

Upgrading of the Property Rights Recording System of Afghanistan

The objective of this note is to stimulate the discussion of a strategy for upgrading of the property rights recording system, in order to correct at least most the major problems. The overall goal would be to produce a recording system which has very good accessibility for the poor and disadvantaged and which has a very high degree of integrity. By “very good accessibility” we mean that the time and expenses needed to get information from the system would be low. By “very high degree of integrity” we mean that the evidence archived in the system concerning who are the true owners of properties is legally and factually accurate.

1. What are positive and negative features of the procedures presently being used for the recording of real property transactions?

There are many positive features of the existing system for recording changes in property rights pertaining to land and buildings:

- 1) the conduct of transactions is decentralized to the District Primary Courts for most steps in a transaction, and is thereby cheaper for people to access than if it were more centralized with offices in distant cities.
- 2) The preparation of deeds by Provincial Primary Court Judges and the storing of deeds in the Court Archives (Makhzans) are just two of the Judges’ responsibilities, so that the administrative costs of the property registration activities are shared with other activities of the Judiciary. This sharing of costs makes the operational costs of the system lower than they would be if the recording and archiving activities were the sole responsibility of the system administrators.
- 3) Having the document archive in the Provincial capital enables the court to make investments in keeping the documents safe, which would be more difficult if the archives were scattered across the districts.
- 4) The Circular Form describes the steps that an applicant for a transaction has to take to complete a transaction. Such a document should enable the general public to understand the process and should enable the control of corruption by clearly describing the procedures required.
- 5) The use of a pre-printed, and bound “standard deed” helps orient the Judges and their clerks in the preparation of deeds, on the one hand, and is designed to assure that the copies of the deeds in the hands of the buyers and in the Makhzans are equivalent.
- 6) Keeping a copy of the deeds in the Makhzans and a copy in the hands of the “grantees” provides a degree of security should one or the other copy be lost.

But not all is perfect in the administration of this system for the recording of legal documents pertaining to property rights. The time needed to complete transactions can extend to several months. There are many agencies that have to sign off on every transaction. The costs in time and money of completing transactions can be quite high.

For whatever reason, many people who are engaging in transactions do not prepare the new deeds through the Primary Courts. Over 50% of actual transactions in urban areas are done informally, and over 75% of transactions in rural areas are done using what is called “customary deeds”. The problem for the economy and for the stability of the country is the inability of the legally defined system for recording transactions to incorporate the valid and legitimate documentation of such transactions. The result is the widespread possession of land and buildings without a legally recognized title.

We propose to analyze these and other problems with the existing legal deed recording system, define immediate improvement in how recording of transactions is presently being done, and engage in a longer term effort to discuss the options for “re-engineering” the system.

What are the problems which could be quickly dealt with?

1. The Circular Form.

The introduction of the Circular Form has been an important guide for the people engaged in property transactions to carry out the prescribed steps in the transaction. However, even with this information, the actual transaction costs for carrying out sales, inheritances, gifts and other property related activities in the Primary Courts and Makhzans are probably too high. More specifically, the number of stops at administrative agencies to verify ownership of the seller and to enable state agencies to collect transfer taxes may include stops whose expense and consumption of time appear to be greater than the benefits that they generate. See Annex 1 for the steps required to prepare a new deed for the sale of a house in Kabul (steps differ in other cities). See Annex 2 for the steps required to prepare a new deed for the sale of rural land.

Questions to be explored:

- a) What is the benefit from securing certification from an agency external to the courts (the Amlak for rural parcels, and the Municipality for urban ones) that the seller is the registered owner of the property, if the certification about that fact could be correctly obtained from the Court’s archives?
- b) What are the revenues actually generated from the 5-6% transfer tax and the 1% municipal tax, and what would be the expected revenues which could be generated by encouraging a much higher percentage of people to legally record their transactions through a reduction of this tax to internationally acceptable levels?
- c) How can the value of the property be assessed in a rapid and accurate manner which does not require the certification from multiple commissions and from actual site visits to the property (especially for urban properties)?
- d) The Circular Form format has changed but the old format continues to be used in daily practice. The new format is not identified by an official stamp or mark, and the authority producing the Form is not identified. Moreover, the use of Arabic in the text of the Form makes it difficult for average people to understand. Should the forms be improved?

2. The standard deed format

The standard deed format which has been in use for several decades is a distinct improvement over the practice in some other countries where lawyers or notaries use complicated and lengthy wording for deeds, usually occupying many pages, to describe a transaction. The Afghan two page (one sheet, two sides) printed standard deed already in a bound volume, where the new owner gets a copy of the official deed, and the Court keeps the original in a bound Konda, is a much better practice. However, much of the pre-printed parts of the standard deed format use antiquated words which are unfamiliar to the general public. Moreover, potentially useful information is not presently required to be noted on a deed, such as the date and number of the deed of the seller, and the Gozar (urban neighborhood) or Village where the property is located. The existing standard format also may not be appropriate for recording of some actions other than sales, inheritances, mortgages and gifts.

A question which should be explored with those familiar with the use of the standard printed deed is: “How should the format of the standard deed be modified?”

Second, “should actions other than the transfer of property rights but involving rights to immovable property which are recorded in the Primary Courts have another format to be used?”

3. Finding a deed in the Makhzan.

When sellers, buyers, courts, or other interested parties wish to find a particular deed in a Makhzan to verify that the person claiming to be the owner is identified as such on a recorded deed, they need the date and number of the deed. If they have only the name of the supposed owner or the location of the property, the Makhzan staff find it very difficult to find the relevant deed. If they know only the location of the property, it is almost impossible to find the deed of the present owner.

Question which should be explored: “What sort of grantor/grantee index would be useful to help locate deeds knowing only the names of the grantors (sellers) or grantees (buyers), or type of transaction or approximate date?”

Second: “What location or tract index would be helpful to locate relevant deeds knowing only the location of the property?”

4. Disorder in the Archives.

The past difficulties in Afghanistan have resulted in serious disorder in the Makhzans. The LTERA project teams (funded by USAID), under the guidance of the Supreme Court, are carrying out the re-organization of documents in the Makhzans, as well as are providing new storage cabinets for the files and rehabilitated rooms for the archives. The teams are also repairing the bound volumes of deeds where possible. Once this re-organization and re-habilitation work is completed, the Record Books or Konda containing documents will be organized physically in the following way.

All documents produced by a court (district or provincial) are placed together in one section of the Makhzan. Within each Court section, books containing court documents are grouped according the type of document so that all books containing property deeds are together, and all books containing inheritances are together, etc. Within this grouping by type of document, books are arranged in time order, from the earliest documents to the most recent.

To complete this process the Supreme Court should consider a Konda labeling system which is clear and easy to use. That system could give each Konda a unique number and other information enabling Makhzan staff to properly store them and easily retrieve them in the future. This numbering system could also facilitate the administration of digital copies of the Makhzan documents. Once a labeling system is approved, training should be provided to Judges and Makhzan staff in its use and maintenance.

5. Fraudulent deeds.

It is commonly asserted that inappropriate changes have been made to documents stored in the Makhzans, and that fraudulent documents have been inserted into the archives of the Makhzans.

To address this problem of inaccurate documents being archived requires a set of institutional reforms and possibly a technical “fix”.

On the institutional side, the formal procedures for the preparation and archiving of documents requires multiple reviews and approvals from the courts and Makhzan staff, so that more than one person has to approve transactions. However, this set of people can

easily develop a “club” mentality, and together conspire to introduce fraudulent information if enough financial inducements can be produced. Some external set of controls are needed to be exercised by people in whose interest it is to keep fraudulent information out of the archives. Who are such people? In some countries (in much of the United States, for example), the general public can give its opinion about the actions of the recording offices’ personnel, since the Registrar of Deeds is selected through non-partisan, periodic elections. In others, a local commission is given supervision of the recording office staff. Such a commission is composed of professional people whose income depends on the fluid operations of property markets, such as property dealers, appraisers, urban planners.

On the procedural side of the problem, a general principle would be: bring the “light of day” into the archives. There is presently a policy within the courts to restrict access to the archives to only the holders of rights to properties, such as the owners who wish copies of the deeds whereby they acquired the ownership of properties. Even then these people are not supposed to physically enter the archives, but rather have to ask the Makhzan staff to copy, by hand, the needed deeds. With this restricted access there is very limited possibility of the public to verify the accuracy of the documents in the archives which pertain to their properties or to properties in which they or their families have interests. In a deeds registry, the archives are supposed to “give notice to the world” that a person has acquired or transferred rights to a property. How can such notice be given when the public cannot verify the accuracy of what is contained in the archives? One possible answer to this challenge is through the use of information technology initially in two ways: (1) digitization of the “grantor-grantee” index, and make that index available to the public in the courts and where feasible over the internet; , and (2) produce digital copies of the deeds themselves, and then provide access to these digital archives to the general public.

The IT approach is time consuming and expensive, but has some important contributions to reducing the incidence of the fraudulent deed problem. The creation of digital copies of all deeds starting with those being produced today and then moving back into time in the archives, will facilitate the location of deeds and conducting searches of deeds for verifying chains of title. Digital archiving will provide greater security of deed storing since copies off site can be easily done. Digital archiving also will make it much more difficult to alter existing deeds in the archives.

What to do?

Several steps could be taken immediately to improve the existing system:

- Carry out an emergency mapping of the boundaries of the smallest administrative unit in the country, probably Gozars in cities and Villages in rural areas, which would become “tracts” in the registration system and which would be used to locate deeds when the approximate location of the property is known, which would also be useful in future adjudications of title.
- Instruct the Primary Court Clerks and Judges to introduce into the deeds the name of the “tract” in which the property is found.
- Assign a unique number to each Konda already in the Makhzan and as the newly filled ones leave the Primary Courts for the Provincial Makhzan.
- Instruct the Primary Court Clerks to improve their writing of the deeds.
- Implement the notation of simple information about each deed in a Grantor-Grantee index and in a Tract Index.
- Develop a system of digital photographing, indexing and archiving of all new deeds which are produced. Begin the digital copying of all documents which enter the system after an established date. Such a procedure would be difficult to implement due to the lack of electricity and lack of skills, but a system could be devised during the interim period when these deficiencies will be corrected. In the meantime, with such a digital backup archive, it would be more difficult to compromise the integrity of the archives. It would also permit the

searching of the archive without physically handling of the deeds, thereby helping to preserve their physical integrity.

2. What strategic re-design options should be considered?

Besides these interim measures, several strategic re-engineering issues could be profitably discussed and decisions made:

a) Should there be an integrated deed recording information system containing the documentation of legal rights and the spatial description of properties (parcel mapping) to which those rights attach?

To follow the trends around the world, the answer should be “yes”. The legal information contained in deeds should be integrated with parcel descriptions contained in maps. However, the nature of this integration has to be defined and a strategy for its implementation elaborated. Included in these decisions should be the definition of a system for assigning unique property numbers to each property which will be noted on the property maps for areas given priority in any future adjudication effort. Such numbers will be used in the deeds to identify the properties involved in transactions. The assigning of “tract” numbers to each deed will be a step in the direction of assigning unique parcel numbers, once an effort is undertaken to adjudicate the title for each property within a tract.

As mentioned above, a first step could be the addition to each deed the name of the Gozar or Village, the smallest administrative unit available, in which the property is located. Such a description does not identify the exact location of a specific property, but it does locate a property more precisely than District or Province. This Gozar or Village method for locating properties is similar to the “tract” method used in most jurisdictions in the U.S. A “tract index” could be created, where for each tract all transactions affecting any property in the tract would be noted, thereby facilitating the location of a document affecting property rights in a specific property, based on which tract it is located in.

A basic need for adjudication of title, if such an effort is justified, and for the creation of tract indices, is a cartographic framework into which can be noted all transactions affecting properties within tracts, and in which to fit any sporadically prepared cadastral survey plans used in systematic adjudications of title. That framework would be the maps showing the boundaries of all Gozars and Villages in the country.

But even the tract approach to location of properties has a cost, in that the maps of these lowest level administrative units have to be produced, since they are not presently readily available. One of the activities of a special project could be to produce such maps as soon as possible in the areas where most of the transactions are occurring, and to provide them as appropriate to each Primary Court.

Clearly Afghanistan needs to resolve claims to parcels of land and to buildings, and provide greater tenure security to the legitimate owners of such properties. One option to be considered to achieve this goal is to undertake systematic adjudication of title to properties in priority areas, such as urban areas slated for renovation (such as the Old City part of Kabul), or areas planned to be the target of special investments, such as the rehabilitation of an irrigation system, or areas of social conflict where insecurity of tenure is inhibiting private investments, such as informal urban settlements. The adjudication of title in such places in a systematic way can be quite costly. However, if the legal documents in the Makhzan archives are coded according to the Gozar or Village of the properties, systematic adjudication could be greatly facilitated by having all such documents easily available at the time of adjudication.

Still, adjudication of claims would be costly. Who should bear the costs of such an effort? The Afghan state would probably cover at least part of the cost, since there is a social gain from improving tenure security. But also the adjudicated owners should bear par of the cost. Why? The argument would be that once titles are adjudicated the values of the properties with clear title are typically at least 30% more valuable than they were prior to establishing a clear title. Part of this “windfall”

increased value which the private owners would capture, could be shared with the entity carrying out the systematic adjudication to help finance the effort.

b) Should the deed recording function be in an administrative function, not part of the daily activities of a judge?

At present the Primary Court Judges and Heads of the Makhzans are under the supervision of the Supreme Court and are appointed by that Court. Clerks and assistants who do the document preparation are monitored by judges with many responsibilities. Such a system suffers from the twin constraints of lack of effective supervision and at the same time the rigidities of being judicial and not administrative offices. The fees they collect are not used to finance the improvement in the operations of the offices, or even the staff salaries and other operational costs. These weaknesses could be remedied by creating separate Deeds Recording Offices, headed by Registrars, with administrative responsibilities over the recording of legally prepared transaction forms. If the fees they generate could be used to finance the operations and improvements of the offices including salaries, the staff would be motivated to improve the efficiency of the office and to become more client centered, in order to encourage people to come into the offices and record their transactions.

Such a concept has been described to a certain degree in a draft Law for the Registration of Legal Documents.

In some countries (e.g., Spain) the Registrar operates the Registration Office much like a private business, with some judicial or other governmental oversight and control. In others, the Registrar reports to the head of local government concerning financial and procedural matters, but operates using the fees generated from transactions independent from local or central government budgets. In other countries, the offices operate like other government service agencies.

c) Should the deed recording function be one of many functions in a “registration office”? In some countries, the recording of deeds is the duties of a village Secretary, who also has other administrative duties. In Pakistan, the recording of changes in ownership of land is part of the property tax administration system. To keep the recording of deeds a locally accessible service, its cost could be shared with the provision of other administrative services.

d) Should there be a new “title” (or Torrens type) registration system in Afghanistan, or should there be an improved, integrated deeds recording system?

A title registration system is based on the parcel/property, as described on a parcel index map. For each parcel there is a “registry page”, on which is recorded the information about ownership, leases, mortgages, and other encumbrances. The registry page gives conclusive proof of the rights attached to the parcel. A Registrar examines a transfer document and issues a new certificate of title in favor of the new owner. The certificate shows the name of the owner, and identifies the land parcel as well as any easements or charges such as mortgages. The main limitations on Afghanistan going from its present deeds recording system to a title registration system is the cost of producing the parcel index maps and the cost of adjudicating title for every property which gets incorporated into the new system. It is possible to move from a deeds based to a title system on a parcel by parcel basis as transactions occur, placing the cost of the conversion on the participants in transactions. The high cost of survey and adjudication of title would probably inhibit people from carrying out legally registered transactions even more than is already the case. In the formerly socialist countries that have wanted to move from public ownership to private ownership after the big political changes of the early 1990's, there was not much transaction history to deal with. As a result, there were very low adjudication costs, making the creation of title registration systems feasible in cost and time needed.

These conditions do not exist in Afghanistan. So, it seems wise to work on making the existing deeds based recording system work better. This decision about system change is actually not a major issue—from a deed system to a title system—since there is growing consensus that in actual practice the two are converging as computers and the need for land use planning have encouraged the deeds

based systems to use maps to describe properties, and the complexities of title have moved the title based systems to adopt many of the procedures of title searches used in the deeds based systems.

e) Correcting Low Public Opinion of the Courts

A major difficulty in Afghanistan is the negative public views of the courts and their Makhzans and their lack of transparency in administration. Several options would have to be explored to correct these deficiencies, such as:

- (1) remove the administration of the recording deeds and describing properties in maps from the direct administration of judges and courts, and make those functions more administrative in nature.
- (2) emphasize the professional competence of the Registrars, making the Registrars accountable to the local community through audit and oversight or periodic direct, non-partisan election,
- (3) simplify procedures (e.g., minimizing tax collections as part of transaction procedures, and minimizing planning conformance, etc.),
- (4) remove or drastically reduce the transaction tax.

f) Decentralization or Centralization of the registration functions.

A formal deed recording system will probably not work if it is distant from the population, and if its procedures are mystifying and costly for the general population to use. The present deed recording system is quite decentralized, in that it relies on the District Primary Court Judge to initiate the documentation of transactions for properties in his District. The Circular Form outlines what local government agencies the seller has to visit for approvals of various sorts. The only trip required for rural land owners is to the Provincial Makhzan archives, to obtain certification that the seller has a valid ownership deed for the property being transacted. The District Primary Court Judge is involved in the final preparation of the deed for transferring rights to the property. The system is decentralized.

One proposal for a new Office for the Registration of Legal Documents would have it function in the Provincial Capital, and would probably eliminate the local Primary Court from having its presently substantial role in transactions. The proposal would to a degree centralize the deed recording process. But perhaps with having a more efficient service the total time needed to carry out a transaction could be less than it is now.

If it is decided to decentralize the deed recording offices, and open a service in each District, there would probably be relatively few transactions each month, meaning that it would probably be more difficult to generate sufficient fees to finance the functioning of the office. In that case, one option is to combine two or three Districts into one Registration Office. It may also make sense to economize on administrative costs of offices and staff, and create local deed recording offices which combine the recording of deeds with the registration of births, deaths, marriages. The fees generated from all of these activities would help finance the secretarial staff, office space, heating, light and supplies. Also, the existence of evidence about the identity of parties to transactions in the local recording office along with the deeds archives would facilitate the verification of the identities of parties to transactions.

g) Easy Access to Information about Property Rights

One of the means for reducing the perceptions of corruption in administrative systems is to make the information stored in the system publicly accessible. This accessibility is even more important for the deed recording system, which has as a major function the displaying “for the entire world” who has what rights to what properties. It is a common international phenomenon for bureaucratic agencies which have a monopoly on information to jealously guard the portals into the archives, and earn “rents” on giving access. Such behavior would be very damaging to the public service functions of the deeds recording system.

In this regard, information technology can be of help. Unlike physical record based archives, making digital copies of documents recorded in the archives, and making those digital copies accessible, can facilitate access to the copied documents without allowing any changes to be made.

In any case, the free flow of information can be a major stimulus to the market economy and can provide evidence that the information contained in the property archives is secure and accurate.

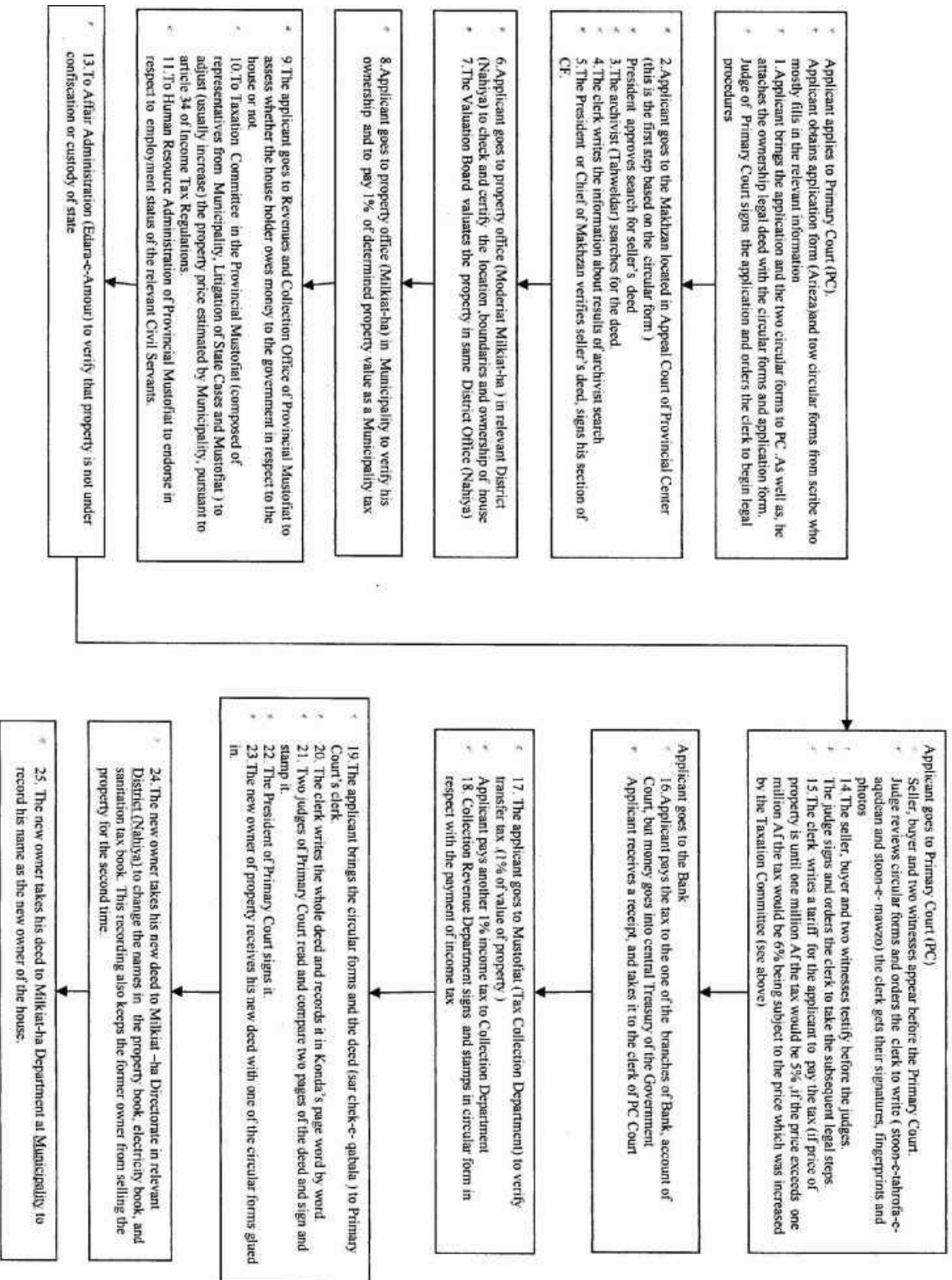
How to assure this free flow of information is a topic worthy of serious attention.

3. Conclusions

In summary, the existing deed recording system has positive features. Notwithstanding these positive features, the system is plagued by a significant disorder in the document archives. Organizing these paper deed archives and preserving the deeds through digital backup archives as well as introducing immediate improvements in the existing systems will be major improvements that can “stop the hemorrhaging” in the registration system. However, these improvements will not be sufficient to correct all of the problems of the existing system.

A reform commission could be formed to consider how a “re-engineering” should be done to produce a modern deed recording system. The phases and funding needs of this re-engineering should be encapsulated into some sort of Deed Recording Action Plan so that over a period of years the investments can be made in an additive manner, resulting in the desired efficient, transparent and accessible property rights registration system.

STEPS FOR THE PREPARATION OF NEW OWNERSHIP DEEDS DUE TO THE SALE OF HOUSES IN KABUL

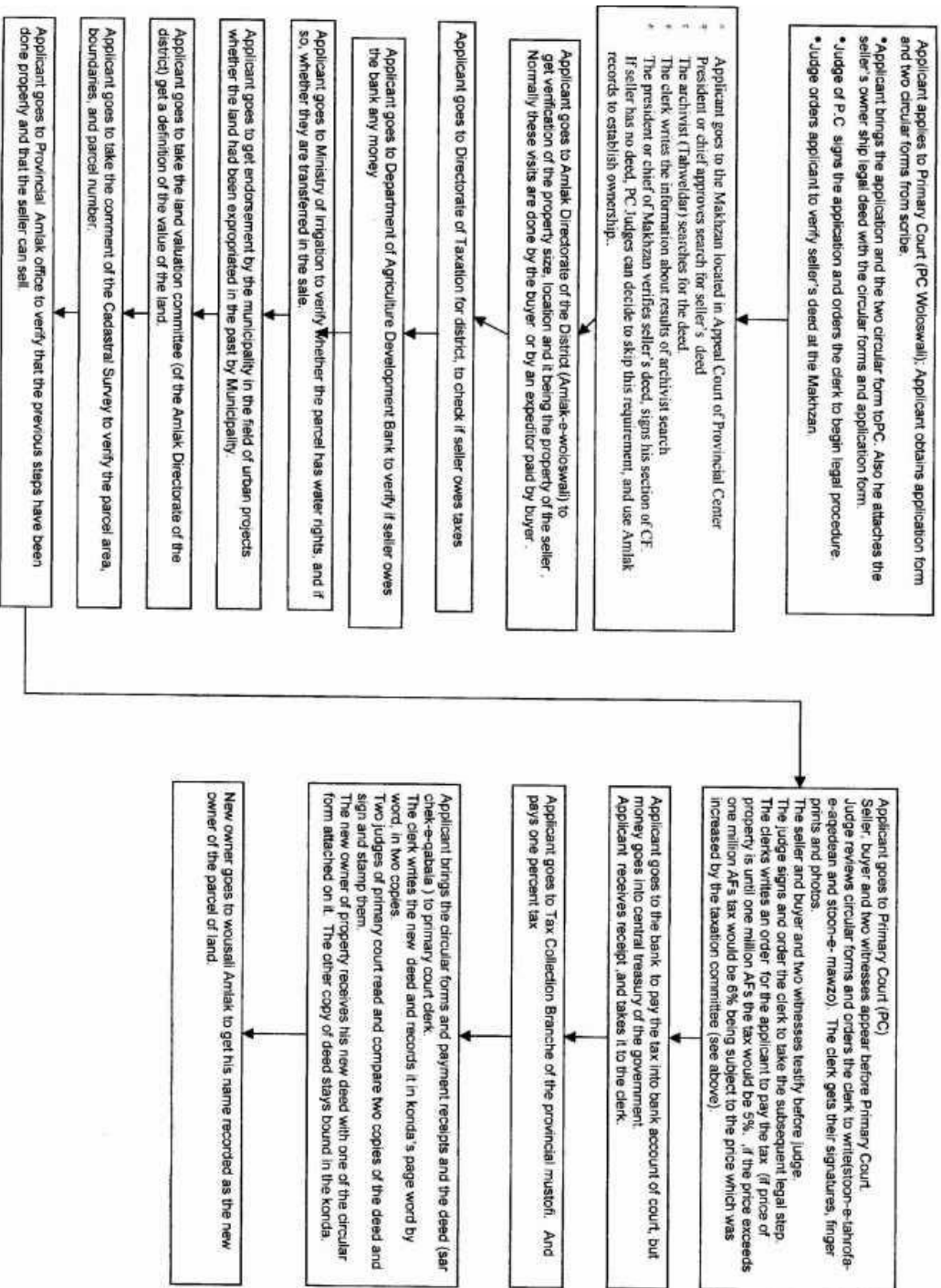


Annex 1: Steps in a House Sale in Kabul

6 May, 2005

Note: Normally the Seller starts the process at the Primary Court. The buyer or expeditor hired by the buyer normally completes the remaining required steps in getting a new deed prepared.

STEPS IN PREPARING A TITLE DEED FOR THE SALE OF A LAND PARCEL IN WOLUSWALI (RURAL DISTRICT)



Annex 2: Steps in a Rural Land Sale in Afghanistan