

The Stolen Lands of Afghanistan and its People

The Legal Framework

Part 1 of a 3 Part Series



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Summary

This report is the first in a series of three on issues related to theft of state and private lands by private individuals, armed groups, communities, the government and the state. This report, which provides the foundation for the subsequent reports, is issued separately and stands alone as a summary of the basic legal framework for land administration and management (A&M) in Afghanistan.

The UNAMA Rule of Law Unit (Unit), consisting of staff at seven regional field offices and HQ staff in Kabul, conducted research in support of this report consisting of a review of the laws, regulations and executive decrees related to land,¹ with focus on application and implementation at the national and subnational levels, and assessment of land related draft laws listed in the Afghan legislative priority list for 2014-2015.² The Unit also reviewed existing land related research and reports, and conducted interviews with national stakeholders.

A basic understanding of the existing legal framework, including its shortcomings, is a prerequisite to effectively identifying, assessing, and addressing the burgeoning threat posed by wide-scale theft of lands in Afghanistan. Issues such as inequitable or inconsistent implementation, lack of transparency or accountability, and the relationships of land issues to political and economic instability and conflict are not presented here, but will be addressed in the remaining two reports.

Land is a commodity with high market value that easily converts to political and economic power. An effective legal framework for land (A&M) contributes to political and economic stability, sustainable governance, and robust rule of law. Afghanistan's current lack of an effective and cohesive land A&M legal framework has led to the emergence of a flourishing and expanding informal land market and "land mafias" comprised of the same power brokers working both inside and outside the government. These individuals and groups form the self-serving illicit political economy in Afghanistan. This illicit political economy frustrates infrastructure development, mining, and other nationally-based programs, as well as those who engage in legitimate business ventures and subsistence farming—all of which detrimentally impact national revenue production. Whether related to the opium trade, extractive industries, or land transactions, land conflict drivers likely affect a far greater proportion of the Afghan people

¹ Although laws are published in the Official Gazette, they are not indexed and amendments are not systematized. Regulations and executive decrees are not published and are not publicly available. This report relies on available laws, regulations, and executive decrees, and is limited in this regard.

² The Ministry of Justice, Taqin Department, the department responsible for legislative drafting, issues a yearly legislative priority list. The legislative priority list for Afghan solar year 1393, corresponding to 21 March 2014 to 21 March 2015, lists the following laws relevant to land and land interests: the Land Management Law and Law on Jirgas and Councils. The Law on Obtaining Rights was listed as a priority in Afghan solar year 1392, 21 March 2013 to 21 March 2014. Those laws not addressed in the year designated roll over to the following year although not listed.

on a daily basis than the ongoing military conflict and perpetuate the no-peace/no-war status quo.³

By Executive Decree 83 of 2003, all untitled land in Afghanistan is owned presumptively by the state.⁴ The Afghanistan Research and Evaluation Unit, an independent research organization based in Kabul, has been actively researching land issues since its establishment in 2002, and estimates that at most 10% of rural lands and 30% of urban lands were titled in the Post-Bonn period.⁵ Private individuals without title can assert ownership and obtain title based on customary tenure if they can meet certain requirements outlined in the Land Management Law (LML) of 2008.⁶ It is unknown how many individuals have successfully asserted ownership and obtained land titles pursuant to the LML and whether this process is a viable legal option. Numerous expert commentaries opine that the existing LML fails to protect customary land tenure because of its unrealistic and often unattainable requirements that rely on documents to establish legal ownership and convert such documents into a formal deed.⁷ Further, it is unknown how much untitled land is being used in some fashion by the government, is part of a government development project, or is claimed by the government, any of which could negate a claim of customary or formal ownership by those individuals who occupy and/or use the land.⁸

³ See LIZ ALDEN WILY, AFG. RES. & EVALUATION UNIT [AREU], LAND RIGHTS IN CRISIS—RESTORING TENURE SECURITY IN AFGHANISTAN (2003), available at https://www.ecoi.net/file_upload/1329_1211898466_land-rights-in-crisis-ip.pdf (stating that land ownership issues are the key source of conflict in Afghanistan).

⁴ See Exec. Decree 83, art. 3 (2003) (concerning landed properties); see also AFG. CIV. CODE arts. 481-82 (1977); Land Management Law, art. 3(8) (2008) [hereinafter LML]; see also CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, adopted Jan. 3, 2004, art. 79 [hereinafter CONST.] (providing that “[d]uring the recess of the House of Representatives, the Government shall, in case of an immediate need, issue legislative decrees, except in matters related to budget and financial affairs. Legislative decrees, after endorsement by the president, shall acquire the force of law. Legislative decrees shall be presented to the National Assembly within thirty days of convening its first session, and if rejected by the National Assembly, they become void.”). *Id.* These types of legislative decrees are not generally referenced as legislative decrees but rather are referenced as executive (presidential) decrees and are not distinguished from executive decrees that are not legislative in nature. Executive decrees that are not legislative in nature, but rather an exercise of the executive’s functions, cannot modify existing law; only legislative based executive decrees have the force of law. This failure to distinguish is a significant shortcoming in the legal system. See also *infra* note 94.

⁵ LIZ ALDEN WILY, AREU, LAND, PEOPLE AND THE STATE OF AFGHANISTAN: 2002-2012 (2013), 22, available at <http://www.areu.org.af/Uploads/EditionPdfs/>. The Post-Bonn period referenced commenced in early 2002.

⁶ See LML, art. 8 (providing for legal ownership and obtaining a title deed based on customary tenure subject to certain conditions, including possession for thirty-five years and visible cultivation or occupation, as established by neighbors).

⁷ See *id.* art. 5 (defining “legally valid documents” for purposes of recognizing a deed as legal); *id.* art. 6 (converting “legally valid documents” into a deed); see also LIZ ALDEN WILY, AREU, LAND GOVERNANCE AT THE CROSS ROADS; A REVIEW OF AFGHANISTAN’S PROPOSED NEW LAND MANAGEMENT LAW 7 (2012), available at <http://www.areu.org.af/Uploads/EditionPdfs/1212E%20Land%20Reform%20I%20BP%20Oct%202012.pdf>.

⁸ See LML, art. 8(1); see also Exec. Decree 83, *supra* note 4 (providing that certain state land is not subject to a private claim of land rights based on customary tenure: “property registered as GIRoA land shall remain thus . . . any land regarded as public for more than 37 years is public land . . . waterways and wells on public land should belong to the public . . . distributed public lands without homes built on them shall revert to being public lands . . . public lands registered by former governments shall remain as public lands”). *Id.* at arts. 2., 3, 4, 5.

Assuming *arguendo* that private ownership can be established, there are disincentives to formally obtaining and registering title to land through the courts. The high costs⁹ and lack of accessibility to the courts¹⁰ hinder landowners, particularly those relying on customary tenure, from formalizing their ownership rights by obtaining and registering a title deed. Additionally, a title or registration of title is no guarantee of establishing ownership and obtaining land rights. Title deeds may be registered with numerous institutions at several locations, creating significant opportunities for fraud and corruption with multiple titles being registered at different locations for the same or overlapping areas of land.

Various laws and institutions secure state land rights;¹¹ however, no comparable laws or institutions are in place to support private land ownership rights. With a focus on and preference for identifying and safeguarding state land rights, the current land framework fails to sufficiently address and balance private ownership rights with the state's need to obtain and access land for infrastructure and revenue-producing projects, such as mining. State seizure, or the taking of lands for public use and benefit, without corresponding community involvement or adequate compensation, has highlighted the issue of private land ownership based on customary tenure and the inadequacies of the current land titling and registration system.¹² State distribution of valuable state lands to the politically and economically elite for their personal use and private development projects, along with the government's failure to act against powerful individuals who illegally occupy government land, have further widened the gap between the government and the people.

Numerous institutions and bodies exist in Afghanistan to resolve land disputes, including both "formal"¹³ and "informal"¹⁴ systems, as well as a "hybrid"¹⁵ justice system. The formal justice

⁹ Under existing practices, a fee of from 1-2% of the property's value is assessed—in addition to other fees, including bribe money—to obtain and register a title to land.

¹⁰ The courts are responsible for issuing titles to land. *See infra* Sec. C(3). To date, a significant number of district level courts operate from provincial capitals or other locations because of security concerns.

¹¹ *See* Government Cases Law, arts. 4, 6-7 (2013) [hereinafter GCL] (establishing the Government Cases Department of the Ministry of Justice with powers, responsibilities, and duties to assert and protect state rights in all cases involving state lands to include initiating and defending cases); *see also* Supreme Court Directive 79 (2013) (providing that the government does not need to prove occupation or control of land in any case in which the government is asserting government ownership).

¹² *See* Ministry of Mines, *Mining for Sustainable Development of Afghanistan: Resettlement Action Plan for 5 Villages at Aynak Copper Mines*, World Bank Project on Sustainable Development of Natural Resources (Jan. 2012) (by Harjot Kaur), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/01/21/000333037_20130121140023/Rend ered/PDF/RP1381v10Afgha01017020130Box374312B.pdf.

¹³ The "formal" justice system relates to those institutions, practices and procedures that are established or provided for by law (e.g., the Constitution, statutes, or regulatory frameworks). The formal system includes, but is not limited to, the Supreme Court, Attorney General's Office, Ministry of Justice (MoJ), Ministry of Interior (MoI), the Independent Directorate of Local Government (IDLG), Ministry of Rural Rehabilitation and Development (MRRD), and other ministries and institutions established by law.

system is considered corrupt by many, with nearly a third of all respondents surveyed in 2013 indicating that they had encountered corruption when interacting with the judiciary and courts.¹⁶ Although decisions by informal mechanisms generally are not recognized by the formal system, including the police, many prefer the informal system for resolving private land disputes.¹⁷ Women face significant impediments to asserting their land rights to *mahr* (dowry) or those acquired through inheritance because of cultural norms and the lack of access to either the formal or informal systems.¹⁸ Disputes involving alleged state lands are addressed by the formal justice system with the state actively involved in pursuing and defending disputes involving state and government lands.¹⁹ This plethora of dispute resolution mechanisms and institutions creates ambiguity, encourages forum shopping, and undermines the legitimacy, consistency, and enforcement of land dispute decisions.

Finally, the land A&M framework is materially and critically lacking in failing to effectively criminalize land grabbing. Land grabbing has not been criminalized as such. Although the AGO states these cases can be criminally prosecuted as theft, such offense carries a maximum sentence of 2 years imprisonment, an inadequate period of incarceration to provide a disincentive to land grabbing. In addition, provincial prosecutors have advised the Unit that land grabbing cases are not being criminally prosecuted because of a Criminal Procedure Code provision that precludes a criminal case until a related civil case, on which the criminal case depends, is finalized.²⁰ Although civil cases can take lengthy periods of time to finalize, one would nonetheless expect to see a number of land grabbers criminally prosecuted. However, the research of the Unit disclosed no criminal prosecutions for land grabbing countrywide. The weak and ineffective land A&M system, coupled with an inability and apparent unwillingness to criminally prosecute land grabbing, is tantamount to an open invitation to steal land in Afghanistan.

¹⁴ The “informal” justice system relates to those institutions, practices, and procedures that are not established or provided for by law or recognized by the government as legitimate institutions.

¹⁵ The term “hybrid” justice system includes those institutions, practices, and procedures that are not specifically based in law but are recognized by, and often implemented under the direction of, formal institutions. These include dispute mechanisms proposed by international donors and “approved” by the IDLG and MRRD that lack statutory basis and arguably exceed the power of the institution. *See infra* Section 5..

¹⁶ *See* Asia Foundation, *Visualizing Afghanistan, A Survey of the Afghan People* (2013), available at <http://afghansurvey.asiafoundation.org/is-corruption-a-major-problem-in-your-daily-life>

¹⁷ *See generally* COLIN DESCHAMPS & ALAN ROE, AREU, LAND CONFLICT IN AFGHANISTAN: BUILDING CAPACITY TO ADDRESS VULNERABILITY (2009), available at <http://www.areu.org.af/Uploads/EditionPdfs/918E-Land%20Conflict-IP-web.pdf>. In addition, if neither party holds title—which is often the case—the parties may be reluctant to bring the case to a formal court where the judge may decide that the land is state land.

¹⁸ *See* UNWomen, *Women Right to Heritage and Property*, Research Report, 2011, 1-2 (finding that women face increased impediments to accessing land rights in Afghanistan because of cultural norms, corruption, lack of accessibility of formal courts, and lack of knowledge and information about land rights). *See also id.* at 11, 14-15, 17-18, 25.

¹⁹ *See supra* note 11.

²⁰ The Penal Code does not criminalize land grabbing. *See also infra* notes 171-175 and accompanying text.

An effective land A&M framework must be clear and unambiguous, recognize customary private and community land tenure, fairly balance competing land rights and needs, and provide for effective criminal sanctions for land grabbing. Such a framework is critical to strengthening economic stability, government infrastructure development, and revenue-producing programs, all of which contribute to security and rule of law in Afghanistan. There are many challenges to developing and establishing such a framework, most notably a lack of will on the part of the politically and economically elite—the primary beneficiaries of the current illicit land economy—to address these challenges. With a newly installed government, there may be opportunities to address some of the more critical issues facing land development in Afghanistan as part of a long-term plan to move the current system toward a twenty-first-century model. Prioritizing these critical elements, refining the long-term integrated strategic policy for land development, and establishing a group such as a Civil Law Reform Working Group to provide technical support in developing and drafting land related legislation and regulations could support land development by providing the necessary roadmap to implement a well-drafted, unambiguous, and consolidated land A&M framework through legislation that reflects international best practices.

Table of Abbreviations

A&M	Administration and Management
AGO	Attorney General's Office
CoM	Council of Ministers
CSO	Cadastral Survey Office
DDDR	Directorate of Documents and Deeds Registration
DoJ	Department of Justice, the provincial office of the Ministry of Justice.
GCD	Government Cases Department
GCL	Government Cases Law
IDLG	Independent Directorate for Local Governance
LEL	Land Expropriation Law
LML	Land Management Law
LOR	Law on Obtaining Rights
MAIL	Ministry of Agriculture, Irrigation and Livestock
MAU	Municipal Amlak Unit
MoF	Ministry of Finance
MoI	Ministry of Interior
MoJ	Ministry of Justice
MRRD	Ministry of Rural Rehabilitation and Development
MUDA	Ministry of Urban Development Affairs
NSP	National Solidarity Program
OSCL	Organization and Structure of the Courts Law
PDR	Protected Document Registry

A. The Significance of Land in Afghanistan

Land ownership disputes are estimated to be the cause of over 70% of all serious crimes (murder and crimes of violence) in Afghanistan.²¹ Recent research completed by the Asia Foundation concludes that 80-90% of all disputes, criminal and civil, are resolved by the informal system.²² Several reports indicate that land-related disputes and crimes make up 50-70% of all cases in the informal system,²³ with over 50% of all cases in the formal system relating to land ownership.

A recent report from the Ministry of Agriculture, Livestock and Irrigation (MAIL) reports that over 1.5 million jireeb of land has been grabbed in Afghanistan, including nearly 15% of all arable land. These lands are taken by local heavy-handed commanders, ethnic leaders, village leaders, wealthy people with illegal revenues, Afghan National Police and corrupt and opportunistic government officials. Land is stolen through force, but also – and increasingly – through forged documents with complicity or involvement of the courts and government officials. Governance frameworks for land A&M and related government institutions are seriously lacking and fail to provide sufficient oversight or checks and balances to address land grabbing.

Well-defined land ownership is critical to Afghanistan's economic development, sustained growth, and increased stability and is dependent on establishing and protecting land ownership rights within a strong and effective land A&M statutory and regulatory framework. This report summarizes Afghanistan's legal instruments relevant to land tenure;²⁴ identifies challenges to the development and implementation of an effective, fair, and enforceable land A&M framework;²⁵ and proposes areas of focus for future consideration.²⁶

²¹ See NOAH COBURN & JOHN DEMPSEY, U.S. INST. OF PEACE, *INFORMAL DISPUTE RESOLUTION IN AFGHANISTAN* (2010), available at http://www.usip.org/sites/default/files/resources/sr247_0.pdf.

²² ASIA FOUND., *AFGHANISTAN IN 2006; A SURVEY OF THE AFGHAN PEOPLE* (2006), available at <http://asiafoundation.org/publications/pdf/21>.

²³ *Id.*

²⁴ Land tenure issues focus on land titling and registration and the protection and enforcement of land rights (dispute resolution mechanisms). This report is limited to a review and assessment of the relevant justice institutions and Arazi. This report does not specifically address governance institutions or actors, such as provincial councils or governors, respectively, or ministries or institutions relevant to land that are not justice institutions, such as the Ministry of Mines and Ministry of Agriculture, Irrigation and Livestock. These will be examined in a future reports focusing the distribution of state lands and land grabbing.

²⁵ This report is not intended to be comprehensive, but rather it highlights the main challenges facing Afghanistan for establishing and implementing a twenty-first-century land A&M framework that reflects relevant best practices given the current legal framework.

²⁶ This report does not include land planning issues (e.g., zoning, urban planning, land use, etc.) or issues specific to returnees and internally displaced persons.

B. Land Administration and Management (A&M): Related Laws

There are over thirty laws, decrees, and documents that relate in some fashion to land A&M in Afghanistan.²⁷ The basic provisions of the relevant laws are summarized below in a “snapshot” manner. Other laws and decrees are referenced throughout this report where applicable.

1. Afghanistan Constitution

The Afghanistan Constitution, passed in 2004, authorizes personal land ownership (except by foreigners)²⁸ and protects land from state seizure unless the seizure is to secure a public interest and the owner is provided with prior and just compensation.²⁹ The Constitution also establishes that mines and other subterranean resources belong to the State.³⁰ In addition, the Constitution mandates land and housing distributions under certain conditions.³¹

2. Afghanistan National Land Policy

In 2007, the CoM adopted the Afghanistan National Land Policy developed by MAIL. The Policy’s objectives are to “[p]rovide every Afghan access to land, [p]romote and ensure a secure land tenure system, [e]ncourage the optimal use of land resources, [e]stablish an efficient system of land administration [and] [e]nsure that land markets are efficient, equitable, environmentally sound and sustainable to improve productivity and alleviate poverty.”³² The Policy sets forth over twenty separate policies, each addressing a specific issue impacting land tenure. These issues include: tenure insecurity;³³ lack of equity, transparency, and accountability in the distribution and acquisition of land;³⁴ competing systems for characterizing land;³⁵ lack of integration between the formal and informal systems;³⁶ land grabbing;³⁷ informal and unplanned

²⁷ See *infra* Annex 1. Both hard and soft copies of all documents in the Annex are available upon request to UNAMA RoL Unit. The land administration and management system in Afghanistan is established by a legal framework highly influenced by Islamic property law and principles; see also INTERNATIONAL NETWORK TO PROMOTE RULE OF LAW, PRACTITIONER’S GUIDE TO ISLAMIC LAW (2013), available at <http://www.inprol.org/publications/inprol-islamic-law-guide>.

²⁸ See CONST, art. 41 (2004) (setting forth foreigners’ right to lease land and obtain property rights to commercial, retail, and industrial property, as well as agricultural and residential land in the form of leasehold not to exceed fifty years).

²⁹ See *id.* art. 40 (providing that “[p]roperty shall be safe from violation. No one shall be forbidden from owning property and acquiring it, unless limited by the provisions of law. No one’s property shall be confiscated without the order of the law and decision of an authoritative court. Acquisition of private property shall be legally permitted only for the sake of public interests, and in exchange for prior and just compensation”).

³⁰ See *id.* art. 9 (providing that “[m]ines and other subterranean resources as well as historical relics shall be the property of the state”).

³¹ See *id.* art. 14 (providing that the state “shall adopt necessary measures for provision of housing and distribution of public estates to deserving citizens in accordance with the provisions of law and within financial possibilities”).

³² Land Policy, art. 1.3 (2007).

³³ *Id.* art. 2.1.1.

³⁴ *Id.* art. 2.1.2.

³⁵ *Id.* art. 2.2.1.

³⁶ *Id.* art. 2.2.2.

developments;³⁸ lack of mechanisms to protect property rights;³⁹ competition for pasture land;⁴⁰ proof of rights to land;⁴¹ bias in land distribution;⁴² overlapping and uncoordinated land management systems;⁴³ overuse and underuse of land;⁴⁴ dispute resolution;⁴⁵ and environmental sustainability.⁴⁶

3. Land Management Law

The Land Management Law (LML) of 2008 sets forth the basic framework for land A&M in Afghanistan. The LML vests all land management and ownership-related affairs in the MAIL.⁴⁷ In 2010, state land management authority was transferred from the Afghan Land Authority (ALA) to Arazi⁴⁸ by decision of the CoM.⁴⁹ By this decision, Arazi was granted all the authority and the responsibilities of AMLAK, ALA, and the Independent Commission for the Restitution of Illegally Occupied Land and has a primary role in carrying out many of the directives of the Land Management Law. In 2013, Arazi became independent from MAIL by executive decree.⁵⁰

The current law covers the following areas: obtaining title deeds; settlement of land with regard to ownership; restoration of appropriated lands to their owners; land distribution; transfers and alterations of land; land leasing; pastures; civil and criminal penalties, including usurpation; and other miscellaneous provisions. The LML predates the executive decree that established Arazi as

³⁷ *Id.* art. 2.2.3; *see infra* note 170 and accompanying text. Although the Land Policy references land grabbing, it does not define it. For purposes of this report, land grabbing is defined as the use, control, occupation, or ownership of land by one without a *bona fide* right.

³⁸ *Id.* art. 2.2.4.

³⁹ *Id.* art. 2.2.5.

⁴⁰ *Id.* art. 2.2.6.

⁴¹ *Id.* art. 2.2.7.

⁴² *Id.* art. 2.3.1.

⁴³ *Id.* art. 3.1.2.

⁴⁴ *Id.* arts. 3.1.1, 3.1.5.

⁴⁵ *Id.* art. 3.1.8.

⁴⁶ *Id.* art. 3.1.9.

⁴⁷ *See* LML, art. 4 (2008).

⁴⁸ Arazi is the Dari word for “land.”

⁴⁹ *See* Cabinet of Ministers Decision 24 (2009) [hereinafter CoM Decision 24]; Cabinet of Ministers Decision 23 (2010) [hereinafter CoM Decision 23]. On 31 August 2009, the Cabinet of Ministers through Decision 24, followed by Decision 23 of August 2010, merged Amlak with the Independent Commission for the Restitution of Illegally Occupied Land, which was created by Executive Decree 638 of 22 April 2010, and the Afghan Land Authority (ALA), naming the resulting organization Arazi. Amlak offices in municipalities did not merge with Arazi, but continue as Amlak offices governed by the Municipality Law; *see infra* notes 74, 75. This distinction between urban (Amlak) and non-urban lands (Arazi) is material.

⁵⁰ *See* Exec. Order 11 (2013) (establishing Arazi as independent from MAIL and, at the same time, merging the Cadastral Survey Department of the Afghanistan Geology and Cartography High Office (AGCHO) with ARAZI for better coordination of land related activities and services, with all structure and service transferred to ARAZI.).

independent from MAIL. The LML has not been amended to reflect this change; however, this law is on the MoJ's current list of legislative priorities.⁵¹

The most significant aspects of the LML include provisions for customary tenure ownership,⁵² registration of ownership in property books,⁵³ establishment of provincial settlement commissions,⁵⁴ provision for and requirements of state land distributions,⁵⁵ and penalties for land grabbing.⁵⁶

The LML provides for the recognition of land ownership based on customary tenure. A private person occupying land without a title can obtain a title if he has occupied the land for over thirty-five years and has publicly occupied it or farmed it, as attested to by his neighbors.⁵⁷ This right is abrogated if the land is deemed to be part of a government project.⁵⁸ In addition, a person without title can obtain a title deed if he can show that the land is recorded in his name in the record books, that he has engaged in permanent farming (a life undertaking), and that he has paid taxes for at least forty years.⁵⁹

The LML also establishes land settlement commissions⁶⁰ that are endowed with extensive powers to settle land disputes, record resolutions with Arazi, make recommendations for land distributions, issue land distribution and possession certificates, and restore illegally distributed land to the rightful owner.⁶¹ Settlement commissions are fully operational in many provinces and are instrumental in resolving land disputes,⁶² as well as requesting and recommending the distribution of government lands to private citizens.⁶³

Under the LML, only the president, upon the recommendations of the settlement commission and the MAIL and subject to the CoM's approval, is authorized to transfer state land to private citizens who are eligible for land distributions.⁶⁴

⁵¹ See *supra* note 2.

⁵² See LML, art. 8.

⁵³ See *id.* art. 15.

⁵⁴ *Id.* ch. 3; see also *infra* Sec. C(1)(b).

⁵⁵ See LML, chs. 5-6. The LML specifies that state lands may be distributed on the MAIL's recommendation and upon the president's approval for a just price as established by the settlement commission. *Id.* art. 39.

⁵⁶ See *id.* ch. 10.

⁵⁷ *Id.* art. 8.

⁵⁸ *Id.*

⁵⁹ *Id.* art. 27.

⁶⁰ *Id.* art. 13(3).

⁶¹ *Id.* art. 15; see also *id.* ch. 3.

⁶² *Id.* arts. 15(1), 15(4).

⁶³ *Id.* art. 15(1).

⁶⁴ *Id.* art. 39(2). The LML provides that "land may be distributed to eligible persons on the recommendation of the ministry of agriculture, irrigation and livestock and upon approval by the president . . ." *Id.*; see also *id.* art. 34 (outlining eligibility requirements).

Although the LML contains a provision stating that those who usurp land are “subject to prosecution,” the provision is worded broadly, does not include the definition of usurpation, and most importantly fails to state any penalty, thus rendering this provision legally defective and unenforceable.⁶⁵ Nor is any such specific crime for land grabbing in the Penal Code,

Expert reports have discussed the need to reform the existing LML to reflect the establishment of the newly independent Arazi, harmonize this law with the National Land Policy, provide for increased land tenure, identify different types of land holdings, address land grabbing, resolve issues of land management at the local level, and address the courts’ role in issuing titles while also adjudicating disputes.⁶⁶ The LML underwent significant review and an amended LML was put before the Assembly in 2013 to address identified contradictions, ambiguities, and lacunae. These amendments have not gained traction in the Lower House of the Assembly and are currently under review in the Taqin Department in the Ministry of Justice (MoJ).⁶⁷

Although at least one land-related report assessed the land A&M framework,⁶⁸ a full review and assessment of the existing laws, such as the Mining Law, Law on Obtaining Rights, Civil Procedure Code, Civil Code, Penal Code, and several executive decrees, does not appear to have been part of the LML review process. Thus, the proposed amendments fail to establish a comprehensive land A&M framework and do not specifically identify or address the inconsistencies with or gaps among the existing land-related laws. Such a comprehensive framework is necessarily complex, possibly requiring separate but integrated laws rather than an overarching omnibus law that is all inclusive.

4. Organization and Structure of the Courts

The recently updated and adopted Organization and Structure of the Courts Law of 2013 (OSCL) established the structure and jurisdiction of the courts and subsidiary bodies and organs in Afghanistan.⁶⁹ The courts’ structure, as set forth in this law and as relevant to land and land issues, is explored fully below.⁷⁰ Of note, the OSCL continues to vest the courts with the authority to issue and register land titles.⁷¹

⁶⁵ *Id.* art. 88 (providing “[a] person who usurps the state land, or falsely introduces himself as the landowner, he shall be dispossessed and be subject to legal prosecution”); *see also* CONST. art. 27.

⁶⁶ *See* WILY, *supra* note 5; LIZ ALDEN WILY, AREU, LAND, PEOPLE AND THE STATE OF AFGHANISTAN: 2002-2012 (2013), available at <http://www.areu.org.af/Uploads/EditionPdfs/1303E%20Land%20II%20CS%20Feb%202013.pdf>.

⁶⁷ The Taqin Department of the MoJ is responsible for legislative drafting and legal review of drafts.

⁶⁸ *See* USAID, LARA Project, *Property Assessment: Land Reform in Afghanistan* (2011).

⁶⁹ *See* Organization and Structure of the Courts Law (2013) [hereinafter OSCL] (recently amended and passed in 2013).

⁷⁰ *See id.*; *see also infra* Sec. C(3).

⁷¹ *See* OSCL, art. 74 (establishing the Documents and Deeds Registration Directorates).

5. Law on Obtaining Rights

The Law on Obtaining Rights (LOR) was enacted in 1999 to regulate methods for real and legal persons to obtain civil and commercial rights and to elaborate on the methodology for obtaining such rights.⁷² The LOR designates the Huqooq Department as the implementing department for the LOR throughout Afghanistan. The Huqooq is established as part of the MoJ in Kabul and in provincial capitals and districts, providing reach throughout Afghanistan. The LOR focuses on creditor/debtor issues, but also includes limited jurisdiction over land disputes.⁷³

The LOR provides for governmental cooperation in implementing the law, including police support in obtaining the parties' presence before Huqooq officials. However, the law does not specifically provide for legally recognized and enforceable dispute resolution through an agreement between the parties. Further, the LOR indicates that the Huqooq shall conduct no investigation and, if the claim is not supported or denied by the Huqooq, the case shall be transferred immediately to the civil court.⁷⁴ Proposed amendments to this law that specifically referenced land disputes and would have provided the Huqooq jurisdiction to mediate land disputes failed to pass the Assembly in 2013. An updated and amended LOR continues to be the focus of national attention.⁷⁵

6. Civil Procedure Code

Certain articles of the Civil Procedure Code of 1990 are relevant to land disputes, many of which are resolved informally. The Civil Procedure Code contains limited provisions for recording and enforcing land-related decisions reached through mediation or traditional dispute resolution mechanisms.⁷⁶ A settlement agreement may be registered with the court if a court action was filed previously and the settlement takes effect during the proceedings or court trial.⁷⁷ However, if the parties reach an agreement prior to filing a court action, such as through an informal dispute resolution mechanism, the Civil Procedure Code provides no basis for recording or enforcing such an agreement.⁷⁸

⁷² See Law on Obtaining Rights (1999) [hereinafter LOR] The Law on Obtaining Rights (LOR) does not reference commercial courts and thus the disposition of unresolved commercial cases is unclear. Under the OSCL, these cases are processed by the commercial courts or, in the absence of such courts, the civil courts.

⁷³ Although not specifically noted, the Huqooq's jurisdiction is broad enough to cover land disputes; however, land disputes involving state land are not within the Huqooq's jurisdiction. See, e.g., GCL (2013); Supreme Court Directive 79 (2013) (providing for differing procedures for cases involving state land).

⁷⁴ See LOR, art. 19 (providing that "[i]ssues concerning civil and commercial rights shall not be subject to investigation. If the claim was not supported by sufficient evidences or denied, based on civil procedure the case shall immediately be referred to the authorized court").

⁷⁵ See *supra* note 2.

⁷⁶ See CIVIL PROCEDURE CODE (1990); see also *infra* Sec. D (discussing the informal system).

⁷⁷ See CIVIL PROCEDURE CODE art. 231(2) (providing that "[i]f the settlement takes effect during the proceedings and the trial, the settlement is recorded in the decision and a judgment is issued allowing the settlement and an end to the dispute between the parties.").

⁷⁸ See *id.* art. 231(1) (providing that "[i]f the parties to the claim settle their differences prior to the commencement of the claim and the proceedings, their settlement is put in writing and their dispute is brought to an end.").

7. Municipality Law

The Municipality Law of 2000 contains provisions applicable to regulating and governing land within municipalities. Urban land and townships are not managed by Arazi as set forth in the provisions of the LML; rather, municipal land is controlled and managed by local governance officials under the management of the Independent Directorate for Local Governance (IDLG).⁷⁹ Amlak offices in the municipalities⁸⁰ support land management and maintain municipal land records.⁸¹ Certain plans and activities are subject to the Ministry of Urban Development Affairs (MUDA) approval.⁸² Arazi provides a number of land support functions to municipalities, but these functions are not administrative or managerial in function or scope.

8. Government Cases Law

The Government Cases Law (GCL) of 2013⁸³ established the Government Cases Department (GCD) within the MoJ as the mechanism to protect state land rights⁸⁴ through identifying and regulating legal disputes involving public lands.⁸⁵ The GCL applies to all cases involving public lands⁸⁶ and sets forth the GCD's responsibilities and authorities, which include: identifying usurped state lands; defending or filing civil cases that assert the state's land interests against private individuals or government institutions; providing legal representation to the state; resolving disputes between government institutions; and issuing rulings on land disputes between governmental institutions.⁸⁷ All rulings are sent to the Huqooq Department of the MoJ for

⁷⁹ See Municipality Law, arts. 2-4, 11-12 (2000); see also *id.* art. 5(4) (noting that Kabul City is not governed by the Municipality Law, but is governed by a separate Kabul city law.)

⁸⁰ Amlak only exists now at the Municipal level, because all but municipal Amlak offices were merged with Arazi. *Infra* at page 17, Sec. C.1.

⁸¹ See Law of Land Survey, Verification and Registration, art.10 (1976) (providing that “[land] forms shall be sent to the Central Amlak Archives through the Amlak branch office upon completion of the procedures for verification and registration of results in the log book, and for determining the boundaries in the new title deeds.”); see also *id.* art. 93 (noting that “ownership documents . . . shall be kept in the Central Archives for Property to safeguard the property records. A uniform title deed shall be granted to the owner. The A3 form shall be prepared by the Amlak branch of the relevant zone and shall be sent to the court in order to complete the ownership document, and to be recorded in the Secure Registry”).

⁸² See *id.* art. 3 (defining “Master Plan”); see also *id.* art. 12(23).

⁸³ See CONST. art. 71 (2003) (defining “government”). The term “government” is the widely used and accepted translation of this law. In accordance with the Constitution, government land is that land held and/or titled by ministries and departments (at provincial level), such as Ministry of Justice and Department of Justice, respectively. State land is not defined, but in usage refers to land owned by the central government (i.e., state). The difference in terms between the LML, Executive Decree 83, and the Civil Code creates ambiguity when clarity is required. Executive Decree 83 does not use the term “public” properties, while this term is used in both the LML and the Civil Code, but not in the same manner.

⁸⁴ See GCL, art. 2 (2013).

⁸⁵ See *id.* art. 3 (defining “public property” to include both state and government lands); see also *id.* arts. 2-3 (including both moveable and immovable public property within this law’s jurisdiction).

⁸⁶ See *id.* art. 2.

⁸⁷ *Id.* arts. 6-7.

enforcement.⁸⁸ As a practical matter, enforcement of these types of cases is difficult and requires police or political intervention to remove those illegally occupying the state land in instances where the court rules in favor of the state. The law does not vest the GCD with the authority to negotiate or resolve cases between the state or government and private individuals.⁸⁹

The Civil Procedure Code is not fully applicable to cases processed under the GCL. By executive decree, the state does not need to prove occupancy or control of the land; the burden of proving ownership is on the private or opposing party claiming ownership.⁹⁰

9. Expropriation Law

The Land Expropriation Law as amended in 2009 permits the state to take land for public purposes, with just compensation, upon approval by the CoM. The CoM also determines the price of the expropriated land.⁹¹ Provisions are set forth to appeal the price determination, but no mention is made of appealing a decision regarding a “public purpose” finding. The law does not contain a definition of “public purpose,” but lists a number of activities and projects that constitute “public purpose” projects.⁹² A land plot of the same value shall be given to whose land has been expropriated, if elected by the owner.⁹³

10. Executive Decree 83

Executive Decree 83, “Landed Properties,” issued by the president in 2003, which has the force of law,⁹⁴ addresses a number of land issues, with a focus on protecting state lands and increasing the legal recognition of state land ownership. This Decree provides that private ownership must be proven by “valid legal instruments,”⁹⁵ and that all untitled and unrecorded land belongs to the state.⁹⁶ The Decree does not provide for the recognition of customary ownership. Arguably, the LML, which was passed in 2008 and allows for proof of customary ownership, supersedes this Decree in that respect.⁹⁷

In addition to the foregoing, the Decree increases state ownership by providing that all lands owned by the state for thirty-seven years or more belong to the state and private claims cannot be brought against these lands. The Decree further provides that in any ownership dispute between a

⁸⁸ *Id.* art. 33.

⁸⁹ Although this dispute resolution authority is not set forth in the LOR, the law that establishes the Huqooq’s authorities and responsibilities, the Huqooq has been involved in land dispute resolutions involving state land and private citizens. The Assembly rejected proposed amendments to the LOR that would have significantly broadened the Huqooq’s authority to include these activities and others.

⁹⁰ See Supreme Court Directive 79 (2013); see also *supra* notes 11, 73.

⁹¹ *Id.* art.10.

⁹² *Id.* art. 2.

⁹³ *Id.* art. 13.

⁹⁴ This Decree was issued pursuant to constitutional authority. The Assembly took no action in regards to this Decree and it thus has the force of law indefinitely, or until rejected by the National Assembly.

⁹⁵ Exec. Decree 83, *supra* note 4, art. 7.

⁹⁶ *Id.* art. 3.

⁹⁷ See LML, art. 8 (2008).

private person and the state, the land shall be in the possession of the state until the matter is decided. The Decree also specifies that land on which the state has built public projects is the property of the state even if a private person holds a legal deed.

Additionally, this Decree provides that new surveys can be conducted only upon written instructions from the president and “through relevant organizations.”⁹⁸

C. Land A&M Related Formal Institutions: Legal Basis and Jurisdiction

Land A&M issues affecting land security involve nearly all formal (statutory)⁹⁹ institutions and governance officials, including, but not limited to: the Supreme Court; Office of the Attorney General (AGO); MoJ GCD; MoJ Huqooq Department; Arazi; IDLG; MAIL; Ministry of Energy; Ministry of Finance (MoF); Ministry of Interior (MoI); Ministry of Resources and Water; Ministry of Urban Development Affairs (MUDA); municipalities; provincial councils; governors; and mayors. Of these, the ones that are discussed in depth in this report are: (1) Arazi; (2) the MoJ’s GCD and Huqooq Department; (3) AGO; (4) Supreme Court; (5) IDLG; and (6) MUDA, with references to other institutions and subnational governance where appropriate.¹⁰⁰ In addition to these formal institutions, a plethora of informal (non-statutory) dispute mechanisms exist that are involved in the resolution of land issues and disputes. Although this report focuses on the formal system, a brief explanation of the informal system is included also because it forms part of the functional land M&A framework in Afghanistan.

1. Afghanistan Land Authority (Arazi)

The Afghanistan Government has been engaged in land administration, primarily as a means of collecting taxes, since the early 1900s. Historically, this activity was the responsibility of the MoI and MoF. Within the MoF, land reform was assigned to the Amlak (Afghanistan Land Affairs) in 1963, and transferred from the MoF to the MAIL in 1978. In 2010, the Amlak was merged with the Independent Commission for the Restitution of Illegally Occupied Land and renamed “Arazi.”¹⁰¹ This merger of the Amlak with Arazi consolidated more than 900 Amlak employees from 337 offices with offices spread across all thirty-four provinces. Of note, municipal Amlak offices were not merged with Arazi because of the authority held by municipalities under the Municipality Law.¹⁰² Despite the recent independence of Arazi from MAIL, prior Amlak

⁹⁸ *Id.* art. 15.

⁹⁹ *See supra* note 13.

¹⁰⁰ This report does not include an in-depth review of the role of sub-national governance institutions and officials. A subsequent joint report by the UNAMA Rule of Law and Civil Affairs Units focusing on transfer of state lands to private individuals will address these roles, as Part II.

¹⁰¹ *See* CoM Decision 24 (2009); *see also* CoM Decision 23 (2010).

¹⁰² The continued existence of Amlak offices in the municipalities is has created some confusion because not all non-municipal Amlak offices have assumed the title of “Arazi” and still consider their offices as part of Amlak. This suggests a significant communication issue between Arazi at the central and the subnational levels.

employees continue to be paid by the MAIL. Many such employees are unaware that they are now part of Arazi, and consider themselves as employees and part of the MAIL.

In 2013, President Karzai established Arazi as independent from MAIL, and also assigned Mr. Jawad Paikar as Chief Executive Officer to head the newly independent Afghanistan Arazi office.¹⁰³ Arazi was granted all the authority and responsibilities of Amlak and the Independent Commission for the Restitution of Illegally Occupied Land. As a result, Arazi is responsible for carrying out most of the LML's directives, despite that the LML has not been amended to reflect this merger and grant of authority. An Arazi presence -- at the regional, provincial, and district levels -- is facilitated through the transfer of all but the municipal offices of the Amlak structure to Arazi.

Arazi's budget is administered through the MoF. At the present time, over 80% of Arazi's operating costs are funded by international donors, including over 70% of Arazi's *tashkeel* (staffing).

a. Responsibilities and Authority

At the same time that Arazi was designated as independent, the state land management authority granted by the LML to the MAIL was transferred to Arazi.¹⁰⁴ As a result, Arazi is responsible for managing state lands throughout Afghanistan¹⁰⁵ and for providing land-related services to government institutions, individuals, and investors, including municipalities. Arazi is not authorized to manage municipality-owned lands,¹⁰⁶ but it is required to support municipality land needs by providing services for which they are responsible countrywide, including surveys, *Tasfiya*,¹⁰⁷ and other required land support services.

To effectively manage state lands and produce revenue through taxes, leases, and land development, Arazi is vested with authority in the following specific areas: (1) state-owned land inventory; (2) state land registration through the land rights identification process (*Tasfiya*); (3) land registration through the cadastral survey process (land survey);¹⁰⁸ (4) land transfers and

¹⁰³ See Exec. Order 11 (2013).

¹⁰⁴ The LML of 2008 was enacted prior to Arazi's creation and, therefore, does not assign specific tasks to Arazi. See LML, art. 4 (2008) (granting the MAIL responsibility for state land management in Afghanistan); see also *supra* note 101 (transferring responsibilities of Amlak to Arazi).

¹⁰⁵ See LML, art. 2 (noting that the objectives of this law include "[d]etermining and segregation of individual, state, as well as grazing, endowed, virgin and arid lands, jungles and so forth").

¹⁰⁶ See *supra* note 79 and accompanying text; see also Municipality Law, arts. 12(19), 18(2), 27(1), 27(4) (2000) (granting the municipality the authority to manage municipal lands).

¹⁰⁷ *Tasfiya* refers to the process of clearing title to government land as a material step in leasing government lands. Individuals often occupy land without title and the government asserts ownership either based on the law or under existing cadastral surveys. These "disputes" must be resolved before the land can be established as government land and made available for lease or for government infrastructure projects.

¹⁰⁸ Under existing law, only the president can order a new cadastral survey, creating serious challenges for private citizens whose land has not yet been surveyed.

exchanges, primarily to other government divisions; (5) leasing land to the private sector; and (6) resolving disputes involving state and public lands.

Under the LML, the MAIL is not authorized to transfer state lands to individuals; rather, Article 39 of the LML specifically states that the MAIL must recommend that the president authorize the transfer of state lands to individuals. Numerous conditions must be met, and the transferee must pay the value of the land over a period of time during which the land is considered “borrowed.” In practice, it appears that both Arazi and the MAIL currently exercise the authority to make recommendations.¹⁰⁹ These recommendations are part of a process that formally commences with Arazi’s land settlement commissions.¹¹⁰ These commissions were established by the LML with corresponding authority in the MAIL to recommend state land distributions and investigate and mediate land disputes. In addition to supporting the settlement commissions, Arazi provides the courts and the provincial Departments of Justice (DoJ) with evidence of the physical territory of disputed land; confirms legal ownership, such as through a title deed, taxes, water rights, and the like; assesses the land’s value; and confirms that the land is not under lease.

In practice, Arazi keeps records with respect to all land, both public and state, including maps, surveys, ownership records, and land transactions. This information is provided to other government institutions and private persons upon request, and it is regularly used by the Huqooq Department and the courts when land ownership and use is in dispute.

Arazi also records land transactions. The parties to a transaction must apply to the Directorate of Documents and Deeds Registration (DDDR) within the courts for certification of title prior to Arazi registering the title.¹¹¹

b. *Arazi Land Settlement Commissions*

Pursuant to Article 20 of the LML, Arazi engages in state land management at the provincial and district levels through settlement commissions set up at provincial capitals throughout Afghanistan. The commissions address land ownership issues between individuals and the government and between the government and government entities. In addition, the commissions make recommendations regarding state land distributions to private individuals. Their specific obligations and powers include:

1. Settlement of landholding areas, distribution of document and land.
2. Determining the limits, category, water rights, and tax of the land.

¹⁰⁹ A transfer of state land to individuals is not a transparent process and, it is unclear whether the MAIL or Arazi must make a recommendation to the president before he distributes state lands to individuals. . Although the LML states that the MAIL makes this recommendation, Arazi asserts this is within their powers as a result of subsuming Amlak’s role.

¹¹⁰ See *infra* Sec. C(1)(b).

¹¹¹ See *infra* Sec. C(3)(e).

3. Determining and segregating lands as individual or state, as well as grazing, endowed, virgin and arid, jungles, and so forth.
4. Referring disputes and lawsuits related to grazing, endowed, virgin and arid lands, jungles, and so forth to the competent authorities.
5. Registration of land settlement conclusions in the relevant book.
6. Referring the conclusions of land settlements for registration in Arazi's principal books of properties and tax collection and preparing legal documents for the relevant court.
7. Restoration of previously illegally distributed land to the owner or his legal heirs.
8. Sending performance reports to the relevant provincial land management department and the central land management organization.
9. Other duties for the purpose of enforcing provisions of the present law that are assigned by the MAIL.¹¹²

The provincial governor chairs the commission and participants include representatives from the Ministry of Energy, Ministry of Resources and Water, the Cadastral Survey Office, Amlak, Arazi, and others.¹¹³ Pursuant to the recently drafted Arazi manual "Dispute Resolution and Land Occupation," Arazi will be activating new offices in seven regions and will provide coverage for all provinces, including dispute resolution commissions.

The relationship between the role and activities of these commissions and those of the Huqooq and the GCD are unclear, and will be explored in future reporting.¹¹⁴

c. Cadastral Survey Office

Prior to its merger with Arazi in April 2013, the Cadastral Survey Office (CSO) was an independent Office of the General Geodesy and Cartography. The CSO operates only in certain larger provincial offices (e.g., Herat) as a "regional entity" with jurisdiction over other provinces (e.g. other western region provinces). However, there is a lack of clarity about its responsibilities to cover not only its own province but the surrounding region, including whether it is authorized to operate in other provinces only in extraordinary cases at the request of its HQ or the courts. Moreover, even if these offices have jurisdiction over a region, as a practical matter there is insufficient staffing and resources to do so.

The CSO does not determine ownership. The CSO specifies the territory, map, and measurements of a piece of land. Based on Article 9 of the Cadastre Law, when determining boundaries of a parcel of land, Cadastre officials consider the alleged landowner's the expressions and the acknowledgements of landowners in the vicinity, the Water Master (or

¹¹² See LML, art. 20 (2008).

¹¹³ *Id.* art. 14. These settlement commissions are operational in Kandahar and Herat. For the most part, membership is consistent with the LML.

¹¹⁴ See *supra* Secs. B(6); see *infra* Secs. C(2)(a)-(b).

Headmaster of Water), and local elders.¹¹⁵ The CSO retains an archive of maps and documents from lands previously surveyed going back to approximately 1969. It also responds to court or GCD requests to provide technical information and serves as part of land surveying delegations.

The CSO, municipality, and Arazi commonly provide documentation to the courts and the DoJ in land cases. However, between 60-70% of the land in Afghanistan has not yet been surveyed, with an even greater percentage remaining untitled.¹¹⁶ Given that only the president can order a new cadastral land survey,¹¹⁷ control over land titling and registration of lands not previously surveyed is held by the president with no apparent checks and balances.

2. Department of Justice: Government Cases Department and Huqooq

a. Government Cases Department

The Government Cases Department (GCD) of the MoJ operates under the direction of the DoJ in nearly all of the provincial capitals throughout Afghanistan, providing some coverage for all Afghanistan territory.¹¹⁸ The GCD is responsible for protecting public lands against wrongful use or occupation, as well as against fraudulent actions to acquire land unlawfully. District governors are responsible for protecting government land in their respective districts. If they cannot resolve a matter themselves, they refer it to the GCD for action.

The GCD pursues the government's land interests (*i.e.*, its right and title to the land) when at least one party to the dispute is the state or government. The GCD receives land dispute cases from government provincial departments, individuals, and district governors. When the GCD receives a complaint, it first coordinates with Arazi to determine ownership of the land in dispute. If it determines that the land is privately owned, the GCD does not have jurisdiction over the case and refers it to the Huqooq or directly to the civil courts. Conversely, the civil courts also refer cases to the GCD if there is uncertainty about whether the disputed land might be government land.

If the GCD determines that the land is government land, it then gives notice to the offending party: either a private person or another government institution. The GCD attempts to resolve such cases through mediation and, if unsuccessful, refers cases to the public rights courts. If the

¹¹⁵ See Law of Land Survey, Verification and Registration (1996).

¹¹⁶ See *supra* note 5 and accompanying text.

¹¹⁷ See Exec. Decree 83, *supra* note 4, art. 15(1) (stating “new surveys and cartography are not permitted to be done through the relevant administration without the written order of the Head of State.”). Pursuant to this decree, recent land surveys in the Guzara and Injil districts in the Herat province were completed in 2013 pursuant to Executive Order 156. These involved land that the government purchased from private individuals for an ANA camp and the Herat University, among purposes.

¹¹⁸ See GCL, art. 4(2) (2013) (establishing the Government Cases Departments in every province).

court rules in favour of the state, the GCD may request that the ANP or district governor evict the party or prevent the party from wrongfully using the land.

b. Huqooq Department

The Huqooq receives individuals' civil complaints, including those relating to private lands, and exercises jurisdiction at both the provincial and district levels in most provinces.¹¹⁹ Upon receiving a land complaint, the Huqooq collects evidence and documents relevant to establishing ownership from Arazî and the courts, and mediates land cases between private individuals or entities. If mediation is not successful, the Huqooq establishes the land's value and refers the case to the civil court.¹²⁰ If, during the course of the case, government ownership is established or suspected, the Huqooq or court, depending on the stage of proceedings, refers the case to the GCD to determine whether the government entity has a claim to the land.

3. Courts

Several courts and offices within them are legally responsible for resolving land disputes and issuing, registering, and storing titles. The relevant courts include the public rights courts, civil courts, personal status courts, and commercial courts. The Office of the Directorates of Documents and Deeds Registration, which encompasses Protected Document Registry and Court Archives, is located within the appellate courts at the provincial level and issues and maintains title deeds. The differently named courts in (a) – (c) below, while called courts, are technically divisions, or “diwans,” within the one court that is at the first instance (also known as a district, city or primary court), or second instance (the provincial court of appeals).

a. Public Rights Courts

The public rights courts division operates only at the provincial level and has jurisdiction over the entire province.¹²¹ In some areas, these types of courts operate as a combined civil and personal status court and public rights court. Appeals are made to the provincial public rights court of appeals and then to the Supreme Court.

The public rights courts review land cases involving government lands. To process cases, the courts employ the Civil Procedure Code and specific Supreme Court directives regarding government case processing.¹²² The courts rely on the municipalities, GCD, Arazî, CSO, DDDR, Court Archives, and other government departments to obtain documents and evidence related to the case.

¹¹⁹ See LOR, arts. 1-4, 9-10, 13, 19, 30-36 (1999); see also *supra* Sec. B(5).

¹²⁰ *Id.*

¹²¹ See Organization and Structure of the Courts Law, arts. 53, 55, 62-63 (2012) [hereinafter OSCL]; see also LOR, art. 11.

¹²² See *supra* Sec. B(8).

b. Civil Courts

The civil courts division generally operates at both the provincial and district levels.¹²³ As previously noted, in some provinces these courts operate as a combined civil and personal status and public rights court. Appeals from the primary court level are to the provincial court of appeals, followed by the Supreme Court.

The civil courts handle land dispute cases in which all parties are private individuals or entities. Similar to public rights courts, the courts employ the Civil Procedure Code to process cases and rely on the municipalities, Huqooq, Arazi, CSO, DDDR, Court Archives, and other government departments to obtain documents and evidence about the case. In addition to dispute resolution, the civil courts issue title deeds. If district civil courts are operational, they are also authorized to issue titles.

c. Commercial Courts

The commercial courts division is authorized to operate in every province;¹²⁴ however, in practice these types of courts are operational only in provinces with major urban centers. The commercial courts' subject matter and geographic jurisdiction include leases and other commercial disputes involving land arising throughout the respective province. If the province does not have a commercial court, the civil courts hear these matters.¹²⁵ If the land-related dispute involves joint ventures between the government and investors or is related to commercial business, the commercial court in the province is also in charge of the land-related case.

These types of cases are processed as standard civil cases, rather than in accordance with the special processes set forth by the Supreme Court directives for ownership disputes involving government cases.¹²⁶

d. Special Courts Division for Property Dispute Resolution (Abolished in 2007)

In August 2002, a Special Land and Property Court Division was established within the framework of the Supreme Court.¹²⁷ In 2003, Executive Decree 89 abolished this court division¹²⁸ and a special primary and appellate court division, within which the courts were known as the Special Property Dispute Resolution Courts, were created to handle all returnee and refugee property cases. These special courts were tasked with handling all property disputes including land, residential houses, apartments, shops, markets, and all immovable properties. In

¹²³ See OSCL, arts. 42, 53, 62.

¹²⁴ See *id.* arts. 42, 52-53, 65.

¹²⁵ See *id.* art. 65.

¹²⁶ See *supra* Sec. B(8).

¹²⁷ See Exec. Decree 136 (2002).

¹²⁸ See Exec. Decree 89 (2003) (abolishing the Special Land and Property Court, which was established to handle property disputes of returnees and establishing the Special Property Dispute Resolution Court); see also Exec. Decree 105 (2007) (creating special courts outside of Kabul).

February 2004, an executive decree was issued to allow clients who were dissatisfied with the special courts' judgments to appeal their cases to the Supreme Court and the Office of the President.¹²⁹ Disputes between the government and returnees, or internally displaced persons, did not fall within the jurisdiction of these special courts.

The special courts division now abolished consisted of two levels: primary and appeal. The primary court was divided into two courts—a primary court only for cases related to Kabul and a primary court focused on cases related to the rest of Afghanistan. Both of these courts were located in Kabul. The primary court responsible for those areas “outside of Kabul” was authorized to travel to the provinces with the Supreme Court’s permission to deal with any special disputes. The primary level special courts were obliged to decide all cases within two months from the date of filing. The appellate court was required to decide all appealed cases within one month.

The judgments and decisions of the appellate court were generally final and enforceable, and the relevant authorities were obliged to ensure their implementation. The Ministry of Interior was responsible for implementing the final decision.

In January 2007, the president issued a decree abolishing the primary court division that handled the cases outside of Kabul and transferred that court’s authority to the provincial judiciary.¹³⁰ The chief judge of the appellate court, chief judge of the city court, and chief of the civil division (appeals court) were designated as panel members of that court and all returnee land and property cases were to be handled by that panel. The appellate level of the provincial panels was in Kabul.

In July 2007, the Supreme Court, using its authority to establish or change court divisions, abolished the primary and appellate Special Property Dispute Resolution Courts Division and their authority was transferred to Afghanistan’s regular courts.¹³¹

e. Directorates of Documents and Deeds Registration: Protected Document Registry (Secure Registry) and Court Archives

The DDDR offices, established by the Law on Organization and Structure of the Courts of 2012 (OSCL),¹³² is sometimes referenced as the “Protected Document Registry” (PDR) or “Secure

¹²⁹ See Exec. Decree 112 (2004).

¹³⁰ See Exec. Decree 105, *supra* note 128.

¹³¹ See Supreme Court Directive 376 (2007).

¹³² See OSCL, art. 74 (2012) (establishing “within [the] jurisdiction of every court of appeals, directorates for documents and deeds registration. Director and professional members of directorates shall be appointed from among those who possess judicial authority. In provinces and districts where there are no directorates for the registration of documents and deeds, the duties and authority to deal with such issues shall be vested with municipal primary courts and district primary courts. Documents and deeds registration directorates shall have administrative staff and offices

Registry” at the provincial level where these offices operate within the appellate courts offices. The DDDR/PDR handles active documents and notebook registries for each solar year, including land transactions and court decisions involving land. In addition, the DDDR/PDR registers land title deeds.¹³³ The DDDR was established only at the provincial level, but has jurisdiction to maintain and collect documents from the entire province. DDDRs have not been established in all provinces; in provinces without a DDDR, the civil court issues titles and maintains these documents.

In March, at the end of the Afghan solar year, the DDDR sends all of the documents to the Court Archive Office, also located in the provincial appellate court, where the deeds are stored. The chief appellate judge and a committee control access to the Court Archive Office, a section of DDDR. This Archive maintains records dating back to 1921, 1299-1300 Afghan solar year, but these records are incomplete.

4. Municipalities

As previously noted, the Municipality Law governs municipal lands. Records for land within the municipality’s control fall under the DDDR in addition to the Amlak Department’s jurisdiction, the department within the municipal government that keeps records with respect to public and private lands in urban and township areas.¹³⁴ The Amlak Department in each municipality, which reports directly to the mayor, records land transactions, court decisions regarding land ownership, and agreements reached through mediation.¹³⁵ Arazi is responsible for supporting the municipality, including researching title deed records when requested.

The Amlak Department maintains two registration books—“the substantive book” for properties with official title deeds, and “the cautionary book” for properties with customary title deeds. The Amlak Department also responds to special inquiries from the courts, Huqooq Department, GCD, governor, and city districts to provide technical information based on its registry records. The MAU also participates in delegations to inspect and evaluate land as assigned.

5. Independent Directorate for Local Governance (IDLG) and Ministry of Urban Development Affairs (MUDA)

The Independent Directorate for Local Governance (IDLG) was established by Presidential Decree in August 2007 and is mandated to improve subnational governance to achieve stability, security, and development. The IDLG is responsible for supervising acts of the governors and

and their number shall be determined by the Supreme Court taking into consideration the workload. Duties and authority for the directorates of documents and deeds registration shall be regulated by the relevant legislative document . . .”).

¹³³ See *id.* arts. 29, 55.

¹³⁴ See *supra* note 102 and accompanying text.

¹³⁵ See Municipality Law, arts. 15(6), 16 (2000).

district governors, as well as officials in the municipalities (excluding Kabul) and providing reports to the President’s Office regarding their performance.

The Ministry of Urban Development Affairs (MUDA) is responsible for developing master urban plans and policies, and also supporting the revenue and capacity building programs of municipalities, including infrastructure and services, sanitation, and preservation of historic areas. The MUDA issues and updates these plans and is involved in policy and decision making relevant to informal settlements and services within the municipality.

The Ministry of Rural Rehabilitation and Development (MRRD) is responsible for developing and implementing programs to promote responsible economic growth in the rural areas. Both the MUDA and MRRD are involved in consultations and decision making relative to state land distribution of urban law and rural land, respectively.

The defined roles of the IDLG vis-à-vis the MUDA and MRRD are unclear. In practice, the IDLG often approves and coordinates the MUDA approved master plans and well as both urban and rural land strategies and policies; however, it is unclear whether these roles are specifically established by statute, legislative decree, regulation, or executive order, or in combination with uncodified practice/usage.

D. Informal Justice System: Traditional Dispute Resolution Mechanisms

In addition to the formal court system, traditional dispute resolution mechanisms provide forums for resolving land disputes. The traditional *shura* and *jirgas*, informal groups of elders and others to whom communities and individuals bring their disputes for resolution, are accessible and trusted by the population. As a result, most private land disputes—for example, disputes that do not involve government land—are resolved through the informal system. Additionally, many landowners do not hold title and bringing a private dispute to the formal system risks a court finding that the land in question is government land, depriving both private parties of land use or ownership.

In addition to *shuras* and *jirgas*, some provinces have seen the need to develop a comprehensive approach to land disputes by providing some links between the informal and formal systems. In Logar, one of the “more inaccessible” provinces due to security concerns, the chief judge established a land coordination meeting in early January 2014 that was attended by representatives of the courts, MoJ, provincial governor’s office, and Arazi. The chief judge noted that the legal process of resolving land matters in the courts did not meet the peoples’ needs, and he saw the need to reengage with land dispute resolutions via *shuras/jirgas* as part of a more

comprehensive approach addressing the dysfunctional legal system surrounding land issues.¹³⁶ The chief judge's support for this land coordination meeting proposal was seen as a breakthrough given that the courts previously shunned any traditional process as "extra-legal" and outside the formal legal system. Other provinces have developed similar *ad hoc* mechanisms to try to bridge the formal and informal systems.

E. "Hybrid" Justice System: *Ulema Shura*

The Ulema Shura, a council of Islamic religious leaders or mullahs,¹³⁷ is a formalized, nationally-recognized structure, and an integral part of religious life in Afghanistan. At the national level, the Ulema Shura exists as a centralized shura, and is represented at the provincial level by sub-shuras.¹³⁸

The Ulema Shura is funded by the Government of Afghanistan, as are the associated provincial Ulema Shuras. It is the Government's intention to have local, *i.e.*, district level Ulema Shuras; however, this is a challenge for two reasons. Firstly, not all districts have sufficient buy-in and support by their communities, and secondly, not all districts could fulfil the necessary requirements to form an Ulema Shura since appropriately educated, high-level persons -- in sufficient numbers -- are needed for a *de facto* quorum.

Local and village shuras are for the most part independent; and not a part of the formally-recognized Ulema Shura system. Community-based local shuras generally comprise a combination of community elders and mullahs at the district and village levels -- a number of whose attendees take part in the Ulema Shura at the central or provincial level. Urban shuras are often, but not always, organized by councils as provided for in the National Solidarity Program (NSP). The NSP is funded by the independent budget of the Ulema Shura and the NSC is recognized as a formal shura.

Although the Ulema Shura is recognized formally, no formal links between this national shura and the formal legal system exist. Thus, the Ulema Shura's decisions are not recorded in or are enforceable by the formal legal system.

¹³⁶ See UNAMA, RULE OF LAW, CENTRAL REGION LAND REPORT (2014) (on file with UNAMA RoL Unit).

¹³⁷ See MOHAMMAD HASHIM KAMALI, LAW IN AFGHANISTAN: A STUDY OF THE CONSTITUTIONS, MATRIMONIAL LAW AND THE JUDICIARY 4, 7 (1985) (noting that the "mullahs are closely associated with the people whom they lead in prayer and whose children they instruct in the fundamentals of Islam. They also play a significant role in marriage, birth, death, and their knowledge of Islam helps them to serve as arbiters and judges in rural areas.").

¹³⁸ The National Ulema Council Afghanistan, established on 25 November 2009, is currently chaired by Maulavi Qiyamuddin Kashaf and is composed of over 3,000 *mullahs* nationwide.

F. Titling and Registration of Title

The LML sets forth the requirements for obtaining title. If the “land [is] recorded in the [property] books in the name of a person in the form of temporary tax and permanent farming (a life undertaking), and the person has paid its taxes for (40) years at minimum, shall be deemed property of the person concerned.”¹³⁹ However, if the property is not registered in the state property books, the person can obtain title under customary tenure rules. Under such rules, a person must show that he has publicly occupied the land over thirty-five years, has farmed it (as attested to by his neighbors), and there are no conflicting claims. This right is abrogated if the land is deemed to be part of a government project.¹⁴⁰ Public lands transferred to a private individual for the first time require the issuance of a title.

Individuals and entities that own land can request that their land be titled and registered by submitting a title deed request form to the respective civil court. The civil court then refers the request to the MAU if the land is municipal land or to Arazi if the land is urban for document and evidence collection. If the land is municipal land, the MAU sends certified documents to the Arazi office where the records are checked to ensure consistency with their records. Arazi is responsible for issuing a final approval letter to the court for both urban and rural land. The court also cross checks old title deeds stored in the court archive to verify their authenticity, provides notice to potential claimants through announcements on the radio and in newspapers, and assesses the amount to be paid to the government treasury (6% of the assessed land value). The court then provides final certification of the transaction to Arazi, which in turn issues an approval letter to the party with the property value information. The party provides a copy of this letter to the Directorate of Finance, which verifies tax payments, and must pay any taxes owed. Finally, after obtaining proof of payment for taxes and fees, the DDDR enters the transaction into its records and issues a title deed to the purchaser. A copy of the deed remains in its archives and additional copies are sent to and recorded by the Arazi office and the MAU.

G. Transfer of Property

A land transfer depends on whether the land is government land or privately owned. Except in those cases in which government land is being transferred to a private individual, the owner transferring the land to another must have a land title. This report does not address the transfer of government land to or between governmental entities.

1. Transfer of Rural Land from Private Individual to Private Individual

The transfer of rural land between private persons requires a complex and lengthy form that is processed by Arazi and the DDDR. The process involves multiple steps and requires collecting

¹³⁹ LML, art. 27 (2008).

¹⁴⁰ See LML (2008).

several signatures and stamps.¹⁴¹ As part of this process, a mixed commission, including Arazi, the GCD, and Department of Finance, determines the market value of the land and calculates the correct estimated basis for assessing the 6-10% fee for the transfer and registration.

With regard to inherited lands, the relevant court must prepare a *hasri worasat* (probate of will) to prove ownership. This document confirms that the person is an heir of the previous landowner, and requires attestation by five witnesses—three witnesses to confirm that the facts given by the heir are true and two witnesses to confirm the credibility of the other three witnesses. The court verifies the legal conditions in each case through the DDDR, after which the case must be processed through the civil court to obtain a new title. Notably, the law on inheritance for women often is not followed and land is transferred instead to male family members.

2. Transfer of Urban Land from Private Individual to Private Individual

The transfer of land upon which there are buildings, or that is part of an urban plan in a municipality or district center, is not subject to the Arazi-DDDR registration and documentation process. This transfer is documented and registered with the municipality's Amlak office.¹⁴²

3. Transfer of Government Land to Private Owners

If the current transfer is the first transfer of government-owned land¹⁴³ to a private owner, or if the owner obtained the land from the public but did not have the documentation processed (titling and registration), the transfer is documented and registered with the municipality's Arazi office.

All land transfers of prior or current state land to private buyers require documentation showing either presidential confirmation that the prior transfer of state land was made or an executive order transferring the property.¹⁴⁴

¹⁴¹ Although Arazi states that the process has been reduced from over thirty steps to nine, it does not appear that this is the case countrywide.

¹⁴² See *infra* Sec. F.

¹⁴³ State owned land refers to land held by the central government and excludes land held by governmental entities, including the ministries.

¹⁴⁴ See LML arts. 39(2), 46(1), 46(5).

H. Land Disputes

The formal dispute mechanisms with the legal authority and jurisdiction to resolve land disputes include the courts, GCD, and Arazi and Amlak settlement commissions. The Huqooq Department also engages in land dispute resolution; however, the legal basis for this authority is unclear.¹⁴⁵

The specific mechanisms and operations utilized differ depending on whether the government is one of the parties to the dispute. The following is a primer on the manner in which varying land disputes are resolved within the formal system and focuses on the process. It is based upon interviews and assessments by UNAMA Rule of Law Unit field offices, and upon published materials available to the Unit's Headquarters.

1. Land Disputes between Private Parties

Land disputes between private parties are currently handled by the Huqooq Department and the civil courts. The Arazi office, CSO (depending on the province), Court Archive, and municipality can also be involved to provide documents and information.

A party cannot register a land dispute directly with the court. The matter is typically first registered with the Huqooq Department. Usually, the Huqooq receives a case when an individual claimant files because he believes that someone is occupying his land or otherwise infringing on his land rights. The Huqooq asks each party to provide documents and evidence in support of their respective positions. If neither party has any documentation, the Huqooq will transfer the case to the GCD for a determination of whether government land is involved. Because much of the land in Afghanistan has not been surveyed,¹⁴⁶ and because most people do not have official documents establishing ownership, it is not uncommon for evidence to consist of the opinions and memories of neighbors, elders, and former government officials.¹⁴⁷ If no government land is involved, the GCD will transfer the case back to the Huqooq.

If one or both parties have documents, the Huqooq will try to mediate the case. As a practical matter, the Huqooq often refers minor land disputes directly to tribal elders and reserves the larger, more inflammatory property claims for the Huqooq office. The Huqooq deems the *jirga* system successful and encourages further connections between the formal and informal sectors.

¹⁴⁵ See LOR, art. 19 (referencing the Huqooq's powers and authority in Article 19, stating that "concerning civil and commercial rights shall not be subject to investigation. If the claim was not supported by sufficient evidences or the denied, based on civil procedure the case shall immediately be referred to the authorized court. ").

¹⁴⁶ See *id.* art. 15; Exec. Decree 83, *supra* note 5 (stating that new land surveys can only be done by order of the president).

¹⁴⁷ The Finance Department provides some documentation for evidentiary purposes, but it does not have a formal role in the dispute resolution process; thus, this role is not discussed herein.

If the parties reach an agreement, the Huqooq assigns a delegation to survey the land and determine its boundaries and value. Thereafter, it will draft an agreement letter, 10% of the price will be paid to the government treasury, and the case will be finalized. If mediation fails, the case, along with any relevant documents in the Huqooq's possession, is sent to the civil court division for formal processing according to the rules of civil procedure. The civil courts present a number of challenges in processing land cases, most notably, contradictory, customary, anecdotal, and unofficial documentation of ownership.

Once a decision is reached, whether through mediation or the courts, that decision must be enforced. If a decision is reached through mediation, the Civil Code provides for the registration of the decision if the civil case was filed prior to the mediation. The status of agreements reached through mediation prior to the filing of a civil court case is unclear; the Civil Procedure Code suggests that such agreements may not be registered or enforced as court judgments.¹⁴⁸ If the civil court issues the decision, the Huqooq is responsible for its enforcement. If a party wants to register the court's decision with the Arazi or Amlak office, he must submit a form to Arazi and/or the Huqooq.¹⁴⁹ The Huqooq can also take other enforcement measures.¹⁵⁰

2. Land Disputes between the Government and a Private Party

Land disputes in which the government is a party are currently handled by the GCD. The GCD receives cases from officials in provincial ministerial departments who believe that the lands their department/ministry own are either partially or entirely occupied by a private individual. The GCD also receives cases from individuals who believe that the government has illegally taken over their land.

Once the GCD receives a case, it identifies the parties and asks them both for any documents or other evidence that prove their ownership of the disputed land. After documentation is obtained, the case is sent to the primary level provincial public rights court. All court cases involving state lands must be filed with the provincial public rights courts because the district courts do not have jurisdiction over such matters.

Thereafter, if the GCD believes that the government is the proper owner, the GCD will provide the court with a statement of the case and the individual will provide an objection or defence letter. The GCD also defends the government in cases brought by individuals who claim that the government is occupying their private property. In these cases, the individual files a statement and the GCD files an objection if the land is considered government land. Once the statement

¹⁴⁸ See *supra* notes 76, 77, 78 and accompanying text.

¹⁴⁹ Titles are not automatically registered with the Huqooq upon the issuance of a title deed by the civil court. The owner must first register the title with Arazi and then with the Huqooq, using specific forms confirmed by Arazi, to enforce land rights through the Huqooq.

¹⁵⁰ See LOR, arts. 30-36 (regarding repossession of land).

and objection are filed, the court procedure is the same as for ordinary government cases. If the GCD believes that the individual's claim is superior to the government's, it still has an obligation to defend the government's position, but it will not do so as vigorously.

For lands located in districts, a similar process to the one above is used. However, because there is no district level GCD sub-office, both the line department and the district governor are responsible for defending the land from occupation and reporting the issue to the GCD at the provincial level to file the case.

3. Land Disputes between Two Governmental Departments

The GCD also handles cases where both parties are governmental departments, that is, provincial ministerial departments. If the dispute is between two governmental ministerial departments, the provincial GCD will identify the department that it believes to be the owner and will request both sides to come to an agreement. If they agree, the GCD will issue a writ to end the case. If they do not agree, the case, along with the collected documents, will be sent to the HQ-level GCD department at the MoJ in Kabul. The HQ-level decision will be the final decision in the dispute as there is no judicial recourse for disputes between governmental departments.

I. Land A&M Framework Challenges

There are several overarching, strategic issues that impact land A&M, many of which cannot adequately be addressed by reform of the land A&M framework.¹⁵¹ These issues, including corruption¹⁵² and lack of court accessibility¹⁵³ are not addressed in this report, but will be included in future reports, Parts II and III. The issues below are those that pose the most significant and material challenges to the development and implementation of an effective, fair, and enforceable land A&M framework in Afghanistan.

1. Land Policy

Approval of the Afghanistan Land Policy of 2007 was a significant milestone in moving toward an improved and effective A&M framework. However, the Land Policy contains numerous "best standards" policies without identifying and delimiting those policies that are in potential conflict. Although nearly comprehensive, the Land Policy may benefit from a critical review and update in response to recent increased urbanization, including IDP and returnee issues. The

¹⁵¹ For example, the lack of transparency in distribution of land by the executive could be addressed by the Law on Access to Information recently approved by the National Assembly and awaiting presidential action (approval or rejection), as well as by regulations to be promulgated by the executive that would make public all executive decrees, including the land decrees, which at the present time are not published. Although not part of the legal framework for land, *per se*, such a regulation would address transparency of these transactions.

¹⁵² Corruption in the civil service is an issue appropriately addressed by civil service reform, administrative preventative measures, disciplinary mechanisms, the High Office of Oversight, and where appropriate, by the criminal justice system actors.

¹⁵³ Court accessibility is an issue appropriately addressed by the Supreme Court, Bar Association, legal aid and MoJ.

inherent tension between the state and municipalities vis-à-vis state lands and the management of public projects is increasingly important as urbanization escalates. Specific issues like land grabbing and state land distribution schemes, particularly in light of municipal powers and authorities, are swiftly becoming national problems that detrimentally affect security, economic development, and private land tenure. A cohesive and unified policy addressing these issues in an integrated fashion could support the identification and implementation of a land A&M framework that meets Afghanistan's specific needs.

2. Nomenclature and Inclusiveness

One of the more difficult challenges in developing a comprehensive land A&M framework is the consistent use of well-defined and inclusive terms that reference the varying forms of land ownership and use. The laws and decrees relating to land A&M in Afghanistan have yet to sufficiently address this challenge. As a result, the meaning of often-used terms, such as public land, state land, and government land, are unclear and ambiguous, with the latter two terms being used interchangeably. In addition, many of the laws and decrees fail to define or provide for the varying types of land ownership and generally address only private and state or government land.¹⁵⁴ Community ownership, commons, pasture, rangelands, and arid lands—all types of land and land uses that are prevalent throughout Afghanistan—are not adequately defined or addressed in one comprehensive framework. For example, the LML, which was intended to establish the basic land framework, does not adequately define ownership and use rights or effectively delineate the borders of these rights.¹⁵⁵ The need for clear definitions that set forth the scope of each term, coupled with a land policy that addresses each of these land usages, is becoming increasingly crucial.

In addition to these basic land A&M issues impacting land tenure and land rights, the lack of identifiable land ownership and usage characterizations, definitions and corresponding rights impacts both private and state business and commercial issues relative to land. A robust land A&M framework would provide clear definitions for the varying types of property ownership and support varying ownership rights, paving the way for personal and state economic development that is dependent on mortgages to obtain capital, leases of private commercial land, and the sale or lease of state land. Without well-defined land tenure definitions and rights, commercial endeavors are risky for all concerned parties, including the state.

3. Private Land Ownership and Land Rights

One of the most significant challenges to implementing an effective and fair land A&M system in Afghanistan is establishing a substantive and procedural framework for identifying and protecting the private ownership of property. As previously discussed, state lands are effectively protected by the current land A&M system; the framework provides for legal representation of

¹⁵⁴ See, e.g., Exec. Decree 83 (2003) (referencing only private and state land).

¹⁵⁵ The LML focuses on rural and agricultural land, although by its terms it purports to cover all land in Afghanistan.

the states' land interests while at the same time defining the state's burden of proving ownership in such a manner as to transfer the burden of proof to the other party.¹⁵⁶ This framework disadvantages private owners asserting claims to lands that the state desires to claim as its own.

The basic objective of an effective and fair land A&M framework is to establish and enforce land tenure rights. Land ownership rights are established through registered title. Although often used as a singular phrase, "titling and registration" are two distinct functions. Proof of ownership is exhibited through a deed in the owner's name, usually with a legal, or other formal, description of the property. Registering the deed places the land in the formal land A&M system whereby land ownership is legally recognized and taxed.

The LML contains the requirements for determining the necessary proof for an individual to establish ownership and obtain a legally recognized deed.¹⁵⁷ Under the current law, all untitled land is characterized as state land unless a person can show ownership through a "legally valid deed"¹⁵⁸ or meeting the occupation and agricultural construction requirements.¹⁵⁹ A "legally valid deed" includes deeds as well as documents that are considered by law to be tantamount to a deed.¹⁶⁰ Establishing customary ownership under the LML is limited to rural areas because of the agricultural construction restriction. Only the courts can determine ownership and issue titles.

Possessing a valid deed is not necessarily straightforward. The historical system of registering titles or documents in the tax books has resulted in multiple entries in several locations with overlapping plots of land and different owners for the same plots or, at the other extreme, no entry at all.¹⁶¹ Additionally, titles have been forged, obtained from the courts through bribes or by offering political incentives, or obtained by force. Similarly, transfers of state land to individuals often are accomplished without meeting the legislative requirements and thus are illegitimate.

¹⁵⁶ See Supreme Court Directive 79 (2013).

¹⁵⁷ See generally LML (2008).

¹⁵⁸ See *id.* arts. 3(16), 5.

¹⁵⁹ See *supra* Sec. B(6).

¹⁶⁰ See *id.* art. 5 (providing that certain proof of tax payments, water rights documents, state decrees transferring state land to an individual, and, in limited circumstances, proof of purchase as provided through the neighbors' testimony).

¹⁶¹ The history of land A&M in Afghanistan is lengthy, with title documents being issued and registered as a means of levying taxes. Often deeds or documents establishing ownership were recorded in the books of ownership and taxation (tax books). Such recording is considered a "valid legal document" and constitutes *prima facie* proof of ownership under the current LML. These books are maintained in Kabul, the provincial capitals, and, in some instances, districts and municipalities, but they are not maintained consistently. Additionally, although the ownership document is to be recorded in the local tax book, often the document is recorded only in Kabul. To complicate matters, the process for registering deeds in the tax books was initiated in the 1960s, but was never completed; therefore, most deeds are not registered. Failure to record a deed in the tax books is not fatal to a claim of ownership, but it necessitates the production of other "valid legal documents" or proof of customary tenure.

As noted above, most private individuals who occupy land have no documents and no records exist to establish ownership of the land they are occupying. As a result, the majority of those occupying land in Afghanistan are legally “landless.” To exacerbate the problem, a land occupier generally has no pressing need to voluntarily obtain a title. Given the costs and risks¹⁶² of good faith *bona fide* property owners/occupiers seeking a deed in court, transfers are normally accomplished informally by signed transfer papers, and private land disputes involving land grabbers are generally put forward to a *shura* or *jirga* for resolution. These practical solutions to routine situations completely bypass the formal land A&M system, resulting in an informal shadow land economy.

Solving the issue of land titling when most land occupiers do not hold title is complex. The differences between urban and rural land occupiers are material and add an additional layer of complexity. As urbanization increases and those from rural areas relocate to cities in search of jobs, the demand for land also increases. Individuals occupy vacant lands and erect houses and other immovable property. Because urbanization is a fairly new phenomenon, most of those settling in urban areas do not have a customary land tenure claim under the existing LML. Although more likely to meet the current requirements for customary land tenure, those occupying rural land face the additional challenge of state land expropriation for public use or revenue-generating projects. Establishing the scope of customary land ownership and other land use rights to support a “fair” system of recompense in expropriation situations has not been addressed adequately by the current land A&M framework.

Assuming the legal requirements for private and community land tenure are set forth in a fair and enforceable manner, mechanisms for legally establishing and enforcing these rights have proven to be ineffective for private individuals. Attempts at establishing and maintaining countrywide specialized land courts to meet these needs have failed¹⁶³ and use of the existing court system, while providing reach throughout the country, has been marred by corruption and inaccessibility in many insecure districts. While these are systemic issues in the courts, they are especially prevalent in land cases where power and money are the commodities at issue. The widespread use of the current informal system to resolve land disputes suggests that a model recognizing the role of the informal system is a requirement for a transitional program and may be a necessary feature of a final solution to meet the need to issue and register title to most of the land in Afghanistan.

¹⁶² Land not titled is considered land of the state. Thus, any case where the private party does not have title could be resolved in favor of the state in a court proceeding. Given that the government need not prove ownership if the land is untitled, the burden on a private individual claiming land without title is very high.

¹⁶³ See *infra* Sec. C(3)(d).

4. Subject Matter Jurisdiction and Functions

The institutional framework for land management established by the combined provisions of the LML, Municipality Law, OSCL, and other various regulations and decrees, is complex, ambiguous, and confusing. The current status of the various provisions in these laws and decrees is unclear given the LML's passage in 2008. Although the 2008 version of the LML repealed the prior 2000 Land Management Law, it only repealed related laws and decrees insofar as they contained contradictory provisions.¹⁶⁴

In addition, the various laws and decrees applicable to land A&M overlap and fail to clearly set forth jurisdictional scope and authority, resulting in multiple institutions performing the same or similar functions. The current institutional framework provides for the involvement of multiple institutions in titling land and registering title. Although only the courts issue titles, many institutions are involved in this process, relying on Arazi, Amlak, DDDR, mayors, governors, MoF, and others to provide information about the respective land during the titling process. At the current time, Arazi, Amlak, and DDDR/Archives formally register titles. This “overlap” of functions creates an opportunity for an illicit land title business that is unlikely to be addressed without the implementation of a centralized titling and registration system.

5. Land Disputes: Informal and Formal Mechanisms

There are two challenges related to the formal and informal system—the formal system's failure to recognize the informal system's decisions, and the statutory and structural protection of state land rights at the expense of individual land rights in the formal system.

In situations in which the land dispute is between two private parties, the dispute generally is resolved by a *shura* or *jirga* at the community level. Estimates indicate that over 60% of all cases brought to a *shura* or *jirga* involve a land dispute.¹⁶⁵ Because *shuras* and *jirgas* are informal, community-based mechanisms that are restorative in nature, as opposed to punitive, enforcement is generally effective and occurs through community consensus and support. However, *shura* or *jirga* decisions cannot be recorded with Amlak, Arazi, or the courts because the formal system does not recognize these decisions. As a result, the owner of the land as determined by a *shura* or *jirga* is not legally entitled to any land rights or land tenure security derived from the land A&M legal framework. A private owner involved in a land dispute is required to pursue this matter through the Huqooq and the courts to obtain legally recognized title.

¹⁶⁴ See LML, art. 104.; see also the AGO and court application of a similar provision (art. 98(3)) with the Interim Criminal (Procedure) Law for Courts (2004), which was interpreted to allow continued application of the previous Criminal Procedure Code, as amended in 1974; specifically arts. 97-99 relating to bail and that do not contradict any provision of the new 2004 Law.

¹⁶⁵ See *supra* note 23.

A private owner without title faces serious systemic challenges to successfully asserting his claim of ownership in the formal legal system. When a dispute arises between private parties, and the parties do not elect resolution through a *shura* or *jirga*, the case is brought to the Huqooq as a prerequisite to filing with the court. Although the Huqooq engages in private land dispute settlements, this authority is not included in the relevant laws.¹⁶⁶ More important, land settlement agreements negotiated by the Huqooq are also not recorded in the courts.¹⁶⁷

The Huqooq files those cases they cannot settle with the courts. Further, when a private party asserts ownership against a state claim, the only available avenue is the formal court system. The current legal framework for land A&M favors the establishment and protection of the state's land interests over those of a private citizen. Executive Decree 83, arguably superseded in part by the LML of 2008, establishes the state's right to land as superior to private ownership interests.¹⁶⁸ In addition, the GCL established the GCD within the MoJ to assert and protect the state's alleged ownership rights. Given that over 60% of the land is untitled¹⁶⁹ and thus presumptively owned by the state, many land disputes involve state land and are mandated by law to be brought to the GCD. The parties often abandon these formal cases.

Unlike the GCD's provision of legal representation to the state in cases involving state land, the Huqooq does not provide or coordinate legal assistance for the parties in civil disputes, including land. Legal aid throughout Afghanistan falls woefully short of what is needed and required, with emphasis placed on constitutionally-mandated representation for criminal defendants. Without legal aid representation or basic information about their rights, a private party is seriously disadvantaged in the formal system.

6. Land Grabbing

“Land grabbing” is defined as the use, control, occupation, or ownership of land by one without a *bona fide* right.¹⁷⁰ The current land related laws fail to effectively criminalize land grabbing; although the LML contains a criminal provision for land grabbing, this article fails to define land grabbing, to set forth the elements of the different land grabbing offenses or provide for penalties, thus rendering it ineffective.¹⁷¹ Land grabbing is not separately criminalized in the Penal Code. According to the AGO, land grabbing can be criminally investigated and

¹⁶⁶ See LOR (1999).

¹⁶⁷ See *supra* notes 76, 77, 78 and accompanying text.

¹⁶⁸ See Exec. Decree 83, *supra* note 5, art. 3 (stating that all land that is not titled belongs to the state).

¹⁶⁹ See *supra* note 5.

¹⁷⁰ See *supra* note 37. Land grabbing includes, but is not limited to, occupying, using, controlling or claiming ownership of the land of others, whether state or private, by force or intimidation; illegally obtaining title to state or private lands through fraud or force, or as political or economic patronage or reward; obtaining title to property legally owned by a wife, sister, or daughter through inheritance; and occupying unoccupied lands.

¹⁷¹ See LML, art. 88 (providing that “[a] person who usurps the state land, or falsely introduces himself as the landowner, he shall be dispossessed and be subject to legal prosecution.”); see also CONST. art. 27 (requiring criminal provisions to state an offense's elements and penalties).

prosecuted as simple theft under the existing Penal Code.¹⁷² However, most of the Penal Code's theft articles have exceptions and limitations that when read literally by the Unit (in the original Dari and Pashto) appear to apply only to moveable property.¹⁷³ The Unit is of the opinion that art. 470 is the most applicable to land grabbing, in that it penalizes anyone who, knowing that he has no right to possession or ownership, possesses "movable or immovable property ("aqar")," and as a result "harm is inflicted upon another."¹⁷⁴ However, the maximum term of imprisonment for this offense is one year, an insufficient length of time to deter land grabbers. Further, the Criminal Procedure Code provides that a criminal case shall not commence until such time as any ongoing civil proceedings on which such criminal case are "dependent" are finalized.¹⁷⁵ As a practical matter, civil cases are lengthy and final judgment is often delayed, resulting in no criminal prosecution of land grabbers. Research by UNAMA Rule of Law in the field and at central justice institutions discloses no known indictments or convictions for land grabbing.

The proposed amendments to the LML that are currently under MoJ review contain some provisions for criminalizing land grabbing; however, these are limited to specific situations and focus on protecting state lands by establishing criminal penalties for state land grabbing by private individuals. A draft land grabbing law consisting of language taken from the LML amendments and focusing on state land protection failed to pass the Assembly in early 2014, suggesting that the passage of land grabbing legislation containing effective criminal provisions will meet strong opposition from the Assembly, many of whom are the beneficiaries of land grabbing. Assuming such a law is passed, the current interpretation and application of the Criminal Procedure Code of 2014, which requires civil proceedings to be finalized, stands as an impediment to successful prosecution of land grabbers.

7. The Role of Arazi

Arazi manages all aspects of state land, including commercial activities such as taxation and raising revenue through commercial and other leases. In addition to participating in the provincial settlement commissions that review and recommend land distribution requests, Arazi's institutional recommendation for the transfer of state land to an individual is required by law before the resident can legally transfer state lands to private individuals. With over 60% of all land untitled and presumptively owned by the state, the power to control the distribution of this land to private individuals equates to significant political and economic power. In addition

¹⁷² See Afghanistan Penal Code (1976), arts. 455-465, 470-471 (establishing theft and theft related crimes).

¹⁷³ *Id.* at art. 454 (defining larceny as "secretly carr[ying] away the personal goods, that are moveable and of value, of another.") The penalty for larceny is a short term of imprisonment (maximum 1 year) or medium term of imprisonment of no more than 2 years. The Penal Code allows for suspension or mitigation of punishment by the court.

¹⁷⁴ *Id.* at art. 470.

¹⁷⁵ Criminal Procedure Code (2014) [hereinafter CPC] art. 181 (providing that a criminal case shall not commence until such time as any ongoing civil proceedings on which such criminal case depend are finalized.).

to its role in state land distribution, Arazi is also responsible for “settling” land—that is, clearing title to state land. It is uncertain how this function relates to a similar function vested in the GCD; Arazi has developed dispute mechanisms that would appear to duplicate the GCD’s function with regard to pre-trial settlements of land disputes involving state land.

J. The Way Forward

A comprehensive land policy is the basis for an effective and cohesive land A&M framework and the first step toward its implementation. A critical review of the 2007 Land Policy would set the foundation for an effective, efficient, and fair twenty-first-century century land A&M framework that contains the following features:¹⁷⁶

1. Addresses countrywide titling and registration requirements and procedures;
2. Establishes an independent land authority with comprehensive powers;
3. Contains a system of checks and balances on the governance structure;
4. Establishes a state land distribution scheme consistent with constitutional mandates, and economic development and humanitarian best practices;
5. Identifies and protects private, state and communal;
6. Provides for the expropriation of private lands and denial of land use based on international standards;
7. Resolves enforcement issues by enacting effective criminal penalties and civil remedies for land grabbing, and allow prosecutors to prove land title/ownership without waiting for civil courts to first finalise; and
8. Leverages the Access to Information Act of 2014, once enacted, to ensure transparency in land transactions, including land distribution and the expropriation of private land.

Reviewing, updating and amending the various land laws, decrees, and related regulatory directives¹⁷⁷ as part of a holistic, integrated process to clearly establish and implement an enforceable, unified system would reduce ambiguity, mitigate complexity, and increase transparency in land processes. Updating the legal framework to harmonize functions, protect private land tenure, and increase transparency would also strengthen a unified legal framework. The Penal Code revision process should also include articles of specific land-grabbing and other land-related criminal acts with appropriate punishment.¹⁷⁸

¹⁷⁶ This report does not address all of the features of such a framework, but rather it highlights those areas that would provide a strong foundation.

¹⁷⁷ These laws include, but are not limited to, the LOR, Civil Procedure Code, Penal Code, Law on the Formal and Informal Systems, Municipality Law, LML, LEL, Pasture Law, and Forest Law. Numerous decrees, directives and regulations also are part of the land A&M framework and should be harmonized with amended laws.

¹⁷⁸ An opportunity for the MoJ’s Taqin to draft a land-grabbing specific penal articles with appropriate punishment exists within the MoJ’s current Penal Code revision process, involving the Criminal Law Reform Working Group working under the MoJ chair, and UNAMA Rule of Law will support the Taqin’s drafting of such articles.

To date, donor efforts have recognized the need for a revised land A&M framework. Several donors have funded consultants and others to draft amendments to the LML and Land Expropriation Law (LEL) in light of the Land Policy of 2007. These efforts have focused on individually amending the current laws, rather than developing a unified law based on a holistic model and specifically including gender,¹⁷⁹ humanitarian,¹⁸⁰ development, and environmental considerations.¹⁸¹ Although at first glance it would appear that amending the existing laws in a piecemeal fashion is the most effective way to address these issues, donor efforts to separately amend the existing laws have met several challenges that have highlighted the practical sequencing and coordination problems inherent in this approach.

Specifically, material amendments to the existing LML were proposed to the Lower House of the Assembly, the *Wolesi Jirga* (WJ), in 2013. The proposed amendments cover a wide range of focus areas and are intended to operationalize the Land Policy agreed on in 2008. (A report issued by the Afghanistan Research and Evaluation Unit in 2013 contains an analysis of these amendments.¹⁸²) It appears that these amendments were not developed through a collaborative process; rather, a series of internationally funded consultants worked with Arazi to develop this law. Although other national stakeholders were provided with a copy for comment prior to the amendments being put before the WJ, their comments were not addressed fully and stakeholder buy-in was not achieved. As a result, the current proposed amendments are stalled indefinitely in the Ministry of Justice. Senior government officials have commented that a new law is needed, rather than extensive amendments to the existing law.

At the same time, expert consultants funded by international donors have drafted a new LEL.¹⁸³ This draft law is based on the proposed amendments to the LML and, as such, both laws must be passed as a package for the LEL and LML to be consistent. The LEL draft was developed in close cooperation with and support of Arazi, but with only limited involvement of other national stakeholders. Recent international and national consultations to introduce the draft LEL highlighted a number of significant and material issues in addition to the draft law's dependence on the passage of the draft LML. At the outset, national stakeholders expressed dissatisfaction

¹⁷⁹ See, AFGHANISTAN NATIONAL DEVELOPMENT STRATEGY (2006) (placing priority on enhancing women's rights, specifically, to "ensure the implementation of law reforms particularly in family law, inheritance and property law").

¹⁸⁰ See e.g. Meeting Minutes of National Housing, Property and Land Task Force Monthly Meeting May 20, 2014 (noting the ongoing work in support of IDPs and returnees related to land issues in Afghanistan), available at <https://afg.humanitarianresponse.info/clusters/housing-land-and-property-task-force>.

¹⁸¹ See, e.g. UNEP, NATIONAL RESOURCE MANAGEMENT AND PEACEBUILDING IN AFGHANISTAN, UNITED NATIONS COUNTRY TEAM IN AFGHANISTAN (2013).

¹⁸² See WILY, *supra* note 66.

with the methodology that excluded them from the development of this draft law. Notably, the lack of a workable definition of “public interest” or “public works” as a basis for state expropriation of private lands has not been resolved. In addition, although the CoM must approve expropriations, local councils determine if the project is in the “public interest.” This decision is not appealable to the courts; only the issue of land ownership can be litigated, with the caveat that the public works project can proceed while the case is pending if all other requirements are met. Further, the draft law establishes Arazi as the implementing institution with very little oversight or structural checks and balances. Under both the current LML and draft LML, Arazi is involved in the state land distribution, creating a possible conflict of interest if Arazi is also the implementing institution for expropriation of private lands.

These drafts of both the LML and LEL vest Arazi with broader powers than currently exist under these and related laws without providing for sufficient checks and balances. A centralized and unified land A&M framework calls for the establishment of one central institution with subnational offices where deeds are issued and registered by that authority. Although the draft amendments would not specifically remove titling from the courts’ jurisdiction, implementing the land reform envisioned by these amendments would necessitate moving this function, as well as many others, to Arazi. This proposed broadening of Arazi’s authority without implementing concurrent checks and balances has raised concerns that Arazi would be empowered and engaged in the illicit land economy. A robust and effective system of checks and balances that includes CSOs and other independent groups is a necessary feature of a unified system.

In addition to efforts to amend the LML and LEL, other efforts over the past two years include amending the LOR to specifically include land cases, mediation authority, and court recording of settlements; drafting a Law on Formal and Informal Systems to provide for recording specific land settlements with the courts; passing a robust Access to Information Law to provide effective access to government information; and passing a Land Grabbing Law to criminalize land grabbing.¹⁸⁴ These efforts have been met with little success, with the exception of the Access to Information Law being passed by the National Assembly, which is not specific to land, but would include the agencies involved.

The previous and current schedules of MoJ legislative priorities list a new Land Management Law, Land Expropriation Law, Law on Obtaining Rights, and Law on the Relationship between the Informal and Formal Systems. These priorities, coupled with the new incoming government, may provide Afghanistan with an opportunity to develop and adopt a twenty-first-century land A&M legal framework that establishes a unified titling and registration system.

¹⁸⁴ Recent efforts to pass a law criminalizing land grabbing have been ineffective. A special parliamentary commission was created to assess land grabbing and compile a list of land grabbers. Despite a list of over 15,000 land grabbers and the identification of this as a serious issue, the Parliament failed to pass a land grabbing law that would have criminalized only a small portion of land grabs and exacted penalties in the form of fees for the majority of land grabbing cases.

The modality for developing a unified land A&M framework might adopt the lessons learned to date and support the creation of a Civil Law Reform Working Group modelled on the successful eight-year-old Criminal Law Reform Working Group that provides policy and revision advice to the Taqin's draft laws, which is chaired by the MoJ and attended by national stakeholders, with technical support provided by the international community.¹⁸⁵ Such a modality would enhance cohesiveness and consistency in the drafting of laws, including related but differing laws involving complex frameworks, while ensuring national buy-in, support, commitment, and full ownership.

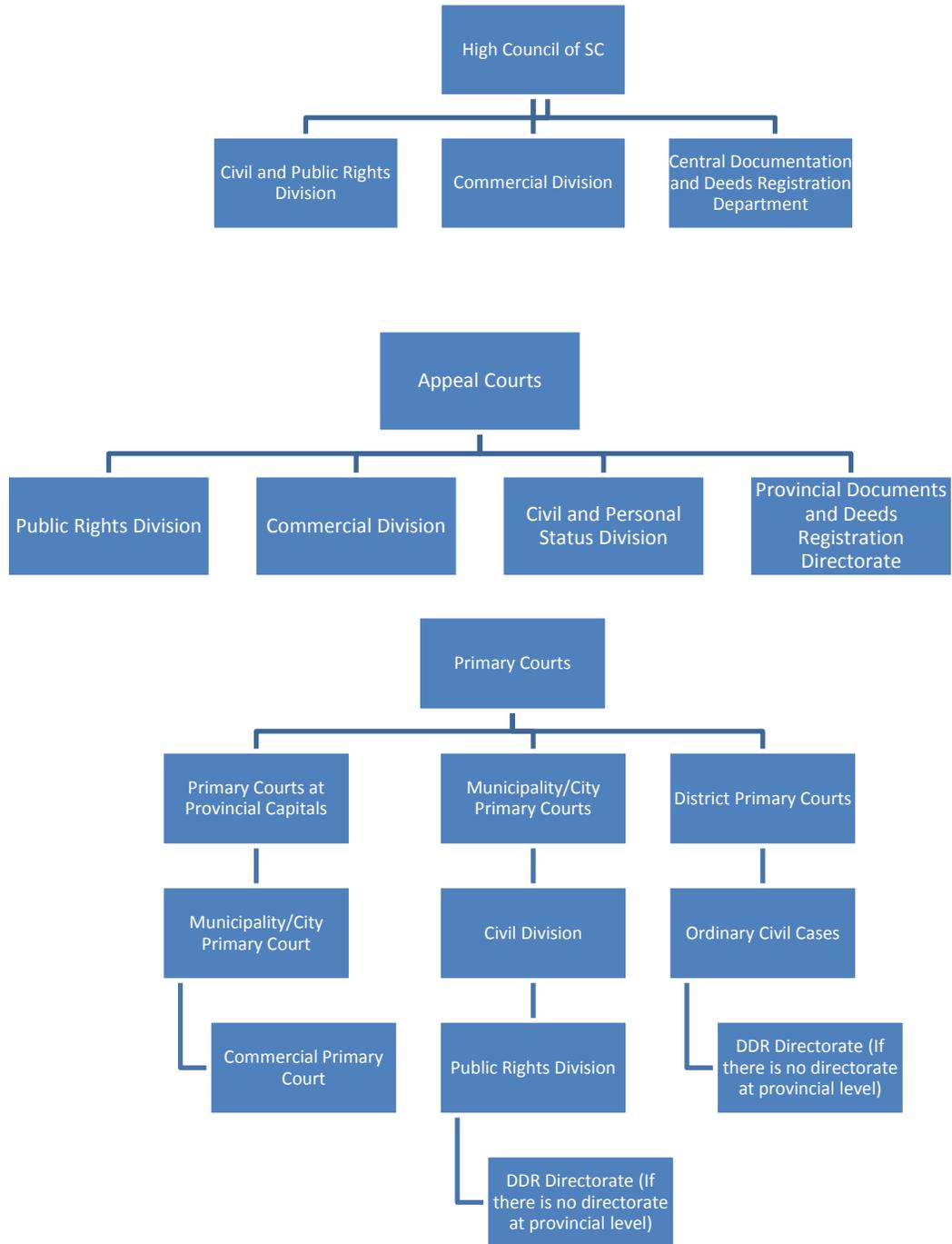
¹⁸⁵ The Criminal Law Reform Working Group is consolidating and revising the Penal Code of 1976 to include special criminal laws, and it is expected that the crime of land grabbing will be included in the new draft law. That revision could also include clarification that land prosecution cases are not dependent upon resolution of any related civil action as to ownership and title. Alternatively, the new Criminal Procedure Code could be amended as to this point.

Annex I: Laws, Decrees, Directives, and Resources

1. Constitution (2004)
2. Law on Organization and Structure of Courts (30/6/2013)
3. Government Cases Law (21/9/2013)
4. Land Management Law (31/7/2008)
5. Law on Obtaining Rights (5/8/1999)
6. Civil Code (4/1/ 1977)
7. Civil Procedure Code (22/8/1990)
8. Commercial Code (1955)
9. Commercial Procedure Code (1964)
10. Elimination of Violence Against Women Law (1/8/2009)
11. Penal Code (10/1976)
12. Criminal Procedure Code (5/5/2014)
13. Law on Pasture and Grazing Land (2000)
13. Property Dealers Law (1999) (OG 786)
14. Law on Survey Verification and Registration of Lands (21/9/1976)
15. Cadastre Law (12 September 1988) (OG 674)
16. Land Expropriation Law (9/10/2000, amended 2005, 2009)
17. Municipality Law (8/10/2000) (OG 794)
18. Procurement (*Tadarokat*) Law (29/07/2008)
19. National Land Policy (2007)
20. Executive Decree 99 (24/4/2002)
21. Executive Decree 83 (9/11/2003)
22. Executive Decree 89 (30/11/2003)
23. Executive Decree 638 (2/4/2010)
24. Executive Decree 45 (26/7/ 2012)
25. Executive Decree (Resolution) 11 (27/05/2013)
26. Executive Decree 220 (24/6/2013)
27. Arazi Five-Year Plan (22/02/2014)
28. Islamic Jurisprudence (Feqh-i-Islami) from Wahba Zuhaili, Hedaya, Mojalatul Ahkam (First Edition 1984, 2nd edition 1985)
29. Personal Status Code of Shia in family cases where one side is Shia citizen (27/07/2009)
30. Supreme Court Directive 79 (2013)
31. Handbook entitled “*Registering Documents and Title Deeds*”, Judge Atiqullah Raofi (2011)
32. Land Settlement Commissions/Communication of Notification (2010)
33. MAIL, Arazi, Regulation on Addressing Disputes and Land Usurpation, (26/09/1390) (20/12/2011)

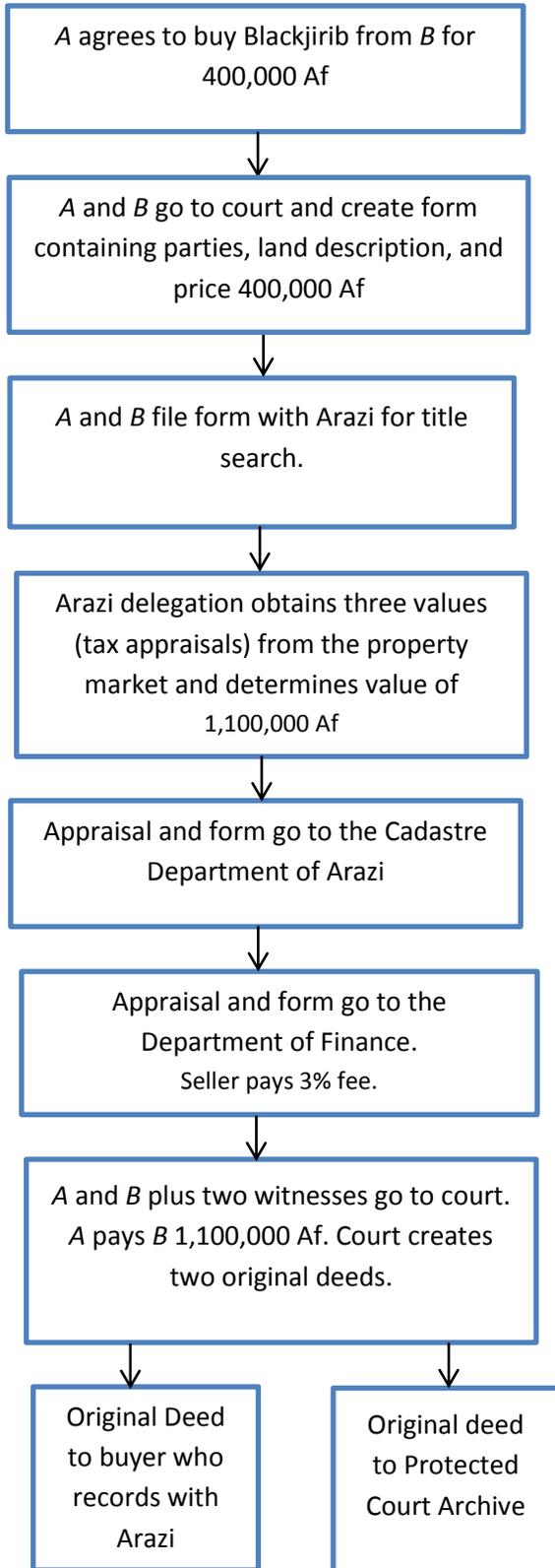
34. MAIL, Arazi, Order 4695 (14/12/2011)
35. Forest Law (10/09/2012)

Annex 2: Court Structure



Annex 3: Private Property Sale, Purchase and Transfer

FORMAL PROPERTY PURCHASE



OR Private land sale in which A pays B 2,000,000 Af.

No records are created and no recording with state. One estimate says 90% of all land transactions are private. Brokers usually charge buyer and seller each 1% whether official or unofficial sale.

Parties may underreport the official price to reduce transfer fees and property taxes.

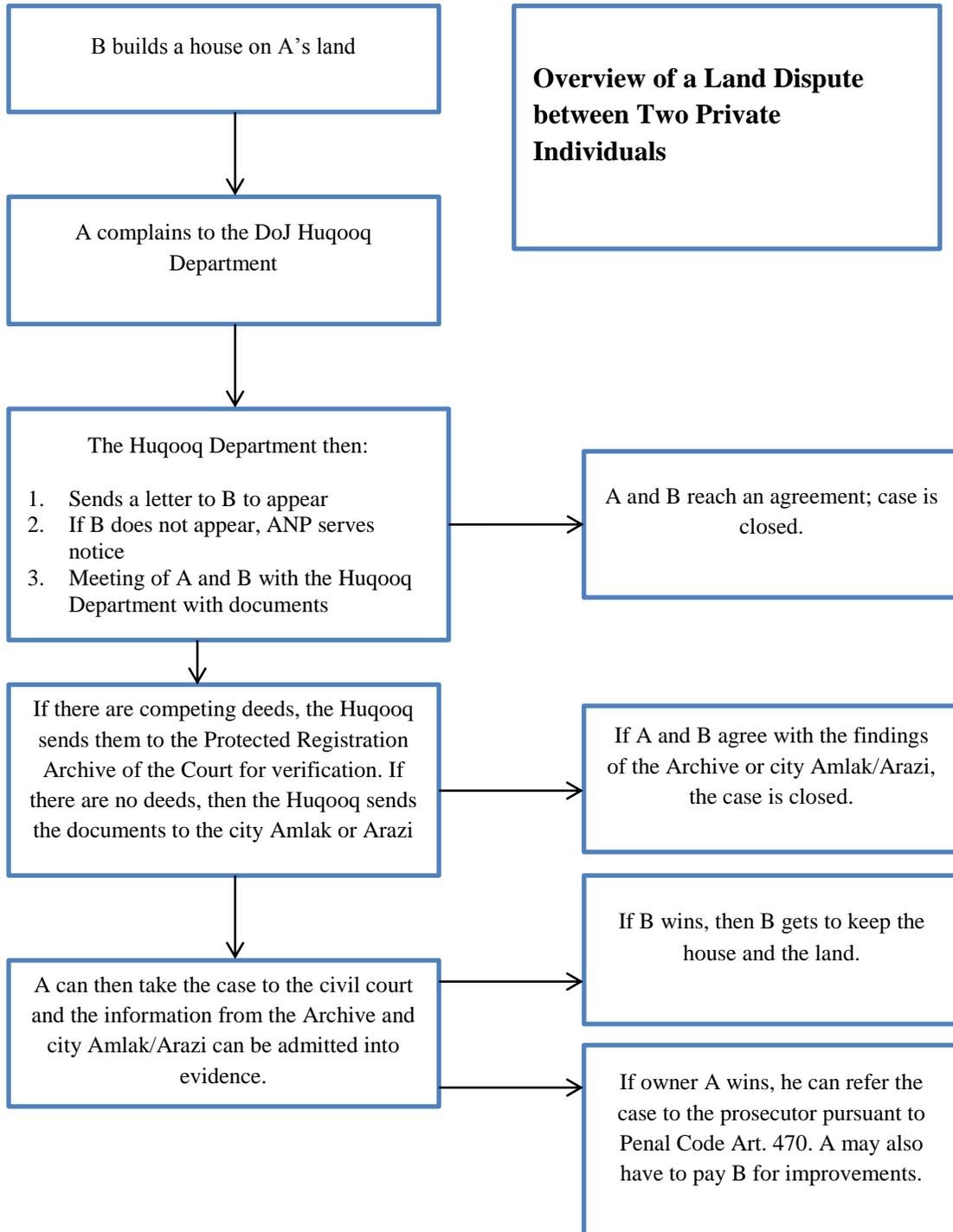
For residential, commercial, and city property, the property agency is the municipality Arazi, which is not affiliated with the Independent Land Authority Arazi.

The property market performs an appraisal function. Required by the state for tax purposes, not by the parties. Like a real estate broker found at the bazaar.

For property valued under 1,000,000 Af, seller pays fee equal to 2% of value. For property valued over 1,000,000, seller pays 3% registration fee to court. An additional 1% is paid to the municipality and 1% to the Ministry of Finance. A 5% transfer tax was eliminated by law in 2008.

In this example, the parties might have agreed on 2,000,000 Af sale price, but to keep fees and taxes low, they officially underreported the price. The appraisal function is designed to ensure the state gets their property tax on the property's real value. Bribes can affect the process throughout, from judges and appraisers to the MoF and Arazi. Note that appraising the property at 1,100,000 and not 1,000,000 added 1% of the value in court fees.

Annex 4: Overview of Private Land Dispute Processing



Annex 5: Overview of Land Dispute between Private Individual and State

