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The World Bank

Land Acquisition in Afghanistan

A Report

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Table of Contents *Page*

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Introduction

The purpose of this report is to review and assess Afghanistan's legal framework regulating social safeguards (national and local laws, regulations, procedures and policies) with special reference to the law and practice of compulsory land acquisition, or expropriation[1]. The assessment will be compared with the objectives and operational principles stated in WB OP/BP 4.12. The overall objective of the report is to consider how Afghanistan's legal framework would address social safeguard issues in upcoming World Bank projects which are likely to involve land acquisition and resettlement of those persons whose land is to be acquired in connection with project implementation. The report will consist of a narrative of the context within which the assessment will be conducted and the assessment which will in both narrative and tabular form. Relevant extracts of the detailed terms of reference are set out in Appendix 4 to this Report.

Afghanistan is embarking upon a massive programme of public works to improve and upgrade the infrastructure of the country: better roads, clean water; more schools and hospitals in both rural and urban areas are needed to provide a better life for all Afghans. The World Bank is committed to providing assistance towards the realisation of this programme. Much of these public works will involve the acquisition of land on which people are at present living and obtaining a livelihood from. It is important to stress at the outset of this report that far from the object of the report being to impede or prevent these necessary public works, the aim of the report and any consequential changes in the law which might result from its proposals are designed to facilitate those public works by providing for a clear and fair system of land acquisition, compensation and resettlement for those people who will be required to leave their homes and land for the greater public good in order that the public works can be carried out. Where people are satisfied that they have been treated fairly, they will be more likely to co-operate in being moved from their homes and this will facilitate the execution of the public works.

[1] During the workshop to consider a draft of this report held in Kabul on 5 June 2007, (the workshop) it was opined by one participant that a distinction should be drawn between land acquisition and eminent domain. The consultant's view is that expropriation, land acquisition, eminent domain and resumption are all different names for the same activity: a government's power to take land away from the citizen against the citizen's will for some public purpose against the payment of compensation. This activity may be contrasted with confiscation where land and other property is taken from the citizen but no compensation paid and colonialism where a whole country was taken away from its citizens with no compensation paid.

The immediate purpose for the report is to review and assess Afghanistan's legal framework on compulsory land acquisition, or expropriation in the light of the objectives and operational principles stated in the World Bank's Operational Procedures 4.12 which deals with resettlement. Congruence between Afghanistan's laws and practices and OP 4.12 will be a condition of loans made available by the Bank for public works. What must be stressed very strongly however that even without the need to follow OP 4.12, there would at some point be a need to revise the existing laws and practices in the light of the provisions of the Constitution and of the Draft Land Policy. However this report will concentrate only on those aspects of the existing law and practice which need changing in the light of OP 4.12 and will not comment on other possible changes[2].

Land acquisition and resettlement – the loss of one's home and means of livelihood for many people – is a major dislocation for those subject to it. At the same time, the law and practice of land acquisition, however painful for the individuals subjected to it is but one part of the total corpus of law and practice of land management in Afghanistan and a relatively small part at that. It would be neither useful nor possible to review and assess this small part of the land law of Afghanistan without attempting to place it in the context of the total picture of that land law. This contextual framework will be set out and commented on first.

The immediate frame of reference for an assessment of the law and practice of land acquisition and resettlement in Afghanistan is World Bank Operational Procedure 4.12. The key aspects of OP 4.12 will need to be drawn out and commented on in the sense that it will be useful to make some preliminary judgement on what aspects of OP 4.12 might be expected to be part of a law on land acquisition, and if so what should be in primary legislation and what left to regulations, and what parts might be better left to practice and so provided for by Ministerial directives or internal management rules drawn up by agencies with the power to undertake land acquisition. This analysis and comment on OP 4.12 will form the second part of this report.

[2] To give just one example, the Expropriation Law provides that land may be acquired for public purposes. It defines public purposes (see footnote 48). These do not include acquiring land from one citizen to hand it over to another so that that other may make a profitable investment in the land – a purpose for which land acquisition is now permitted in the USA: *Kelo v City of New London* 125 S.Ct. 2655 (2005). That would probably be regarded as legalising land grabbing in Afghanistan.

The third part of the report will be the review and assessment of the existing law and practice of land acquisition in Afghanistan in the light of the two preceding parts of the report. The fourth part of the report will be a discussion of possible solutions to the perceived gaps and the pros and cons of each solution together with recommendations. This part of the report will be summarised in tabular form to facilitate its consideration.

In discussion with the Deputy Minister of Justice, he advised that it would be helpful if, in the event of any recommendations on the need for amendments to or any replacement of the existing Expropriation Law 2000, a draft of any possible amendment or replacement law formed part of the report. Useful though this might be, it seems better to obtain some form of governmental acceptance of the proposals in this report especially of a proposal for a new Expropriation Law before proceeding to draft such a law, so no such draft accompanies this report. An appendix sets out the possible contents of a new Law in the form of an 'Arrangement of Articles' of such a Law.

The consultant's first missions to Afghanistan were in June, July and October 2005 as a UN-Habitat consultant. Part of his work was to review and comment on the existing land law of Afghanistan and the then problems affecting its implementation with special reference to urban development and make suggestions for its reform. This earlier consultancy has both helped and hindered the present consultancy. It has helped it in that the consultant comes to this consultancy with some knowledge of the context of land law and its problems within which this report must be written. It represents something of a hindrance in that it is difficult with respect to writing about the all-important land law context of this report to be particularly original or to ignore the report of two years ago. Clearly where there have been changes, they will be considered. Where however it is the consultant's view in the light of interviews conducted during his consultancy, that nothing has changed since 2005, the assessment and conclusions of that report will form the basis of the assessment and comments on the land law context of this report.

Part I: An overview of land policy and law

The most important development in land administration not merely in the last two years but since the Bonn Agreement of December 2001is the drafting of a land policy, a process that was set in motion in 2005 and has at the time of writing this report got to the point where the draft land policy is before the Cabinet. This policy must be summarised and assessed on the assumption that it will, in its essentials, prove acceptable to the

Cabinet and the National Assembly and may therefore herald some important new developments in land law and administration in Afghanistan in the future.

1. The Draft Land Policy

The Draft Land Policy (DLP) is short and confines itself to broad general principles. It is recognised by those closely involved in its drafting that it will need to be followed up by a strategy of implementation which will consist of more detailed and specific proposals and, either alongside these detailed proposals, or, as a follow up to them, some new laws. Given the succinctness of the DLP it is best to provide a summary of the key policies pertinent to the subject matter of this report in the words of the DLP. First the rationale of the DLP:

> 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.

That more or less sums up the thrust of the consultant's UN-Habitat report of 2005, though couched in more general and diplomatic language[3].

Key policies likely to affect the law and practice of land acquisition may be quoted:

- 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…
- 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.

[3] This analysis of the present situation on land management was echoed by the Minister of Urban Development, Minister Pashtoon in his introductory speech to the workshop.

All legitimate property rights must be protected by law and framework established to provide appropriate remedies for entitled claimants.

- 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. (Policy 2.1.1)
- It is a national policy that the law on land grabbing distinguishes the instances of individuals who have acquired appropriated land in good faith, and squatters who occupy public land in order to accommodate themselves and their immediate household from cases in which land has been grabbed by individuals for distribute to followers or sold off for profit. In the case of the former categories, there shall be a formalization law that provides for a standard by which the government will grant secure tenure of real property. (Policy 2.2.3)[4]
- It is national policy that the government shall endeavour to upgrade the basic services of residential areas formed on public land occupied by homeless squatters on habitable land…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…The government shall promote land tenure regularization in these areas in collaboration with relevant communities based on standards to be established by law.

[4] At the workshop, this distinction occasioned some debate. One participant advanced a strongly held view that no-one could be considered a bone fide purchaser of grabbed land since "everybody knows what land has been grabbed." It would seem better to consider such a situation in terms of the burden of proof: a purchaser of grabbed land would, once the land was shown to have been grabbed by a warlord, have to show that he/she did not know and could not have been expected to know (actual and constructive notice) that the land was grabbed. This might well be a difficult burden to discharge. Nor does this dispose of the wider issue of whether, even supposing that a purchaser could not discharge the burden, he or she should be deprived of any compensation or assistance with resettlement in the event that the land on which he or she was living was compulsorily acquired. OP 4.12 would suggest not. It would seem rather hard and inconsistent to penalise those who, however misguidedly, bought land in the informal market to accommodate themselves yet 'reward' those who "occupied public land in order to accommodate themselves" by upgrading their settlements. The point was made by another participant that under Islamic law, one cannot benefit from another's wrongful actions which fits the situation of the purchaser from a land grabber. But that principle also in applies to those who without any lawful authority "occupied public land in order to accommodate themselves" – a wrongful action in itself.

- 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. (Policy 2.2.4)
- 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 public's interest.
- Compensation for expropriation of rights over land must be provided equitably in accordance with the law. (Policy 2.2.5)
- 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, in accordance with a law to be issued to govern the regularization of property rights, to customary documentation and legitimate traditional property rights affirmed by local knowledge. (Policy 2.2.7)

It may be stated with some confidence that if all these policies were to be not merely formally approved by Cabinet and the National Assembly but implemented by the necessary laws being enacted and practices being changed to reflect and follow the new policies, then there would be considerable congruence between Afghanistan's land law and practices on land acquisition and OP 4.12 and any remaining gaps between law and OP 4.12 would likely be easily bridgeable. However, the extent of the gap between the existing law and practice and the proposed policies may be judged by the introductory rationale for the policy quoted above. We will revert to the DLP later in considering possible solutions to gaps. Now we must turn to the existing land law and administration.

2. Land Tenure

There are a plethora of post 2001 reports and books on the land law of Afghanistan and it is neither necessary or desirable to add to them or attempt to summarise them. Rather what is needed for this report is a statement of the key problems or challenges of land administration and land law in Afghanistan which would be likely to impinge on the law and practice of land acquisition and the ways and means of closing the gap between that law and practice and OP 4.12. However, it is necessary to start off this overview of problems and challenges with a summary of land tenure in Afghanistan basing this

overview on the quite excellent work that has been published quoting from it to set out the main elements of the law.

We must start with the Constitution. After surveying the constitutional provisions relating to land, *A Guide to Property Law in Afghanistan* sums up the position thus:

> In practical terms these constitutional provisions mean that all Afghan citizens are permitted to acquire and make use of property within the limits of the law and are protected from arbitrary or unlawful interference with their privacy and home. No one can be arbitrarily or unlawfully deprived of his or her property. The State is also obliged to protect individuals against the arbitrary deprivation of their property, to restore property to its rightful owners where they have suffered a wrongful deprivation, or to compensate them for any loss suffered. While the State can, under certain specified circumstances, deprive individuals of their property, or control its use, the interference must be 'lawful' and a 'fair balance' must be struck between the interest of the general community and the right of the individual property owner.[5]

These general principles are very much in tune with the philosophy implicit in OP 4.12; a point which must be borne in mind when the possibility of reforms in the existing Expropriation Law are considered.

Turning now to the land law of Afghanistan, a good introductory summary of the sources of the law is provided in *Looking for Peace on the Pastures: Rural Land Relations in Afghanistan*:

> The ownership of real property (land and fixed assets like buildings and houses) is regulated by a complex of customary, religious and statutory law. The last has derived as often through dictatorial decree and edict as through parliamentary enactments. Statutory law (or state law) comprises the civil code, land subject laws and the overriding supreme law, the national constitution. [6]

It is pertinent here to refer to a general comment about Afghan law and particularly statutory law:

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[5] C. Foley, (2005) *A Guide to Property Law in Afghanistan* Flytninghjelpen (Norwegian Refugee Council) and UNHCR, Kabul, Chap.1, 11 – 12.

[6] Liz Alden Wily, (2004) *Looking for Peace on the Pastures: Rural Land Relations in Afghanistan*, (Afghanistan Research and Evaluation Unit), Kabul, 28.

> because the law of Afghanistan is, thus, for the most part, either the traditional Islamic law or an indigenous product, it is a system somewhat unique in the world. Unlike most of the other Islamic and non-Western countries, Afghanistan never came under the political and juridical dominance of any European power. Accordingly, its sources have remained purely Islamic and where foreign models have been used they have, with the major exception of the Commercial Code, normally been molded to the Afghan context.'[7]

A more specific comment on the current land law is provided by McEwan and Whitty:

> In the more recent history of Afghanistan, land law has been one of the main vehicles for interventionist government policy…The Gazettes are littered with statutes enacting mutually contradictory, overlapping and piecemeal legislation from successive regimes…The present legislation, therefore, comprises an unfortunate mosaic of inconsistent provisions. Identifying the current law is a challenge…[8]

On the basis of the existing law, land and land tenure, the authors set out the following typology of non-urban land:

> **Pasture**: Pasture land is described…very broadly as: "all types of land, including hills, deserts, mountains, river beds, forests that have places where grass grows and supports animals, are known as pastures."[9] This requires interpretation…Two possibilities exist. First the phrase "grows and supports animals" is taken to refer to traditional practices and such practices are still being used[10]. The alternative is a definition…identifying as pasture all land that can graze animals, excluding irrigable and built-up land.[11]
>
> **Wilderness**: the same legislation [the Decree of 2000] defines *mawaat* as "unused lands" which extends to "desert, mountains, rivers, virgin land, barren lands and forests."

The authors take this to mean "unusable land" as opposed to land which is not presently being used. They then go on to set out a typology of ownership of all lands:

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[7] Rob Hager (1975) Foreword to *Compiled Translations of the Laws of Afghanistan*, UNDP, Kabul, quoted in Foley, cit, Chap 1, 9 – 10.
[8] A. McEwan and B. Whitty (2006) *Land Tenure*, Case Study Series; Water Management, Livestock and the Opium Economy, an AREU report (Kabul), 2
[9] The Law on Pasture and Maraa, Decree 57 of 2000.
[10] Supported by article 63 of the Land Survey and Statistics Law, 1965.
[11] Supported by article 2 Law of Pasture Land, 1970.

> **Private ownership**:…Briefly, ownership provides exclusive rights to the property.
> **Government ownership**: closely resembles "private ownership" with the government taking the stead of the private individual…
> **Public ownership**: Some state land (notably but not exclusively *mawaat*) is held by the government but not in "simple" form in that it is held for "public use"…
> Communities might claim rights to public or government-owned pasture land which might be either exclusive or non-exclusive based on customary usage or a deed.[12]
> **Common ownership**: The leading example of this land is *maraha* land which can be defined as commonly owned village pasture. Entitlement to grazing rights arises from the criterion of "residence": ownership of a house in a "neighbouring community"
> ***Waqf* ownership**: A private individual is allowed to offer land as a gift as long as it is used for religious or charitable purposes…Once gifted its status is fixed…it can no longer be transferred.[13]

There are three lesser or derivative rights to land which must also be noted:

> **Lease**: Afghan Civil Law recognises two types of lease: one called *heker*, has a term of up to 50 years and pertains to land leased for construction or plantation purposes. The second which has a term of up to three years…is a hybrid contract with both real and contractual consequences. While it is described as a contract which does not bind third parties to whom the property is transferred, it does survive the death of the lessor. The Civil Code also deals with leases of agricultural land…and sets rules for the ownership of crops, the rights to water and access attached to land…
> **Sharecropping**: The Civil Code classifies sharecropping as a form of lease…The Code…elaborates the duties binding both sharecropper and landlord…It is interesting to note that sharecropping has effect against third party inheritors of the sharecropped property, at least until harvest. Such contracts therefore have real implications.
> **Mortgage**: The Afghan Civil Code recognises two distinct varieties of mortgages. One roughly approximates the Western notion of a debt secured against immovable property while the other works like a pawn contract (*gerawi*) whereby possession of property is delivered to and remains with the mortgagee…until the mortgagor pays off the loan…Ownership of the land remains with the mortgagor.[14]

[12] Op. cit., 43.
[13] Op. cit., 3 – 4.
[14] Ibid., 4 – 5.

All these classes of rights to own or occupy land will have implications for the process of land acquisition, the compensation payable in the event of land being compulsorily acquired and the obligations to assist those persons whose rights have been taken away to resettle and or acquire rights in land elsewhere.

McEwan and Whitty who conducted fieldwork amongst several villages in three provinces note that the "legal landscape" over public and common land is much more confused then that over private land. In many villages, the villagers were not clear as to what land they were claiming. *Amlak*'s (the Land Management Department of the Ministry of Agriculture, Animal Husbandry and Food) version of the legal status of much land was different to that of many villagers. It was also the case that "No landowner interviewed held a formal title; a few were in possession of an informal [customary] title."[15]. Thus, many could rely only on community recognition of ownership or oral tradition; often one and the same thing. The relevance of this information is that government officials are usually unwilling to accept the authenticity of a customary deed or local community recognition as evidence of ownership of land so that in the event of acquisition of land where the only evidence of an occupier of the land is either a customary deed or community recognition, there will inevitably be disputes about who has what rights to what land and so who is entitled to what compensation.

McEwan and Whitty concentrated on rural land. Customary law however applies in both rural and urban areas, the latter particularly with respect to proof of title in informal and unplanned settlements and will be commented on below. The importance of taking account of both customary law and Islamic law in any attempt to understand urban land relations was highlighted by an earlier UN-Habitat Report on urban land tenure in Afghanistan:

> Any political and administrative decision related to land ownership and its distribution must take into consideration Islamic principles and traditional practices which are the basis of Civil Law are engraved in the collective mind of Afghan civil society and differing provincial and regional practices.[16]

[15] Ibid., 47.
[16] N. Y. d'Hellencourt, S. Rajabov, N. Stanikzai, and A. Salam (2003) *Preliminary Study of Land Tenure Related Issues in Urban Afghanistan with Special Reference to Kabul City*, UN-Habitat, Nairobi, 1.

Current statutory law applicable to urban land is for the most part either law promulgated by the Taliban, principally the Law on Land Management Affairs in 2000 or various decrees promulgated by President Karzai since his assumption of office in 2002. The effect of these laws for purposes of this report is as follows:

> The basic legal system of land distribution put in place by the *Taliban* has remained in force…However, to counter what was perceived as widespread distribution of public lands to undeserving beneficiaries at the local, provincial and national levels, the Government issued a decree, in April 2002, which froze distributions of public land countrywide.
>
> This ban remains in effect. However, the rapid return of so many refugees and other displaced persons to Afghanistan in recent years has placed it under great strain.[17] Lack of access to land, either for shelter or livelihood, is reported to be one of the major obstacles to reintegration for a good proportion of the returning Afghan community.
>
> To respond to these needs, some uncoordinated efforts were undertaken in 2003 and 2004 by some local authorities to distribute State-owned land.[18] The distribution took place without central Government authorization or central coordination and there were a number of problems with the process. Provincial authorities were not able or willing to distinguish governmental land from private land[19]…Allegations of official corruption also marred the process. Beneficiaries with family, tribal and political links to local authorities were allegedly prioritised and land was sometimes claimed by powerful commanders and then re-sold to ordinary Afghans for exorbitant sums of money.
>
> The policy of the current Government of Afghanistan has been to attempt to enforce the rule of law with regard to land and property rights; to restore ownership to those who have suffered arbitrary deprivations; to encourage private investment in land and property; to increase the efficiency with which it is used and to realise its potential equity for investment and tax-raising purposes…The Government has…attempted to implement this policy through a number of decrees.
>
> In April 2002 a Decree Regarding the non-distribution of intact and uncultivated land 'firmly directed' all Government Ministries and other governmental institutions that: 'They shall not distribute any State-owned land for building houses or for any other purposes.'[20] In May 2003 the Government

[17] See David Turton and Peter Marsden, *Taking refugees for a ride, the politics of refugee return to Afghanistan*, Afghanistan Research and Evaluation Unit, December 2002 and Conor Foley, *Afghanistan, the search for peace*, Minority Rights Group, November 2003.

[18] Principally in Herat, Jalalabad and Bamyan.

[19] In Bamyan, for example, private land was distributed.

[20] Decree 99 of the Head of the Transitional Government, Regarding Non-distribution of intact and uncultivated State-owned land, 4/2/1381 *HJ* (24 April 2002).

> ordered its Ministries to 'take necessary measures to return properties of the Ministry of Defence (MOD) that are occupied by others[21]…In September 2003 a Decree was issued which specified that: 'The High Commission for City Development is the only competent authority for deciding on and executing any evaluations and studies on town plans or on the distribution of plots of lands for houses and high-rise buildings.'[22] This Decree formally stipulated that such decisions are not within the authority of the Vice President.[23]
>
> In April 2003 the Government decreed that: 'Government properties that are being illegally occupied by persons because of their power and influence should be confiscated.'[24] The Decree also stipulated that: 'All provincial governors in the country must repossess any government properties occupied illegally as soon as possible and return such properties to the rightful governmental departments in which they belong.'[25] 'All provincial governors must report their operations regarding judicial and legal proceedings to the protection section of Affairs Controlling Department. The courts, prosecutors, police departments and municipality departments must cooperate in the implementation of this decree.'[26] Another Decree issued in 2004 stated that: 'State authorities and persons who use their power or personal influence or by use of threat, fear or by use of weapons, possess the lands of others be punished in accordance with the law as the case may be in addition to the appropriation of land and compensation for loss.'[27] [28]

These decrees, worthy though their intentions may be, have been widely ignored by those to whom they are addressed.

Wily draws attention to another important aspect of the Government's current land policy backed up by several decrees. This is to claim as much land as possible for the state. Foley quotes Wily as claiming that around 86% of land in Afghanistan is claimed as public or state-owned land. Foley highlights some recent decrees on this:

> In 2004, a Decree with Regard to Properties, stipulated that: 'Properties which have been under the control of the State for more than 37 years shall be considered

[21] Decree No. 17 of the Head of the Transitional Government, Regarding the return of immovable properties to the Ministry of Defence, 2/30/1382 *HJ* (20 May 2003).
[22] Decree 3860 of the Head of the Transitional Government Regarding the High Commission for City Development, 16 September 2003.
[23] ibid., Articles 2 – 5.
[24] Decree 362 of the Head of the Transitional Government, Regarding the illegal occupation of Government property, 1382/1/19 or 08 April 2003, Article 1.
[25] ibid., Article 2.
[26] ibid., Article 4.
[27] Decree No. 83, Decree of the Head of the Transitional Islamic State of Afghanistan with Regard to properties (*IMLAK*), 18-8-1382, Article 14.
[28] Foley op. cit. Chap.2, pp. 14, 15, Chap.3, pp. 1, 2, 3.

> as State-related. Claims of people with respect to such property shall not be heard.'[29] The 37-year period reflects the 15 years laid down for adverse possession in *Sharia* and the Afghan Civil Code plus the 22 years of communist, *Mujahideen* and *Taliban* rule of Afghanistan in which it was considered unrealistic for such claims to have been made. Private property was defined as: 'that in which ownership of people is proved by *Sharia* and law. Private property shall be proved by valid *Sharia* and legal documents provided that no superior contradictory document exists.'[30] However, where it cannot be proved that a particular piece of property belongs to someone, the assumption is that it belongs the State.
>
> The Decree stated that: 'Non appropriated property that has been registered previously in documents and books as State-related property shall be deemed to be State-related property and such documents and books shall be deemed as the valid documents.'[31] Properties that have been appropriated by previous governments would be considered as belonging to the State in a number of circumstances…[32]

Without wishing to minimise the potential confusions and conflicts over ownership and occupation rights in rural areas, it is important to discuss in more detail two specific matters which affect primarily urban areas, since as already noted, land acquisition by the government in pursuit of implementing development projects is more likely to take place in urban than rural areas and will certainly affect more people in so doing and these matters will affect any land acquisition.

i. tenure in unplanned and unauthorised settlements

All the major cities have outgrown their Master Plans. Settlements have been developed in unplanned areas; that is areas that had not been allocated for residential or in some case any development in Master Plans prepared in the 70s and 80s. Many of these settlements have been developed on government land and the terms on which the current users of the land are occupying the land are in most cases of dubious legality. Few of the houses constructed have received any kind of building or planning permission from municipalities nor do they in fact conform to any building regulations or any other

[29] Decree No. 83, Decree of the Head of the Transitional Islamic State of Afghanistan with Regard to properties (*IMLAK*), 18-8-1382.
[30] ibid., Article 7.
[31] ibid., Article 1.
[32] Foley, op. cit. Chap. 3, pp.13, 14

regulatory regime that in theory applies to urban development[33]. Thus on every possible criteria, these homes and other buildings are 'illegal': the occupation of land is illegal; the transaction by which the occupier came to the land is illegal; the construction of the house is illegal; the actual physical structure is illegal.

It is necessary to distinguish between different types of tenure insecurity since there may be a need for different approaches to the different insecurities. Tenure insecurities arise from the following situations:

A. Government land:

- direct invasion of land by the present occupier of the land
- acquisition through a market transaction of land from a direct invader
- acquisition of land by a 'follower' of a commander or warlord who grabbed the land and allocated plots to his followers
- acquisition through a market transaction from a commander, warlord, or follower who acquired as above
- acquisition through a wrongful allocation by a government official

B. Land dealt with in a Master Plan

- land acquired in any one of the above ways which is unplanned land under the Master Plan and on which a house has been built
- land for which the occupier has customary title deeds or other community accepted authentication of ownership which is unplanned land under the Master Plan and on which a house has been built; e.g. the land has been 'illegally' converted from agricultural to residential use land
- land acquired in any one of the above ways which is planned land but on which a house or other building has been built that is not in accord with the plans or zoning requirements of the Master Plan for that land

C. Private land (in addition to the situations which may arise on private land where development falls foul of the Master Plan as described above)

- living in a house or using land which is alleged to belong to a returnee

[33] This is not to suggest that these buildings are ramshackle. Many 'illegal' developments consist of solid well built houses and represent a considerable investment on the part of the owner/developer.

- living in a house or using land in respect of which it is alleged that fake title deeds were used to obtain the land
- living in a house or using land in respect of which a challenge to the occupation is made whether or not based on fake title deeds
- no acceptable (to government agencies) evidence of private ownership of the land either because all evidence has been lost or destroyed or because the agencies will not accept customary/community-backed evidence of ownership
- land under threat from a land grabber

The majority of cases of tenure insecurity arise from the first category of cases but the other categories exist and cannot be ignored.

There are those in authority and others (some of whom were at the workshop) who argue that Master Plans are still in force and should be applied; illegal settlements on government land and on unplanned land should not be accorded any recognition; government land should be reclaimed for official and legal allocation. In this way both the rule of law and planned and orderly urban development are re-asserted. This perspective is less prevalent than two years ago and it is certainly encouraging that the DLP appears to have rejected it.

Informal settlement has taken place because the legal system of land allocation and planning has failed to provide for the needs of the occupiers over the last three decades. Many ‘illegal’ occupiers paid for their plots; the original illegal acquirer of the land is a warlord or commander whom no-one can or is willing to touch. To demolish homes and evict occupiers would be to penalise the innocent while letting the guilty go free. Considerable investment too has been made in these unplanned and informal settlements so that any policy of large-scale demolition would represent an unaffordable waste of private investment. Similarly, to eject occupiers without paying them any compensation would be extremely unfair to occupiers and be a disincentive to invest in building homes. This argument seems to have won the day in the DLP at least with respect to those who grabbed a plot of land for themselves as opposed to those who bought a plot from a large-scale land grabber.

ii. Land grabbing

This is both a specific land administration problem and a major governance and rule of law problem. The substance of the matter is familiar to everyone who has no more than a passing knowledge of land issues in Afghanistan. Since the collapse of the communist regime in 1992, warlords and commanders (these words are now used in discussions about land in Afghanistan as one would use words like estate agent and surveyor in discussions about land in other countries – words the meaning and content of which are so well understood that there is no need to explain them) have taken the object of fighting for the capture of territory quite literally and have helped themselves to large amounts of real estate in the areas which they have captured and now exercise de facto power over[34]. These practices have not markedly changed since 2001 although the manner of the exercise of land grabbing has changed or expanded in type. Land grabbing through the use of illegal and forged deeds is more prevalent than open and public invasion of land.[35]

It is immaterial whether the land that has taken for themselves is occupied or unoccupied; planned or unplanned; with or without formal or customary title. Commanders have quite often created or been the cause of what amounts to an unofficial land market in the land they have acquired; land is allocated to followers or sold to developers; followers either sell the land on or build and then rent out or sell on. When undeveloped land is sold on, it may be bought by a developer who then sells the houses and other buildings to users. Title deeds are faked and officials who decline to sanction these totally illegal transactions are either by-passed or beaten up and then by-passed. Officials who assist in the acquisition of land or sanction the transactions are rewarded.

[34] To an English land lawyer, this is not unfamiliar. When William I conquered England in 1066 he assumed ownership of (grabbed) all the land of England. He doled out parcels of land to his followers. But he could not grant them ownership of the land for that would be to make them 'kings' of their little bit of England. So he granted them 'tenure' – the right to hold – of an 'estate' – a bundle of rights – in the land. Thus was the common law of tenure and estates – now the basics of the land law of the many countries in the common law world – born. Far fetched though it may seem, this division of rights in the land and the separation of rights which can be used in the market from 'bare' ownership of the land may offer a way forward in Afghanistan. Nor is it too far removed from Islamic law which distinguishes between ownership of that which is on the land – trees, houses etc – from ownership of the land itself.

[35] One is reminded of the scene in *The Godfather* where the Godfather informed a night club owner that either his signature or his brains would be on a contract offering the Godfather's godson a contract to sing in the nightclub.

The original illegality backed up by the use of force cannot in any way be condoned. Unfortunately too often it has been by the government which has either been unable or unwilling to do anything about it or members of which are participating in the grabbing. Once the grabbed land has been cut up, allocated to followers, developed, lived on and or sold off, it is effectively too late to do anything about it. The problem from the perspective of land acquisition is how to reconcile the need to be fair to those who are on the to-be-acquired land with the need not to appear to be rewarding participating in illegality. This dilemma has been highlighted rather than solved by the relevant policy in the DLP.

In addition to these specific urban land problems, there are some more general problems of land law and administration that affect the administration of land acquisition and may be noted here.

iii. Informal land markets make land valuation a hit or miss affair.

The informality of land markets is a consequence of several factors.

- First, is the widespread 'informality' of title; that is people holding land by titles which are not recognised by the government. The lack of official recognition of title does not prevent a land market from functioning but it is necessarily 'underground' as neither transfers nor prices cannot be recorded anywhere.
- Second, the large 'stamp duty' payable to government on a transfer – some 7% to 8% of the price – has the effect of encouraging the operation of a 'two tier' pricing system even in the official market; an official price declared for purposes of paying the stamp duty; and a further price paid in cash which together with the official price makes up the agreed market price. Naturally this agreed market price is not given much publicity.
- Third, leases and share-cropping contracts within the opium economy. The opium economy is conspicuous by its absence in any discussions of land markets and land administration but it cannot be ignored. Both directly, that is the price for land used for the growing of poppies, and indirectly, the effect of that price on other land is a factor which operates in the land market and

influences the value of land, however difficult it is to pinpoint that effect and however impolitic it may be to take account of it[36].

iv. Deficient formal land transfer and land registration system

There is no fully comprehensive system of land registration operative in Afghanistan. An attempt was made in the 1970s to create such a system but it does not cover very much land. However quite apart from the lack of a comprehensive system, there are many other problems connected to the formal land transfer and registration system. Gebremedhin[37] who has been working on upgrading and reforming the formal registration system for almost three years sums up the problems thus:

> The formal property titling system does not facilitate the efficient use of land or promote the operation of a real estate market. Given its current corrupt and inefficient nature, the formal land titling process does not provide a suitable mechanism to accommodate the potential demand for real estate transactions…
> Corruption is…a factor that discourages both buyers and sellers of property from meeting the legal formality of property conveyance. Unlawful fees that are associated with the web of administrative and judicial processes of property transfer are equally discouraging, as is the high legal transaction costs of formal sales of land and houses in the city. In addition to the legal and unlawful exorbitant transaction costs the inefficient court system and bureaucracy makes the whole transfer process intolerably long for buyers and sellers to complete the formal property transfer procedure…
> The administrative and legal process for the transfer of property ownership is guided by what is commonly referred to as the "circular" form that was approved by the High Council of the Supreme Court (Shura-e-Aali). This form maybe modified by the same council when deemed necessary. The form requires the applicant for property transfer to go through a lengthy process involving multiple government offices…
> In the process of formal transfer of ownership, registration of a property in the Makhzan provides the greatest legal security to formalization of property rights. While the property deed transfers ownership rights from one owner to

35. David Mansfield (2001);The Economic Superiority of Illicit Drug Production: Myth and Reality of Opium Poppy Cultivation in Afghanistan; J. Koehler and C. Zuercher (2007) Statebuilding, Conflict and Narcotics in Afghanistan: The View from Below, *International Peacekeeping*, Vol.14, 62 – 74. The study on which this article was based was undertaken in February and March 2005 in cooperation with GTZ

> another person, registering the property should ensure those ownership rights against claims by third parties. However, due to various factors such as collapse of government institutions, corruption, illegal land sales to multiple individuals, multiple allocations of a plot of land and fraud there have been many instances when multiple claimants were able to support their claims over the same property with formal deeds, which prima facie carry equal validity. [38]

v. Lack of coherent and efficient land administration system

The DLP sums up as well as any report the present situation:

> Afghanistan's land administration system lacks coordination and efficiency. There is confusion among competing agencies which often vie for pre-eminence 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.

The DLP states that 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 all of the necessary technical and administrative support, both at the national and local level but it would be unwise to assume that this will be introduced any time soon.

Along side this lack of coordination and efficiency is the lack of capacity and professional expertise. A draft report on capacity building for land policy and administration with respect to rural land administration puts this aspect of the matter thus:

> it can be fairly stated that the Afghan land administration system does not have the capability at the level needed to resolve land tenure problems, let alone to implement and agree on shared working rules about the following critical

36. Y. Gebremedhin (2005) *Legal Issues in Afghanistan Land Titling and Registration* (Emerging Markets Group (LTERA) Kabul).
37. pp. 8 – 9.

questions in need to be addressed and monitored by any functioning land administration system:

1. how to know who "owns" land and attached constructions;
2. how and on what basis to tax the holders of land;
3. how land holders should use the land;
4. how individuals can get the rights to use land;
5. what people in conflict over uses or ownership of the land should do to resolve their conflicts.[39]

vi. Land disputes

There is widespread recognition attested to by many reports that the settlement of land disputes is probably the weakest part of the whole edifice of land administration. The piling up of unresolved disputes cannot but affect the efficient and speedy resolution of the inevitable disputes which arise on land acquisition and indeed will exacerbate them as disputes will arise not just on whether land should be acquired or the amount of compensation that should be paid on acquisition but who is entitled to challenge the acquisition and or receive the compensation. The point has been made by the author of a recent study on urban land dispute settlements in Kabul:

> Contested ownership of real property is a typical legacy of conflict situations and removal of these conflicts severely tests the capacity of post conflict administrations to restore social order and/or to reform unsatisfactory norms.[40]

Although the report concludes that there are fewer disputes about land in Kabul being brought to formal dispute settlement fora than was assumed to be the case, there is a potential for urban land disputes to escalate, the current courts available for the settlement of disputes are not working well and major rethinking and reforms are needed.

The handling of conflicts over land in rural areas is if anything worse than in urban areas. A very recent study comments on this as follows:

> [There] is a clear indication of a tendency in rural Afghanistan to 'solve' conflicts by means of bribes, patronage and raw power. It not only points to a

[39] ADB/DFID (2006) *Capacity Building for Land Policy and Administration Reform*, Interim Report, Kabul.

39. L. Alden Wily, (2005) *Resolution of Property Rights Disputes in Urban Areas: Rethinking the Orthodoxies* World Bank, (unpublished draft only), 1.

> situation where the rule of law appears to have little weight in rural areas. It also implies that conflicts are not processed in an orderly fashion and thereby resolved, but…they may break out again as soon as power relations change…Of relevance is also the fact that most respondents thought that money was by far the most important asset for influencing the outcome of conflict…[41]

The authors concluded that the state's capacity for dealing with conflicts appeared low.

3. Conclusions on the survey of the land laws

- Government claims to own 86% of the land of Afghanistan and appears to be intent on asserting its claim to as much land as possible
- This claim would be and is contested both in rural and urban areas;
  - In rural areas, "conflicting land grants, traditional use rights and confused legislation contribute to major dislocation between the government and the community"
  - In urban areas, large amounts of land are occupied by unauthorised settlements or by people who would claim on the basis of a variety of documents to own the land they are occupying
- to all intents and purposes, there is no formal, ordered and regular system of land administration in the country although efforts have been made over the last few years and are still being made to create such a system: thus
  - there is no up-to-date or countrywide system of title registration
  - there is an inadequate system of dispute settlement yet land disputes are a major factor in tenure insecurity in rural areas and to some extent in urban areas also
  - there is no comprehensive, coherent and internally consistent body of land law
  - insofar as a land market exists, it is characterised as much by force and fraud as by consensual exchanges
  - no real effort is being made to tackle the problems of land grabbers
- although a new Land Policy is in process of being developed, it is important to realise that this will be meaningless unless it is followed up by a determined effort to tackle the problems that it highlights

[41] J. Koehler and C. Zuercher (2007) op. cit., 67.

The Government has created or rather has continued and enhanced a land legal system which combines the worst of all possible worlds: it does not cater for the majority of citizens or potential foreign investors. It neither facilitates the market nor regulates it. It ignores the major law-breakers and encourages action against the victims of the system. The planning system it maintains contradicts the market system it claims to be furthering. Worse of all, it has stumbled into this position because it has adopted a reactive approach to law making; instead of thinking through the problems, the possible solutions, the preferred options and then legislating, it has used legislation as a substitute for policy. Furthermore, the promulgated decrees themselves are for the most part inadequate; they are too short; they lack process, and they have an air of unreality about them.

It is then this current state of land administration that provides the backdrop to a consideration of the law and practice of land acquisition to which the report now turns.

Part II: World Bank Operating Policies (OP) 4.12

1. Introduction

This part of the report will discuss the World Bank's Operating Policies 4.12. It should be emphasised that any comment will not be directed to the content of OP 4.12 which for purposes of this report is a 'given'[42] but to process and procedure; particularly, given the aims of this report, what parts of OP 4.12 might be expected to find a place in national legislation on land acquisition and compensation, and what parts might more appropriately be left to administrative practice, albeit practice which would be expected to be based on the law.

Rather than attempting to repeat OP 4.12, it is considered more helpful to attempt to set out the requirements of OP 4.12 in a form in which they might be provided for in any set of legal provisions or how they might be addressed by an administrative agency following a logical approach to land acquisition. In order to distinguish what is *required* by OP 4.12 and how such a requirement might be met in law or practice, the latter will be indented and in italics in this Part of the report.

[42] Subject however like any other legal and quasi-legal document to interpretation particularly with respect to any ambiguities in it.

It will be useful to set out up front the fundamental principles of policy which inform the Bank's position on resettlement and land acquisition:

> (a) Involuntary resettlement should be avoided where feasible, or minimized, exploring all viable alternative project designs
> (b) Where it is not feasible to avoid resettlement, resettlement activities should be conceived and executed as sustainable development programs, providing sufficient investment resources to enable the persons displaced by the project to share in project benefits. Displaced persons should be meaningfully consulted and should have opportunities to participate in planning and implementing resettlement programs.
> (c) Displaced persons should be assisted in their efforts to improve their livelihoods and standards of living or at least to restore them, in real terms, to pre-displacement levels or to levels prevailing prior to the beginning of project implementation, whichever is higher.[43]

While the bulk of OP 4.12 is concerned with the land acquisition and resettlement aspects of projects, it does refer to the need for a borrower to prepare either a resettlement plan or a resettlement policy framework. This latter document is required when a project has sub-projects that may require some resettlement but the exact scope is not clear at the outset of the project. The policy framework sets out the principles which will be followed in the event that any resettlement becomes necessary.

> *A policy framework will apply to a specific project. It may be suggested however that there would be a case that, prior to any new laws, administrative practices and resettlements plans and policy frameworks being developed to ensure that proposed projects meet the criteria of OP 4.12, the government should consider producing a national land acquisition and resettlement policy which will guide both the development of new land acquisition legislation and all actions on the subject thereafter[44]. This would help ensure consistency in the production of specific plans and policy frameworks.*

2. Step 1: Preliminary issues: is acquisition necessary

The first step addressed by OP 4.12 is avoidance of land acquisition and resettlement if possible. Land acquisition and resettlement should not be seen as the easy first option; rather it should be seen a last resort.

[43] World Bank Operation Policies (OP) (2007) 4.12, (World Bank, Washington D.C.) para. 2
[44] A resettlement policy is in process of being prepared by the government with the assistance of UN-Habitat in connection with the government' s policy to resettle some 2 million returnees in new towns.

From the point of view of what governmental action might be necessary to meet this first step, it is suggested that alongside any environmental impact assessment and financial analysis of the proposed project that is required to be undertaken,

- *a social impact assessment will need to be undertaken*
- *a preliminary investigation and assessment of the land that is being targeted for acquisition will be undertaken*
- *persons likely to be affected by the project (project affected persons or PAPs) and other interested parties should be given an opportunity to contribute to or comment on the location of the proposed project and the necessity of acquiring the proposed land for the project. This involvement is separate and distinct from PAPs participating in the planning of any resettlement that has to take place*
- *a cut off date for any ultimate assistance and compensation for PAPs must be determined and announced. After that date, no one coming into or obtaining land or a house in the potential project area will be entitled to compensation.*

3. Step 2: Preparing an acquisition and resettlement plan

The second step in the process is to prepare a land acquisition and resettlement plan which must include measures to ensure that project affected persons (PAPs) are, in the words of OP 4.12:

> (i) informed about their options and rights pertaining to resettlement;
> (ii) consulted on, offered choices among, and provided with technically and economically feasible resettlement alternatives; and
> (iii) provided prompt and effective compensation at full replacement cost for losses of assets attributable directly to the project.
>
> If the impacts include physical relocation, the resettlement plan or resettlement policy framework includes measures to ensure that the displaced persons are
>
> (i) provided assistance (such as moving allowances) during relocation; and
> (ii) provided with residential housing, or housing sites, or, as required, agricultural sites for which a combination of productive potential, locational advantages, and other factors is at least equivalent to the advantages of the old site.

> Where necessary to achieve the objectives of the policy, the resettlement plan or resettlement policy framework also include measures to ensure that displaced persons are
>
> (i) offered support after displacement, for a transition period, based on a reasonable estimate of the time likely to be needed to restore their livelihood and standards of living; and
> (ii) provided with development assistance in addition to compensation measures…such as land preparation, credit facilities, training, or job opportunities.

In terms of what might be contained in either or both law and administrative guidance to ensure that these requirements are met it is suggested that the following would need to be in any land acquisition and resettlement plan:

- *the land to be acquired*
- *the persons who will be suffering any losses of assets, income, sources of livelihoods*
- *the persons to be required to move*
- *the place or places to which such persons are to be moved to*
- *the circumstances of the place to which persons are to be moved to: viz*
  - *whether the land is occupied and by whom*
  - *what the land is presently being used for*
  - *the condition of the land and its facilities*
- *the arrangements to be made to facilitate resettlement and integration*
- *the manner and form in which compensation is to be assessed and paid*
- *the heads of compensation payable*
- *an estimate of the compensation payable and of the resettlement expenses*
- *the procedures to be followed in executing the plan*
- *the arrangements for the involvement of PAPs in plan execution*
- *what opportunities there will be to challenge plan execution and compensation*

In practice, the preparation of this plan will or should commence as part of the exercise of developing the project for it is, as OP 4.12 makes clear, to be regarded as a part of the project but in terms of process, it is sensible to keep separate the issue of whether any land acquisition and resettlement is necessary from the issue of what resettlement will take place and how it will be conducted. This second step however is also to involve

PAPs – participation in the preparation of the plan and not just in being given a chance to object to a plan made by officials. OP 4.12 spells this out very clearly as follows:

> (a) Displaced persons and their communities, and any host communities receiving them, are provided timely and relevant information, consulted on resettlement options, and offered opportunities to participate in planning, implementing, and monitoring resettlement. Appropriate and accessible grievance mechanisms are established for these groups.
>
> (b) In new resettlement sites or host communities, infrastructure and public services are provided as necessary to improve, restore, or maintain accessibility and levels of service for the displaced persons and host communities. Alternative or similar resources are provided to compensate for the loss of access to community resources (such as fishing areas, grazing areas, fuel, or fodder).
>
> (c) Patterns of community organization appropriate to the new circumstances are based on choices made by the displaced persons. To the extent possible, the existing social and cultural institutions of resettlers and any host communities are preserved and resettlers' preferences with respect to relocating in preexisting communities and groups are honored.

4. Step 3: Acquiring the land, resettling the dispossessed, paying compensation

The third step is the execution of the plan: that is the acquisition of the land and the resettlement of those persons displaced by the acquisition. This is the central part of the process of acquisition and resettlement and must be broken down into several sub-steps. Not all these sub-steps are set out specifically in OP 4.12; they are a necessary part of land acquisition and resettlement and are therefore assumed by OP 4.12 to take place.

Before each sub-step is summarised, a general point about the legal framework must be made. There will need to be in place a law or code or set of clear and binding legal rules on the whole of step 3. This code will need to cover –

- the empowerment of institutions to execute, regulate and monitor the process
- which officials are empowered to take actions and give orders
- what actions and orders must or may these officials take or give
- the processes and institutions of participation and consultation
- to which PAPs and others will these actions and orders apply
- what must PAPs do to comply with orders and take required actions
- what must PAPs do to gain benefits and assert rights under the law

- with respect to compensation
  - the scope and form of compensation
  - the manner of assessment of compensation
  - the manner and timing of claiming and paying compensation
  - the process of decision-making and appeals on compensation
- with respect to resettlement
  - process and procedures on resettlement
  - financial and other assistance with resettlement
- processes and institutions relating to challenging and contesting decisions.

The ensuing discussion of the sub-steps assumes that such a code of law will be in place.

Sub-step 1

The first sub-step is the process of acquiring the land; informing all the qualified owners and occupiers of the land of the intention to acquire the land and pay compensation for any land so acquired. This will involve intensive personal contact with owners and occupiers of land and oral explanations of what is happening and what owners and occupiers should do in order to ensure that they obtain recognition for their occupation of land and compensation for same. Acquisition of land will also necessitate full and clear documentation of what is happening.

This is especially relevant where, as does occur, some land may be 'donated' by PAPs. While this may be a practice in Afghanistan and sanctioned by Shari'a, there must be very clear documentation that any person who has 'donated' land to the project was made fully aware of his or her right to receive compensation for any land which he or she is losing to a project and specifically waived that right.

With respect to references to 'occupiers' of land OP 4.12 states that these embrace

> (a) those who have formal legal rights to land (including customary and traditional rights recognized under the laws of the country);
> (b) those who do not have formal legal rights to land at the time the census begins but have a claim to such land or assets—provided that such claims are recognized under the laws of the country or become recognized through a process identified in the resettlement plan

(c) those who have no recognizable legal right or claim to the land they are occupying.[45]

OP 4.12 states that the first two categories of occupiers are entitled to receive compensation for loss of their land; the third category is entitled to receive resettlement assistance. However, this provision must be read in the light of the requirement in OP 4.12 that at the time of the identification of the project area, a census must be carried out within the area of those who will be affected by the project and will be eligible for assistance. Persons who encroach on the project area after the cut-off date which will be the completion of the census will not be entitled to any compensation or other assistance.

OP 4.12 thus makes clear that squatters must receive some compensation and assistance with resettlement. The rationale for this is that such persons are usually the poorest members of the community and those most likely to be the hardest hit by having to move. OP 4.12 is not making any policy statement about whether such persons should be given property rights nor in the context of Afghanistan's particular problem of land grabbers is it requiring that such persons who have acquired large tracts of land by force and or fraud should receive resettlement assistance.

Sub-step 2

The second sub-step involves determining claims to compensation, assessing amounts of compensation and paying compensation. OP 4.12 distinguishes between compensation and assistance, financial or otherwise, in connection with resettlement. This is perfectly logical as it makes clear that persons are entitled to compensation for lost assets etc whether they are being relocated or not. However, if compensation is understood as –

money, money's worth or land and/or other assistance to put a person back into the position as near as may be as he/she was prior to having his/her land (including buildings and natural resources on the land) acquired and or the value of retained land diminished and or having to vacate his/her land and move elsewhere

[45] OP 4.12., para. 15.

then we can deal with monetary compensation for loss of assets along with what may be called resettlement expenses.

Although not a specific provision in OP 4.12, it is suggested that the content of this sub-step should include and so the law and administrative guidelines should make provision for –

- *making claims for compensation*
- *provision of assistance to PAPs in making claims*
- *assessment of claims*
- *determining claims and dealing with appeals*
- *the payment of compensation*

Compensation will include

- *full replacement cost of land taken at its market value so far as possible*
- *alternative land of the same quantity and quality so far as possible*
- *compensation for 'injurious affection'[46] of land not taken*
- *possibly a 'solatium'[47]*
- *resettlement expenses which in turn may include*
  - *costs of moving (disturbance compensation)*
  - *financial and other assistance in provision of housing*
  - *income support and livelihood replacement including retraining*

The issue of replacement cost is dealt with in OP 4.12 which states in a note to the main text:

[46] A good explanation of injurious affection is provided by a Canadian judicial decision given in 1916: "The basis of a claim for lands injuriously affected by severance must be that the lands taken are so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance." The value of the lands left is reduced by virtue of the taking and that must be compensated for. B. Denyer-Green (2003) *Compulsory Purchase and Compensation* 7th ed (Estates Gazette, London), 234.

[47] A solatium is sum of money paid to an occupier of owner of land over and above the market value of land in recognition that the acquisition is compulsory and losing one's home involves more than just losing a piece of property. In English law it is called a 'home loss payment'. A solatium of 10% over and above the market value of land used to be provided for in the Land Acquisition Act 1894 of India. The administrative case for paying a solatium is that it is often cheaper in financial terms and quicker in settling claims to pay a bit extra over and above market or replacement costs than to argue the dispute out in a succession of courts. Where as in Afghanistan, that course of action is unlikely, it may still be more efficacious to pay something extra than to face the possibility of violent resistance to acquisition.

Replacement cost" is the method of valuation of assets that helps determine the amount sufficient to replace lost assets and cover transaction costs. In applying this method of valuation, depreciation of structures and assets should not be taken into account. For losses that cannot easily be valued or compensated for in monetary terms (e.g., access to public services, customers, and suppliers; or to fishing, grazing, or forest areas), attempts are made to establish access to equivalent and culturally acceptable resources and earning opportunities.

Replacement cost is a method of compensation used under the Law of 2000 so that adopting the approach of OP 4.12 should not occasion any difficulty.

Sub-step 3

The third sub-step involves the actual taking of the land – the entering into possession of the land by the acquiring authority – and the departure and resettlement of the PAPs. This will need to be handled sensitively with plenty of notice given to PAPs. OP 4.12 does not specifically deal with this sub-step but it is necessary part of the process of acquisition and resettlement.

Assistance with resettlement will include

- *assistance with packing up and moving*
- *provision of transport for those being resettled*
- *working with and providing additional resources for the 'host' community*
- *advice and assistance to those being resettled*
- *preparation of land, provision of accommodation and facilities*

Whatever might be the case in the literate, urban and mobile societies of the West, the whole process of leaving one's land, moving to another area, relating to a new community, getting started again is likely to be extremely stressful. It will neither be desirable nor possible to carry through the process by written procedures – filling in and processing forms. There will need to be constant contact with PAPs both individually and via their representatives where there are substantial numbers of PAPs involved. A consensual rather than a confrontational approach must be taken to decision-making on awards of compensation.

To what extent does law and practice in Afghanistan conform to this model of land acquisition and resettlement? It is to this matter this report now turns.

Part III: Land acquisition law and practice in Afghanistan

1. Expropriation Law 2000

Land acquisition for public purposes was first provided for by law in Afghanistan in 1935. The principles of this law were reflected in the Constitution of 1964 and again in the Constitutions of 1977, 1987 and 1990. Article 40 of the 2004 Constitution provides:

> No person's property shall be confiscated except within the provisions of law and the order of an authorized court.
>
> Acquisition of personal property is permitted only for securing public interest, in return for prior and just compensation according to law.

Afghanistan's current Expropriation Land Law was enacted in 2000. Quite apart from any changes that would facilitate compliance with OP 4.12, changes are needed to ensure compliance with the Constitution. The Law contains three chapters or parts. Chapter One – General Provisions – deals with what expropriation may be used for and certain basic procedural matters. Some matters contained in Chapter 2 which deals with compensation also cover procedures and will be dealt with here.

Land may be expropriated for public purposes[48] with the approval of the Council of Ministers in exchange for prior and fair compensation. While part only of a plot may be expropriated, if the non-expropriated part cannot be used beneficially by the owner, the whole of the land must be taken. Preliminary and exploratory investigations on land which may be expropriated may be carried out without expropriation with the permission of the municipality. The date and location of such exploratory work must be agreed with

[48] Public purposes include the construction of industrial complexes, high ways, and oil and natural gas pipelines, the extension of telecommunication line, the laying of electricity lines, to build canals and other means of water supply, to build mosques and religious madrassas, and for the construction of other welfare foundations; and to extract from mines and underground resource deposits. Article 3. Neither the Constitution nor Law specifically sanction acquisition of land in order to implement an urban or master plan. Public purposes are not discussed in this report since they do not feature in OP 4.12. Any consideration of a new Law however should use the opportunity to review the list contained in Article 3.

the owner or user of the land but failing agreement, the mayor may determine these matters. Damages arising from this exploratory work must be compensated for.

The expropriating municipality must establish a committee to determine the compensation owed to the owner. The committee consists of the owner, user or their agent; a representative of the organisation "that determined the expropriation was necessary"[49]; an agent of the expropriating municipality; an official from the Ministry of Finance; and from the Ministry of Justice.

Three months prior to the expropriation, the owner or user or their agent must be notified of the forthcoming expropriation along with the compensation which will be provided. Absence of the owner or user during this three month period does not prevent the relevant authorities from carrying out the expropriation or the implementation of the Master Plan – the only place where expropriation for such a purpose is mentioned in the Law.

Ownership passes once the compensation has been paid and this should take place three months prior to the commencement of the project for which the land is required. However the passing of ownership will not prevent the erstwhile owner or user from harvesting produce from the land except where the urgency requires immediate taking of the land.

Chapter 2 deals with compensation. The basic rule of compensation is as follows:

1- The price of the expropriated land;
2- The price of any expropriated residential houses or other buildings located on the land; and
3- The price of any fruitful trees, greenery or other plants on the land.[50]

Those persons whose land ownership is based on "special legal documents" issued between 1978 and 1992 (the period of communist rule when there were "botched attempts at land redistribution"[51] and private ownership of land was abolished) only receive the price of buildings and plants on the land but not the value of the land itself. Similarly, when land owned by the government is taken, then those occupying the land

[49] This is not entirely clear. It seems to imply that while a municipality is the organisation that is empowered to carry out the expropriation, it does so on behalf of some other organisation, i.e. a Ministry or a parastatal, that needs the land. Nowhere does the Law state which public authorities have the power to expropriate land.
[50] Expropriation Law, article 8.
[51] C. Johnson and J. Leslie (2004) *Afghanistan: The Mirage of Peace* (Zed Books, London), 141.

will only receive the value of the construction materials and neither the value of the land nor the building value, that is, the added value of the conversion of the construction materials into a building, shall be paid to them.

The value of expropriated land is determined by the Council of Ministers while the value of expropriated houses and other buildings are determined by the municipality committee. The value of fruit trees and other productive plants are determined by the municipality and the Ministry of Agriculture. Those whose residential property is taken may request another piece of property of equal value provided in a residential area belonging to the government. Similarly with expropriated land: a piece of land of equal value to the expropriated land may be given to the owner. Special provisions apply to state land taken for public need. No price is to be paid for such land but municipalities get compensation for the cost of public works carried out on such land.[52]

Where, after receiving notice of the expropriation, the owner or users of the expropriated land cannot harvest their crops from the land before the start of actual expropriation, the organisation that is to use the expropriated land must compensate the owner or user for the lost crops. The compensation is determined by a committee of municipal or district officials and the Ministry of Agriculture.

Chapter 3 deals with Final Provisions. Two substantive matters are dealt with. First, the owner must hand over all legal documents relating to the land to be expropriated with amendments to be made to any such documents where part only of the land is to be taken. Second, no claims from owners who have accepted compensation shall be heard.

By generally recognised international standards, the Law leaves a good deal to be desired but it contains positive aspects which must not be ignored. Some of the gaps in the Law are those which have always been there since the first such law in 1935 and others are those which are specific to this Law compared to other laws.

[52] Article 17 provides that this expenditure includes: expenditures related to planning and preparing under construction land; expenditures related to the cost of concrete and substantial ways and expenditures for creating streams; expenditures related to creating or improving the greenery of areas near buildings and the creation of fundamental and sub-fundamental parks; expenditures related to water supplies, canals and connecting electricity lines; and; other relevant expenditures.

Leaving aside for the moment the gaps between this Law and OP 4.12 (which will be considered after reviewing some regulations and practice) the ten most glaring deficiencies are –

- there is no indication of the measure or quantum of compensation for land and buildings, what factors have to be taken into account or ignored or how compensation is to be assessed. Foley states that

  > Neither the 2004 Constitution nor the Civil Code specify what constitutes 'fair compensation' nor how this should be decided but it can be assumed from previous laws and practice that compensation should [be] determined by an independent body according to the land's current market value.[53]

  but he adduces no evidence for that statement.
- there is no provision for a court to be involved in the process of expropriation as is specifically required by the Constitution
- there is no provision for any appeal against the award of compensation as was provided by earlier compensation laws
- there is no provision for any disturbance compensation which is a standard head of compensation[54]
- there are no provisions on resettlement
- there are no basic provisions setting out powers and duties of officials and how these are to be exercised
- there are no provisions on how claims are to be made by PAPs or on any other matters affecting PAPs where they might be expected to have to take some action
- there are no provisions on how the land to be expropriated is to be delimited
- in terms of who is covered by the Law, references to 'owners/users' is very vague and unclear

[53] C. Foley (2005) *A Guide to Property Law in Afghanistan* 1st ed, (Norwegian Refugee Council, Kabul), 60.

[54] Disturbance compensation is compensation for the losses occasioned to the owner of acquired land as a consequence of being turned out of or 'disturbed from' his or her land: costs of moving, finding somewhere else to live or work from; loss of profits from a disturbed business. All these heads of compensation would fall within any resettlement plan but they are independent heads and should be payable irrespective of a resettlement plan.

- unlike earlier laws, there are no provisions for a plan to be made for the land prior to expropriation, or for the owner to be able to buy back his/her land if its not used for the purposes for which it has been expropriated.

2. City Projects Settlement Rule 25 Year Plan (Design) of Kabul City Decree 29/2000

Some but by no means all of these deficiencies are partially rectified by Decree No. 29: City Projects Settlement Rule 25 Year Plan (Design) of Kabul City promulgated in 2000 just after the enactment of the Law. The following discussion of these rules will draw on information obtained from interviews on their operation within Kabul.[55]

These rules deal with the implementation of the Kabul City Master Plan but they cover many procedural matters in relation to expropriation. Article 2 of the rules provides that information relating to the land or buildings that are going to be acquired will be sent to the owner or his counsel "through the media" three months before implementation of the project. During the ensuing three months, there is considerable activity in relation to the land: officials visit to survey the land and explain to people in the area what is going to happen; persons from the area begin to make representations to the Mayor's office; there may be some protests about the proposed expropriation and there will be discussions in the area. An important practice which necessarily is not provided for in the rules but is perfectly legal and commonsensical is that *before* any announcement is made of the need for expropriation, officials visit the area and assess land values. It is those land values that form the basis of compensation when an official announcement is made of the need for expropriation.

Negotiations about expropriation take place during this period and the Municipality is prepared to continue negotiations for some considerable time to try and reach a consensual sale of the land before determining to push through expropriation. In the case of acquisition in connection with improving the water supply for the city, consultations with land owners went on for five months and involved the Minister of Urban Development, the Mayor of Kabul, the MP from the affected area and senior officials from the Municipality. The lack of any provisions about the demarcation of the land to be

[55] This section is based on the very full report *Documentation on Land Acquisition Related to Kabul Water Supply* prepared by the Municipality of Kabul dated 24 May 2007. This report is a model of how such information should be presented: clear, frank and comprehensive.

acquired has occasioned difficulties: in the case of a project to dig wells to improve Kabul's water supply, the City Planning Department was insistent that proper survey and demarcation of plots be done in order to obtain exact locations of plots in relation to existing and planned roads in the area.

After the three months, a formal official letter is sent to the owner/user requiring them to come to the Mayor's office for the acquisition. Article 2 provides that the owner or his counsel has to be present at the office of the acquirer throughout the whole process of acquisition but if they are not, the compensation will be deposited in a bank. In the Kabul water supply case, many landowners came to the offices of the Municipality to agree to and sign their acceptance of acquisition and compensation. They must produce some documentary evidence of their ownership of the land in order to ensure the correct people are receiving compensation. Given the facts of widespread absentee landowners, some lands have to be acquired in absentia, and compensation paid into a bank with owners/users having great difficulty in accessing the money.

The article refers to the payment of fair compensation and with respect to land which is to be used for commercial buildings, this will be determined by a committee appointed and approved by the Council of Ministers. In practice, the Municipality appointed a the committee which prepared proposals for prices to be paid for land acquisition and this committee's recommendations were reviewed by a Cabinet Committee for onwards transmission to and approval by the Cabinet.

A key concept in the rules (there are no definitions so this has to be spelt out of the rules) is "the expenses of the project". So far as it is possible to understand the word, "the project" means the construction of a building or buildings and the notion of "the expenses" becomes clearer from article 5 which states –

> The real price of the land, cost of construction and establishment of streets, roads including the cost of levelling, surfacing and asphalting, recreation places and bus stops, are taken into consideration for fixing the total price of the lands of the projects.

The Kabul Water Supply Report explains this article as follows:

> The above Article advises the Municipality to calculate the price of land based on the prevailing prices of land and infrastructure development. The

> acquisition price is supposed to be equal to the real price of land, whereas the total sale price also includes the cost of future infrastructure development of the land.[56]

So the price of land under the rules consists of three or possibly four components:

1. the land
2. the costs of the construction of a building
3. the costs of putting in the infrastructure associated with the building
4. (possibly – this isn't clear) a proportionate part of the costs of infrastructure not associated specifically with the building but associated with urban development generally in the area of the building.

The infrastructure associated with a building which it is the responsibility of the owner to put in consists of –

> the sidewalks, small bridges, drains, small green area, specific to the construction of such buildings would be taken into consideration as a part of the total construction… (art 12(ii))

Most of the rules consist of how to value different categories of land and buildings in the light of these concepts of the price of the land:

- fully completed buildings built in accordance with a Detailed Plan
- half completed buildings
- buildings built without the infrastructure; or some part of it
- persons with legal title deeds to their land
- land with only customary title deeds to 'their' land
- the situation where a person has more than one plot of land

The full import of the provisions about the expenses of the project and the price of land comes out in article 12(i):

> People who get land in the Projects, or are the real owners of their own legal properties, and have a complete or half-complete buildings on their own legal properties, in the case their buildings are protected in the Detail Plans *and if he*

[56] Ibid., 12.

> *has not paid the specified expenses completely or partially then the expenses of the Municipality would be taken from the difference between the price of acquisition and selling price of the Project*… (italics added)

The thrust of article 12(i) although by no means clear is this: it is part of the landowner's legal obligations to put in certain infrastructure and also contribute to the cost of what may be called 'general urban infrastructure' so that if he has not, he cannot get 'full' compensation. He can only get compensation for the land and the building. The money Kabul Municipality receives from the Ministry of Urban Development for compensation will not all be paid to the landowner *even if s/he has a legal title to the land and the house is built in accordance with the Detailed Plans* because he hasn't put in 'his' infrastructure or contributed to general urban infrastructure.

Although the rules are a bit clumsy, what they are trying to get at is the perfectly well recognised concepts of developed, partially developed and undeveloped land and legal and alegal ownership of land. There are several categories:

- A person whose land is fully and properly developed i.e. a person denominated in the first part of rule 12(i) and who has complied with all the provisions on infrastructure set out in the second part of rule 12(i) will or ought to receive full compensation; (article 3)
- A person who falls within rule 12(i) whose land is only partially developed will only receive compensation for what is developed;
- A person whose has only got a piece of land will get compensation for that land *if and only if s/he can produce a legal deed of ownership of the land;*
- A person with lawful ownership of land but with a building on it which has been unlawfully constructed will receive compensation for the land but a court will decide whether any compensation should be paid for the construction materials (article 14)
- A person with just a customary deed who has constructed a building on the land will be compensated just for the construction and the materials. The legal owner of the land gets the compensation for the land. The customary deed owner is left to go back to the person from whom s/he bought the land via a customary deed and negotiate to get repayment of the price from the compensation paid to the legal owner. (article 16)

- Persons who have taken over government land to use for agriculture or to build a house on will get no compensation: the "chosen committee" of officials from the Ministries of Finance and Agriculture will determine land ownership and take the land away from the people on it if its belongs to the government (article 6)

Leaving aside the issue of those with customary deeds only or those who are squatters, the other provisions do not seem to be too unreasonable. Land with a house on it but no infrastructure is clearly worth less than one with full infrastructure. If Kabul Municipality is buying plots of land with a lot of 'incomplete' houses on them, and is then intending to complete 'the project' and dispose of the houses, it will need money for the infrastructure which the landowner has no legal or moral right to.

While the bulk of the rules are not unreasonable, a particular practice is causing problems. This is the 35:65 rule. This rule was suggested by the Kabul Municipality Committee:

> In 1384, the KM Committee calculated the land acquisition price to be 35% of the sale price. No changes were made to this norm in 1385 and…this is the current reference point for determining the land acquisition prices…
> …A Commission chaired by Dr Anwarul A. Ahadi, Minister of Finance was established to precisely and comprehensively asses the issue of pricing properties of the projects that need to be acquired…The Commission assessed the sale and acquisitive prices of land proposed by KM and compared it with prices of open market. Though the prices mentioned in the KM proposal were low, the Commission was confident that the problems of the owners would be solved…Therefore the Commission accepted the KM proposal and sent it to the Cabinet for approval. This was approved by a Presidential decree dated 24-7-1385.[57]

The Council of Ministers has thus determined that the real price of the land under article 5 shall be divided 35% as the price of the land and 65% as the price of the infrastructure and services. So when the Ministry of Urban Development pays money over to the Municipality for compensation, the Municipality keeps back 65% of that money as its compensation for the costs of the infrastructure it has or has to put in and pays 'only'

[57] Ibid., 13.

35% of the money over to the landowner even though if the landowner sold the land on the open market, he/she would get the full 100%.[58]

What it is important to stress is that while a Presidential decree gives authority to the 35:65 split between the land and the infrastructure, this practice has no foundation either in the Law or it is argued, in common sense. It is just bureaucratic convenience. My reading of the rules would allow some landowners to receive the full 100% compensation while others would not: it would depend on how developed their land was. It will be much more complicated to assess the compensation for each and every householder/landowner so one can sympathise with the Municipality for adopting this rule. But it might well work injustice in many cases and this is of particular concern when, as already noted, there are no provisions for any appeal against an award of compensation.

3. Practice outside Kabul

Practice on expropriation in Kabul is based on the rules and the evidence (apart from the so far unexplained payment of only 15-16% of the price of the land to landowners instead of the 35% which should be paid) is that every effort is made to comply with the rules and the practices decreed by the Ministry. Practice outside Kabul is not governed by similar rules but both interviews and a report on land acquisition in connection with the building of a road between Qaisar and Hasanhan village – part of a donor funded project to build a road between Herat and Andkhoy suggest that practice outside Kabul follows the same broad approach.

An interviewee from AMLAK stressed the role of a clarification team composed of officials from different Ministries that goes out to the relevant area – the visit is announced via local radio and in the mosque – to ask people to come forward with their papers which they will be relying on as proof of their ownership of land. Clarification takes 1 to 2 months. Even those who come after the due date will if they have 'strong documentation' be compensated or given land elsewhere. With respect to customary deeds, if the holder of a customary deed can show a good 'root of title' back to the original landowner who held land with an official title, then the customary deed will be

[58] According to one interviewee, in practice at the moment Kabul Municipality is only paying 15- 16% of the money over to the landowners.

accepted; otherwise not, as there would be a real possibility that the 'deed' would be forged. Here too the reason for this practice is perfectly understandable; the problems of possible injustice arise if it is applied inflexibly and because of the absence of any appeal process.

This interviewee also explained the assessment of compensation. There were three ways of determining compensation: First, the price was based on the value of sales in the neighbourhood during the last year. These values were discovered on the basis of informal inquiries (this somewhat unscientific method of determining market value confirmed information to the same effect received from another interviewee from the Ministry of Justice). Second, use was made of the Ministry of Agriculture's 7 'levels or grades of land'; compensation was fixed on the basis of yields, what is cultivated on the land; wheat is level 1; dead land is level 7. Third, the inter-ministerial committee fixes the compensation on the basis of the grades of land and this is done centrally. In terms of acquiring the land, if it's a big project, its done from the centre but small ones are done at the provincial level. The impression given by this interviewee was of a judicious and discretionary application of rules.

This impression is confirmed by the report prepared by the Ministry of Works for the Asian Development Bank in respect land acquisition on the Qaisar – Bala Murghab road.[59] Two key paragraphs are worth quoting in extenso:

> The resettlement entitlement matrix recognizes different types of losses associated with dislocation and resettlement. These include the loss of boundary walls of residential and agricultural properties and the frontages of shops. …Under the existing land acquisition law when private landholdings are acquired for public purposes, compensation is paid to the owner based on the category and location of the land and the value of land for compensation is determined by the Council of Ministers.
>
> The decision is based on the recommendation of a committee consisting of the following (i) the landlord or person who uses the land or their representatives; (ii) an official representative of the agency who needs to acquire the land (viz., MoPW); (iii) a representative of the local municipality; (iv) a representative of Ministry of Finance; and (v) a representative of Ministry of Justice. The land acquisition process is initiated with the

[59] Short Resettlement Plan: Supplementary Appendix to the Report and Recommendation of the President to the Board of Directors on the Qaisar – Bala Murghab Road Project in Afghanistan. June 2005, paras 13 and 14.

> constitution of the committee. As land is acquired for a public purpose, the law apparently does not entertain any objection to the acquisition of an individual's property. However, if there is any unhappiness over the acquisition, which mostly relates to the value of compensation, the committee inquires into the matter and arrives at a solution. The whole process is based on a negotiated approach and as the affected person is also a member of this legally constituted committee a consensus is reached on the replacement value of the land and assets lost. The said committee thus also performs the tasks of a grievance redress committee. Once the value of a piece of land to be acquired is successfully negotiated, the land acquisition process is complete within three months' time.
>
> As part of the survey an assessment was also carried out on the present market price of land. However, there is hardly a market for land sale and purchase in the rural areas and most affected households or the shop owners did not know the present market price. Some people, though, quoted a price as they thought was appropriate, such as, AF150,000/- for one "jirip" (2000 square meters) of agricultural and residential land (and more if there is irrigation facility for the agricultural land), and AF200/- per square meter of land in commercial use, such as, shops.
>
> Affected persons will receive replacement value for the property and other physical assets, based on the assessment of the above mentioned legally constituted committee for land acquisition and valuation of the structures…The 3 affected squatter shops will self-relocate / push back on the existing government land with rehabilitation assistance… If the people are not able to establish the title of the land or the structure they are utilizing, the project affected people identified at the time of the census will be legally noticed as the occupiers of the land or structure and considered for compensation and assistance under this project.

There remains one practice which is very common and accepted and must be noted and commented on. In many communities, both rural and urban (my informant on this was commenting on its urban manifestation), it is common for occupiers and owners of land to donate land to a project. This is done at the behest of the local leader or the *shura* and would usually involve small amounts of land. The donation is for the good of the community and complies with Islamic principles. While the concept of a donation implies that the land is given for community purposes, it seems that in some cases, some payment is made for the donation and in the case of donations made by persons who are squatters in the Kabul Urban Reconstruction Project, the expectation is that in return for the donation, the donors will obtain at least de facto security and will not have their houses demolished by the Municipality.

The evidence then is that practice does to some extent ameliorate the deficiencies of the Expropriation Law of 2000. Real efforts are made to reach consensus on compensation; the committee which determines compensation acts as a redresser of grievances if necessary; in rural areas, customary deeds can be the basis for claims of land ownership; attempts are made to discover and pay market level compensation; the rules are not so rigidly applied that deserving cases are not considered. Practice in Kabul seems a little more legalistic than in rural areas but this would seem perfectly understandable and probably wise: there are likely to be more complaints in an urban setting and to point to the 'rules' as a justification for a decision will protect the official whereas the exercise of a discretion may only too easily be thought and alleged to have been purchased.

This conclusion is significant. It suggests that changes that may be needed to bring law and practice into line with OP 4.12, and international practice may not be too difficult to bring about: in several cases, proposed changes will be aimed at bringing the law into line with practice or urban practice into line with rural practice and thence converted into law.

What the report turns to now is to consider, in the light of Parts II and III, the gaps between OP 4.12 and law and practice of land acquisition in Afghanistan and the what possible solutions might be offered to bridge such gaps as do exist. The following table sets out the position.

Part IV: A Table of comparison between Afghan law and practice and OP 4.12 with proposed reforms

Afghan acquisition law and practice (ALP)	WB Operating Procedure 4.12 (OP 4.12)	Gaps between ALP and OP 4.12 with comments	Possible solutions to gaps	Preferred option
PART	**ONE:**	**PRE**	**ACQUISITION**	**PROCEDURES**
1. No legal opportunities provided to potential PAPs and others to challenge or discuss proposed acquisition and resettlement or for any public debate and approval on proposals. In practice at least in Kabul, early discussions do take place.	Principle that involuntary resettlement to be avoided where possible implies discussion of necessity for and alternatives to acquisition and resettlement	The principle behind OP 4.12 is followed in practice in Kabul but the law is silent on the matter: more an issue of governance than of land acquisition; a policy decision needed.	1. No change: not *required* by OP 4.12 2. Practice could be adjusted to allow for discussions 3. Change the law to require some public discussion 4. Change the law to provide for a public approval process	Potential PAPs should be able to discuss need for acquisition. Major projects involving large amounts of acquisition and resettlement should require some form of public discussion before approval. 3 is the preferred option.
2. Officials visit area *before* any official action to assess land values; values so assessed are the basis of compensation.	Land values assessed as at pre-project or pre-displacement value whichever is higher	No real gaps; just different approaches to the same need to limit claims and compensation.	Both actions should be taken; ALP as practice; OP 4.12 as law	A date set prior to the commencement of acquisition should be fixed for land values
3. As a matter of practice in Kabul efforts are made to determine those entitled to compensation and resettlement	Census conducted of persons in the area to determine eligibility for assistance, and to limit inflow of people ineligible for assistance.	No real gap here.	Given the practice in Kabul, there would be no problem in adopting OP 4.12 as the law	The law should require a census of eligible PAPs to be undertaken at the immediate pre-project stage.
4. Information on land to be acquired sent to PAPs 3 months before acquisition. Informal discussions and negotiations occur both on land to be acquired and on compensation. It is at this point that donations of land may be 'invited'.	Prepare resettlement plan on how project to be implemented and resettlement etc provided for. Emphasis on participation by PAPs in preparation of process and in project implementation Stress laid on early information to be given to potential PAPs of possible resettlement	ALP law does not provide for what OP 4.12 requires. Some pre-planning of project will exist and informal discussions with PAPs involves participation. 3 months notice may be too little where relocation is likely but not rigidly adhered to.	1. Write into law participation in project preparation and implementation. 2. Adjust practices for WB projects but do not alter the law	The law should provide general backing for the Kabul practice of a participatory approach to acquisition and resettlement planning and implementation. A two-tier system of acquisition would be complicated and create resentment in those relegated to the 'lower' tier
5. No special provision in the law for a resettlement plan Outside of acquisition as part	Prepare resettlement plan: contents to include – Involvement of and ensure	Major gap of substance	1. Re-introduce 1935 provision requiring land-use plan for land to be acquired.	For the same reasons as above, the law should provide for resettlement etc plans in

of implementing a Master Plan, no resettlement plan in practice	PAPs their rights compensation relocation assistance development assistance in new location. Distinction drawn between short and full plans, depending on numbers to be resettled.		2. Provide for resettlement plan administratively for WB projects as in the ADB road project 3. Provide for possibility of resettlement etc plans in the law in specific situations	specified circumstances. No need for such plans in cases of acquisition where very few people are to be moved.
PART	**TWO:**	**ACQUIRING**	**THE**	**LAND**
6. Owner/user and or agent to be present throughout all stages of acquisition. Acquisition may proceed even if owner etc not present. Owner etc obliged to submit documentary evidence relating to land to acquiring authority	No specific procedures required by OP 4.12 but content of resettlement plan implies PAPs will be involved in all stages of acquisition	No real gaps: but the spirit of OP 4.12 conflicts with ALP's provision that acquisition may proceed in absence of owner. Given many absentee owners, may be unavoidable to allow absentee acquisition.	1. Do nothing: not part of OP 4.12 2. Spirit of OP 4.12 could be met by more protective provisions and or practice on dealing with absentee acquisition	2 is to be preferred: a combination of altered law and practice. Greater protection for absentee owners should be provided by law. An officer of the acquiring authority could be specifically charged with this duty
7. After transfer of ownership, owner/user may enter the acquired land and harvest crops except where urgent use of land prevents this	Not mentioned	ALP ahead of OP 4.12 on this: ALP 1: OP 4.12 0	A good provision	No change
PART	**THREE:**	**COMPENSATION**	**PAYMENT**	**PROCEDURES**
8. Law draws clear distinction between those with legal title and those with customary title or no title with respect to the payment of compensation. Practice in rural areas is more accommodating to those with customary titles. Practice in Kabul is to acquire documentary evidence.	Fundamental principle of OP 4.12 is that all those on land are to be entitled to fair compensation and assistance with resettlement	Major gap of substance in the law but given practice in rural areas, it is not unbridgeable.	1. Accommodate OP 4.12 by changing practices for WB projects. 2. Change the law to expand the PAPs who may receive compensation and resettlement assistance	Given huge numbers of people not having and not going to get formal legal titles to their land in the measurable future, the law should be changed so those living and or working on on land at the census date receive fair compensation and resettlement assistance.
9. Constitution and Law provides for payment of prior	OP 4.12 requires prompt and effective cash compensation	There does not appear to be too much of a gap between the	1. Accommodate OP 4.12 by changing practices for WB	Article 40 of the Constitution suggests that option 3 should

and fair compensation. No definition of 'fair'. Detailed rules provide how to assess compensation and seem to allow for replacement costs in some circumstances. Disturbance compensation not allowed for. Compensation can be land for land Compensation may be paid into a bank. No assistance for PAPs to access bank for their compensation. Practice on the ground is careful and painstaking.	sufficient to replace the lost land and other assets at full replacement cost in local markets. Compensation for lost livelihoods required Disturbance compensation required Land for land compensation encouraged. Resettlement costs and 'start up' expenses required.	law in ALP and OP 4.12. Sensible not to insist on market value in the absence of reliable functioning markets. Biggest gap is compensation for squatters and even there best practice in ALP provides some compensation to those with no legal title. Practice of paying compensation into a bank even when PAPs not absentee difficult to reconcile with prompt payment of compensation.	projects 2. Provide a non-binding guide on compensation for all acquirers to use at their discretion in all projects. 3. Rewrite the law to provide a clear comprehensive and fair code on compensation applicable to all acquisitions including resettlement costs.	be the preferred one. It should be supplemented by guidance on how to apply the code in practice.
10. No provision in the law on resettlement support. Practice seems a little haphazard and tends to turn on legality of occupation of PAPs who are to be relocated	OP 4.12 requires implementation of resettlement plan the contents of which are noted at 4 above	Major gap of substance as noted in 4 above.	If preferred option at 4 above accepted, resettlement plan implementation is issue:. Choice is between formal top-down and participative involvement of PAPs which OP 4.12 requires.	A revised Law providing for the making of a resettlement plan (5 above) should be based on a guided participative approach to implementation.
PART	**FOUR:**	**ADMINISTRATIVE**	**& JUDICIAL**	**PROCEDURES**
11. Law provides for administrative agencies to manage acquisition processes and deal with compensation. PAPs are part of some committees dealing with compensation. No provision for courts to be involved or for appeals. In practice, committees may act to solve grievances No provisions for e.g. legal aid to assist PAPs to make claims.	OP 4.12 silent on judicial and administrative arrangements. It requires appropriate and accessible grievance mechanisms to be established for those being resettled. Logic of OP 4.12's references to 'meaningful consultation' with PAPs and making use of CBOs and NGOs suggests preference for decision-making process which is not just part of the administration.	A gap on grievance mechanisms and current administrative arrangements in ALP difficult to reconcile with the participative approach of OP 4.12. Earlier laws involved payment of compensation in the presence of a judge and allowed an appeal albeit from the judge to a Minister.	1. Retain existing law but make adjustments in law and practice to accommodate WB projects. 2. Develop new participative practices across the board but keep them administrative rather than legal. 3. Make legal provision for appeals from administrative decisions and decisions on compensation to an independent body.	A combination of new law and practice guidance would be the best way forward. Law to provide for co-operation with *shuras* and community councils in areas where PAPs are Law to provide for appeal mechanism to independent body; need not be a court. Codes of practice to facilitate co-operative and participative management of acquisition and

Practice at least in Kabul does appear to try and help PAPs.				resettlement.
12. Law does not provide for any external monitoring body or process	OP 4.12 states that the borrower is responsible for adequate monitoring and evaluation of the activities set forth in the resettlement instrument.	Major gap on procedures	1. Provide ad hoc monitoring for WB projects 2. Establish specialist monitoring agency for all projects involving acquisition and resettlement 3. Empower provincial and local institutions to monitor projects.	Meaningful monitoring is required. New institutions should be kept to a minimum. Consideration should be given to use of National Assembly committees, provincial authorities and NGOs. Regular reports should be made and published

Part V: Comments on the Table

At the workshop there was general agreement with the analysis presented by the Table and with the preferred options in the 4th column. There were those who argued that the law was working satisfactorily and no changes were needed but this view was a minority one. Certain general points were raised however that need some discussion. They can be brought together under the head of concern about delay. Increased procedural safeguards were thought likely to delay the implementation of projects and it was implementation that the people wanted. It is possible that this will occur. However what comes through the picture of practice given in the report on acquisition in connection with improvements to Kabul's water supply is the very careful and painstaking approach to acquisition and payment of compensation already taken by the Kabul Municipality. What is being proposed in this report is the formalisation of practice into general legal principles so that the best practice of Kabul Municipality becomes the legal standard for the whole country. This should not need lead to undue delay; indeed if practices are as far as possible standardised, then implementation should be speeded up.

The second argument is the more general one that any major change in the law will take some considerable time and this will pose the dilemma that either projects will come to a halt pending changes in the law to bring about congruence between the law in Afghanistan and OP 4.12 or projects will have to go on contrary to OP 4.12 which will lead to difficulties with the World Bank or they will proceed in accordance with OP 4.12 but contrary to the law. This argument must be addressed in the context of the argument in the Preferred Options column that of the two possible alternatives of altering procedures to meet the requirements of OP 4.12, the first alternative, making ad hoc changes for World Bank projects but otherwise leaving the law and regular practices unchanged is a worse alternative than the second, viz., altering the Expropriation Law and practices generally so that *all* land acquisition and resettlement follow the principles of OP 4.12.

There are several arguments in favour of this. First, it is neither efficient nor fair to operate a dual system of land acquisition; an upper tier system with full procedural safeguards, fair compensation and support systems for resettlement for World Bank and other IFI and donor funded projects and a lower tier system with fewer procedural safeguards, less compensation and no support for resettlement for Afghan Government funded projects. Scarce human resources will be wasted in managing and operating two

systems. Considerable resentment on the part of PAPs will be generated if neighbours receive different amounts of compensation depending on who is financing the project for which land is required. This scenario is not unlikely and in fact happened in Lesotho where compensation for land acquisition for roads by-passing Maseru, the capital, built in connection with the World Bank's partial funding of the Lesotho Highlands Water Project was higher than compensation for other roads built in Maseru, which were solely financed by the Government of Lesotho. Legal challenges – some successful – were mounted to the acquisition processes.

Second, even if the two tier approach were adopted, legal changes would still be required to enable OP 4.12 to be complied with. It would not be possible to ensure compliance purely by administrative changes. To take just one example, the current law does not permit squatters and occupiers of land under customary deeds to receive compensation for the loss of their land; OP 4.12 requires that this be possible. To enable that to occur, the law would need to be changed. Third, we must factor in the Constitution. Parts of the existing Expropriation Law conflict with the Constitution: even if OP 4.12 did not exist, there would be a need sooner rather than later to amend the Law to bring it into line with the provisions of the Constitution, not merely article 40 but articles 50 and 51 in particular.

For all these reasons, legislation on acquisition is needed. This brings one to the second point. There are two possibilities for legislation: the first is a law amending the Expropriation Law. The second is a new law replacing the Expropriation Law. Where required changes are quite limited and the existing law works quite well, the case for amending the existing law is strong. Where however the changes required are extensive, and the existing law is not working well then the case for its replacement by a new law is correspondingly stronger. In the case of the Expropriation Law, the required changes are extensive, and although the law is being used, it is not working particularly well so that a replacement would be justified. There are two arguments of substance against replacement. The first is that there is a considerable backlog of draft legislation which is piling up awaiting attention in the draftsman's office and in the National Assembly. But that argument would apply equally to a law extensively amending rather than replacing the Expropriation Law and it is a problem, the solution to which is beyond the remit of this consultancy.

What then of the argument that such changes, however beneficial in theory, would take too long to bring about and so lead to the problems highlighted above? A general view which was expressed in the workshop was that the kind of changes being argued for in the report would take 4 or 5 years to bring about. In such circumstances, would it not be possible to provide for some interim measures pending a full review and alteration of the Expropriation Law? In principle there would not appear to be any constitutional objections to such an approach which would entail that for an interim period – say 3 to 5 years – practice supported by e.g. a Presidential decree would provide for a special set of substantive and procedural rules to apply to acquisition required as part of a World Bank (and possibly other externally) funded project. There may be practical problems: it might be difficult to persuade the Cabinet and or MPs of the justice of such an approach; the Draftsman's Office in the Ministry of Justice may take issue with such an approach and argue that either primary or secondary legislation would be needed; it would be unwise to assume that no delay would attend the preparation of the necessary legal instruments. But this is certainly an approach that should be explored.

The second argument derives from the picture of land administration highlighted in Part I of this report: given the present state of land administration in Afghanistan, is it sensible or indeed feasible to bring forward a major change in one part of the land law of the country in the absence of a comprehensive programme of legislative and administrative reform based on and designed to implement the National Land Policy? For instance, with respect to the recognition of the land rights of those holding land on the basis of customary titles or occupying land for a long period but with no evidence of title, is it appropriate that decisions on these issues should be driven by the need to comply with a specific World Bank policy? Providing compensation for such persons under OP 4.12 can be seen as a decision to accord such persons rights which in effect pre-empt a national policy decision. A full answer to this question lies outside the remit of this consultancy; a partial answer is that reform has to start somewhere and to provide that persons being compulsorily resettled from where they are living and working should be entitled to financial and other assistance, irrespective of their strict and formal legal status in relation to the land they are occupying, need not be taken to pre-empting any general policy decision about the tenure rights of such persons. Indeed OP 4.12 is careful *not* to make judgements about tenure *rights* of PAPs. The overall conclusion then is that there is a strong case for a new Expropriation Law to replace the existing Law. The heading of the possible contents of such a Law are set out in Appendix One to this report.

Part VI: Recommendations and next steps

1. A new Expropriation Law should be prepared as a matter or urgency taking into account

- **the Preferred Options set out in the Table in this report so as to ensure the law meets the principles of OP 4.12**
- **the need to bring the law into line with the Constitution**
- **best practices of land acquisition in Afghanistan as outlined in this report**
- **the relevant detailed policies on land acquisition set out in the draft Land Policy**
- **best international practices**

2. An investigation should be made as a matter of urgency by relevant government officials of whether it would be possible and acceptable to prepare an interim Law or set of regulations to enable OP 4.12 to be complied with when projects requiring land acquisition are being funded in whole or in part by the World Bank and any other external agencies which would require compliance with OP 4.12 as a conditions of their funding projects involving land acquisition. If such a course of action is possible –

3. An interim legal instrument should be prepared to provide for the arrangements as above

4. In order to proceed with the preparation of the relevant legal instruments as outlined above, a small committee of officials drawn from the Ministries of

- **Finance**
- **Public Works**
- **Urban Development**
- **Agriculture, Animal Husbandry and Food;**
- **Justice;**
- **and an official from the Office of the Mayor of Kabul**

should be established with a mandate to work on the drafting of the legal instruments to a strict timetable. This committee could if they so wish be assisted by input from the World Bank and co-opt one or two other experts

5. The committee should take as its starting point of analysis of the existing Expropriation Law, this report but should be at liberty to make use of other pertinent evidence and information.

6. The committee should be required to work to a strict timetable along the following lines:

- **Complete first draft of legal instruments together with commentary three months after appointment**
- **Publish the draft for public comment**
- **Hold one or more workshops and public meetings in Kabul and elsewhere to review the draft over a two month period from the date of the publication of the first draft**
- **Revise the draft and commentary in the light of the workshops and public meetings within one month of the end of the two month period of public meetings etc.**

Appendix 1

A proposal for a

LAND ACQUISITION AND COMPENSATION LAW 2007

Arrangement of Articles

PART I
Preliminary

PART II
Acquisition

PART III
Taking possession

Temporary occupation or use of land

PART VII
Special provisions

PART VIII
Resettlement Areas

PART IX
Miscellaneous

Appendix 2

Minutes of Land Acquisition Workshop
June 5th, 2007
Venue: Intercontinental Hotel

Welcome Remarks and introduction of high Government Officials by Ms. Asta Olesen

Welcome address by Ms. Ludmilla Butenko

Introductory Remarks by Mr. Pashtoon:

- Special welcome to Mr. Patrick

Land issue is a big problem in Afghanistan, since it is a country being in conflict for the past several years.
Delaying of projects in MoUD
Slow cooperation of people
Corruption and shortage of Capacity in two levels such as Administrative and Technical, which requires much more intensive work, since capacity could be? resolved by training and etc but corruption is different.
After Security and Drug, Land is the third problem in Afghanistan
Weakness of existing lows and if it not resolved more of our population will be suffering from it.

Suggestions:
Implementation should be on the top of the Agenda as 100 % of implementation needed based on economic and current country laws
Sufficient attention of the WB requested
Road map and legal instrument should be considered
Land availability is very important issue for any development project.

Introductory Remarks by Mr. Rohullah Aman:

- Appreciation from WB and special welcome to Mr. Patrick

Land Acquisition law has been revised based on the need of the time
As per long duration of conflict in Afghanistan the low of land acquisition couldn't work successfully but to be mentioned there is a low for land acquisition
It takes some time to identify the proper owner of the land based on the difficulty of legal document with a number of people for the same land
We need to bring amendments to the law of land acquisition
Recently this issue will be audited and evaluated by the MoUD, KM, MoJ and other stakeholders to consider the proper land owners and then as per land acquisition law Kabul Municipality will take action to acquire the land and implement the plan accordingly
New Master plan for the whole Afghanistan especially for Kabul City is under work.

Comments on the Report by Mr. Wahid Ahad

- Appreciation from WB

Key stakeholders and public participation in issues of land acquisition make it more important
To be considered what type of land purposed for people
Duel system not be used
Concentrations on planning
Pre thinking of replacement and benefit of people from the projects
Fair compensation
Consultation and discussion with people
We need for a team to make a draft of procedures based on the roles and regulations of the Bank and to be submitted to the government and to be followed.
Request from Kabul Municipality to be more concentrate on the issue as most of activities can be planed by them and they are playing an important role on the issue.

Comments on the Report by Ms. Pushpa

- It is the right of the government to acquire the land for different projects but people are not agree for replacement or to acquire their land
  City plan implementation only exist for Kabul not for other areas
  Gap in market and paid price
  Revising the law could take time shall we stop our activities till then?

Comments on the Report by the other participants:

- Existing lows to be considered
  Constitution allows/asks that people can challenge government and consultation is very important for our people they seen it as self respect
  Not to consider rights of the people but to deliver it to them
  While we are acquiring the land from people and instead give them the land they are not happy because they need money for construction
  There should be a center as a lead of land arrangements
  Once the property acquire there should be a fairly compensation submitted to the owner of the land
  There should be a system to establish to calculate the compensation
  Those people who got others property there won't be any compensation for them while there land acquired
  We must resettle the plans this is something valid and propitiate
  We should have our specific roles and regulations and have understanding how to implement our roles and regulations
  Problem with huge number of returnees
  Resettlement and lively hood planning are acceptable for the people and for the government
  There should be an administrative body which directly relate to land acquisition

Appendix 3

List of participants at Land Acquisition Workshop

S/N	Name	Designation	Organization	Ph: Number	E-mail Add.
1	Mr. Yusoof Pashtoon	Minister	MoUD		
2	Mr. Rohullah Aman	Mayor	Kabul Municipality	070022884	
3	Mr. Siddiqi	Deputy Admin	MoI		
4	Dr. Farouq Bashar	Advisor to the Minister	MoUD	0799077562	
5	Eng. Wahid Ahad	Team Leader	KURP	0700285259	arewahid@hotmail.com
6	Ms. Saleha Begum	Head of FPMD	MRRD/NSP	0797723565	
7	Mr. Safar	Land Specialist	ADB	0799218611	yasinsafar@yahoo.com
8	Mr. Ghazi	Chief Coordinator	NRAP		ghazi@nrap.org
9	Mr. Katawazi	HRO	DNAMA	0799301052	katawazi@un.org
10	Mr. Sonja Varga	Social Advisor	NRAP	070028286	sonjav@unops.org.af
11	Mr. Md. Ishaq	Head of Social Department	NRAP	0799875610	muhemmadi@unops.org.af
12	Ms. Pushpa Pathake	Advisor	Kabul Municipality	0799550141	Push_pathake@yahoo.com
13	Eng. Amin	Head of Department	Kabul Municipality	0700277762	
14	Mr. Md. Aziz	Protection Officer	UNHCR	0700279048	rahjo@unhcr.org
15	Eng. Shah Wali	Head of Municipal Dept.		0700201231	
16	Mr. Wahidullah Azizi	DCC	NRAP/MRRD	0799629230	wahidullaha@unops.org.af
17	Ms. Suman Kr.		UNHBITAT	0799582374	Suman.kara@unhabitat.af.org
18	Mr. Richhard Geier		UNHBITAT	0700161120	r.l.geier@gmail.com
19	Mr S. R. Podipireddy	UWSS Expert	MUDH	0799576516	podipireddy@gmail.com
20	Mr. Alan Roe	Sen. Researcher	AREU	0799-842157	alan@areu.org.af
21	Mr. Saleem	Manager	MoF	0700211134	Saleem.kundozi@undp.org
22	Ms. Sajida Hussaini	HRA	UNAMA	0799638774	hussainis@un.org
23	Ms. Anna Soave	Urban Planner	AKTC	0799335647	Anna.soave@aktc.akdn-afg.org
24	Mr. Rahi Ahady	Planner	AKTC	0799308405	Rahi.ahadi@yahoo.com
25	. Mr. Iqbal Yousufi,	Dir. General Land Mgt Department	MAAH&F	0700205319	
26	Mr. Gul Ahmad Hoshmand	Deputy	MAAH&F	0700276764	
27	Mr. A. Malal		MoJ	0700281561	
28	Mr. Ali Hassan	Head of Department	Kabul Municipality	0700272313	
29	Mr. Abdul Wasay	Director of City Planning	MoJ	0700054521	awassayrahim@yahoo.com
30	Mr. Md. Harif		MoJ	0700198103	
31	Ms. Ludmilla Butenko	Operations Advisor	WB		
32	Ms. Susanne Holste	Sr. Transport	WB		

		Specialist			
33	Ms. Maria Perisic	Sr. Operations Officer	WB		
34	Ms. Asta Olesen	Sr. Social Specialist	WB		
35	Mr. Patrick McAuslan	Consultant	WB		
36	Mr. Arif Rasuli	Environment Specialist	WB		
37	Ms. Wahida Obaidy	Team Assistant	WB		
38	Dr. Farhad Fidai	Translator	Shafaq CES Limited		
39	Ass. To Dr. Farhad	Assistant	Shafaq CES Limited		
40	Ass. To Dr. Farhad	Assistant	Shafaq CES Limited		
41	Ass. To Dr. Farhad	Assistant	Shafaq CES Limited		

Appendix 4

Extract from

TERMS OF REFERENCE FOR ASSESSMENT OF AFGHANISTAN'S LEGAL FRAMEWORK FOR LAND ACQUISITION

I. Introduction

1. The World Bank is currently exploring how Afghanistan's legal framework would address social safeguard issues in upcoming projects. In order to undertake this assessment, the relevant legal framework of Afghanistan will be assessed and compared with the objectives and operational principles stated in WB OP/BP 4.00.

2. In addition to this assessment, the World Bank will also carry out as part of OP/BP 4.00 a review of the of Afghan Government's implementation practices, track record and capacity. It is important that there be a close working relationship between these two tasks.

II. Objective

4. The goal of the consultancy is to review and assess Afghanistan's legal framework regulating social safeguards (national and local laws, regulations, procedures and policies).

III. Scope of Work

5. The assessment should include but not necessarily be limited to:

a. review of Afghanistan's national legal and regulatory framework relevant to the objectives and operational principles (stated in Table A1 of OP 4.00) of the World Bank, and any pending related laws and regulations;
b. preparation of a detailed comparison of these laws with the World Bank's safeguard requirements;
c. preparation of a gap analysis of the differences between Afghanistan's system and the World Bank's requirements;
d. detailing of the record and experience of Afghanistan in interpreting and applying the relevant legal framework (e.g., administrative and judicial decisions), including identifying the number and types of relevant licenses granted under the legal framework; and,
e. based upon the foregoing, specification of any actions required to address the gaps in the legal framework to be undertaken at the national and state level by the Government of Afghanistan

IV. Methodology

6. The consultant will compile, study, and prepare a comparative analysis of the extent of equivalence between Bank requirements and Afghanistan's systems at the national level, and, where applicable, at the local and implementing agency(ies) level. The analysis would describe Afghanistan's current legal and institutional frameworks related to the World Bank's Social Safeguards requirements. Specifically, for each applicable safeguard area, the analysis would identify, and describe the pertinent provisions of the relevant laws, regulations or other legal instruments and evaluate gaps and inconsistencies between national, and local laws in terms of policy objective(s), scope, trigger(s), mechanism(s) for policy compliance, consultation and disclosure requirements, and implementation responsibilities. Additionally, the consultant would set forth the related institutional responsibilities associated with each associated law, regulation or policy.

Appendix 5

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