

جمهوری اسلامی افغانستان Islamic Republic of Afghanistan

DRAFT LAND POLICY



دلو 1385

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INTRODUCTION

This policy document is the product of a series of consultations with pertinent government officials, communities and other stakeholders. The purpose of this document is to set forth a clearly defined set of issues and policy options that will serve as general guidance to inform the revision and modification of the legal framework for land. Also, under this umbrella policy framework the ministries of Agriculture and Urban Development shall formulate or adjust their strategies and plans of action to tackle challenges pertaining to rural and urban land.

1.1. RATIONALE FOR A LAND POLICY

Land management in Afghanistan is governed by an ineffectual and inadequate legal framework. The strict application of existing laws is limited both administratively and judicially. In many respects the situation of land management and use is characterized by informality. While many provisions embodied in existing laws are useful, many other provisions have not been sufficiently adjusted to address the post conflict reality; these provisions require reform. Existing land issues dictate a strong imperative to formulate new, relevant and workable legal paradigms. The legal drafting and enactment of any new or amended land laws should be guided by a cogent, clearly established policy.

1.2. POLICY VISION

This policy envisions the maximization of social and economic benefits to the whole of Afghan society based upon the orderly and sustainable use of its most important natural resource-land.

1.3. LAND POLICY OBJECTIVES

- Provide every Afghan access to land
- Promote and ensure a secure land tenure system
- Encourage the optimal use of land resources
- Establish an efficient system of land administration
- Ensure that land markets are efficient, equitable, environmentally sound and sustainable to improve productivity and alleviate poverty

1.4. LAND POLICY PRINCIPLES

- 1.4.1. Ensure a flexible, equitable and transparent policy that serves the diverse interests of the Afghan society.
- 1.4.2 Land as a natural resource is fundamental to the livelihoods of its people and must be preserved and protected for future generations.
- 1.4.3 All Afghans should have the opportunity to legally access land resources and the right to maximize their social welfare. No individual or group should be barred from ownership.
- 1.4.4 Land is the most important resource to assist in achieving the visions and related goals inherent in the Afghan Constitution.
- 1.4.5 Institutional coherence and efficiency is a necessary precondition for the achievement of all the above objectives.
- 1.4.6 Transparency, accountability and community participation are critical for effective land administration and must be applied at all levels, from communities to the highest levels

of government. Local communities must take responsibility and the government must acknowledge its role to serve the people.

- 1.4.7 It is the right of every Afghan to pursue a livelihood and should not bear the burden of any land-related legal impediment on the basis of ethnicity, gender, language, religion or marital status.
- 1.4.8 The private sector holds the key to economic growth and is dependent upon the establishment of clearly defined, enforceable and transferable property rights through a legal and efficient institutional framework.
- 1.4.9 Land resources should be used for the nation's benefit and efficiency should be promoted through the facilitation of a transparent land market.
- 1.4.10 All forms of user rights to land should be formally recognized and be protected by law.
- 1.4.11. Information on land ownership and user rights should be generally accessible to the public at designated offices.
- 1.4.12 Land ownership and user rights have an economic value which should be transferable or disposable in return for payment or as a gift, bequest, or inheritance.
- 1.4.13 The ownership and use of land may be subject to taxation by the Government and its authorized agencies.
- 1.4.14 The government shall distribute land ownership and user rights fairly to promote social harmony and protect the poor.

2. POLICY CONTEXT

In order to achieve the vision and objectives of this land policy the following issues are identified and policies recommended.

2.1. LAND TENURE ISSUES AND POLICIES

2.1.1 Issue: Insecurity of Tenure In Rural and Urban Areas

The problem of tenure insecurity in both urban and rural areas manifests itself in a variety of forms. Tenure insecurity not only discourages property holders from making an economic investment in their property, but also deprives the market economy of their participation and potential contribution. The ongoing failure of the formal land allocation, adjudication and registration systems has caused uncontrolled informal developments in urban and rural areas. Squatting, land grabbing, acquisition of immovable property from land grabbers through informal market transactions, improper allocation of land, inter alia, have undermined efficient and equitable use of land for social and productive purposes. At the same time, these uncontrolled and informal developments have given rise to serious tenure insecurity to users and owners of land. There are many cases of multiple claims of rightful claimants and a current possessor who acquired or bought the property legitimately and in good faith which must be resolved to ensure peace and stability in the country.

2.1.1 Policies:

- It is national policy that the government draws clear distinctions between types of tenure insecurity and provides appropriate legal and administrative solutions for the various forms of insecurities. To resolve the dichotomy of the complex and diverse formal system and informal tenure systems requires a continuum of tenure categories embodied in a legal framework.
- It is national policy that the constitutional guarantees for security of tenure are observed. In consideration of equity and justice issues no one may be deprived of property rights except in accordance with the law, and no law may permit arbitrary and forcible deprivation of property rights. Further, the state must take appropriate legislative and administrative measures to foster conditions which enable citizens to gain access to land on an equitable basis. In particular, there shall be no discrimination with respect to tenure security on the basis of ethnicity, gender, religion and social status.
- It is national policy that all individuals who hold rights to property be afforded the quiet enjoyment to the use and ownership of their properties. All legitimate property rights must be protected by law and framework established to provide appropriate remedies for entitled claimants.
- It is national policy that alternative forms of tenure together with sufficient safeguards, such as private ownership, usufruct, leasehold, communal ownership, be available to agricultural workers, rural and urban dwellers. The availability of these legally enforceable tenure alternatives will ensure more accessibility to secure tenure.
- It is national policy that compensation for the expropriation of ownership or of rights over land as enshrined in the Constitution be strictly enforced by law. Property rights may only be expropriated under defined legal procedures and for defined legal purposes.
- It is national policy that no law may permit arbitrary deprivation of property rights. In the event that the government decides to implement a development project in the interest of the public, the value that the land had prior to the announcement of the expropriation will form the basis for the amount of monetary compensation to the owners of the property.

2.1.2 Issue: Distribution and Acquisition of land. Existing land allocation procedures lack equity, transparency and accountability. Land prices have escalated over the past four years and pricing for available housing has skyrocketed far beyond the reach of most urban dwellers. There is a clear need to create and implement strategies to enhance the delivery of land for affordable housing options. Furthermore, access to rural land and to user rights is critical to the sustainability of rural families and pastoralists. At present, land allocation and rights to use government land often controls the ability of rural families to earn a living. The rural landless are disadvantaged, deprived of community support and unable to accumulate income or capital assets. Land allocation must therefore ensure that families within a community and the rural landless have access to sufficient resources to sustain themselves.

2.1.2 Policy:

- It is national policy that the government implements an equitable, transparent and clearly defined set of procedures for the allocation of land. Those procedures must ensure transparency and accountability by the allocating authorities and must clearly define the authorities and responsibilities of the allocating authorities and the rights of land applicants. Land allocations must be based upon need and the rural and urban landless will have priority.

2.2. LAND USE AND LAND MANAGEMENT ISSUES AND POLICIES

2.2.1 Issue: Land Classification: Existing land-related laws classify land under a number of different classification systems which are often vague and confusing. In particular the definition of state owned land has changed through multiple regimes. A land

classification system should exhibit simplicity and clarity and clearly define public, private, community and state lands.

2.2.1 Policy

- It is national policy that all land be classified as public, private, community or state-owned land and that the definitions of each classification be clearly stated and consistently applied throughout the body of land related laws.

2.2.2 Issue: Duality of Land Tenure and Land Management. The land tenure and land management system consists of both formal and informal systems. The informal property market reflects the inadequacies of the formal system and is most often used in lieu of the formal market system. Such duality in a land management system impedes the operation of integrated and efficient management of land as national resource.

2.2.2 Policy

- It is national policy that land be managed as a national resource through a land management system that does not distinguish on the basis of tenure alone and is based upon an institutional framework which integrates the formal and informal tenure systems.

2.2.3 Issue: Land Grabbing: Land grabbing has been one of the most problematic aspects of land management throughout the country. The act of land grabbing is often accompanied, preceded or followed by equally reprehensible acts such as faking deeds and registration of property rights through corrupt practices. Land grabbing also encourages informal property markets. The accompanying unlawful acts complicate the land tenure issues concerning the grabbed land, particularly when the appropriated land was sub-divided and allocated to followers or sold off and developed and lived on by other individuals. In rural areas communal lands have been appropriated by powerful entities resulting in the misuse of public resources to the exclusion of others.

Land grabbing must not in any way be encouraged. However, the range and complexity of cases of land that has been originally appropriated forcefully but later on distributed or sold off to other individuals who have developed the land calls for realistic government measures.

2.2.3 Policies

- It is a national policy that a management system be built upon the legal and institutional frameworks with the objective to prevent land grabbing in the future and deal with the acts of grab that have happened in the past. This institutional framework will function both at the district, provincial and national levels within the auspices of the ministries of Agriculture and Urban Development in their respective spheres of mandate.

2.2.4 Issue: Informal and Unplanned Developments. Over the last three decades the country has experienced an enormous expansion of informal settlements and unplanned developments in almost all urban areas. Although the development and expansion of informal settlements has manifested itself in a variety of forms, the expansion of informal settlements has often involved the unlawful occupation of land. These unlawful acts are in large measure due to the failure of the formal system of land allocation and planning to provide for the needs of the occupiers due to social disruptions. Although uncontrolled developments have provided temporary solutions for many citizens, the uncontrolled development in urban areas has created challenges to land tenure security, land use planning, provision of basic services and protection of the environment. In most urban areas, uncontrolled development has made pre-war prepared Master Plans obsolete. The variety of forms that the issue of informal developments has manifested itself calls for proper classification of the problem. Residential areas formed on government/public lands are of two types. First, there are public lands grabbed by powerful people and sub-divided into smaller plots. These types of land are either distributed or sold off

to others or they are found in the hands of the grabbers. Second, homeless people have built houses on public lands within approved boundaries of urban areas to accommodate themselves and their immediate dependants or family members.

2.2.4 Policies

- It is national policy that all land development be carried out in accordance with duly approved plans developed by competent authorities in consultation with local communities. Such plans shall consider both the current and future needs of communities. The government shall promote the upgrading of informal settlements in tandem with progressive housing development.
- It is national policy that the legal framework for land distinguishes between cases in which land has been grabbed by powerful people for distribution to followers or sold off for profit, instances where homeless people (squatters) have occupied public land in order to accommodate themselves and their immediate household and instances where individuals or households have built houses on privately owned non-agricultural land.
- It is national policy that residential areas formed on public or government land grabbed by powerful people shall not be covered by upgrading programs promoted by the government and the government shall take appropriate measures to deal with the unlawful occupation in accordance with the law.
- It is national policy that the government shall endeavor to upgrade the basic services of residential areas formed on public land occupied by homeless squatters on habitable land. The relevant municipality in consultation with the Ministry of Urban Development shall determine the habitability of an area taking into account clearly defined environmental and planning criteria and endeavor to integrate settlements formed on habitable land into the planning process of urban areas. Eligible households will be granted residence permit based on status of property right clarification process to be launched by the government.
- It is national policy that the Government gradually upgrades informal settlements formed on privately owned and environmentally tenable land as certified by the Ministry of Urban development and relevant municipality and endeavor to integrate them into the formal planning processes of urban areas. The government shall promote land tenure regularization in these areas in collaboration with relevant communities based on standards to be established by law.
- It is national policy that the status and future plans of informal settlements formed on the surrounding areas of government approved boundaries of urban areas be determined by the ministries of Agriculture and Urban Development.

2.2.5 Issue: Protection of Property Rights: There are not in practice any coherent and transparent mechanisms to protect property rights and equitably compensate those who are displaced. Poorly protected property rights have an adverse effect on the climate for private investment and inhibit social and economic development. Arbitrary and forcible eviction and relocation without equitable compensation are the primary manifestations of this problem.

2.2.5 Policy

- It is a national policy that the national and provincial governments take measures to protect citizens including residents of informal settlements from arbitrary and forcible eviction. Eviction and relocation of unplanned settlement residents shall be undertaken with community involvement only for necessary spatial rearrangement which should take effect in accordance with the interest of the public.
- Compensation for expropriation of rights over land must be provided equitably in accordance with the law.

2.2.6 Issue: Regulation of Pasture Land: The competition for limited resources of pasture in many areas in Afghanistan has adversely affected the economic livelihood of pastoralists

and fueled long standing conflicts. The competition over grazing land between pastoralists and settled farmers is a result of ill-conceived historical political agendas, poor land management, lack of adequate land survey, the non-existence of adequate dispute resolution mechanisms, the near collapse of land adjudication and registration systems, and the lack of strict enforcement of existing laws. The lack of adequate management and control over public owned land has resulted in grabbing of land that was traditionally used by pastoralists as well as settled farmers for grazing livestock herds. The regulation of pasture land is an imperative if it is to be protected from threats to its sustainable use such as grabbing of community lands of neighboring villages, grabbing of rangeland, cultivation of traditional grazing land, government designation of grazing rights in what have traditionally been considered communal grazing lands. Pastoral ownership is unclear and formal law ambivalent as to whether pasture lands are state-owned, public or communal.

2.2.6 Policy

- It is a national policy that access to land resources be clarified and secured as part of an integrated natural resource management which springs from local community based resource management. Such community based resource management must be conducted under the strict supervision and guidance of the Ministry of Agriculture.
- It is national policy that community-based natural resource management strives to ensure environmental protection and usage for all public owned pasture users.
- It is national policy that the resolution to complex issues of ownership and access rights to pasture lands be examined at the provincial level and traditional use rights of settled farmers and pastoralists established and respected.
- It is national policy that the Ministry of Agriculture reactivates land surveying in order to clarify rights to land.

2.2.7 Issue: Proof of Rights to Land: In most cases, proof of land rights is based upon tax records, *Amlak* registration, customary deeds, formal deeds and local knowledge. Some formal deeds are suspect or fraudulent; in some areas registered deeds have been destroyed during the years of conflict. Under such a chaotic property rights situation, it is imperative for the government to establish a realistic and effective method of property clarification process. Best practices and the reality in the country inform that community-based property adjudication processes that utilize local knowledge can be effective vehicle to re-identify local ownership.

2.2.7 Policy

- It is a national policy that land ownership may be documented through a process of property clarification and certification process conducted at the community level.
- It is a national policy that recognition be given to customary documentation and legitimate traditional property rights affirmed by local knowledge, in accordance with a law to be issued to govern the regularization of property rights.

2.3. HUMAN RIGHTS ISSUES

2.3.1 Issue: Bias in Land Allocation: The constitution prohibits any kind of discrimination and privilege between the citizens of Afghanistan and reiterates the principle that women and men have certain rights and duties before the law. Shari'a law and the Civil Code guarantee comprehensive rights of ownership and inheritances of land to both men and women. However, customary practices often dictate that land rights inherited by a woman be given over to male family members. It is important to ensure the embodiment of constitutional rights for all Afghans in land-related practices and law consistent with Islamic law principles.

2.3.1 Policy:

- It is national policy that the civil law especially the property law be consistent with the Constitution and relevant principles of Islamic law in the protection of a man's and woman's right to acquire and hold land independently, share equitably as a family member in family owned property, and rights of inheritance.

2.3.2 Issue: Landless Farmer Workers: More and more farm workers are landless and are dependent on the landowners for whom they work for their shelter. In many cases poor farmers have mortgaged their land in such a manner that their livelihood and land ownership is at risk. This is particularly true as a result of increased pressure from poppy cultivation. The relationships between landowners and farm workers, tenants, sharecroppers must be improved to ensure equity as well as productivity.

2.3.2 Policy:

- It is national policy that the labor terms for farm workers, and tenant/rent and sharecropping agreements as well as the terms by which farmers mortgage their land be closely regulated to ensure that workers and farmers receive an equitable return for their labor.

3.1 LAND ADMINISTRATION ISSUES AND POLICIES

3.1.1 Issue: Land Use. Drought, war, land appropriation and increased poppy cultivation have resulted in the concentration of land ownership into the hands of a relatively wealthy small minority. There are also large numbers of rural families sharecropping land that they formerly owned.

3.1.1 Policy:

- It is national policy that land distribution schemes for productive and economic activities be balanced to evenly serve the competing interest of all segments of society.
- It is national policy to distribute land for housing purposes in accordance with defined procedures. The procedures shall be fair and equitable to all segments of society.

3.1.2 Issue: Overlapping and Uncoordinated Land Administration System. Afghanistan's land administration system lacks coordination and efficiency. There is confusion among competing agencies which often vie for preeminence due to ill-defined or overlapping roles and differing agendas. The uncoordinated pursuit of different agendas has led to stalemates and a resultant inability to tackle urgent problems as they arise. There is no formal method of resolution of such conflicts, resulting in inaction when urgent action is required. The overlapping role of multiple ministries and government bodies results in inefficient and uncoordinated land administration and generates conflicts. In particular, courts are often responsible to resolve disputes that arise from improperly prepared land ownership documentation prepared and registered by the court.

3.1.2 Policies:

- It is national policy that the administration and management of land be conducted through a consolidated, cohesive, transparent and representative land administration body which possesses the necessary technical and administrative support, both at the national and local level. An institutional framework will be created with the objective to streamline certification and registration operations and provide appropriate access to the public. The institutional framework should include a body entrusted with the authority to determine land allocation in coordination with local communities.
- It is national policy that all land administration functions be gradually consolidated in a single government body to ensure efficiency, avoid duplication and better utilize available technical knowledge and professional skills.

- It is a national policy to gradually and as practical establish within the new land administration body a consolidated, simplified and localized system of land registry that is transparent and accessible to provide less costly, efficient transfers of property, updated changes in ownership, provide greater accountability to landowners and focus the function of the court on the resolution of land-related disputes.

3.1.3 Issue: The Land Market Does Not Operate to the Benefit of All Citizens. The demand for land within a private market system derives from people with financial resources and an interest in investing in land. People with limited financial resources find themselves excluded from acquiring land through purchases.

3.1.3 Policy:

- It is national policy that the formal land markets operate with transparency, efficiency and equitably to benefit all Afghans. The poor must be able to access land markets and a greater numbers of Afghans must be included in the economy. Access to land markets includes other tenure opportunities such as rentals or leases.

3.1.4 Issue: Rural Landlessness: Rural landlessness is pervasive and has a negative effect on the economy and families.

3.1.4 Policy:

- It is national policy that in order to reduce rural and urban landlessness and encourage significant investment in agricultural development targeted to landless farmers, a land trust shall be established to allocate state-owned land to the landless.

3.1.5 Issue: Underutilization and wasteful use of land. Only a small percentage of state-owned cultivatable land is under lease. The existing land administration and regulative framework supports the underutilization of land.

3.1.5 Policy:

- It is national policy that land management and administration is grounded in the principle of sustainable development and ensures competent management and the maximization of sustainable economic benefits from the land resource, for the benefit of both the property owner and the nation as a whole. Appropriate measures shall be instituted to ensure that land resources are being used for the benefit of the nation as a whole, including transparent, accountable management systems and a well-enforced government regulative framework.

3.1.6 Issue: Foreign direct investment and foreign ownership of land.

While the constitutional provision that restricts ownership of land by foreigners must be respected, at the same time, there is a need to enhance foreign direct investment by making land available for foreign direct investment.

3.1.6 Policy:

- It is national policy as enshrined in the Constitution that foreigners may not own land, and may only obtain property rights to commercial, retail and industrial property, agricultural and residential land in the form of leasehold. Such leases may be for a term of up to but not to exceed 50 years.
- It is national policy that foreign diplomatic missions may obtain rights to immovable property in accordance with the principle of reciprocity.

3.1.7 Issue: Conversion of Agricultural Land to Urban and Peri-Urban Status. Large numbers of returnees and internally displaced persons are creating more pressure to convert surrounding agricultural land for urban and peri-urban development. Such conversion not

only infringes on those whose livelihoods are intricately woven into the land, but lacks any rational integration into the larger urban planning process. Although urban expansion is inevitable and even desirable, Afghanistan's supply of arable land is scarce, and some prime areas are under threat of permanent alienation from urban expansion. Much of the arable land can more appropriately be utilized to ensure its highest and best sustainable use.

3.1.7 Policy:

- It is national policy that agricultural land contiguous to peri-urban and urban areas be protected from encroachment by urban development. The nation's limited supply of arable land is fundamental to its long-term future, and is to be protected accordingly. Appropriate measures must be introduced which both protect arable land from unplanned conversion and which supports its sustainability.

3.1.8 Issue: Land-related Dispute Resolution: Disputes regarding land are the result of years of conflict, and historical/ political based property allocations which have never been resolved. While many claims relate to private land others relate to the rights of use or ownership of non-private (public or state owned land). Workable resolutions concerning private claims generally must consider the appropriateness of the return of property to its displaced owner and alternative shelter or some form of compensation to other good faith claimants. However, there is a multiplicity of legal frameworks both formal and informal (customary practices), inconsistency in interpretation and most importantly a lack of any viable enforcement mechanisms. Afghans do not repose any confidence in the courts to equitably resolve land-related disputes. A feasible and practical dispute resolution approach must acknowledge the value of community-based knowledge. Furthermore, any approach to sustainable dispute resolution must address the historical and underlying grievances associated with how land was acquired whether by government or individuals.

3.1.8 Policy:

- It is national policy to restore stability of land ownership through the promotion of alternative dispute resolution processes such as arbitration, mediation and conciliation at a district or community level.
- It is national policy that the relevant laws be amended to provide that land claims shall be barred by period of limitation after the lapse of 37 years.
- Disputes resolved through a community-based dispute resolution process which are not in contravention of the law shall be given full faith and credit by the formal justice sector.

3.1.9 Issue: Environmental Sustainability. Land management systems have not traditionally assigned priority to environmental issues with regard to the sustainability of natural resources including forest conservation and prevention of desertification. Degradation of land, from overgrazing, lack of flood controls, poor mining techniques, deforestation, to name only a few has negatively impacted Afghanistan's greatest natural resource. Environmental protection campaigns are most successful when supported and implemented by the general public, however public awareness of environmental issues is negligible.

3.1.9 Policy:

- It is national policy that land is a natural resource and fundamental to the livelihoods of our people which shall be protected for present and future generations. Land management issues shall consider the environmental impact in all aspects related to land use, regulation, allocation, resource use and management.
- It is national policy that a campaign of public awareness be initiated to ensure that all citizens develop a level of environmental awareness in order to support and implement environmental protection measures, individually, at the community and national level.

Approved and signed this 24th day of January

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