results in legally-binding records) could be restructured to enable communities to conduct first-stage identification themselves.” This would facilitate nationwide community level identification and documentation of rights as opposed to the expensive and often resisted formal surveys done by governmental agencies.

The latest draft of the LML elaborates adjudication or *tasfeya* to better identify owners, but the procedure remains structured in a way that makes it almost impossible to apply. *Tasfeya* is still to be applied on an ad hoc basis, as directed by the President, or as required by donor-funded government projects. “It will remain an expensive procedure that responds mainly (and possibly only) to demands for issue of commercial leases or purchases of state or public lands for mining, oil extraction, agricultural enterprises and housing estate developments. In this respect, the proposed amendments do not serve the majority.” (Wily, 2013, p. 56)

Many if not most major land conflicts involve the extension of community boundaries onto public lands over which the State claims ownership. A long lasting solution to community-State conflicts “cannot be found unless a clear definition of use rights by communities is formulated, and ideally, their de facto ownership over some current government land is recognized.”(TLO, p. 58)

Long-term efforts through ARAZI to settle existing land conflicts and help avoid conflicts in the future especially those around forest and pasture lands, cannot be significantly furthered in isolation from a general policy framework clarifying the status of state land and granting a degree of ownership or usage rights to communities. This process must also be considered in the broader context of land holding, since tensions might arise concerning public land which communities have traditionally occupied and worked (TLO, p. 53).

However, for land conflicts not involving State-community or community-community conflicts, “...ARAZI can work with dispute resolution providers to facilitate and consensually supervise processes already taking place. In this scenario, traditional norms and processes of dispute resolution are allowed to go forward, or go forward with relatively minor amendments, but with ARAZI providing technical support in the form of mapping and documentation (with the precise content of the support to be negotiated between ARAZI and community leaders)”(TLO, p. 12).

USIP, however, cautions that even this limited but potentially important involvement of ARAZI in documenting TDR successes does not presently have legal basis authorizing this role for ARAZI.

That is, Arizi has not been not empowered to simply accept the results of TDR for establishing private ownership for a disputed property. Even worse, the existing legal requirements for establishing private ownership which would govern ARAZI's assessment of the TDR result for a customarily held piece of land are onerous, and even dangerous for the private customary owner. If ARAZI examines the bases for the TDR ownership decision and finds the documentation inadequate according to the law's requirements, then some entity of the State could confiscate the land claiming State ownership of "unowned" land without compensation.

Presumably in the future, with ARAZI limited to land administration services and not the management of State land, ARAZI would not be the entity which might initiate confiscation proceedings. ARAZI has drafted a regulation for such disputes resolution which is currently under national consultation, then it will be discussed at the High Council of Land and Water and then it should go to the cabinet for approval. Once ARAZI has such regulations, these concerns should be minimized. Plus in the new LML draft, villages special land (traditionally communal pastures bordering village agricultural land) as new type of lands which the communities can reserve for the use of village families unless agreed with outsiders (TLO, p.12), and subsequently there will be a separate regulation to identify the special village pasture lands.

If ARAZI continues to be constrained from being involved in direct conflict resolution, can ARAZI help forestall future conflicts through offering communities land surveying and private ownership registration? There is an ARAZI Land Disputes Resolution Department, which in coordination with the Cadastral Department could offer mapping and surveying of village lands and also enhance the capacity of villages to settle disputes based on well publicized and community based regulations and standards. Once a dispute is settled the boundaries and interests in the property as described in the dispute settlement document would be registered as a settled dispute in the respective department of ARAZI and any needed title documentation issued and recorded.

The TLO concluded from its assessment in Khost, that if the ARAZI collaborates with communities through the provision of surveying and registration services when requested by communities to document TDR successes or for other community identified needs... "...then broader documentation of land rights can take place. ARAZI could collaborate with local leaders to register all land in a given area (e.g., village, *manteqa*), not just land that is subject to a transaction or implicated in a dispute settlement. Although ARAZI will be playing a greater role in this type of collaboration, community partnership should remain paramount (TLO, p. 12).

The TLO report on its assessment of the feasibility of ARAZI offering surveying and registration services states that

“...government surveying, registration and eventually titling processes will be accepted **to the extent that communities do not lose land to the state**. A significant drawback continues to be that most major conflicts occur over government land customarily held by tribes who would in no case consider surveying acceptable if it means what they regard as their legitimate ownership is not recognized” (TLO, p. 45).

USIP cautions against optimistic expectations about community acceptance and support for ARAZI offered land survey and registration, unless the legal framework for legally recognizing private ownership claims is substantially modified. Specifically, existing law does not accept ARAZI's role as simply recording what the community concludes about private ownership, since that recording of a Shura/Jirga case and decision would not be a full *tasfeya*. There are pending amendments which may change this situation.

The MEC recommends the creation of an independent land registration institution (MEC, p.47), with a legal mandate to record documents about land rights which meet minimal drafting requirements. This concept of administrative land registration would put the burden on any potential "grantee" (buyer in a sale transaction) of confirming that the "grantor" (seller in a sale transaction) as having the rights to transfer the property. A combination of legal changes to allow a greater weight to documented decisions of community *shuras/jurgas* about validating rights to land with easier access to Court deed archives could guard against illegal usurpations or other forms of fraud becoming legal. There would be a need for developing capacities for examination of a "chain of title" by competent, accessible and trustworthy people. This searching capacity would require access to the Judicial archives, which would be extremely difficult unless the archives are digitized and a system for secure access is put into place and actually works.

If illegal land usurpation by local commanders or other powerful individuals is the problem being addressed by present legal provisions making it difficult for people to establish private ownership through Judicial review, some form of documentation of "illegitimate" title may be conceived to get by these difficult cases.

Converting ARAZI's land survey and registration responsibilities into administrative actions only to record community decisions, and not requiring *tasfeya* or some other quasi-judicial review of the ownership claims involved, can facilitate the recording of community decisions. But the role remains to be defined of Judges and their preparation of title deeds which result in socially valued documentation of property ownership. Will Judges accept community declarations of legitimate private ownership, even if recorded in ARAZI? Will Judges also accept community based ARAZI surveying and registration? A regulation is presently pending in Cabinet to deal with these questions.

2.3 Formalizing Tenure as Part of Informal Settlement Upgrading

(This section has benefited from contributions by Eng. Akram Salam)

Limited access to basic water and sanitation services, drainage systems and security posts are common in most informal settlements which have emerged in Kabul and other cities since 2001. About 70% of urban populations living in such settlements. Such living conditions represent a constant threat to the health and welfare of settlement inhabitants.

Being in unplanned and unserved settlements with precarious living conditions on land not legally occupied add to the potential interest which municipalities, wealthy developers or private owners have in removing them to be replaced by housing and commercial development of the more well off sectors of the population. Inhabitants have lurking fears of eviction or relocation as well as fear of conflicts with other claimants to the land where their homes are constructed.

Private investment in housing in informal settlements is estimated at approximately \$1.3 billion in Kabul City. This is people's wealth at the same time it is part of national wealth. How is it possible to ignore people's investments and talk about demolishing of their houses?

Moreover, if a municipality provides infrastructure, services, and security of tenure only for part of the city which is called formal settlements and not for majority parts of the city in informal settlements, it is social discrimination and marginalization of a usually very large part of the city.

If government does not pay attention to the housing, tenure security and infrastructure problems of the poorer communities, it creates mistrust and a gap between people of informal settlements and government. Growing mistrust and gaps between government and people is reason for alarm and sends a message of insecure situations in the future. About 70% of urban populations throughout Afghanistan live in informal settlements. By solving tenure security and infrastructure problems of informal settlements the security situation throughout the country also improves.

Part of insecurity felt by informal settlement households comes from the threat of eviction. Municipalities and/or developers may want to demolish such settlements to make way for planned urban expansion. Few informal settlement households have definitive deeds to their house parcels, meaning that they cannot appeal to the Judiciary for protection of their rights. In the LTERA parcel and household surveys (using digital photos verified by CDCs) an average of 1.8 households occupied each housing parcel. Ownership of these parcels is supported by a formal definitive title deed prepared by a Judge in about 20% of the parcels, while the holders claimed ownership through private transaction documents (customary deeds) in about 40% of the parcels. Another 40% of the claimed owners of the housing compounds report not having any documents to support their claims (LTERA, 2006).

2.3.1 Pilot Projects Reviewed

The pilot projects which are examined in this section include:

1. UN-HABITAT Informal Settlement Upgrading, 2003-2014 (UN Habitat, 2012; Turkstra and Popal, 2010; and Turkstra, 2014)
2. LTERA, 2004-2009 (LTERA 2006 and LTERA, 2009)
3. LARA, 2009-2014 (Tetra Tech ARD, 2014)
4. Cooperation for the Reconstruction of Afghanistan (CRA), Small Upgrading Project, 2013-2014 (CRA, 2015)

2.3.2 Common Points among Implementers of Informal Settlement Upgrading Projects

The first upgrading project implemented by UN-HABITAT in 2003 was funded by EC and covered 30 Neighborhoods in District 6, 7 and 8 in Kabul City, using CAP (Community Action Planning) workshops and discussions about how to implement upgrading projects. These initial Habitat efforts did not deal directly with informal settlement households' tenure insecurities, only physical upgrading of neighborhoods. But through working with

Municipality to approve such physical upgrading, there was a strong implication that the Municipality would not demolish the informal settlements in which there had been substantial public and community investments. Moreover, the Municipality and the affected neighborhoods negotiated the payment by households of an annual sanitation tax to help pay for the Municipal collection of garbage, thereby generating much needed Municipal revenues and a recognition of the households' existence in occupation of the settlement.

After CRA's team had been trained by Habitat's project manager in 2003-2004 in the community action planning method for informal settlement upgrading, CRA implemented the one LTERA upgrading project involving both physical upgrading and tenure upgrading in 2005.

The LARA project continued building on the foundations provided by UN Habitat and the former USAID supported LTERA project, and refined the procedures, particularly the cadastral surveying component for the partial formalization of tenures for inhabitants in two informal settlements in 2012-2013.

Another CRA project was then launched in 2013-2014 with Asian Consortium for Community Action using a small infrastructure upgrading approach, which points the way to more empowerment of urban communities and more self reliance for dealing with informal settlement upgrading.

Because this evolution of community based informal settlement upgrading methods build on the lessons learned by each, the upgrading projects implemented by different organizations have been basically similar, except some do physical upgrading, some do formalization of tenure through documentation of rights, and some do both. The CRA small project approach steps out of the big project box and provides some novel ideas for stimulating community self help in future informal settlement upgrading and for formalization of tenure efforts even in rural areas.

Some of the common points are;

- All organizations worked through local communities and the community representative system (Community Development Councils—CDCs) for both genders in separate Councils.
- They provided training for the established CDCs
- All implementing organizations worked in coordination with district municipality and community CDCs
- They managed CAP workshop for two or three days
- Upgrading project implemented by local people under supervision of their male CDCs
- Sanitation tax (safahee) booklets and their registration with Municipalities provided the documentation of possession of land and buildings by their inhabitants and provided tax revenues for the Municipalities.
- All implementers used their own logos and projected their "ownership" of the project they implemented.
- None of the organizations worked for sustainability of the community councils; they used the established community councils as a tool for implementation of their projects.
- Women councils have been established, but usually have not had important roles during implementation of the upgrading activities. Most of the implementing organizations did

not consider cultural requirements about gender roles in community development projects during implementation of the upgrading projects. The Community Action Planning model does include the organization of separate men and women “shuras” for planning and implementing physical upgrading, but a lasting change in gender roles seems illusory. The grand goal of “women empowerment” has tended to be a show to meet donor expectations.

- For the USAID funded “upgrading” efforts, physical upgrading combined with tenure upgrading only occurred in three out of nine upgrading project sites (neighborhoods). For the remaining six sites, informal settlement residents only received sanitation books, and they did benefit from de facto commitment from the municipalities not to demolish their settlements. USAID designed LARA as LTERA to be “technical assistance” and not investment projects did not allocate funds to the highly demanded and needed physical upgrading of informal settlements.
- The CRA small upgrading project model as implemented showed what could be done to actually improve people’s lives with limited outside funding, although to date CRA has not built community-municipal relations around the sanitation tax, and thereby also has not done much to improve the security of individual household tenure nor motivate municipalities to provide documentation of occupation in order to benefit from projected increases in tax revenues.
- UN-Habitat in its recent upgrading projects has combined both physical and tenure upgrading (sanitation tax) through community action planning techniques in collaboration with municipalities.

2.3.3 Comments for Improving Informal Settlement Upgrading

a. Community-Municipal Relations.

Upgrading of informal settlements can contribute to the integration of informal settlements into the urban fabric and incrementally strengthen security of tenure for the affected settlements as well as for households within them.

However in some cities and upgrading projects such as the recent upgrading activities done in Kabul City only basic infrastructure has been improved, mainly roads and drainage systems, but integration of communities into the urban fabric has not happened.

Other upgrading efforts have not included funds for improving basic infrastructure, only supporting the mapping of property boundaries and providing sanitation books and municipal assurances of not demolishing houses to produce a sense of tenure security among the settlement residents. The logic of such an approach apparently has been that with improved tenure security the residents themselves will invest in improving their properties and neighborhoods.

It seems more likely that improved community-municipal relations will result from upgrading efforts combining public investments in basic infrastructure and in improving tenure security.

b. Documented Tenure Security.

With existing corruption it may not be easy to provide an ownership deed for each individual household. Discussions have yet to be held on the holders of rights to be specified in the title deeds. Such a task takes time and involvement of related ministries and perhaps even Parliament. Municipalities typically do not have the procedures, staff or resources to do it. But it is possible for projects to help register specifications of the land parcel and coordinate with municipality to provide safahee (sanitation) book for each household to collect annual safahee tax as UN-Habitat did in Kandahar and LARA did in Jalalabad.

There are three advantages with providing safahee book for each land parcel:

- It is a document as to the de facto occupation of the household compound. It shows the recognition of the occupants as paying for Municipal services, and could be of importance should the Municipality decide to try and demolish the settlement. In the future if government/municipalities plan to provide ownership or occupation documents for occupying households, the project documented and mapped land parcels registered with the Municipality could speed up the process. Where occupants rent from absentee owners, there will be complications.
- On annual bases municipality will have income from sanitation tax (safahee tax) from informal settlements, and
- Municipality receives a sanitation tax from each household so municipality has to provide sanitation services for them. The official involvement of the municipality in providing service for informal settlements produces an indirect message to the people of the informal settlements that they are secure and slowly connects these settlements to the formal settlements.

c. Comprehensive criteria for prioritization of the informal settlements for upgrading.

While a draft policy for upgrading informal settlements exists, it has not been acted on. Municipalities could take the initiative and invite all experienced organizations, social activists, community leaders for a workshop and design a sustainable system to be implemented by all.

d. Community Development Councils.

Typically, each project implementation effort starts with the organization of local community councils, followed by the project managers sending lists of the established local councils to municipal neighborhood (gozar) and municipal district (*nahiya*) offices. These municipal offices usually receive the lists and put them in a file. Soon after, another organization comes and follows the same path because the implementing organizations want to implement their projects, not usually to support a sustainable system of community representatives linked to a municipality. Project implementing organizations typically want to reach their project planned outputs not necessarily changes in behaviors, relationships and living conditions

emerging from sustained efforts over long periods of time—that is sustainable development of settlements.

Solution: Municipalities could invite all experienced organizations, social activists, community leaders for a workshop and design a sustainable system to be implemented by all. And donors would do well to undertake evaluations of outcomes, impacts and sustainability of their funded projects.

e. Coordination

There is a lack of proper communication and coordination among implementers of the upgrading projects in informal settlements. Each organization keeps their information within their offices because they collected the information and produced the documents so they feel ownership.

Many organizations are implementing upgrading projects, but they do not have any information about each other. Everyone talks about 70% lands of Kabul city occupied by informal settlements, but nobody knows the percentages of the informal settlements upgraded or what that upgrading has involved. Different organizations have been working for years on upgrading projects and millions of dollars have been spent. To this day Afghan government and municipalities do not have exact data and information from upgraded informal settlements.

Solution: It seems logical that donors and Afghan governmental and NGO organizations build capacity of the municipalities initially of the five major cities of Afghanistan regarding creating a data base system, collection and sharing of the informal settlement upgrading information and mapping. If government or municipalities are not involved in this process it is not sustainable. For a beginning to build community awareness, all information regarding upgrading can be posted on municipality websites. At the same time the integration of improved ARAZI's property titling and registration services into the upgrading process is of critical importance.

Municipalities, or at least some of them, in coordination with ARAZI could take leadership of the coordination meetings and manage regular coordination meetings at the municipality meeting hall.

f. Financing of Upgrading

A community saving and loan system can be effective for community mobilization and sustainability of the upgrading activities.

Saving is the first layer in building community's self-help capacity. Then when a community's saving system has brought households together, built their confidence, their management skills, their collective strength, and their own internal funds, they are ready for the second layer, which is the development fund. The job of the development fund is to pump additional resources into people's finance system (through loans or grants). This extra

financial resource greatly expands people's space to create, to develop and to negotiate. It allows them to speed up and scale up their problem-solving initiatives and to push beyond the limited capacity of their internal savings, which by itself would allow them to move forward. When people's financial resources grows from the ground (community) up like this, people can begin to think for themselves what they would like to do, and then do it.

To start upgrading of informal settlements in this way will be more likely to be sustainable and communities will be more inclined to feel ownership of the upgrading process. The process becomes very transparent and less susceptible to corruption.

Through a community upgrading system like the one described, donors will have direct access to local communities for monitoring. Funds go directly to the community's financial system, thereby reducing the number of steps to reach to the real beneficiaries of the project. The project doors will be closed for corruption.

Community based upgrading helps close the existing gap between people and government and avoids misunderstandings because the system is very transparent and brings peace and stability in the major cities

g. Modifying municipalities' aversion to upgrading of informal settlements

Municipalities are under pressure from international agencies and from the settlements themselves to engage seriously with upgrading of informal settlements instead of preferring demolition and eviction. Financially municipalities are not able to demolish the informal settlements. For too long many municipalities have not been interested in upgrading of informal settlements.

Solution: Organizational restructuring of the municipality is a strong need because the existing structure is not responding to the existing needs. In the structure of the municipality one option is the establishment of a General Directorate of Informal Settlements to work for land security and upgrading of informal settlements.

h. ARAZI responsibility for land tenure documentation

Upgrading of informal areas within a municipal border is the responsibility of the respective municipality, but the Municipality by law cannot provide title deed certificates of occupancy. A safahee book is not a ownership document and in the view of some legal specialists by law it should only be given to owners not informal settlers. If this is the case, most of the projects by international organizations who worked with municipalities to distribute safahee books to informal area occupants were not in line with the laws.

Under proposed draft regulations, a municipality would issue a Safahee while ARAZI would issue the Certificates of Occupancy. ARAZI will provide the C.O.s valid for five years. If no claim is registered within that period, ARAZI could issue them title deeds. In this process ARAZI and municipalities will have similar software and property records administration system. ARAZI will be able to record any house or land selling and buying in that area and inform the respective

municipalities about the new transactions in that area, and changes of names of the old owners with the new owners or the creation of new properties through subdivisions or grants.

Some issues remain to be resolved, including:

- The procedures for issuance of Safahee and Certificates of Occupation (C.O.) such as who would be eligible (owners of structures, owners of land, tenants) and who would decide--a *gozar* council based on local definitions of who are the legitimate occupants or ARAZI based on formal law, or some combination? As mentioned above, a regulation is being drafted for approval by the Cabinet, which focuses only on urban informal houses not agriculture lands and other types of lands in urban areas. Certificates of Occupancy will be only issued to the persons who built the house on a state land or private lands without permission of Municipality. The regulation will not allow ARAZI to register the recently grabbed lands. The registration of these houses will be done based on the regulation not the way LML instructs, which is *tasfeya*, or land title clearance. If law is applied then none of those houses on grabbed land should be allowed to stay; drafting of regulations is trying solve the people's problems in various ways.
- Would a search of the judicial deed archives be necessary to identify any existing definitive deeds for the land or structures in the informal settlements or elsewhere in the Municipality?
- What would be the process for converting Certificates of Occupation into ownership? The C.O.s will contain certain obligations for the occupant; if he/she fulfills these obligations then they will be subject to full title. In most cases the Certificates will lead to full ownership title, except the areas which might be used for a public welfare project. All these terms and conditions are to be listed on the C.O., and signed both by the occupant and ARAZI.
- Would ARAZI record any decision by the Municipality to recognize the existence of each informal settlement as being eligible for incorporation into the Municipal Plans, and thereby not subject to demolition and by implication the extinction of any occupancy rights?

3. Capacity Development: State Land Administration Agencies

While some of the projects for re-building land administration have been piloting community based land administration, other projects have tried to improve the capacities of State land administration entities to carry out their mandates and also support community based land adjudication and registration.

The LTERA project (2004-2009-funded by USAID) made substantial investments in rehabilitating of the Judiciary's Provincial deeds archives, including physical document indexing and rehabilitation as well as digital archiving. LTERA also invested in the Cadastral Department's physical space and the training of its staff.

The Harakat project (funded by DfID, 2014) followed the LTERA project and continued the physical and digital rehabilitation of the Judiciary’s archives. The LARA project (2011-2014) funded by USAID following the end of its LTERA project assisted in the design and implementation of deed registry software for the Provincial courts to administer their deed archives, as well as the design and implementation of cadastral information administration software for the Cadastral Department and for selected municipalities.

The LARA, Adam Smith and US Institute for Peace (USIP) projects contributed to the strengthening of ARAZI’s land administration functions as well as ARAZI’s abilities to manage State lands under its authority (particularly the management of leases).

The LTERA, ADB-RLAP and LARA projects contributed to the elaboration of the National Land Policy, the drafting and discussion of the Land Management Law and Forestry Law, amendment to the Cadastral legislation, and the Informal Settlement Upgrading policy.

3.1 Information Sources

Information about investments made since 2003 in the formal land registration sub-system comes from publications produced by the following projects:

LTERA (Land Titling and Economic Restructuring in Afghanistan) 2004-2009, supported by USAID (LTERA, 2009)

LARA (Land Reform in Afghanistan), 2009-2014, supported by USAID (Tetra Tech, 2014)

ALCO (Afghan Land Consulting Organization), supported by Harakat, 2009-2010

Harakat, Afghanistan Investment Climate Facility Organization, 2013

USIP/ARAZI Project on the Land Conflicts (Gaston and Dang, 2015)

3.2 Registration of Documents Describing Rights to Land

Decades of conflict have resulted in serious damage to Judiciary provincial archives (*Makhzans*), which contain the formal title deeds and other deeds documenting legal transactions in land rights prepared by Primary Courts since 1916. These documents provide evidence as to the rights of those who claim to be land owners to sell, gift, or mortgage their land. Without such publically available and trustworthy evidence, transactions in land are subject to insecurity.

3.2.1 Administration of Property Transaction Documents (Definitive Title Deeds)

The LTERA (2004-2009) and Harakat (2009-2014) projects worked with the Supreme Court to rehabilitate all 34 of the Provincial Court Archives (Makhzans). This rehabilitation improved the physical spaces of the provincial court archives and the cabinets to store the bound volumes

(Kondas) of deeds. This work also involved the repair of the bound volumes containing legal documents and their proper numbering and organization on storage shelves. These two projects helped salvage and reorganize nearly 7 million court archived documents, with special attention being paid to 957,500 definitive title deeds (from such transactions as sales, gifts, inheritances) for repairing the documents in preparation for their digitization. A “definitive title deed” is a permanent transfer of rights from one person or entity to another. A mortgage deed under Afghan law is considered a temporary transfer of rights until the terms of the mortgage are completed.

With this rehabilitation, the Judges and their clerks more easily and quickly consult with the archives to verify ownership or other interests in immovable properties acquired in the past through deeds of transfer prepared by Primary Court Judges. With the rehabilitated archives, the Judges also more easily and quickly prepare new deeds of transfer as required by participants in private-to-private (sales, gifts, inheritances, etc.), State-to-private transactions (settlement grants), private-to-State transactions (acquisitions) and thereby verify ownership of immovable properties for future transactions.

While doing this physical rehabilitation, LTERA, LARA (2009-2014) and Harakat (2009-2010) also supported the digitization of mostly the definitive title deeds. That is, the projects did not digitize all court documents which are stored in the Provincial Court archives, only those definitive deeds documenting immovable property transactions. Digitization involved the digital copying of the deeds along with entering indexing information for each deed into a database. Approximately half of the more than one million title deeds from 34 Provincial Court Archives (Makhzans) were digitized under LTERA, with another 270,000 title deeds digitized by ALCO under contract with Harakat 2009 through 2010.

This digital information was initially an Access/ArcInfo data base developed in LTERA and continued under Harakat-ALCO. Under LARA a software more adapted to use in land registries, OpenTitle, was introduced, with the intention of migrating the older digital data into the new software. LARA was implemented through a USAID contract with the firm TetraTech, whose partner, Thompson-Reuters, owned the copyright to this software.

The court prepared definitive title deeds do not typically refer to survey plans to describe the location and boundaries of immovable properties being transacted, except where a transaction involves a rural village property surveyed by the Cadastral Survey Department (Safar and Stanfield, 2007). Judges use street addresses for urban properties and village names for rural ones to generally locate the properties, but also include in the deeds the names of the bordering owners.

The LTERA, Harakat and LARA projects improved the traditional Court administered deed preparation and deed archiving, leaving for the future the decision as to whether to move the administrative recording of transactions to ARAZI, now that the Cadastral Survey is administratively located in ARAZI.

This approach has not dealt clearly with the fact that most immovable property transactions are not channeled through the courts or governmental institutions, but involve private agreements usually documented in what people call “customary deeds”.

Amendments were made to the Land Management Law (2008) to guide judges in using the evidence in customary deeds to produce definitive title deeds, but apparently with limited practical success.

Another option being considered presently is for ARAZI to issue title documents to people claiming ownership of properties based on judge prepared title deeds and properties with customary documents. In cases of transactions, ARAZI would do a title clearing process which is supposed to be fast and community based before any property will be transferred to a buyer or mortgage holder or some other “grantee”. In this way people with customary documents as to their claims to a property will be able to do transactions through official channels. There are several difficulties with this option, however:

- There would have to be Court approval of ARAZI’s title adjudication process if it includes a search of judicial archives, which is likely to be long and costly. In the protocol being negotiated with the Supreme Court, every provincial court should submit the scanned copies of the title deeds from their archives to ARAZI. ARAZI’s title adjudication process should not be subject to the courts’ approval since the draft amendments to the LML allows ARAZI to act as decision maker in titling. The judiciary is one of the parties which should provide ARAZI with information regarding property titles; other entities such as MoF, the Cadastre Dept, MAIL and Ministry of Energy and Water are also part of the team to provide land ownership documents.
- If ARAZI bypasses the judges and issues title documents (deeds) without a title search of judicial archives, then judges may not recognize the legal validity of the ARAZI title documents in their court proceedings.
- People who hold definitive title deeds prepared by judges may prefer to conduct transactions through judges, which would produce a costly and potentially disastrous dual titling and registration system, making the control of fraudulent transactions even more difficult than it is now.

Assuming that the rehabilitation and digitization of definitive title deeds are as advanced in the Provincial *makhzans* as claimed in project reports, it should be possible to identify potentially fraudulent deeds which have been incorporated into the court archives. Using the digital data bases, it should be possible to compare names of the grantees with names of the grantors in the previous definitive deeds. They should be the same, as should the property addresses. If they are not, then the active deed can be identified for further investigation as potentially fraudulent. Unfortunately no project has yet developed and tested any procedure taking advantage of the digitization for purging the archives of fraudulent documents.

Another LARA activity through Thomson Reuters post Harakat was the introduction of components of the OpenTitle software in ARAZI (ARAZI Land Records Management Information System, ALRMIS) for administering data on State land allotments, particularly land leases, and other ARAZI land administration and management functions.

LARA subcontractor Thomson Reuters also provided software analysts and training coordinators who worked with municipal management strengthening teams from RAMP-UP, UN-HABITAT and UNDP/ASGP and established formats and procedures for the setup of a unified IT system for municipal property books in the cities of Jalalabad and Kandahar principally for the administration of the sanitation tax. The data fields and categories of land from the manual forms that had been in

use in these municipalities were integrated in the Thompson Reuters' OpenTitle™ template. All parcels identified during a cadastral survey of 2,780 housing parcels in two informal settlements in Jalalabad (Geo Survey, 2013) were entered into municipal databases and tested for quality assurance. A UN-Habitat report states that their CB-MSP project had also developed a property database (Integrated Financial Management System (IFMS) and related to a parcel based spatial database (GIS) in Kandahar and Jalalabad for improving municipal revenues from the safayi (sanitation) tax (UN Habitat, 2012).

An open question is the sustainability of these investments in land records administration software. What are the technical and financial capacities of the Courts, ARAZI and Municipalities to keep the information systems functioning technically, and pay the licensing fees to the company Thomson Reuters? The Afghanistan Information Management Systems (AIMS) allegedly purchased licenses of GRM Cadastre (Thomson-Reuters purchased the components MultiCadastre and LRS Backfile from International Land Systems) supporting this ARAZI initiative (Holl, 2012) as well as possibly for other land administration agencies which need ownership data linked to defined land parcels.

While the introduction of the same OpenTitle software package for administering land records into the Provincial Makhzans, ARAZI and municipalities is probably a good idea, the process was in mid stream, when the sponsoring project, LARA ended, meaning that the TetraTech technical support has departed. There is apparently no Afghan technical capability for supporting OpenTitle, and more fatally, there is no funding for continuing paying the annual licensing fees to Thomson-Reuters. Without financial resources and technical support for OpenTitle, it seems probable that the massive effort at digitizing the definitive title deeds (as well as the other applications of OpenTitle in ARAZI and municipalities) will simply disappear.

As far as the judiciary is concerned, the potential failure of digitization will leave the Makhzans with new cabinets and reordered bound volumes of court documents (Kondas), which are certainly major contributions from the LTERA and LARA projects. But even for this to be claimed as an achievement an assessment is needed to verify that the rehabilitation allegedly done with LTERA and ALCO support has actually been completed, and is being maintained.

Perhaps AIMS will fill the void left by the ending of the LARA project for assuring the use of OpenTitle in the future in the Courts, ARAZI and Municipalities, all using parcel based information about land tenure, land value, and land use. The decision to introduce OpenTitle into the Courts, ARAZI and selected municipalities is an example of projects undertaking an initiative whose implications were not fully reviewed by Afghan land administration institutions as to the technical value and cost of the software package.

Such an assessment could still be launched by the High Council for Land and Water with recommendations as to the future use of that particular software package.

3.2.2 Information about the Location of Immovable Properties

With the intention of invigorating the Cadastral Survey begun in 1965 but mostly suspended in 1978, the LTERA and LARA projects have also invested in equipping and training a new generation of cadastral surveyors and have advised on the preparation of new cadastral

legislation providing for surveys in urban areas as well as rural areas, using modern technologies.

The reliance on the strategy of making the cadaster applicable to all land parcels, urban and rural, is theoretically a good idea, but implementation will be very costly and time consuming. What is needed is a stepwise strategy stretched over several years.

An immediate project could be the community based establishment of the boundaries of Cadastral Territorial Units (or “taxation zones”, a term used in the “Law of land survey, verification and registration”, of 1978). Village and *gozar* leaders and respected elders would have to define such boundaries.

A CTU would be a bounded geographical area, such as a rural village or an urban neighborhood, containing a reasonable number of immovable properties of various tenure types—private, community, State, etc. Part of the identification of any particular property by judges or ARAZI or Municipal staff would be the CTU within which it is located. More precise geographical location data, such as boundary surveys, can be gathered over time as the holders desire and as the value of properties justify the expense.

Just having defined CTUs would be a good start, but must also be accompanied by a commitment from ARAZI and from Judges to use them to locate the properties involved in the deeds that they prepare and similar commitments from other and land administration agencies to locate properties which they help administer. All of the transactions in each CTU should be available for searching by hand if need be to locate all deeds pertaining to a particular property and help avoid fraudulent transactions.

A second best intermediate step would be for Judges to at least include in all deeds the addresses of the properties involved in the deeds that they prepare, and for land administration agencies to identify the location of land parcels as precisely as possible using local place names as well as names of neighboring land holders/users.

The tendency of both LTERA and LARA to consider the cadastral survey of all property boundaries as the key spatial component in a computerized system may be illusory in a country which has developed a physical document based property administration system of remarkable resilience but limited actual use. Certainly moving into the digital age will happen, but over a relatively long period of time. During this conversion, many useful improvements to the spatial component of a deed administration system under the Judiciary or gradually under ARAZI can be undertaken.

In order to retain the investments already made in the deeds administration and cadastral survey, the regulatory framework issues mentioned above deserve serious consideration, and while that is going on, the salvaging of the deed data bases and the training of Judges and their clerks as well as the staff of any new Administrative Land Registration Agency in their use are of great importance.

3.2.3 ARAZI and the Registration of Land Conflict Resolutions

USIP and ARAZI envisioned a joint pilot to test a new set of administrative procedures and processes that would allow ARAZI to register land rights established through its dispute resolution office in coordination with local community dispute resolution bodies (Gaston and Dang, 2015).

Within ARAZI, land conflict cases are to be collected at the district or provincial level and forwarded to national ARAZI. There, depending on the nature of the case, they are supposed to be recorded in one of a series of books. Before this pilot there was no such book for cases brought to ARAZI's dispute resolution department, nor were there procedures or forms for registering the outcomes of a community dispute resolution process.

Innovations from the pilot included:

- As part of its technical assistance, USIP worked with ARAZI to develop a registration book for these cases.
- A training manual on how to use the registration book was prepared, and training was delivered to staff at Khost and Kunduz ARAZI offices.

However, due to lack of time to actually assist with the resolution of conflicts combined with the reluctance of Provincial staff to get involved with dispute resolution, this pilot evolved into the exploration of the demand in communities for ARAZI dispute resolution services through two NGO's, The Liaison Office (TLO) and the Peace Training and Research Organization (PTRO) (TLO, 2014 and Miah, 2014) pending approval of authorizing legislation.

The recommendations from these two field studies are summarized in the section above on community based land adjudication and registration.

4. Lessons Learned from Land Administration Projects

One of the problems of the Afghan land sector has been lack of coordination among the key stakeholders and donors. The approach for identifying and fixing problems has always been project based, which has produced discontinuity among different phases of the projects.

More fundamentally, at least until the Ghani administration, the Afghan political leadership has shown a disappointing lack of interest in the community based land adjudication and registration pilots, which has meant that government has not yet invested in going to scale with any of the pilots.

Even for the large projects investing in the State land administration agencies, the government has not adequately monitored and directed the foreign donor initiatives, the most problematic case being the introduction of a proprietary information system by one of the foreign contracted consulting firms without governmental buy-in.

Political paralysis at the governmental level, however, does not mean that the country stops working. The key message of this paper for donors, government, private sector and civil society is focus land administration initiatives on the energies and resilience of Afghan urban and rural

communities to rebuild the linkages between the State and communities. Build on what communities are already doing.

Some of the more specific lessons learned from the pilot projects include:

- a) The ways that people relate to the land and to each other are more often governed by custom than by governmental policies and laws. The community based land adjudication and registration pilots explored ways to bridge the gap between community customs and state formalities by recognizing the resilience of customary institutions. At the same time, links between the State and communities are necessary for developing the governance capacities of communities and for the future stability and prosperity of the Afghan people.
- b) Bringing change to governmental institutions and the legal framework pertaining to land is a slow process, complicated by the inertia of carrying out mandates with priorities other than dealing with land issues;
- c) The CBLAR pilot projects introduced interesting and useful ideas and procedures, but were almost uniformly unsuccessful in getting governmental buy-in, at least in the short term. Part of the reason for this failure has been the lack of governmental commitment to resolving land administration and management issues as a precondition to the positive evolution of the country;
- d) The mostly foreign funded projects have not been adequately oriented, coordinated or monitored, neither by government nor by civil society. This inattention has precluded governmental and civil society from learning from the projects, and in particular has not produced the needed changes in governmental policies, laws, procedures and institutional structure.
- e) The complicated nature of land administration projects has led their designers and funders to retreat from insisting that the projects define changes in behaviors and relationships which form the core of the national development process. Instead, project monitoring has focused on verifying quantitative outputs. Government and donors who agree on the need for the development of Afghanistan require more effective monitoring methods to change project procedures when needed to better contribute to the development of the country.
- f) Two institutional decisions are of fundamental importance for future land administration projects: 1) how to define the roles of the Judiciary and ARAZI in the documentation of rights to land--formal and customary--individual, community (and tribal) and state; and 2) how to protect against land grabbing and still enable the formalization of customary rights for those with legitimate customary rights.

5. Policy Recommendations

Potential policy recommendations for the Afghan Government and donors include the following:

1. A significant number of pilot projects in land administration and land disputes resolution have been tested and implemented in the country, mostly with the financial and technical assistance of the donors mentioned above, which is appreciated and there are list of good lessons to be learned from each of these projects. But, it is the time for the government to take lead and translate all those good lessons from the pilot projects including the newly implemented LGAF recommendations into a "Roadmap" as an attachment for the Afghanistan National Land Policy

which will be reviewed based on the instruction of High Council of Land and Water in 1395 (2016);

2. Donors have been involved in supporting Afghanistan in land administration since early 60s; the approach in this respect has always been project based. It is highly recommended that a programmatic approach replace the "project based approach" and all key stakeholders will work based on the "roadmap" and strategic plans of ARAZI as One Stop Shop for land administration in the country;

3. Land Administration restructuring starts with the support of the new administration, particularly, H.E President Ghani's attention to the land sector. Land has become a top priority for the current government. Establishment of High Council of Land and Water, allocating 600 new positions under a Presidential decree to ARAZI and making ARAZI a member Afghanistan's cabinet shows strong political support of the government and the President. The government may keep up with the momentum which has been created in this respect and support respective institutions especially ARAZI to process the draft amendments of the Land Management Law, the Land Acquisition Law (LAL) and separate regulations, and policies through the cabinet and Parliament of the country;

4. Recently, there is a trend to make titling an administrative process. The government leadership and the donors support the process from design to implementation stages. Enhancing ARAZI's capacity and a gradual transformation of titling and registration function from courts to ARAZI is a fundamental step toward modernizing of land administration and registration of lands with customary documents. We should remember that Afghanistan is a country of customary documents;

5. A separate department within ARAZI is to be established to record the special villages lands (community lands) and while developing procedures for identifying villages special lands we should consider the lessons learned from RLAP and SALEH projects;

6. Afghanistan needs to train the new generation with modern and IT based land administration. A technical institute is required to be established in this respect in order to produce quality human resources for land institutions especially for ARAZI;

7. Besides donors support, the government may allocate a separate development budget for land administration in its annual budgets;

8. Government intends to fight corruption in land sector and approve ARAZI's newly drafted restitution policy for state grabbed lands;

9. Institutional re-arrangement seems to be required and is promising when it comes to the institutions which are involved in land management and land administration. ARAZI will focus only on land administration and services including cadastral survey, land title adjudication, land registration, land disputes resolution, mapping and identifying/recording borders of the country, provinces, districts, villages, urban districts and neighborhoods (*nahiyas* and *gozars*). State land management and state immovable assets management should be placed in another appropriate institution in order to refrain from any conflict of interest in land services mentioned above;

10. Coordination among different government entities involved in land administration and land management is a MUST, that is exactly why the High Council of Land and Water has been created, with special support from Afghanistan's Parliament, Cabinet, Supreme Court and provincial courts, Ministry of Justice, and other related entities. The momentum has been created in land administration improvement which is very important and vital.

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