

1ST EDITION

AN INTRODUCTION TO THE  
PROPERTY LAW OF  
AFGHANISTAN

alep  
AFGHANISTAN  
LEGAL EDUCATION  
PROJECT

Stanford  
LawSchool

An Introduction to the

# Property Law of Afghanistan

First Edition  
Published 2015

**Afghanistan Legal Education Project (ALEP)**  
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## PREFACE & ACKNOWLEDGEMENTS

Stanford Law School's Afghanistan Legal Education Project (ALEP) began in the fall of 2007 as a student-initiated program dedicated to helping Afghan universities train the next generation of Afghan lawyers. ALEP's mandate is to research, write, and publish high-quality legal textbooks, and to develop a degree-granting law program at the American University of Afghanistan (AUAF). The AUAF Law Department faculty and Stanford Law School students develop curriculum under the guidance of ALEP's Faculty Director and Executive Director with significant input from Afghan scholars and practitioners.

In addition to *An Introduction to the Property Law of Afghanistan (1st Edition)*, ALEP has published introductory textbooks about: *The Law of Afghanistan (3rd Edition)*; *Commercial Law of Afghanistan (2nd Edition)*; *Criminal Law of Afghanistan (2nd Edition)*; *Constitutional Law of Afghanistan (2nd Edition)*, *International Law for Afghanistan (1st Edition)*; *Law of Obligations of Afghanistan (1st Edition)*, *Legal Ethics in Afghanistan (1st Edition)*. Textbooks addressing Legal Methods: Thinking Like a Lawyer, Legal Methods: Legal Practice, and a new version of Public International Law are forthcoming. Many of the ALEP textbooks have been translated into the native Dari and Pashto languages and are available for free at [alep.stanford.edu](http://alep.stanford.edu). Additionally, ALEP has published professional translations of the Afghan Civil Code and Afghan Commercial Code, and business guides authored by Afghan students in the business law clinic. All are available on ALEP's website.

ALEP would like to acknowledge the individuals and institutions that have made the entire project possible. ALEP benefits from generous and dynamic support from the Bureau of International Narcotics and Law Enforcement (INL) at the U.S. Department of State. Current Stanford Law School Dean Elizabeth Magill, former Dean Larry Kramer, and Deborah Zumwalt, General Counsel of Stanford University and member of AUAF's Board of Trustees, have provided important continuing support to ALEP. ALEP's partnership has deepened over the last six years with AUAF's leadership: Dr. Sharif Fayez (Founder), Dr. Mark A. English (Acting President), Dr. Michael Smith (former President), and Dr. Timor Saffary (Chief Academic Officer).

As with all ALEP textbooks, the content of *An Introduction to the Property Law of Afghanistan (1st Edition)* is the product of extensive collaboration. Were it not for the skillful work of Elite Legal Services, Ltd. and Mohammad Fahim Barmaki in creating the first reliable English translation of the Civil Code of Afghanistan, this textbook could not have been written. We thank the ALEP authors: Tres Thompson, Marta Darby, Michelle Hillenbrand, Trevor Kempner, Mansi Kothari, Andrew Lawrence, Ryan Nelson, and Tom Wakefield for their work researching, drafting, and revising the chapters. ALEP Curriculum Advisor, Rohullah Azizi, and former AUAF Prof. Naqib Khpulwak provided substantial guidance and feedback to the students throughout the process. Tres Thompson, Tom Wakefield, and Jason Fischbein worked tirelessly to edit the drafts and get the textbook into final form with assistance from ALEP Program Advisor, Rolando Garcia Miron. Finally, Megan Karsh, Executive Director of the Rule of Law Program, deserves special acknowledgment for the innumerable tasks both large and small that she undertook in shepherding this textbook from inception to completion.

ALEP looks forward to continuing the collaboration that made this book possible. Please share your feedback with us on our website, [alep.stanford.edu](http://alep.stanford.edu).

*Erik Jensen, Faculty Director, ALEP  
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## CHAPTER 1: PROPERTY PRINCIPLES

*“There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right to property.”* William Blackstone<sup>1</sup>

At the beginning of this textbook, the authors would like to make two suggestions about how to approach the study of property law.

First, property is a subject that affects our lives every day, that we think about often, and about which we have strong opinions. For this reason, you should not think of property law as a purely academic subject. Instead, you should think of property law as a practical subject about which you already have a lot of knowledge. This textbook will formalize and organize your knowledge of property law, but you should use what you already know about the subject as you read the textbook.

Second, property is a controversial subject with social and political implications. This textbook addresses *what property law is* (a legal question). There is another question of *what property law should be* (a **normative** question, or question about social values). For instance, there is a legal question about how to acquire ownership of a plot of land, and there is a normative question about how many plots of land a single person should be allowed to acquire. To be clear, the normative question is how to balance the individual right of land ownership with a collective goal of relative equality in land ownership. This question itself makes assumptions that you may disagree with. For instance, you may not believe in an individual right of land ownership. Or, alternatively, you may reject the notion that society needs to strive for relative equality in land ownership. Regardless, the point is that property law is a controversial topic worthy of your careful study. Although the textbook focuses on legal questions, it is important to consider and discuss normative questions too. It will make for good conversation with your classmates, as these normative questions are deeply interesting.

As a final note, this introductory chapter introduces property principles. The chapter provides a background of larger ideas about property law that will inform your understanding of the particular topics discussed in later chapters. It answers these questions: What is property? Why do we have property law? What are the theories that serve as the basis of property rights? Finally, the chapter concludes by briefly introducing what will follow in later chapters.

### 1. PROPERTY PRINCIPLES

#### 1.1 What is property?

##### 1.1.1 Defining Property

#### 1977 Civil Code of the Republic of Afghanistan<sup>2</sup>

**Article 472:** Property is a physical object or right that has material value among people.

<sup>1</sup> William Blackstone, *Commentaries on the Laws of England*, volume II, p. 2.

<sup>2</sup> 1977 Civil Code of the Republic of Afghanistan, Article 472.

Imagine you have just purchased a house that occupies a small plot of land. You now have the right to move into your new house. There are many other rights that you now possess too. For instance, you can allow a neighbor to use a path that goes across your plot of land. Or you can exclude another neighbor from playing football on your plot of land. Maybe you are an excellent cook, and you decide that you would like to have a newer, better kitchen so that you can prepare delicious meals for your family and friends: you can wreck the old kitchen and build a new one. Eventually, you may decide that you would like to move to a house in another neighborhood: you can sell the house to a buyer. All of these actions are examples of rights that follow from ownership of the physical object of the house. Note, however, that these rights are limited, as will be explained later in the textbook.<sup>3</sup>

This simple example helps us think about how to define property. Property refers to *things*, like the house. Property also refers to *rights* of ownership, like the right to exclude the footballing neighbor from your plot of land. *Things* are physical objects that we can own. *Rights* are legal protections that follow from ownership of the physical object. One prominent legal dictionary defines **property** as “[t]he right to possess, use, and enjoy a determinate thing.”<sup>4</sup> Note how similar this definition is to the definition in the Civil Code. Note also how both definitions contain both *things* or *physical objects* and *rights*.

Some scholars define property only as things<sup>5</sup>: a house, a bicycle, a watch, et cetera. This is a literal perspective. Other scholars define property only as rights.<sup>6</sup> From their perspective, property is a human relation, often arising from conflicts among people. Thus, a man on a deserted island may possess things, like a house, a bicycle, or a watch, but he does not possess property. This is a theoretical perspective. Despite this interesting academic debate, the best definition of property for our purposes contains both things and rights.

The debate over the definition of property—i.e., what does and does not constitute property—is evident in Islamic jurisprudence as well. The Hanafi School of Islamic thought confined its definition of property to physical things. It required that for something to constitute property, it “must satisfy two conditions: (i) possibility of physical possession and (ii) having potential beneficial uses.”<sup>7</sup>

The first condition seems easy to understand. To be property, the thing must be able to be held or in some way stored by people.<sup>8</sup> For example, the sky cannot be property because it cannot be possessed.

The second condition is a bit more difficult to understand. One way to think about what has a “beneficial use” is to think if the thing has value. If it has value, then the thing must have beneficial uses and would be considered property. Figuring out what has value, however, may be more difficult than you might think. To determine what has value, custom can play a role. Customarily, some things such as a drop of water or a handful of sand are considered to have no value. For this reason, these items would not be considered property under Hanafi Jurisprudence. For this reason, to figure out if some thing would be considered property under the Hanafi School of Islamic thought, you would need to think about whether the item seems to have value and also consult custom.<sup>9</sup>

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<sup>3</sup> See, e.g., Civil Code, Book 3, Title 1, Chapter 1, Section 3—Restrictions of Ownership.

<sup>4</sup> Bryan A. Garner, editor, *Black's Law Dictionary*, 9<sup>th</sup> edition, p. 1335.

<sup>5</sup> Laura S. Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford University Press, 2003), pp. 11-12.

<sup>6</sup> *Id.*

<sup>7</sup> Afghanistan Legal Education Project, *Commercial Law* (2d ed.), pp. 11-12.

<sup>8</sup> See Mohammad Hashim Kamali, *The Right to Life, Security, Privacy, and Ownership in Islam*, (Turkey: Islamic Texts Society 2008), 259

<sup>9</sup> For different definitions of property in Islamic law, see, Muhammad Wohidul Islam, *Al-Mal: The Concept of Property in Islamic Legal Thought*, *Arab Law Quarterly*, Vol. 14, No. 4 (1999), pp. 361-368.

Can you think of items that might be considered property under the Civil Code but not under the Hanafi School of Islamic thought?

While there are many possible answers to this question, one particularly important item that is not considered property under Hanafi jurisprudence is called **usufruct**. Usufruct is the right to enjoy the fruits of a piece of property.<sup>10</sup> For example, suppose you own a house and have an extra room. To put the room to use, you decide to rent the room to a university student who needs a place to stay. He must pay you each month to use the room. This rent payment would be considered usufruct. It is the benefit you get from owning the room.<sup>11</sup>

Usufruct is not considered property under Hanafi Jurisprudence because your enjoyment of the benefits of your property in the future is not something you can store for future use.<sup>12</sup> Think again about renting the apartment to the university student. The rent you will get next month is not something you can hold now. For this reason, this future rent does not qualify as property you own.

Now that you have thought about things that might not be considered property under Hanafi Jurisprudence, can you think of items that would be considered property according to the Hanafi School of thought? See the chart below that describes common types of things that are considered property under Hanafi Jurisprudence. What do you think about the Hanafi school of thought’s definition of property?

Examples of Common Types of Property According to Hanafi Jurisprudence

Movable Property	Property that “can be transferred from one place to another” <sup>13</sup>
Immovable Property	Property “which cannot be transferred to another place.” For example, a house. <sup>14</sup>
Money	Cash, coins, and gold. <sup>15</sup>
Merchandise	Goods “other than cash, animals, things estimated by measure and things estimated by weight.” <sup>16</sup>
Common Articles	Things you can find at different markets without any difference in price <sup>17</sup>
Rare Articles	Things you cannot find in a market, or if you can find it, the price is different. <sup>18</sup>

<sup>10</sup> “Usufruct,” Merriam-Webster, accessed 2/9/14, <http://www.merriam-webster.com/dictionary/usufruct>

<sup>11</sup> Mohammad Hashim Kamali, *The Right to Life, Security, Privacy, and Ownership in Islam*, (Turkey: Islamic Texts Society 2008), 259.

<sup>12</sup> *Ibid.*; Wael B. Hallaq, *Sharī‘a: Theory, Practice, Transformations*, (Cambridge UP: Cambridge 2009), 298.

<sup>13</sup> Al-Majalla Al Ahkaam Al Adaliyyah (The Ottoman Courts Manual (Hanafi)), Article 128, available at [http://legal.pipa.ps/files/server/ENG%20Ottoman%20Majalle%20\(Civil%20Law\).pdf](http://legal.pipa.ps/files/server/ENG%20Ottoman%20Majalle%20(Civil%20Law).pdf)

<sup>14</sup> *Ibid* at Article 129.

<sup>15</sup> *Ibid* at Article 130.

<sup>16</sup> *Ibid* at Article 131.

<sup>17</sup> *Ibid* at Article 145.

<sup>18</sup> *Ibid* at Article 146.



### Exercise I

Think about the following items: blood, water, and a tribe name. Are they property in Afghanistan? Why or why not? Ask yourself: Are they things? And do rights adhere to those things?

### Suggested Answer Exercise I

Blood is a thing. But it is not a thing over which you can exercise rights. Therefore, blood is not property under the law of Afghanistan.

Water is also a thing. And water is a thing over which you can exercise rights. For instance, if you owned a tract of land that had a stream of pristine water running through it, you could likely bottle the water and sell it at the market. Therefore, water is property under the law of Afghanistan.

A tribe name is not a thing—that is, it is not a physical object in the way that blood and water clearly are. As will be discussed later in this chapter, the fact that a tribe name is not a thing does not necessarily mean that it is not property. But a tribe name also does not confer any rights. For the purposes of this exercise, then, a tribe name is not property under the law of Afghanistan.

## 1.1.2 Immovable Property and Movable Property

### Civil Code<sup>19</sup>

**Article 478:** Immovables are those objects that have a fixed base and their transportation, without destruction, is impossible. Objects that are not of this characteristic are deemed as movables.

The Civil Code identifies two types of property: immovable property and movable property. In civil law countries like Afghanistan, immovable and movable property are the preferred terms. In common law countries like England, real and personal property are the preferred terms. Immovable and real property are basically the same thing. Movable and personal property are basically the same thing. For the purposes of this book, of course, immovable and movable property will be the preferred terms. We mention real and personal property in case you should encounter these terms in comparative or international law. Now let's discuss what this basic division in property law means.

**Immovable property** is property that cannot be moved. And if immovable property were to be moved, moving the property would destroy it. The most obvious example of immovable property is land. In addition to land, immovable property includes things attached to land. For instance, a permanent building is immovable property because it is attached to land. Both land and a permanent building would be destroyed if they were moved to another location. The land would have to be dug up, and the permanent building would have to be torn down.

**Movable property** is property that can be moved. In other words, movable property is property that is not attached to land. A book, a spoon, and a jacket are all examples of moveable property. What about a tent, a yurt, or another temporary building? This is a more difficult question. The question is tricky because they are buildings, but they are not permanent buildings as in the example above regarding immovable

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<sup>19</sup> Civil Code, Article 478.

property. The answer is that these temporary buildings are movable property because they can be moved without being destroyed. For instance, imagine you live in a tent that you have erected on one plot of land. You then decide that you would like to move to another plot of land. You can disassemble the tent on the old plot of land, then reassemble it on the new plot of land. The tent will not be destroyed. For this reason, a tent is an example of movable property.

There are some types of immovable property that can become moveable property. Plants, trees, and grass are all instances of immovable property. Once cut or dug up, however, they are no longer attached to the land and become movable property that can be bought and sold. For example, a tree on your land is immovable property, but if you chop down the tree and cut its branches into logs for firewood, the firewood is movable property that you can sell.

In sum, ask yourself the following simple question in order to distinguish between movable and immovable property: Can the property be moved without being destroyed? If yes, it is movable property. If no, it is immovable property.

It is important to remember this basic distinction between immovable and movable property as you read the Constitution and the Civil Code. Certain provisions of these laws may not apply to property generally. Instead, certain provisions apply to either immovable property or movable property, but not both.

For instance, consider Article 1986 of the Civil Code: “If owner of *movable property* waives its ownership, it shall become a free property.”<sup>20</sup> This provision applies to movable property but not to immovable property. Let’s say you’re an avid cricket player. Sadly, you injure your arm and must quit the sport. You decide to waive your ownership of your cricket bat. You leave it on the street curb for another person to take and use. Can a passerby take the cricket bat without paying for it? Yes, because a cricket bat is movable property. This is precisely the situation envisioned in Article 1986 of the Civil Code.

For a contrary instance, consider Article 41 of the Constitution: “Foreign individuals shall not have the right to own *immovable* property in Afghanistan. Lease of *immovable* property for the purpose of capital investment shall be permitted in accordance with the provisions of the law. The sale of estates to diplomatic missions of foreign countries as well as international organization’s to which Afghanistan is a member, shall be allowed in accordance with the provisions of the law.”<sup>21</sup> This provision applies to immovable property but not to movable property. Let’s say your friend is from Turkey. He spends a semester studying in Kabul. He decides to get a job in Kabul and move to the city permanently. Can he buy an apartment? No, because (1) your friend is foreign and (2) an apartment is immovable property. Your friend will have to rent an apartment. This is precisely the situation envisioned in Article 41 of the Constitution. But there is nothing to prevent your Turkish friend from owning movable property in Afghanistan. So he could pick up your cricket bat from the street curb!

As a final reminder, you should distinguish between movable and immovable property as you read this textbook and the Civil Code.

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<sup>20</sup> Civil Code, Article 1986 (emphasis added).

<sup>21</sup> Constitution, Article 41 (emphasis added).

### 1.1.3 Intellectual Property

#### Civil Code<sup>22</sup>

**Article 491:** Intellectual rights that are rights to intangible property shall be subject to provisions of special laws.

This textbook focuses on the types of property discussed above: immovable and movable property. When we think of property, we think of these types of property because we live our daily lives surrounded by them. For instance, we live in houses (an example of immovable property) filled with furniture (an example of movable property). Property under this meaning is tangible. It exists as a physical thing that we can see and touch. There is another type of property that is intangible. It does not exist as a physical thing that we can see and touch. Instead, it is a creation of the mind.

This type of property is called intellectual property. **Intellectual property** provides rights to the creations or products of the mind. This definition is abstract, but it will be easily understood if we consider a series of hypotheticals. Let's say that you're a doctor who invents a medicine that cures a terrible disease. The product of the mind in this instance is the chemical formula for the medicine. Or let's say you're a musician who writes a popular song that plays on the radio. The product of the mind in this instance is the melody and lyrics of the song. Or let's say you're an author who writes a script for a play that attracts large crowds at the theater. The product of the mind in this instance is the script.

Intellectual property law protects against the stealing of ideas. It gives a person exclusive rights to his idea. In other words, it gives a person a monopoly over his idea. A **monopoly** is an economic term describing a marketplace in which there is only one seller. Society has intellectual property laws to promote the creation of good ideas. Society is improved when there are good medicines, beautiful songs, and wonderful plays. People are more likely to create good ideas when they know that they will benefit personally for their contributions to society.

The above paragraphs show that intellectual property is about protecting ideas, not things. This is the distinction between intangible and tangible property. Perhaps it seems odd that people can have property that is an intangible idea. But consider the following situation. You are, of course, an intelligent student who is popular with your classmates. As you walk to class, you see a classmate named Akhtar. You and Akhtar have a conversation about the assigned reading. You tell Akhtar a brilliant idea that you have about the assigned reading. You had intended to mention this idea during the class discussion, so that your professor and all of your fellow classmates could appreciate your brilliance. But Akhtar mentions your idea during the class discussion before you have a chance to do so. Now the professor and fellow classmates think that the idea is Akhtar's, and not yours. Wouldn't you feel annoyed with Akhtar in this moment? Although this is not an instance of intellectual property infringement in the legal sense, the situation does suggest that people having property in intangible ideas is not as odd as it may seem at first.

### 1.2 Why do we have property law?

In Section 1.1, we defined what property means in a legal sense. Now, we consider the question of why we have property law. This seems to be a simple question. But it is a question that causes serious debate among property law scholars. Debate exists because justifications for property law involve normative judgments. That is, justifications for property law involve important social, moral, and political questions

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<sup>22</sup> Civil Code, Article 491.

about which intelligent people have different perspectives. What follows are general justifications for property law.

Two justifications of property law are discussed below. First, property law promotes security and reduces conflict. Second, property law enables equitable distribution of scarce resources.

As you read the following justifications for property law, ask yourself to what extent you find them persuasive. Also think of any other reasons why we might have property law.

### 1.2.1 Property law promotes security and reduces conflict

One of the justifications for property law is that it promotes security and reduces conflict.

In a country without property law, there is no legal recognition of ownership. In such a country, you cannot be certain that your possessions will not be claimed by your neighbor. And if your possessions are claimed by your neighbor, you can't seek **redress** in the legal system. To seek redress in the legal system means to resolve your dispute under the law in the courts or other governmental organization. Instead, you must resolve your differences outside the legal system.

This is an undesirable state of affairs for two related reasons. First, you have no security in your possessions. You fear that they could be claimed by your neighbor at any moment. Second, you could come into conflict with others who claim your possessions, even if they do so in good faith. For instance, maybe your neighbor believes that his land extends into your land. There is no ill intention on his part, but you could come into conflict nonetheless. Alternatively, others may claim your possessions in bad faith. For instance, maybe your neighbor steals crops that he knows belong to you from your land. This situation is almost certain to result in conflict. The point is that regardless of whether the conflict stems from a simple misunderstanding or malicious conduct, you and your neighbor may come into conflict without property law. The conflict could cause a long, angry argument that could turn violent in the worst instance.

Imagine a country with property law and a functioning legal system. In this country, you can prove that you own your possessions. First, you can be more secure in your ownership of possessions. Second, you are less likely to have conflict outside the legal system. For instance, you would have a deed to your house in a country with property law. A **deed** is a written document held by the owner of a piece of immovable property.<sup>23</sup> If your neighbor tries to claim that he owns your house, you can present him with the deed to prove your ownership of the house. If your neighbor persists in claiming that he owns your house, you can present the deed to the authorities.

The above examples show how property law promotes security and reduces conflict. The examples used in this section so far have considered you as an individual. Now, imagine another situation. Instead of thinking about yourself as an individual, think about yourself as a business owner making decisions for your business. A lack of security and a likelihood of conflict will affect your how you make decisions for your business. Business owners like to be secure in their investments. They also like to avoid expensive conflicts. For instance, you are unlikely to build a new factory if you think that the factory might be confiscated by a competing business or a hostile government entity. Further, if other business owners think in the same way, there will be relatively low investment in the country's economy. It is bad for the country when there is low investment in its economy. The less investment in the economy, the more slowly its economy grows. The more slowly the economy grows, the fewer jobs there are. In this way, a country without property law is likely to experience a weakened economy.

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<sup>23</sup> *Black's Law Dictionary*, p. 475.

In addition to individuals and businesses, the rationale that property law promotes security and reduces conflict is applicable to tribal disputes over land. Maybe you know of a tribal dispute over land in Afghanistan that could have been avoided or more easily resolved using property law. Take, for instance, the dispute between the nomadic Kuchis and the settled Hazaras in the central highlands of the Hesa Awal Behsood district west of Kabul.<sup>24</sup> This is a complex dispute that reaches back as far as the reign of Amir Abdul Rahman Khan in the late 1800s. In short, the present conflict relates to the Kuchi's right to travel through land where the Hazaras remain settled throughout the year. While the conflict focuses on land use, it is exacerbated—and perhaps even motivated—by religious and ethnic tensions. The Kuchi-Hazara dispute has often descended into violence as the tribes seek to enforce their clashing claims to the land. As in the hypothetical with you and your neighbor above, the presence of robust, understood, and enforced property law could help to prevent these conflicts by clearly delineating the tribes' respective rights to the land.

In sum, one justification for property law is that it promotes security and reduces conflict. This justification applies to individual people. The justification applies a fortiori to larger organizations like businesses and tribes. A **fortiori** is a legal expression that means for the same reason but with even greater logical force.<sup>25</sup>

### Constitution<sup>26</sup>

**Article 40:** Property shall be safe from violation. No one shall be forbidden from owning property and acquiring it, unless limited by the provisions of law. No one's property shall be confiscated without the order of the law and decision of an authoritative court. Acquisition of private property shall be legally permitted only for the sake of public interests, and in exchange for prior and just compensation. Search and disclosure of private property shall be carried out in accordance with provisions of the law.

### Exercise II

Can you identify any sentences in Article 41 of the Constitution (above) that support the justification that property law promotes security and reduces conflict?

### Suggested Answer II

Several sentences in Article 41 of the Constitution support the justification that property law promotes security and reduces conflict. A Constitution is a government charter that is both a set of laws and a statement of aspirational principles. For this reason, it is not surprising to find both laws and the justifications for laws in a Constitution. Below are two sentences in particular that support the justification under discussion in the above section.

“Property shall be safe from violation.”<sup>27</sup> This sentence states that property will be protected from violation. Thus, it promotes security.

<sup>24</sup> See, e.g., Nastrat Esmaty, *The Kuchi & Hazara Land Dispute Conflicts—An Endless Struggle for Land Ownership*, KHAAMA PRESS, Sept. 7, 2013; Maiwand Fida, *UN Steps in to Resolve Kuchi-Hazara Dispute*, PAJHWOK AFGHAN NEWS, June 13, 2012; *Fighting for Land and Water*, ECONOMIST, June 26, 2007.

<sup>25</sup> *Id.* at p. 69.

<sup>26</sup> Constitution, Article 40.

<sup>27</sup> *Id.*

“No one’s property shall be confiscated without the order of the law and decision of an authoritative court.”<sup>28</sup> This sentence states that property will be protected from a certain kind of violation: arbitrary government confiscation of property. It is similar to and more specific than the above sentence. Thus, it promotes security as well.

## 1.2.2 Property law enables equitable distribution of scarce resources

Another justification for property law is that it allows for equitable distribution of scarce resources.

### 1.2.2.1 Property law needed where demand for resources exceeds supply of resources

At the beginning, it is important to state a basic economic assumption regarding supply and demand. **Supply** refers to the amount of a particular good in a market. **Demand** refers to the number of people who want that particular good in the market. Importantly, society only needs property law when demand for property exceeds supply of property.<sup>29</sup> That is, in most instances society only needs property law when there are more people who want property than there is available property. Note that this basic economic assumption is true for resources too. This point is shown by two hypothetical scenarios.

In the first scenario, think of a single person in a large forest. Let’s call her Fauzia. In this scenario, demand for property is low: Fauzia is only person. Supply of property is high: there is a large forest with lots of resources. Fauzia can take all the land, food, and water that she wants from the forest. It is not very important to have property law in this scenario.

In the second scenario, think of a city of ten million people located on a small piece of land surrounded by water. Let’s call the city Atlantis. In this scenario, demand for property is high: there are ten million people in Atlantis. Supply of property is low: Atlantis is a small city surrounded by water. It is very important to have property law in this scenario.

Why is it important to have property law in the second scenario but not the first scenario? Consider what would happen if there were no property law in each scenario.

In the large forest, Fauzia will not compete for resources with anyone. She is free to take all the land, food, and water without coming into conflict with anyone. Supply of resources exceeds demand for resources. Property law does not need to regulate this scenario.

In Atlantis, imagine that there’s a small park in the middle of the city with land, food, and water. Ten million people will compete for those resources with one another. Obviously, there will not be enough resources for all ten million people. Demand for property exceeds supply of property. Property law needs to regulate this scenario. But what would happen if there was no property law in such a scenario? That is the topic of the next subsection.

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<sup>28</sup> *Id.*

<sup>29</sup> Alison Clarke & Paul Kohler, *Property Law: Commentary and Materials*, p. 60.

### 1.2.2.2 The problem of “the tragedy of the commons”

If there is no property law in a world of scarce resources where demand exceeds supply, soon there will be no more resources.<sup>30</sup> This problem has been referred to as “the tragedy of the commons.”<sup>31</sup> First, the problem will be explained as a theory. Then, the problem will be explained through an example.

A commons is a plot of land shared by an entire village. Each villager has an equal claim to the scarce resources in the commons. Each villager also wants to limit the amount of resources that each of his fellow villagers can take from the commons. Otherwise, there will be no more resources. But without property law it is difficult to limit the amount of resources that each of the fellow villagers can take from the commons. Thus, the practical effect is that the villagers take as much of the resources as they can. And soon, there are no more resources.

Consider a specific example of the above theory. Sayed lives in a village with a commons where sheep graze freely. Sayed and his fellow villagers may take the sheep without limit. Sayed realizes that there are fewer and fewer sheep as his fellow villagers take more and more sheep. Sayed himself takes as many sheep as he can before there are no more sheep. Soon there are no more sheep.

#### **An Example from the Real World: Pistachio Harvesting in the Faryab Province<sup>32</sup>**

Consider the following story about pistachio harvesting in Afghanistan. In what ways is it similar to the “tragedy of the commons”? In what ways does it differ?

Afghanistan is the only country in the world where pistachios grow naturally. Not surprisingly, then, Afghanistan is one of the world’s largest producers of pistachios; in 2012, it was the eighth largest producer in the world.<sup>33</sup> Afghan pistachios are noted for their small size and dark green color, and they are good enough to fetch high prices relative to pistachios from other countries.

Traditionally, the government would open the pistachio groves for harvesting for a designated twenty-day period once the nuts were ripe in September. A festival, Shole-e-Pista, came to mark this annual harvest. During those twenty days, the harvesters were free to take as many pistachios as they could gather. Harvesters would keep some of the pistachios for their own consumption and sell excess pistachios for a profit. Because the harvest was time-limited, harvesters would sometimes damage trees or take unripe nuts as they hurried to harvest as many pistachios as possible.

Imposing a twenty-day period helps to avoid the “tragedy of the commons” by limiting when pistachios can be harvested. But by allowing a free-for-all during those twenty days, the period indicates how a limitless harvest would harm the resource. Without limitations, there would be damage to the trees and many unripe nuts would be stripped from the trees. Soon, you can imagine, the pistachio groves of Afghanistan would dwindle away.

<sup>30</sup> *Id.*

<sup>31</sup> Garrett Hardin, *The Tragedy of the Commons*, SCIENCE, Dec. 13, 1998.

<sup>32</sup> Mohammad Saber, *Badghis Pistachio Forests Face Destruction*, INSTITUTE FOR WAR & PEACE REPORTING, May 13, 2010, available at <http://iwpr.net/report-news/badghis-pistachio-forests-face-destruction>; Sayed Yaqub Ibrahim, *Pinning Hopes on Pistachios*, INSTITUTE FOR WAR & PEACE REPORTING, Nov. 17, 2005, available at <http://iwpr.net/report-news/pinning-hopes-pistachios>.

<sup>33</sup> FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, available at <http://faostat.fao.org/site/339/default.aspx>.

### 1.2.2.3 The solutions to “the tragedy of the commons”

In Subsection 2.2.1, we learned that we need property law in a scenario where demand for property exceeds supply of property. In Subsection 2.2.2, we saw the problem that arises when there is no property law in that scenario where demand for property exceeds supply of property. In this subsection, we consider the solution to the problem. The solution is to have property law. Property law enables **equitable** distribution of scarce resources. Equitable means fair and in accordance with justice.

To continue with the same example, Sayed and his fellow villagers could discuss a way to impose a limit on the taking of the sheep in the commons. If they can impose such a limit, they won't kill all of the sheep. Instead, they will preserve this scarce resource. Further, they can preserve the scarce resource in a way that is equitable to all the villagers. In this example, Sayed and his fellow villagers are discussing a system of property law.

There are different systems of property law. Think about the systems described below.

#### 1.2.2.3.1 Private property



The commons before private property



The commons divided into private property

One system of property law is **private property**. The villagers have been sharing the commons. But the villagers could divide the commons into private plots of land. Let's say that the villagers decide to do so. Where the commons was once a large, open plot of land owned by all the villagers, it has now been divided into small, private plots of land owned by individual villagers.

Again, think of Sayed. Instead of sharing the commons with all the other villagers, he now owns his own plot of land. He can take care of his own sheep on his own plot of land. He would not kill off the sheep for fear that there will be no more sheep soon. Other villagers would have their own plots of land, their own sheep, and they would act in the same way. Each villager will have a share of the scarce resource. Also, the scarce resource will be preserved. Thus, a system of private property can enable equitable distribution of scarce resources.

#### 1.2.2.3.2 Communal property

Another system of property law is communal property. **Communal property** is an alternative to private property. Rather than divide the commons into private plots of land as in private property, the villagers could continue to share the commons. They could institute a system of regulations for how they can use the scarce resources in the commons. For instance, the villagers could assign each villager a quota for



how many scarce resources may be taken in a year. A **quota** is a maximum number that cannot be exceeded.

Again, think of Sayed. He and his fellow villagers may decide to share the commons. They may also decide that each villager is allowed a quota of three sheep for the year. Each villager will have a share of the scarce resource. Also, the scarce resource will be preserved. Thus, a system of communal property can enable equitable distribution of scarce resources.

### 1.2.2.3.3 State property

A final system of property law is **state property**. State property means the same thing as government property. The state could take ownership of the commons and turn it into a park. Parks are an example of state property. The state regulates the park. Some activities would be allowed. For instance, flying kites might be allowed. Other activities would be prohibited. For instance, smoking tobacco might be prohibited. The state would decide through political or administrative processes which activities to allow and which to prohibit.

State property is similar to communal property, but it differs in two important ways. First, there is a difference regarding who owns the property. With state property, the state owns the property. With communal property, the people own the property. Second, there is a difference regarding who regulates the property. With state property, the state makes decisions about how to regulate state property. With communal property, the people make decisions about how to regulate communal property. In sum, it is the difference between decision making by government actors and decision making by communal tribes.

For the last time, think of Sayed. Imagine that the commons has become state property. Sayed and his fellow villagers no longer own the commons. Further, he and his fellow villagers no longer regulate the commons. Rather, the state owns the property. And state officials like politicians and administrators regulate the commons. Sayed and his fellow villagers will be expected to follow the state officials' regulations. Assume that the state regulates intelligently. If so, then Sayed and his fellow villagers will each have a share of the scarce resource, and the scarce resource will be preserved. Thus, a system of state property can enable equitable distribution of scarce resources.

### 1.2.2.4 Conclusion

In sum, one justification for property law is that it allows for equitable distribution of scarce resources. First, we saw that property law is a necessity where demand for property exceeds supply of property. Second, we considered the problem that results from a situation where (1) there is no property law and (2) demand for property exceeds supply of property. The problem is "the tragedy of the commons." Third, we realized that property law is the solution to "the tragedy of the commons." We looked at three types of property law: private property, communal property, and state property. All three property law systems enable the equitable distribution of scarce resources.

### An Example from the Real World: The SALEH Project

The "tragedy of the commons" is a theoretical justification for the existence of property law. This does not mean, however, that it is only an idea that is written about in books and discussed in classrooms. Rather, "the tragedy of the commons" can be seen in the events of the real world. For instance, consider the following account about a property issue in Afghanistan. As you read this account, ask yourself how closely you think the account resembles the theoretical justification of the "tragedy of the commons." What are some similarities? What are some differences?

One Afghan property law scholar has described the situation regarding ranges and pastures in Bamyan Province that recalls “the tragedy of the commons.”<sup>34</sup> The government decided not to allow Hazara communities in Bamyan Province to own the land that they had been using for a long time. Instead, the government decided to own the land itself. So land that was effectively communal property became state property. This newly-declared state property existed in the spaces between different Hazara communities. The problem was that the government didn’t regulate state property to enable the equitable distribution of scarce resources. In other words, the government owned the land but did nothing with it. The state property for that reason became what might be called by the expression *no man’s land*. Consequently, the Hazara communities took what resources they could from the state property separating one Hazara community from another. There was no way for these separate Hazara communities to coordinate and regulate what they took from the state properties between them. The result resembled the “tragedy of the commons.” As the property law scholar writes, “rural communities were denied recognition of customary ownership of their traditional pasturelands. The result was that such areas were treated as ‘free for all’ resources. Inter-communal competition, disputes and even violent conflicts were the result.”<sup>35</sup>

The United Nation’s Food and Agriculture Organization (FAO) initiated a project called SALEH in an effort to ease this problem. As part of this project, the Afghan government and the Hazara communities worked together to find a solution. As the property law scholar writes, the project brought 100 square kilometers of what was formerly *no man’s land* “under clear tenure and community-based governance. Formal outputs included satellite-based or hand drawn maps lodged with the district [Department of Land Affairs] offices and the District Governor’s Office, along with signed inter-community agreements of the boundaries of their respective pastures. The District Governor was party to agreements where discussion among communities were most contested. In addition, each community developed rules for sustainable use of pastures. The highlight was an agreement to reduce the use of pasture bushes for winter fuel, and to close the most environmentally-damaged areas for several years to allow their recovery. This was built upon a traditional conservation approach in Hazarajat known as *ayghal* but which many communities had abandoned when their pastures were declared to be state property...”<sup>36</sup>

This example is highly relevant to “the tragedy of the commons.” It shows the devastation that resulted without property law. Then it shows how property law can enable equitable distribution of scarce resources. In this example, negotiations between the government and the communities reached this result and prevented further tragedy.

### 1.3 What are the theories that serve as the basis of property rights?

We have now defined property in Section 1 and justified property law in Section 2. In this section, we explore theories on the basis of property rights. First, we asked the question: what is property? Then, we asked the question: why do we have property law? Now, we ask the question: where do property rights come from? As we will see, one answer to this question is that property rights come from law. The other answer is that property rights are inherent to us as human beings.

The answers to this question are the theories that serve as the basis of property rights. The two theories on the basis of property rights offered below are legal positivism, and natural law and natural rights.

As you read the following theories on the basis of property rights, ask yourself to what extent you find them persuasive.

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<sup>34</sup> Liz Alden Wily, *Land, People, and the State in Afghanistan: 2002-2012* (United States Institute for Peace, 2013).

<sup>35</sup> *Id.* at 62.

<sup>36</sup> *Id.* at 62-63.

### 1.3.1.1 Legal positivism

Legal positivism is a simple theory. Legal positivism is also a **counterintuitive** theory. This means that it is a theory that opposes our instincts about the subject. **Legal positivism** is the idea that our laws exist because they were passed into law and written into the law books.<sup>37</sup> In other words, our laws rest on the basis that they have achieved the status of law. The implication is that there is no deeper basis on which our laws rest.

In this way, legal positivism asserts that law is morally disinterested.<sup>38</sup> That is, legal positivism separates these two questions: First, what is law? Second, what is moral? Thus, legal positivism asserts that there is no necessary relation between law and morality. This doesn't mean that law is opposed to morality. It only means that law is not necessarily aligned with morality.

An example using property law will help us understand this theory. Let's look at a particular provision of the code from the perspective of legal positivism. Take, for instance, the right to ownership in Article 1900 of the Civil Code: "Ownership is a right on the basis of which a thing comes under will and dominance of person and only owner may, within the limits of provisions of law, use and utilize it and take any possessive actions on it."<sup>39</sup>

What serves as the basis for the right to ownership described in this provision? From the perspective of legal positivism, the basis for the right to ownership is Article 1900. In other words, the right to ownership exists because Article 1900 exists. And if Article 1900 were not to exist, the right to ownership would not exist.

What do you think of legal positivism? As a descriptive matter, it is difficult to dispute the notion that, well, law is law. But some people think legal positivism is a contrived view of the law. While conceding that law has achieved the status of law, they insist that law has achieved this status for determinable reasons like moral principle or economic incentive. Laws, after all, are written by lawmakers who are human beings acting deliberately.

## 1.3.2 Natural law and natural rights

### 1.3.2.1 Natural law

Natural law is also a simple theory. It is easily distinguished from legal positivism. As explained in the above section, legal positivism is the idea that laws exist because they have achieved the status of law. In other words, law is law. This is the end of the analysis for legal positivism. Natural law analysis accepts legal positivism's premise but takes the analysis further.<sup>40</sup> Think of **natural law** as a two-step analysis. As a first step, natural law accepts that the law is law. As a second step, natural law asks whether the law agrees with human reason. That is, natural law asks whether the law is a reasonable one.<sup>41</sup>

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<sup>37</sup> Leslie Green, "Legal Positivism," *Stanford Encyclopedia of Philosophy*, first published Jan. 3, 2003, available at <http://plato.stanford.edu/entries/legal-positivism/> (defining legal positivism as "the thesis that the existence and content of law depends on social facts and not on its merits.").

<sup>38</sup> James B. Murphy, "Legal Positivism," available at <http://www.nlnrac.org/critics/legal-positivism>.

<sup>39</sup> Civil Code, Article 1900.

<sup>40</sup> See generally Anver M. Emon, *Islamic Natural Law Theories* (Oxford University Press, 2010); John Finnis, "Natural Law Theories," *Stanford Encyclopedia of Philosophy*, first published Feb. 5, 2007, available at <http://plato.stanford.edu/entries/natural-law-theories/>.

<sup>41</sup> See Finnis, *supra* note 42 ("Natural law theory accepts that law can be considered and spoken of *both* as a sheer social fact of power and practice, and as a set of reasons for action that can be and often are sound as reasons and therefore normative for reasonable people addressed by them.").

An example will help us understand the difference between legal positivism and natural law. Think about the following statement: “Unjust laws are not laws.”<sup>42</sup> Does this statement make sense from the perspective of legal positivism? And does the statement make sense from the perspective of natural law? The answer is no to the first question, and the answer is yes to the second question. Legal positivism simply says that a law is a law. Legal positivism does not analyze whether a law is just or unjust. In contrast, natural law does analyze whether a law is just or unjust. In the first step, natural law would accept that the law is a law. In the second step, natural law could determine that the law does not agree with human reason and is therefore unjust.

You might be wondering: Why is it called natural law? What about it is “natural”? For those legal philosophers who advocate natural law, it is “natural” because it can be understood by using human reason. That is, it is “natural” that we can use our reason to decide whether a law is just or unjust.

### 1.3.2.2 Natural rights

Natural law is closely related to natural rights. **Natural rights** are certain rights that exist independently from law. In other words, the concept of natural rights asserts that you have certain rights simply because you are a human being. These are inherent rights, which means that they don’t depend on exterior circumstance like law. Such rights exist regardless of whether they are acknowledged in law. Some legal scholars consider property rights to be a natural right.

Again, an example will help us understand this theory. Let’s return to Article 1900 of the Civil Code: “Ownership is a right on the basis of which a thing comes under will and dominance of person and only owner may, within the limits of provisions of law, use and utilize it and take any possessive actions on it.”<sup>43</sup> Above, we discussed how from a legal positivism perspective the right to ownership exists because Article 1900 exists. The right depends on the law. Now, we will discuss Article 1900 from a natural rights perspective. Let’s assume that there is a natural right to the ownership of property. Article 1900 simply acknowledges a preexisting right to ownership. Article 1900 does not create a right to ownership. The right is inherent. The right does not depend on the law.

### 1.3.3 Islamic law

Islamic law also offers a basis for property rights. According to Islamic law, Allāh ultimately owns all things. As humans, we have been given the right to hold property by Allāh.<sup>44</sup> In Islamic jurisprudence there are two general theories explaining this relationship between Allāh, people, and property.

The first is explained by Sayed Qutb. According to Qutb, humans are only trustees of Allāh’s creations on earth.<sup>45</sup>

Under this idea of property, humans do not have full rights to their property and do not truly own property. Instead, people are only custodians of Allāh’s property, with Allāh as the true owner, it means that people’s ownership rights rely on Allāh’s approval.<sup>46</sup> This means that there are some obligations that people must uphold to be trusted by Allāh to hold his property.

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<sup>42</sup> *Id.*, where Finnis also uses the “unjust laws are not laws” example to distinguish legal positivism and natural law.

<sup>43</sup> Civil Code, Article 1900.

<sup>44</sup> Wael B. Hallaq, *Shari‘a: Theory, Practice, Transformations*, (Cambridge UP: Cambridge 2009), 296.

<sup>45</sup> *Ibid.*

<sup>46</sup> See Wael B. Hallaq, *Shari‘a: Theory, Practice, Transformations*, (Cambridge UP: Cambridge 2009) 296-97; Mohammad Hashim Kamali, *The Right to Life, Security, Privacy, and Ownership in Islam*, (Turkey: Islamic Texts Society 2008), 254-56.

Once someone is entrusted with property from Allāh, they accept three obligations. First, the person agrees to act socially responsible with the property. This means the owner agrees not to use the property in a way that causes excessive harm to others. Second, the owner agrees to allow other people to benefit from the property under certain circumstances. This means that the owner allows people to pass through the land. Third, the owner agrees to act justly with the property. This means that the owner will not waste the property, he will help those in need, and he will not hoard too much property.<sup>47</sup>

These three requirements come from the fact that Allāh is the true owner of the property and humans must use it in a way he sees fit. If a person does not meet these obligations, the imam or ruler may intervene. The imam or ruler may take steps needed to make sure the obligations of Allāh are met.<sup>48</sup>

For example, imagine Rahim owned a piece of land next to a school. He decides to use the property to store dangerous chemicals. The chemicals are stored in leaky containers and Rahim does not do anything to try to stop the leaking. The chemicals leak onto the school's land and many students get sick. In this instance, Islamic law would allow an imam or ruler to intervene. The imam's goal would be to make sure the property was used in the way that Allāh permits. He could achieve this goal by telling Rahim to clean up the chemicals, put them in better containers, or move the chemicals somewhere else. After listening to the imam, Rahim would be using his property in accordance with Allāh's obligations.

The second and more commonly accepted theory of property rights is explained by Saad Bin Abi Wagas. Under this view, humans are not merely trustees, but rather heirs of Allāh's creation.<sup>49</sup> According to this theory, people must remember that Allāh created everything and is the ultimate owner of all property, but humans are granted the ability to directly own property.<sup>50</sup> This theory implies that humans have more control over their property and more property rights since they truly own the property. For this reason, supporters of this theory believe that Imam's and governments should have less power to interfere with people's property or take it away.<sup>51</sup> This does not mean that people can do whatever they want with their property. There are still restrictions. In particular, property cannot be used to cause harm or as a means of corruption.<sup>52</sup>

## CONCLUSION

This chapter began with an introduction to property law principles. First, we defined property as a legal concept. We learned that there are different categories of property: movable and immovable property, tangible and intangible property. Second, we considered justifications for property law. As we saw, property law promotes security and reduces conflict. This rationale applies on an individual scale, as between neighbors, and on a larger scale, as in the real world example involving the Kuchi-Hazara conflict and the hypothetical example involving the business owner. It also enables the equitable distribution of scarce resources, as demonstrated by the theory of the "tragedy of the commons" and the real world example of Bamyan Province. Third, we considered theories that serve as a basis of property

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<sup>47</sup> Mohammad Hashim Kamali, *The Right to Life, Security, Privacy, and Ownership in Islam*, (Turkey: Islamic Texts Society 2008), 256.

<sup>48</sup> *IBID.*

<sup>49</sup> Mohammad Hashim Kamali, *The Right to Life, Security, Privacy, and Ownership in Islam*, (Turkey: Islamic Texts Society 2008), 256-57.

<sup>50</sup> Mohammad Hashim Kamali, *The Right to Life, Security, Privacy, and Ownership in Islam*, (Turkey: Islamic Texts Society 2008), 256.

<sup>51</sup> Mohammad Hashim Kamali, *The Right to Life, Security, Privacy, and Ownership in Islam*, (Turkey: Islamic Texts Society 2008), 258.

<sup>52</sup> Mohammad Hashim Kamali, *The Right to Life, Security, Privacy, and Ownership in Islam*, (Turkey: Islamic Texts Society 2008), 258.

rights. Legal positivism offers a literal law-is-the-law perspective. Natural rights, to the contrary, suggests that rights are inherent and exist apart from what is written into law.

Now, let's look forward to the rest of the textbook. In doing so, it's helpful to present in brief the bundle of sticks analogy for property law.<sup>53</sup> Think of property law as a whole as a bundle of sticks. Each individual stick in the bundle represents a particular area of property law. So there's a stick for ownership, a stick for transfers, and so on. By looking at each individual stick, we can learn the rights and responsibilities of that particular area of property law. So you can consider each chapter of this textbook as adding a stick to the bundle of sticks. And when you finish the textbook, you will have the full bundle of sticks.

So, what sticks will you pick up along the way?

In the second chapter, you will learn about the legal framework and dispute resolution systems. These topics are essential to understanding the workings of property law in Afghanistan.

In the third chapter, you will learn about ownership and titling. Ownership is perhaps the most fundamental concept of property law. When you own something, your ownership gives you rights. But your ownership also carries responsibilities. The chapter will present both the rights and responsibilities of ownership. Further, titling is the process by which ownership is proved.

In the fourth chapter, you will learn about transfers. This chapter will examine how property can be transferred in different ways. Transfer is the process by which you give your property to others. There can be transfer through sale, gift, lease, or death.

In the fifth chapter, you will learn about takings. Takings are also referred to as land grabs. This is a salient topic in modern Afghanistan.

In the sixth chapter, you will learn about limitations on use. As a general matter, legal rights are rarely unlimited. This is because if we were to exercise our rights without limitation, we would likely infringe upon the rights of others. Thus, limitations on use will explain how our property rights are limited by concomitant responsibilities. In particular, this chapter will look at limitations due to private interests and limitations due to the public interest.

In the seventh and eighth chapters, you will learn about the property law surrounding resources that are especially important in Afghanistan. The seventh chapter focuses on water and agriculture, and the eighth chapter focuses on minerals and hydrocarbons.

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<sup>53</sup> The bundle of sticks analogy will be presented in detail in the second chapter on ownership.

## CHAPTER 2: LEGAL FRAMEWORK AND DISPUTE RESOLUTION

In this section, we will introduce the basic legal framework in Afghanistan for addressing property disputes. This framework has two important components: the sources of property law and the dispute resolution process. We will begin by discussing the different sources of property law in Afghanistan. These sources are the places where the rules that govern property law come from. After learning about the different sources of property law, we will change our focus to the process Afghans take to resolve disputes.

### 1.4 Sources of property law

Imagine you have a property dispute. Where do you look for law that will allow you to resolve the dispute? In Afghanistan, there are three principal sources of law that could allow you to resolve the dispute: state law, Sharia law, and customary law. This textbook focuses on state law on property, since this textbook series as a whole has the purpose of teaching and analyzing state law. With this said, Sharia and customary law are also important sources of law used by Afghans to resolve property disputes and will be discussed periodically throughout this textbook. In the part of the chapter, we will think about all three of these sources of law and explore how they interact with one another. As an aside, note that for the purposes of simplification this discussion addresses only domestic law.

#### 1.4.1 State law

**State law** is the property law promulgated by the government in its official role. To **promulgate** means to officially pass or publish a law, decree, edicts, et cetera. In other words, you can think of state law as the property law announced by the government. It consists of the Constitution, the Civil Code, decrees, edicts, et cetera. Together, these varied documents comprise state law. The relation of these varied documents to one another will be discussed in the next section on the hierarchy of law. They are meant to work together to provide clear, consistent rules. Interestingly, property law scholars have argued that property issues were the primary reason for the importance of the courts as an institution in Afghanistan during the 20<sup>th</sup> century.<sup>54</sup> Afghans went to the courts primarily to receive paper documentation with which they could prove ownership of land. This fact suggests that property law is an especially relevant area of law within the state law system as a whole. Today, state law's role in property disputes is mainly to adjudicate disputes and to store the documentation of ownership discussed above. And remember: state law is the primary focus of this textbook. By reading this textbook, you will gain an understanding of state law on property.

#### 1.4.2 Sharia law

**Sharia** is the path to Allāh that has been given to mankind by Allāh through the Prophet Muhammad (PBUH).<sup>55</sup> To stay on this path, there are certain rules people must be follow.<sup>56</sup> These rules appear as the word of Allāh in the Holy Qur'ān. Also, more of these rules can be learned by looking to the **Sunnah**, or the statements or actions of the Prophet Muhammad (PBUH).<sup>57</sup> In particular, rules of the Sunnah can be found by looking to what the Prophet Muhammad (PBUH) said (**Qawli**), did (**Fa'eli**), or approved of by allowing people to some act in some way front of him without his disapproval (**Taqriri**).<sup>58</sup>

<sup>54</sup> Wily at p. 17 (citing Vertan Gergorian, "The Emergence of Modern Afghanistan," *Politics of Reform and Modernization 1880-1946*).

<sup>55</sup> Abdur Rahmān I. Doi, *Shari'ah: The Islamic Law*, (London: Ta Ha Publishers 1984), 2.

<sup>56</sup> See *Ibid.* at 4-5 (describing a conflict solved via Shari'ah and the path's law like nature).

<sup>57</sup> *Ibid.* at 7.

<sup>58</sup> See Mohammad Hashim Kamali, *The Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 1991).

Together, the Holy Qur'ān and the Sunnah are the two sources that comprise the Sharia.<sup>59</sup> These sources directly convey laws given by Allāh and are considered the primary sources of Sharia.

## 1.2 Islamic Law

Islamic Law and Sharia are related, but distinct bodies of law. Since Sharia comes directly from Allāh, it must be heard, understood, and written down by humans. Humans are fallible and bound by our own abilities. This means that any interpretation of Sharia must go through our fallible understanding. The resulting beliefs about what Sharia law says makes up Islamic Law.<sup>60</sup> All *human interpretations* of the Holy Qur'ān and the Sunnah make up part of Islamic Law. Apart from these two sources, there are two sources of Islamic Law that are universally recognized among Muslim jurists.

One of these sources of Islamic Law is the **Ijmā**. The Ijmā, or consensus of Islamic jurists, serves as a source of Islamic Law because it provides an accepted belief among Islamic experts. If the experts agree on how to interpret a passage of the Qur'ān or a law that should be followed, their agreement signifies that the rule is correct. For this reason, Ijmā is another source accepted in Islamic Law.

Another source of Islamic Law that is widely accepted is **Qiyās**. This source consists of analogical reasoning. It is a doctrine that allows people to take a rule from one context and apply it in another similar context. For this to be allowed, two conditions must be met. First, the rule that the person wants to extend must come from the Holy Qur'ān or the Sunnah. Second, the same effective cause (Illah) or legal reason must apply in both cases. If both of these requirements are met, a rule may be extended to a new situation.<sup>61</sup>

These sources of Islamic Law are accepted by almost all Muslims. There are other sources of Islamic Law that not all Muslims accept. In Afghanistan, an additional source of Islamic Law is used: Istishan. This source is used because Afghanistan generally follows Hanafi Islamic thought. This topic will be discussed in the next subsection.

### 1.2.1 The Hanafi School of Islamic thought and Islamic Law

Since Sharia Law must be interpreted by humans, it is easy to see that some people might disagree on the best interpretation. While there is a lot of agreement on how to interpret Shari'ah Law, many of Islamic Law's greatest scholars have disagreed on how to interpret certain aspects of Sharia Law. This disagreement has led to the formation of different schools of Islamic Law. Each school gets its unique beliefs from the Imam of that school. These schools take different approaches about how to interpret Sharia Law and have different rules to follow.<sup>62</sup>

The legal system in Afghanistan follows the Hanafi School of Islamic thought. This school of legal thought follows the Sunni School of thought and was founded by Abu Hanifah Nu'man ibn Thabit. It has more adherents than any other school.<sup>63</sup> One major way that the Hanafi School is different from other schools is that it relies more heavily on an additional source of Islamic law: Istishan.<sup>64</sup>

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<sup>59</sup> Hamid Khan, *Practitioner's Guide: Islamic Law*, July 2013.

[http://inprol.org/sites/default/files/publications/2013/islamic\\_law\\_guide-july\\_2013\\_final\\_0.pdf](http://inprol.org/sites/default/files/publications/2013/islamic_law_guide-july_2013_final_0.pdf)

<sup>60</sup> *Ibid.* at 16.

<sup>61</sup> *Ibid.* at 24.

<sup>62</sup> Mohammad Hashim Kamali, *Shari'ah Law: An Introduction*, (Oxford: Oneworld 2008), 68-70.

<sup>63</sup> *Ibid.* at 70-73.

<sup>64</sup> *Ibid.* at 94.



**Istishan** is a preference for reaching fair solutions even if it means not directly following the written rules. Istishan allows choosing a fair solution in situations where a strict application of the rule would lead to hardship or undesirable results.<sup>65</sup> It might be helpful to think of Istishan as a less strict version of qiyas. Like qiyas, istishan allows decisions that extend the written rules to new situations. Unlike qiyas, this extension does not have a strict requirement that the principle from the written rule directly apply in the new situation. Instead, thoughts about what solution would avoid bad results guide the decision.<sup>66</sup>

### A Note About the Shia School of Islamic Thought in Afghanistan

As we will discuss later in this chapter, the Constitution and other laws of Afghanistan tell us the situations when courts can use Islamic Law in making their decisions. For now, it is only important to realize that in some limited cases, Islamic law can be used.

When Islamic Law is used, most of the time courts in Afghanistan will apply the rules of the Hanafi school of thought. There are some very rare instances when this is not true. In some parts of the country Shia interpretations of Sharia Law are applied in limited cases.

Like in the Sunni School of thought, those who adhere to the Shia School of thought do not always agree on how to interpret Sharia Law. Therefore, there are also different schools of legal thought within the Shia School of thought. In Afghanistan, when the Shia School of thought is used in court, the court follows the Jafari school of Shia jurisprudence.<sup>67</sup> This school relies on a person's ability to reason and think about how to solve moral problems.<sup>68</sup>

We will discuss when to apply Hanafi jurisprudence versus Jafari jurisprudence in the next section.

- 1.1.1** Since almost all cases that use Islamic Law use Hanafi thought, the rest of this book will discuss the laws under the Hanafi School of thought. This means that while many of the rules in this chapter may be followed by all adherents to Islam, some rules are specific to the Hanafi School. If you are in a situation where a different school of legal thought is used, this chapter should serve only as a basis for your legal research. **Customary law**

Practically speaking, customary law has been very important in resolving property disputes.<sup>69</sup> **Customary law** refers to rules established by long-observed customs or practices. The “rules” are enforced outside of the state legal system and try to reach a fair, equitable result. In this sense, customary law can be defined as the dispute resolution mechanisms that exist outside the state judicial system, which tries to reach a just result. In Afghanistan, the Jirga and the Shura are common forms of customary law. The Jirga and the Shura are gatherings of people that resolve disputes, including property disputes, outside the state judicial system. Further, such gatherings are considered an essential part of Afghan culture. For instance, note that the two houses of the legislature are called the Wolasi Jirga and the Mashrano Jirga.<sup>70</sup> It is interesting that the country's formal legislature takes its name from its traditional informal gatherings.

<sup>65</sup> *Ibid.*

<sup>66</sup> Wael B. Hallaq, *Shari'a: Theory, Practice, Transformations*, (Cambridge UP: Cambridge 2009), 107-09.

<sup>67</sup> Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, (2005), 20-21, available at [http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/86A7E9B3EE11392EC1](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/86A7E9B3EE11392EC1).

<sup>68</sup> Jafari: Shii Legal Thought and Jurisprudence, Oxford University, Last accessed 2/10/14, <http://www.oxfordislamicstudies.com/article/opr/t125/e1153>

<sup>69</sup> *Id.* at p. 98.

<sup>70</sup> *Id.* at p. 102.

Generally, customary law “depends on community-made norms that change over time.”<sup>71</sup> In addition to changing over time, customary law varies from community to community. This is in contrast to state law, which tends to be uniform throughout the country. Customary law is often an oral negotiation process without paper documentation. This is also in contrast to state law, which tends to include paper documentation. State law uses paper documentation in an effort to provide uniformity and predictability. As mentioned above, provision of paper documentation on property issues is an important part of the court’s work. Note, however, that certain communities use oral negotiations that include paper documentation as well. For instance, Pashunwali is the customary law of the Pashtun tribes.<sup>72</sup> And when land is transferred according to Pashunwali, there will be paper documentation.<sup>73</sup> So certain communities have customary law with elements that resemble state law. This observation—along with the above observation that state law is to a large extent modeled on Islamic law—shows that the boundaries between the three sources of law are not always firm or clear. The extent to which these boundaries exist differs from location to location.

## 1.2 Hierarchy of laws

A **hierarchy** is a system with varied elements where certain elements are understood to take precedence over others. You probably encounter hierarchies all the time. For instance, let’s say you are on the university basketball team. Assume that the other players on the team are in their first, second, third, and fourth years of study at the university. At the beginning of the season, the players need to choose their jersey numbers. Naturally, each player has his preferred number. But there can only be one of each jersey number on the team. How can this situation be resolved? One way to resolve the situation would be to establish a hierarchy based on seniority; that is, how long the basketball players have been studying at the university. So the fourth-year students get to choose their jersey numbers first, then the third-year students, then the second-year students, then the first-year students. This hierarchy based on seniority would resolve the situation between the different years. But what about the situation of resolving who among players in the same year gets to choose his jersey number ahead of whom? In other words, how to decide who among the fourth-year students gets to choose first, second, third, and so on? One way would be to establish a hierarchy based on how many points the players scored in the previous season.

The point of this example is to show how we apply hierarchies all the time in making decisions about what elements take precedence over others. Finally, note that that hierarchies can apply both *across* elements (*e.g.*, between the different years of basketball players) and *among* the same element (*e.g.*, among the same year of basketball players).

Now let’s talk about hierarchies in law. If there were no hierarchies in law, people would be able to choose whatever law from whatever source provided the most advantageous outcome to their legal dispute. This could be a problem. Think about a situation in which one law would require a certain outcome and another law would require the opposite outcome. One party to the dispute would argue using one law, and the other party to the dispute would argue using the other law. Without a hierarchy of law, it would be difficult to know which law takes precedence. Thus, having a good hierarchy of law is almost as important as having good laws in the first instance.

What follows is a discussion of two relevant hierarchies of law: first, the hierarchy between different sources of laws; second, the hierarchy within state law. Think of the hierarchy between different sources of laws as similar to the hierarchy *across* the different years of basketball players. Then, think of hierarchy within state law as similar to the hierarchy *among* the same year of basketball players.

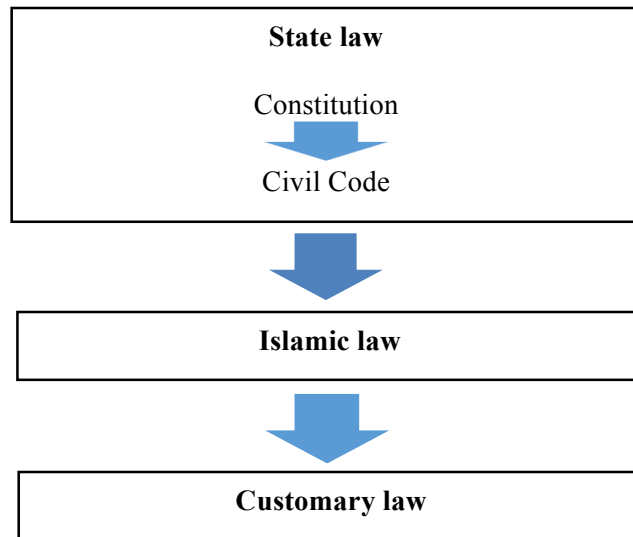
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<sup>71</sup> *Id.* at p. 17.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

As a starting point to the discussion, look at the diagram below. It shows both of the relevant hierarchies of law.



### 1.2.1 The hierarchy between different sources of law

In Afghanistan, courts follow the hierarchy of sources of law shown in the diagram above. Courts start at the top of the diagram with state law and move downward through Islamic Law then customary law. In the next few subsections we will look at each of these sources of law and think about when they should be used in court. We will begin by examining state law and the hierarchy of laws within it. Then we will discuss Islam and Islamic Law. In particular, we will focus on the role Islam and Islamic Law play in court decisions and when lawyers should make arguments based in Islam or Islamic Law. Last, we will briefly talk about customary law.

As a final comment, you may be wondering who or what sets up this hierarchy of law. As you will see below, this hierarchy is set up by state law. Lawmakers in Afghanistan have agreed that state law is the primary source of law and mandates when to use the secondary (Sharia) and tertiary (customary) sources of law. Because of this structure, state law plays two roles in addressing property disputes. It both sets up which sources of law can be used to solve a particular property dispute and it also gives us substantive rules about property. Before moving on, look at the diagram once again. Think about how the box at the top orders the boxes beneath it.

### 1.2.2 State Law and the Hierarchy Within State Law

Imagine that there is a dispute involving an unusual question of property law. Assume now that there is state law to apply to the question. This is helpful because due to the hierarchy of laws shown above, we know that this dispute should be solved using state law alone since it is on the top of the hierarchy. But, imagine when you are looking at state property rules, you see many different rules that apply to your dispute. Some rules come from the Constitution while others come from the Civil Code. Which set of rules should you use? This is another hierarchy of laws question. Within state law, there is another hierarchy that tells us which sources of state law overtake others.

The Constitution is the supreme law of Afghanistan. It takes precedence over any other law. Further, any other law contradicting the Constitution is for that reason invalid. Given the paramount importance of the Constitution, the courts first look to see if there is an article of the Constitution to apply. If there is constitutional law to apply, then the courts will apply it. If there is no constitutional law to apply, then the court will look to see if there is statutory law to apply. The statutory law consists of the articles of the Civil Code. The Civil Code has several thousand articles and treats property extensively. In fact, property comprises the largest single topic in the Civil Code.<sup>74</sup> There are over 1,000 articles in the Civil Code on property.<sup>75</sup> Thus, there is a good likelihood that there will be statutory law to apply. And in addition to the Civil Code, there are other statutory sources that have provisions on property law.

### **1.2.3 Islamic Law in Court**

In the following subsections we will examine the use of Islamic Law in the courts of Afghanistan. In particular, our focus will be on when and how Islamic Law can be used to make an argument in court. We will begin by examining the key provisions relating to Islam in the Constitution and then study the Constitution's references to Islamic Law.

#### **1.2.3.1 Islam in the Constitution of Afghanistan**

Articles One, Two, and Three of the Constitution of Afghanistan discuss Islam in Afghanistan. They tell us that Afghanistan is an Islamic state and that no laws should contravene the tenets and provisions of Islam. In the next two subsections we will discuss each Article. In the first subsection Articles One and Two are examined. In the second subsection, Article Three is discussed in detail.

##### **1.2.3.1.1 Article One and Article Two of the Constitution of Afghanistan**

The first two Articles on the Constitution of Afghanistan establish the place of Islam in Afghanistan. They read as follows:

<b>Constitution of Afghanistan</b>
<b>Article One</b> Afghanistan shall be an Islamic Republic, independent, unitary and indivisible state.
<b>Article Two</b> The sacred religion of Islam is the religion of the Islamic Republic of Afghanistan. Followers of other faiths shall be free within the bounds of law in the exercise and performance of their religious rituals.

These provisions show us that Islam has a special role in Afghanistan. Each Article tells us something different about Islam's role.

Article One tells us that Afghanistan is an Islamic Republic. This places Islam as a part of the foundation of the state.

Article Two describes Islam as the religion of the Afghanistan. This Article acknowledges that people with faiths other than Islam are permitted to practice their religion so long as they don't break the law in

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<sup>74</sup> Foley at p. 24.

<sup>75</sup> Nezamuddin Katawazi, "Land Disputes and Governance in Afghanistan," *TransConflict*, Oct. 1, 2013, available at <http://www.transconflict.com/2013/10/land-disputes-governance-afghanistan-110/>.

doing so. Taken together with Article One, we can see that Islam lies at the foundation of Afghanistan. These Articles serve as some justification for using Islamic Law in court. The reasoning is that if Afghanistan is an Islamic Republic and Islam is the state religion, the religion can play a role in how the country operates. While Article Two allows people to practice religions other than Islam, they are still in an Islamic Republic and sometimes they may be subject to Islamic laws in court.<sup>76</sup> This is important because these provisions give the courts some authority to use Islamic Law in their decisions.

For practicing lawyers, these Articles are important because they play a role in setting the foundation for using Islam in court. These provisions, however, will rarely be used by an attorney in making his argument. These Articles will probably not be used in court because they only state broad principals about religion, the state, and the legal system. Cases are far more specific and probably will not have their outcome depend on these provisions. Also, the Constitution and other laws give more detailed explanation of how religion, the state, and the legal system interact. Since those laws are more specific, a lawyer would use them because they give the court more detail on how to make its decision. We will now study some of these more specific provisions.

### 1.2.3.1.2 Article Three of the Constitution of Afghanistan

Article Three seems easy to understand. This appearance can be misleading. Article Three states:

**Constitution of Afghanistan**

**Article Three**  
No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.

This Article establishes a court power to review laws to make sure they do not offend the tenets and provisions of Islam. If a law contravenes the tenets and provisions of Islam, the law can be erased.<sup>77</sup>

Before discussing the details of Article Three, there is one important thing to note. Article Three acts only as a way to erase laws against Sharia. It does not tell us that all laws must have Islamic Law as their basis. According to the Article, lawmakers do not need to start with a provision of Islamic Law and build off of it to write laws like the Civil Code. Only laws that *contravene* Islam are forbidden. This means that if there is no text or ruling within the sources of Islam, Article Three will not apply.<sup>78</sup>

For example, Article Twenty-Six of the Civil Code of Afghanistan (this section will be covered in more detail later) states that ownership rights are to be decided based on the rules of the locality where the property is. This means that each locality may have different ways of determining how ownership questions are answered. Since Islam has no rules about giving power to localities to decide ownership questions, Article Twenty-Six has no connection to the tenets or provisions of Islam. The rule does not come from Islamic Law and it does not break any Islamic Law rules. In light of these facts, the law would be permissible because it does not *contravene* Islam. Knowing this, we can discuss how Article Three of the Constitution functions.

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<sup>76</sup> See USCIRF 2013 Annual Report, USCIRF, April 2013, 218, <http://uscirf.gov/reports-and-briefs/annual-report/3988.html>.

(NOTE: this cite must be pulled before final copy)

<sup>77</sup> Mohammad Hashim Kamali, *Afghanistan's Constitution 2004: An Islamic Perspective on Interpretation*, (2009), 6, available at [http://www.usip.org/sites/default/files/ROL/a\)%20Kamali%20Paper%20English.pdf](http://www.usip.org/sites/default/files/ROL/a)%20Kamali%20Paper%20English.pdf).

<sup>78</sup> *Ibid.* at 6.

In examining this Article, the first thing to recognize is that it does not necessarily invalidate laws that contravene Islamic Law. Rather, it only invalidates laws that contravene the “tenets and provisions . . . of Islam.” While at the time of this writing in January 2014 the exact meaning of this provision is unclear, some scholars have offered interpretations. One interpretation noted by Mohammad Hashim Kamali suggests that this provision is quite broad and includes both theological and legal principles of Islam. Other possible readings suggested by Kamali note that Article Three might be narrower and only invalidate laws that contravene the overarching principles of Islam.<sup>79</sup>

In addition to contravening Islam, three other requirements must be met before applying Article Three. These rules are given to us by Article One Hundred Twenty-One of the Constitution. First, only the Supreme Court may invalidate a law because it contravenes Islam. Second, only the government or lower courts may request for the Supreme to review a law under Article Three.<sup>80</sup> Third, in order for a law to be challenged, it must have been actually enforced against someone. This means that the law must be used against someone before it can be challenged and laws cannot be challenged before they go in to effect.<sup>81</sup>

For lawyers, knowledge of how Article Three operates provides one way to use Islam in court. A lawyer may go to court and argue that the law applied against his client contravenes the tenets and provisions of Islam.<sup>82</sup> While this argument is possible, it may be difficult to make. First, it is unlikely that a law will actually contravene Islam. Islam is so important and lawmakers tend not to make laws without consulting Islam.<sup>83</sup> Second, many parts of the attorney’s case would need to fit together perfectly to erase a law. For example, the attorney’s client would need to have a case that he was wronged in some way by a particular law. Then the attorney will need to argue that the law applied against his client contravenes Islam. Next the court will need to agree and request that the Supreme Court interpret the law. The Supreme Court will then decide if it wants to hear the case. If it does, the Court may erase the law if it contravenes Islam. The attorney would then need to re-evaluate his client’s case and decide if he still needs to go to court.<sup>84</sup> Therefore, Article Three gives practicing attorneys one route to use Islam in court. This method, however, is rarely used and difficult to win.

### Discussion Questions

1. Suppose Aamir reads in the newspaper about a new law passed by the government. Aamir does not think that the law is proper under the principles of Islam. Even though the law does not affect Aamir, He wants to get the law erased. What can Amir do in court to get the law erased?
2. Suppose the government made it illegal to sell a cellular phone to anyone under the age of 20. Abdullallah, a cellular phone salesman, recently sold his phone to someone who was 19 years old. Abdullallah has been brought to court for selling his phone to someone so young. Abdullallah wants to argue that the law has no basis in Islam. Since Islam is silent on the topic, Abdullallah wants the law erased. Can Abdullallah get this law erased?

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<sup>79</sup> *Ibid.* at 5.

<sup>80</sup> *Ibid.* at 3.

<sup>81</sup> *Ibid.* at 8.

<sup>82</sup> *Ibid.* at 7, 9.

<sup>83</sup> *Ibid.* at 5.

<sup>84</sup> *See ibid.* at 3, 8-10.

### **Suggested Answers**

1. Aamir cannot do anything in court. The law has not been enforced against Aamir. It has not affected him in any way. It is one of the requirements of using Article Three that the law actually affect the person who wants to erase the law. Since this description does not fit Aamir, he does not have the ability to challenge the law in court.
2. Abdullallah cannot get this law erased. Article Three only forbids laws that contravene Islam. This law may not have any counterpart in Islam, but it does not break any of the tenets or provisions of Islam. Islam does not limit how old someone must be to sell them a cellular phone. For this reason, Article Three does not apply.

The provisions discussed above demonstrate how Islam may be used in court. In the next subsection, we will discuss how Islamic Law can be used in court. You will notice that Islamic Law is much more commonly used.

#### **1.2.3.2 Islamic Law in the Constitution**

In this section we will discuss how the Constitution tells us to use Islamic Law in court. When reading ahead, remember that there is a difference between the principles of Islam and Islamic Law. The principles of Islam are the overarching beliefs of Islam. Islamic Law consists of specific rules that have been interpreted from the Sharia.

The Constitution gives us two Articles that explain when to use Islamic Law. Articles One Hundred Thirty and One Hundred Thirty-One explain that Islamic Law can be used to supplement arguments from the Civil Code. In practice, each Article functions in the exact same way. The only difference is in which school of Islamic Law to use. To start, we will examine the Article One Hundred thirty and how it operates. Then Article One Hundred Thirty-One will be introduced and discussed.

##### **1.2.3.2.1 Article One Hundred Thirty of the Constitution – Hanafi School of Islamic Law in courts**

Article One Hundred Thirty describes when Islamic Law should be used in court. The Article reads as follows:

#### **Constitution of Afghanistan**

##### **Article One Hundred Thirty**

In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner.

On first reading, this Article suggests that Islamic Law should only be used when the other laws of Afghanistan are silent. This means that a judge must first look to the Constitution and other laws in deciding a case. If none of these sources provide an answer, the judge may then look to Islamic Law.

An attorney reading Article One Hundred Thirty may think that he should only argue using Islamic Law when he thinks other laws do not provide an answer. In practice, however, this is not true. This is due to how these Articles are applied.

Articles One Hundred Thirty and One Hundred Thirty-One are not invoked by attorneys. Only the court may decide when to use these Articles.<sup>85</sup> This means that the court gets to make the decision to decide the case based on the Constitution and other laws or Islamic Law. In some cases it may be clear which type of law the court will apply. For example, there might be an instance where there is no law in the Constitution or other laws even mention the problem in the attorney's case. Here it would be easy for the lawyer to know that Islamic Law will likely decide the case. In most cases, however, it might be difficult to tell if the judge will use laws like the Civil Code or Islamic Law. After all, how different does a case need to be from the laws of the Constitution and other provisions before Islamic Law can be used? Unfortunately, there is no clear answer to this question and it is up to the judge to make this decision.

This poses a problem for you as future attorneys. How do you know when to rely on the Constitution and other laws versus when to rely on Islamic Law? If you rely only on the Constitution and other laws and the judge makes his decision based on Islamic Law you may lose your case. Oppositely, if you rely only on Islamic law and the judge decides not to invoke these Articles, you might lose your case. What would you do?

In practice, attorneys refuse to make this decision. Instead of making a decision about which laws to use in their argument, attorneys simply use both. This means that practicing attorneys argue both from the Constitution and other laws as well as Islamic Law. Usually, this takes the form of making an argument and then citing both state law sources and Islamic Law sources. By doing this, the attorney can be sure that no matter which set of laws the judge applies the attorney will have made his best argument from both sources of law.

Apart from to telling courts when Hanafi jurisprudence can be used, Article One Hundred Thirty also limits the use of Hanafi jurisprudence in two ways.

First, the Article says Hanafi jurisprudence can only be used "within the limits set by this constitution." As of February 2015, the exact meaning of this phrase is unclear.<sup>86</sup> However, some commentators propose that this phrase should mean rules from Hanafi jurisprudence should not be used when they directly conflict with provisions in the Constitution.<sup>87</sup> For example, Article 27 of the Constitution forbids courts from finding someone guilty of a crime that is not listed in the laws of Afghanistan. Hanafi jurisprudence allows punishment for some crimes that the laws of Afghanistan has not listed. Commentators argue that "within the limits set by this Constitution" means Hanafi jurisprudence cannot be used to punish these alleged wrongdoers because Hanafi jurisprudence conflicts with the constitution.<sup>88</sup> Others argue that this interpretation cannot be correct because of Article Three of the Constitution. They say that since Article Three forbids laws that contravene Islam, the Constitution cannot conflict with the Constitution because if it did, the Constitution would go against Islam and be void. For this reason, they

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<sup>85</sup> Conversation with Hamid Khan 1/24/14.

<sup>86</sup> See International Development Law Organization, Papers from the Technical Workshop: Gender and Criminal Justice in Afghanistan, Kabul 15 (May 15-16 2006), available at [https://archive.org/stream/azu\\_acku\\_pamphlet\\_hv6250\\_4\\_w65\\_t434\\_2006#page/n5/mode/2up](https://archive.org/stream/azu_acku_pamphlet_hv6250_4_w65_t434_2006#page/n5/mode/2up); Mohammad Hashim Kamali, *Afghanistan's Constitution Ten Years On: What Are the Issues?*, AREU at 27 (2014), available at <http://www.areu.org.af/Uploads/EditionPdfs/Afghanistan%20constitution%20ten%20years%20on%20English.pdf>

<sup>87</sup> International Development Law Organization, Papers from the Technical Workshop: Gender and Criminal Justice in Afghanistan, Kabul 15 (May 15-16 2006), available at

[https://archive.org/stream/azu\\_acku\\_pamphlet\\_hv6250\\_4\\_w65\\_t434\\_2006#page/n5/mode/2up](https://archive.org/stream/azu_acku_pamphlet_hv6250_4_w65_t434_2006#page/n5/mode/2up)

<sup>88</sup> *Id.*



argue the “within the limits of the Constitution” phrase must be some weaker restriction on the use of Hanafi jurisprudence.<sup>89</sup>

Second, the Article tells courts to use Hanafi jurisprudence “in a way that attains justice in the best manner.” Again, the exact meaning of this clause is not certain.<sup>90</sup> One proposed interpretation says that this clause should be understood to mean that judges should rule in a way that aligns with general principles of law. Supporters of this interpretation suggest this phrase means judges should consider general fairness, justice, and the rule of law when making a decision.<sup>91</sup>

Can you think of other ways to interpret these two phrases? Which interpretations do you think are best? Why?

In the next subsection we will examine a very similar provision, Article One Hundred Thirty-One.

### **1.2.3.2.2 Article One Hundred Thirty-One of the Constitution – Jafari School of Islamic Law in court**

Like Article One Hundred Thirty, Article One Hundred Thirty-One describes instances when Islamic Law may be used in court. This Article states:

#### **Constitution of Afghanistan**

##### **Article One Hundred Thirty-One**

The courts shall apply the Shia jurisprudence in cases involving personal matters of followers of the Shia sect in accordance with the provisions of the law. In other cases, if no clarification in this Constitution and other laws exist, the courts shall rule according to laws of this sect.

This Article operates in the same fashion as Article One Hundred Thirty. It allows Islamic Law to be used when judges deem it necessary to resolve a case. Again, it will be hard for an attorney to know when the judge will decide to use Islamic Law or other laws. Attorneys respond by making argument based in the Constitution and other state laws like the Civil Code as well as Islamic Law.

This Article is different from Article One Hundred Thirty in two key ways.

First, Article One Hundred Thirty-One is limited to cases involving “personal matters.” For example, this Article may apply in cases involving family law.

Second, Article One Hundred Thirty-One states that once a judge has determined that Islamic Law should be used, Shia jurisprudence should be used if *both* parties in the case follow the Shia School of thought. In these cases the Jafari School of Islamic Law is applied.<sup>92</sup> Even if one party does not subscribe to Shia School of thought, then this Article will not be used.

<sup>89</sup> See Mandana Knust Rassekh Afshar, *The Case of an Afghan Apostate – The Right to a Fair Trial Between Islamic Law and Human Rights in the Afghan Constitution*, Max Planck Yearbook of United Nations Law at 601 (Vol. 10, 2006), available at [http://www.mpil.de/files/pdf3/mpunyb\\_13\\_knust1.pdf](http://www.mpil.de/files/pdf3/mpunyb_13_knust1.pdf).

<sup>90</sup> Mohammad Hashim Kamali, *Afghanistan’s Constitution Ten Years On: What Are the Issues?*, AREU at 27 (2014), available at <http://www.areu.org.af/Uploads/EditionPdfs/Afghanistan%20constitution%20ten%20years%20on%20English.pdf>

<sup>91</sup> *Id.* at 26

<sup>92</sup> Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, (2005), 20-21, available at [http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/86A7E9B3EE11392EC1](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/86A7E9B3EE11392EC1).

Both of the above restrictions on the use of Article One Hundred Thirty-One make it an Article that is not applied often.

### 1.2.3.2.3 Final Note on Islamic Law in the Constitution

Using what you have learned about Articles One Hundred Thirty and One Hundred Thirty-One consider what you would do in the following situation:

#### Discussion Question

Imagine Hamid comes to your office with a problem. His friend, Asa, had agreed to sell some of his land to Hamid. The land was supposed to be used for farming. Trusting Asa, Hamid paid for the land without seeing it. The next day Hamid decided to go see his new land. When he arrived, he saw nothing but a field of dry, rocky dirt. After inspecting the land, Hamid realized that it was not suitable for farming. He feels that he should get his money back from Asa because Asa had not told him how rocky the land was. Asa has refused to give the money back arguing that they had a fair deal. While talking to Hamid, he tells you he is a follower of the Hanafi School of thought.

You decide that the best way to solve this dispute is to go to court. Your argument is due to the court in two weeks. What sources of law do you use to make your argument?

#### Suggested Answer

According to Article One Hundred Thirty, you should first look to the Constitution and other laws of Afghanistan. Using these rules you should build the strongest case you can for Hamid. So long as the laws of Afghanistan provide rules for the dispute, this argument will probably be enough to win the case.

If it seems the laws of Afghanistan may not have rules for Hamid's situation, you should supplement your arguments with rules from Islamic Law. You should do this because under Article One Hundred Thirty, the judge may use Islamic Law if he does not think the situation is covered by the laws of Afghanistan.

In citing to Islamic Law you should use arguments from the Hanafi school of Islamic thought. Since we know that Hamid is a follower of the Hanafi Fiqh, we know he does not follow the Shia School of thought. Since this means that *both* parties cannot be followers of the Shia School of thought, we know that Article One Hundred Thirty-One does not apply.. These facts tell us that we should follow Article One Hundred Thirty. This Article says to use Hanafi jurisprudence.

After reviewing how Articles One Hundred Thirty and One Hundred Thirty-One operate, you now know when to use Islamic Law in court. You know that you should argue using both laws like the Civil Code and Constitution as well as Islamic Law. Also, in this section we discussed which schools of Islamic thought to apply depending on the parties in the case. Knowing all of these details leaves one big question unanswered. What are the rules given to us by Islamic Law? This is the topic examined for the rest of this chapter.

### 1.2.3 Customary Law

Customary law is the final source of law courts can use in resolving disputes. Article Two of the Civil Code of Afghanistan tells us that customary law should only be used when *both* state law and Islamic Law are silent on how to resolve the disputed issue.

#### Civil Code of Afghanistan<sup>93</sup>

**Article 2:** Where neither do provisions of law exist, nor any ruling is found among principles of Hanafi Jurisprudence of Islamic Sharia, courts shall decide according to common custom, provided that the custom does not contradict provisions of law or principles of justice.

Based on this Article, customary law can only be applied when there is no state law or principle of Hanafi jurisprudence that can be used to solve the dispute. Note, however, that the court will only apply customary law “provided that the custom does not contradict provisions of law or principles of justice.”<sup>94</sup> In other words, the court will not presume the customary law to be valid and apply it without scrutiny.

### 1.3 Formal institutions

So far, this legal framework section has focused on the laws of Afghanistan. First, we considered the different sources of law. We also considered how those different sources of law interact with one another. In the next subsections, we consider the relevant institutions that use these sources of law. In other words, we turn our focus away from the law itself and toward the institutions that enforce the law.

#### 1.3.1 Courts

The courts are an important formal institution. The basic structure of the judiciary consists of three separate levels.<sup>95</sup> First, there is the Supreme Court. Second, there are the High Courts. Third, there are the Primary Courts. Of course, property disputes are heard in all three of these levels. A case begins in the Primary Courts, and it can be appealed to the High Courts and the Supreme Court. Further, there are specialized courts within this basic structure that focus on specific areas of law. For instance, a presidential decree established the Special Property Disputes Resolution Court in 2002 to focus on “looking after returned refugees in Afghanistan and addressing their complaints, as to hasten the process of resolving property disputes.”<sup>96</sup> This was created because cases about property are the most common type of case in the formal system. The Special Property Disputes Resolution Court, however, lost its effectiveness by 2005 because law enforcement agencies did not enforce its rulings.<sup>97</sup> Thus, the judiciary now adjudicates such land disputes according to the usual procedures within its normal docket.<sup>98</sup>

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<sup>95</sup> Foley at p. 21.

<sup>96</sup> *Id.* at 30 (citing Decree 89 of the Head of the Transitional Islamic State of Afghanistan, Regarding the Creation of a Special Property Disputes Resolution Court, Article 1).

<sup>97</sup> Katawazi.

<sup>98</sup> *Id.*

### 1.3.2 Government agencies

The government agencies that regulate land are also important formal institutions. For many years, the principal government agency that regulated land was the Department of Land Affairs (AMLAK).<sup>99</sup> King Zahir Shah founded the agency in 1960 as part of an effort to document property. Documenting property was good for government because it enabled taxation. Documenting property was good for citizens too because it proved ownership. Zahir Shah ordered AMLAK to oversee and allocate the land. AMLAK remained in place through subsequent regimes. As late as 2001, AMLAK still existed “[as land offices] at provincial levels and in most districts, but their role was more of a keeper of records than of land administrators.”<sup>100</sup>

After fifty years, AMLAK became the Afghanistan Land Authority (ALA) in 2010.<sup>101</sup> Like AMLAK, ALA is still classified as part of the Ministry of Agriculture, Irrigation, and Livestock (MAIL). Unlike AMLAK, ALA is now an executive agency. ALA has focused on simplifying processes regarding property matters: acquiring title, facilitating leases, et cetera. The reformed agency was supposed to become a so-called “one-stop shop” for property matters. In other words, the reforms hoped to eliminate the necessity of going from agency to agency and completing form after form to achieve a simple task regarding property documentation. Rather, the reforms hoped to consolidate these processes within one agency: the new ALA. That said, there is a perception that the reforms have focused on commercial activities and achieved only limited success.<sup>102</sup> There is also a perception that the reforms have done little for ordinary citizens.<sup>103</sup>

The Land Management Law is legislation that could change ALA’s functioning in ways that respond to the above perceptions.<sup>104</sup> The Land Management Law is pending at the time of the writing of this textbook. The ALA has amended the legislation several times. The current draft of the legislation includes certain provisions that could improve efficiency for both commercial entities and ordinary citizens. In particular, by giving more authority to community-based land administration systems instead of the centralized administration in the capital, the legislation could provide more democratic processes better fit for the conditions in the community.

## 2. DISPUTE RESOLUTION

### 2.1 Overview

Now that we have analyzed the sources of property law and the institutions that apply it, we will take a closer look at land-related disputes within that framework. Land conflicts are very common – in fact, they are the most common type of conflict in Afghanistan. These disputes can arise regarding ownership, inheritance, appropriation, displacement, access to pasture, water allocation, access to community property, mineral rights, and many other issues. Essentially any element of property can be the subject of a dispute. Most commonly, property disputes come about based on transfers of land or questions of ownership. Consider this scenario: Imagine that you own a piece of land that you inherited from your father. Some type of conflict occurs, and you leave Afghanistan for Pakistan for several years. When you return, you hope to reclaim the property you inherited. Where do you begin? As noted above, state law, Sharia law, and customary law could all apply.

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<sup>99</sup> Wily at p. 19.

<sup>100</sup> *Id.* at p. 22.

<sup>101</sup> Afghanistan’s Council of Ministers effected this change through Decree Number 23. Afghanistan Independent Land Authority, Main Page, available at <http://arazi.gov.af/>. See also Wily at p. 55.

<sup>102</sup> Wily at p. 55.

<sup>103</sup> *Id.*

<sup>104</sup> The analysis in this paragraph relies on Wily at p. 56-58.

## **2.2 Choosing a source of law**

You might imagine that the hierarchy of laws discussed above would lead you to the state law. State law is enforced by the courts and government agencies. We will refer to this as the formal system. But for many reasons, individuals do not always turn to state law. Sometimes customary law (the informal system of Shuras and Jirgas) governs property disputes. This means property disputes are common in both systems. Each one has a different process and reasons you might prefer to bring your claim there.

### **2.2.1 State law**

In our discussion of state law, we noted that it is meant to provide clear, consistent rules. It was initially created partially to provide documentation of property ownership. These motivations behind state law might encourage you to use the formal system for your dispute. If you have formal paper documentation of your ownership, for example, your claim is extremely likely to succeed. Other reasons to choose the formal system of the courts are more cultural. Certain communities tend to use the formal system more often. In Jalalabad Nahiya Five, for example, land confiscation cases are most often brought to the courts and apply state law. Your ability to bring suit at all may also impact your decision. In some communities, women are barred from the informal mechanisms that apply customary law. These women prefer the formal court system. Your perception of the institutions that apply state law will also impact your decision. Some people view the courts and government organizations as corrupt. This encourages people to choose the formal system that applies state law if they have the desire, means, and ability to bribe judges and officials in their favor.

### **2.2.2 Customary law**

Customary law consists of “rules” are enforced outside of the state legal system. As discussed above, this system tries to reach a fair, equitable result. About 80-90% of disputes are resolved in this system, using customary law. This high percentage is partially due to delay in the courts. Because land disputes are so common, the courts that implement state law have a very full docket. This means that the decision in any kind of suit, including those about property, can be delayed. This delay encourages some litigants to look to customary law to resolve their disputes. Another reason you might prefer customary law is because it can be less costly. It is also more accessible for most people, because the formal court system is centered in Kabul. People outside Kabul may not have access to, familiarity with, or means to travel to the court. Instead, people might prefer to use a customary law method like a Jirga. The local elders that preside over a Jirga are generally close to the facts, and know the parties, their families, and how the land has been used in the past.

## **2.3 Bringing a claim**

After choosing a source of law, you would bring a claim in either the formal or informal system. By choosing the system, you choose the set of rules and processes that will guide the end result. But as you have seen, the line between these systems is not always clear.

### **2.3.1 State law**

If you chose to file a claim in the formal system, you would begin by submitting a request to the **Hoquq** – a part of the Ministry of Justice. Your request would summarize your claim and the land in dispute. The Hoquq would send a letter to the Police Department, which would then inform your opponent of the claim and his responsibilities. The Hoquq would then try to get you and the opposing party to come to a settlement through mediation, which could involve a Jirga. This is one way that the formal and informal

systems blend. But if you and the opposing party did not choose mediation, your case would be referred to the court system. In most cases, this would be a city or district court.

### **2.3.2 Customary law**

If you chose to resolve your dispute using customary law, many different mechanisms could govern. This includes the Jirga and Shura referenced in our discussion of customary law above. It is important to note, however, that many other types of informal mechanisms exist. Generally, notable members of the community preside over these informal mechanisms. These members are chosen because they are viewed to have the appropriate wisdom to resolve the dispute. They are not elected or appointed. If a dispute crosses villages, half of the members are taken from each side. The number of people involved overall varies depending on the complexity of the issue.

## **2.4 The process**

### **2.4.1 State law**

After your case is referred to the court system, the president on the court would review your case and choose the three judges who would preside over it. These judges determine the date of the first hearing. They also oversee the proceedings at that hearing.

These proceedings would begin with you, as the plaintiff, making a statement. Only the presiding judge would be allowed to question you unless he gave permission to those on the judicial panel. Afterward, the opposing party (the defendant) would also make a statement. Both of you could present evidence to support your claims. After these proceedings, the judges come to a decision. Since there are three judges, this result is either by majority vote or unanimous vote. If there is a minority opinion, it is attached to the majority's opinion and preserved for the court archive. It is also sent to the affected party.

### **2.4.2 Customary law**

The usual setting for dispute resolution under customary law is the Jirga. This open forum allows a group of people to make a decision that is binding on those involved in the dispute. In other words, the consensus of the people participating in the Jirga determines the outcome of the dispute. As they are making their decision, the elders presiding over the Jirga or Shura try to reach a result that is acceptable to both sides. They encourage compromise by bringing up the idea of family and community honor. They will also consider Nerks, which are tribal-specific damages for particular wrongs. Eventually, the Jirga reaches a decision, known as a **prikra**. Then both parties are able to sign a letter of agreement. This document contains the terms laid out by the Jirga, and can be submitted to the courts to be included in the official court record. This is another way the formal and informal systems collide.

## **2.5 Appealing the decision**

### **2.5.1 State law**

At the end of the initial hearing, you or the defendant could appeal the decision by sending a letter to the higher court explaining the disagreement. A party can also appeal if the Primary Court's initial decision has not been appropriately implemented. If the higher court found the letter valid and important, it would accept the case. It would then request all the lower court's documentation and begin a similar process. Again, there is a judicial panel of three judges to analyze the case. These judges request more details from the appellant, who would submit a brief.

The hearing at this level is almost the same as that below. Both parties are allowed to make statements. Before they do so, the judge reads a report of what elements the judicial panel considered as it decided whether to take the appeal. After the proceedings are over, the judicial panel comes to a result as it did below. This court can approve the decision of the lower court, send the case back to the lower court for a new judgment or new reasoning, or invalidate the decision of the lower court. If it overrules the decision of the lower court, the decision is final and cannot be appealed. At this point, the court issues a ruling with details about the proceeding including its reasoning, the law, and the final decision.

If the higher court rejects an appeal, the decision can be brought to the Supreme Court. If the Supreme Court rejects this appeal, it is unlikely to be reopened.

### **2.5.2 Customary law**

If a party did not agree with the decision of the Jirga, he or she could leave the circle in order to avoid being bound by the decision. However, there are safeguards in place to try and prevent parties from doing this. Before the Jirga begins, a third party collects cash equal to the value of the case. If one party decides to leave the Jirga, refusing to accept its decision, he forfeits this amount.

If a party decides he is not satisfied with the result of the Jirga, he or she does have recourse other than leaving the circle and forfeiting the cash given in the beginning. Like the appeals process in the formal system, he or she may ask that another Jirga review the decision. If he is displeased with this decision, he may request one final review, known as **Takhm**. If he does not abide by the decision of this final jirga, he will be punished according to a decision of the applicable tribe.

## **2.6 Case studies**

In the last section, we provided an overview of the informal system as a whole. In this section, we will examine some specific mechanisms by showing how they operate in practice. As you read, keep in mind that the mechanisms discussed here are not a comprehensive list. Consider as you read each one how the formal and informal systems collide. Each case study comes from an actual property dispute in Afghanistan.

### **2.6.1 Shura and courts**

One case in Qara Bagh involved a dispute between two brothers, each of whom demanded a certain amount of the land granted to them by their father. Though the case was initially brought to the primary court there, then it was referred to the district Shura. This decision was made by the court because the district Shura had particular, localized knowledge about land issues. From there, the district Shura sent the case to the village Shura. After the four elders of the village Shura divided the land, they sent the decision back to the district Shura for approval. Their decision about the allocation of the land was ultimately accepted by the two brothers.<sup>105</sup>

This case shows the integration of the formal and informal systems. Here, the use of both gave the decision more legitimacy and allowed those with the most knowledge about particular issues to handle them. The district Shura, in sending the case to the village Shura, left those closest to the facts to make the decision. But by sending it back to the district Shura, the village Shura created more social pressure to accept its ruling. The district shura's approval gave the decision more weight. The downside, though, is the lengthiness of this process. In this case, it took more than a year for the dispute to be resolved.

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<sup>105</sup> <http://www.usip.org/sites/default/files/sr285.pdf>

### 2.6.2 Jirga and courts

The following case study was reported by the International Legal Foundation, and documented by the Norwegian Refugee Council. “For almost one hundred years the people of two villages in Laghman Province, Afghanistan have been using a road that one group of villagers claim they constructed on government-owned land. During the jihad against the communists the two villages allied themselves to different Mujahedin factions and in 1992, most of the people of one village fled to Pakistan. The people from the other village blocked access to the road by those who remained. This dispute lasted for over 12 years. Two attempts to solve it using the courts failed and two Jirgas also failed to reach an agreement that was acceptable to both sides. Finally, in 2004 legal counsellors from the Norwegian Refugee Council’s Information and Legal Aid Centre in Jalalabad intervened in the case. The legal counsellors took statements from both groups of villagers and also met with the District Governor, the police, and other public officials. Lengthy negotiations followed before the two sides would even agree to another Jirga. One village demanded the exclusion of villagers associated with a particular local commander as a pre-condition and certain other rights guaranteed to them. Such pre-conditions are quite common before a Jirga can even start. However a Jirga was eventually held, which agreed that both villages could have access to the road.”

Ultimately, this case came to a positive end – both parties eventually agreed to convene, and both sides compromised to get to an end result. But this study shows one of the drawbacks of dispute resolution via Jirga: its voluntary nature. To even begin a Jirga, both parties must agree to do so. As shown in the above case, this can prove difficult and lengthy if parties are unwilling to compromise or unwilling to attempt resolution. Even if parties agree to meet, it is possible that there will not be a result that is satisfactory to both parties – and, as shown in this case, that could potentially mean a dispute carries on for years. There is no official enforcement mechanism for a Jirga, and so either side can refuse to accept a ruling.

## 2.7 Standardization

As you have observed, the use of customary law to resolve disputes is deeply engrained in Afghan culture. Thus, customary law and state law are very intertwined. Most outside organizations do not recommend eliminating this system. Instead, they recommend using the informal system to strengthen the formal court system. In order to achieve this goal, organizations like the United States Institute of Peace (USIP) recommends allowing civil cases to operate in mediation systems like Shuras and Jirgas. The “fairness” approach of the customary system reduces antagonism between parties and reduces the burden on the courts. This reduces the amount of time a case in the formal system will take.

## 2.8 Conclusion

This chapter introduced the legal framework in Afghanistan. First, we defined the sources of property law: state, Sharia, and customary. Although state law is not the most common source of law for resolving property disputes in Afghanistan, we explained that this textbook focuses on state law. Second, we considered hierarchies of law. Hierarchies of law explain what law takes precedence over other laws. In particular, we looked at the hierarchy *across* sources of law and the hierarchy *among* state law. Third, we considered the formal institutions that implement state law: the courts and government agencies. Finally, we looked at dispute resolution, which as a practical matter is perhaps the most important mechanism for resolving property disputes in Afghanistan. We considered the way dispute resolution occurs under both state law and customary law, including how to choose a source of law, initiate the process, and appeal a decision. Next, we observed these concepts in practice by analyzing case studies. Importantly, we observed the way state law and customary law operate together – sometimes in harmony, and sometimes in conflict.



## CHAPTER 3: OWNERSHIP

### INTRODUCTION

In the first chapter, you read about what is meant by the term “property.” Now, the question is: What do people do with their property? In order to do what you want with a piece of property, you must own it. What does it mean to “own” a piece of land? This seems like a basic question, but think about it for a minute. Your answer may be very different from the answer of another student. It may also be different from the answer of a student from another country. Every society and country establishes rules related to who can own property, and what those owners can do with it. In Afghanistan, as in most countries, the legislature has created these rules, and they exist in many parts of the laws of Afghanistan.

The Civil Code of Afghanistan, Article 1900, defines ownership as “a right on the basis of which a thing comes under will and dominance of person and only owner may, within the limits of provisions of law, use and utilize it and take any possessive actions on it.” That definition is quite complicated. Who gives that person the “right” mentioned in the Article? May anyone possess that right to use the land as he pleases? As with many code provisions, it is helpful to break down such provisions into sections that are more easily understood. What are the important parts of the code provision above? The first is that the right of ownership is a legal right, a concept often called a financial right in Islamic Law. The second important element of the code article is that the concept of ownership is defined as a relationship between an owner and his property. This means that the owner has control over the property, and his ownership of the property would be meaningless without his actual relationship to the property as its owner. And the third is that this owner has control over his property, within the limits of the law. This means that, once it is established that somebody is the owner of a piece of property, he can do whatever he wants with the property, as long as it is legal. This is a form of control, a relationship that some say puts the land “under will and dominance” of the owner.

Article 40 of the Constitution of Afghanistan states, “No one shall be forbidden from owning property and acquiring it, unless limited by the provisions of law.” Acquisition of property is protected, and seizure of property by the government must be court-authorized, for “public interest,” and “in exchange for prior and just compensation.” That seems quite straightforward, but there are some limitations. For example, Article 41 says that “Foreign individuals shall not have the right to own immovable property in Afghanistan.” But, generally, Afghan citizens have the right to acquire and possess property within Afghanistan.

What can someone do with property that he owns? One way that some scholars define property ownership is to say that owning a property is like having a collection of sticks. Imagine that you have in your hands a number of sticks. Nobody contests the fact that they are yours, and that you may do whatever you please with them. Each of those sticks represents a particular right of use of your land. One stick might say “agriculture.” You may use the land for agricultural purposes. Because you own the property, it is your right to cultivate and grow whatever you please on your land. Another stick may say “**lease.**” A lease is when you own land, but allow somebody else to use it for a fee. For example, you could own land, but you allow your cousin to use the land in exchange for a payment of money every month. If you decide that the best purpose of the land would be to lease it to somebody else, you have the right to allow someone else to use the land.

With the sticks that have certain rights written on them, there are also sticks with responsibilities written on them. One says “compliance with the law.” This means that, whatever you do with your land, you must still obey the law when you use it. Article 1922 of the Civil Code of Afghanistan states that, if you share a wall with your neighbor, you may not adjust the height of the wall without your neighbor’s permission. Another stick in your hands says “duty to neighbors.” Generally, you may not use your land in a way that hurts your neighbors. Many Articles of the Civil Code require such responsible conduct. For example, Article 1917 of the Civil Code states that you may not use so much water from a stream on your land that other people downstream of your land do not have enough water. Many of these duties or responsibilities will be discussed later in the textbook.

In this chapter, you will learn about many of the benefits and responsibilities of ownership of property. Although you can, of course, own many different types of property (not just land or buildings), this chapter will focus on ownership and management of land. First, we will explore different kinds of ownership, how certain people or groups can own land, and what each kind of ownership means for the owner of a parcel of land. Next, the chapter will discuss **title** systems. Title is a way for the government and its citizens to have an official record of who owns what pieces of land, so that each owner can feel secure in using his land. You will then read about **mortgages** and **securitization**, which are ways that you can convert your land’s value into usable money for investment or improvement. In that same section, you will read about other ways you can use your land to create value. And the chapter will conclude with a discussion of the future of property law in Afghanistan, and how the duties and responsibilities discussed in this chapter affect and will continue to affect Afghan property owners.

1. What does owning property mean to you? Is it important to be able to own property? Is there a particular stick in the bundle that you believe is more important than others? If so, why?
2. Some Native American communities in what is now the United States of America used to manage land differently from how most countries manage it today. Instead of having land owned by a particular person, these communities had “communal land” that anybody could use, so long as the way one person used the land did not cause problems for anybody else’s use of the land. For example, if you were using the land to grow wheat, your neighbor could not harvest your wheat; but he could use the land next to your wheat to grow his own. Do you think that this is a good system of property management? Why, or why not? Can you think of a practice that people use in Afghanistan that is similar to this Native American system?

## 1. TYPES OF OWNERSHIP

There are different sources that govern property ownership in Afghanistan. The first is the 2004 Constitution of Afghanistan. The Constitution provides more general protections for landowners, such as in Article 40, which provides a general right for Afghan citizens to own property. Next is the 1977 Civil Code, which is still viewed as definitive by many judges. There is also the 2007 Land Policy, which made clear some areas of overlap between other sources of law, and recognized the establishment of community-based ownership, discussed below. And last is the more recent 2008 Law on Managing Land Affairs, which settles some of the technical details related to using specific kinds of land, and discusses a new system of land distribution. The relationships between these sources of law are complicated, and many people are not sure what law to apply in certain situations. However, each of the different sources of law discusses a group of different kinds of ownership.

## 1.1 Private Ownership

As in most of the world, property ownership in Afghanistan can be separated into different categories of ownership. The first category is **private** ownership. In Article 3(7), the Land Management Law defines private ownership as “Plot(s) of land[] belonging to individuals or non-governmental legal entities.” In private ownership, a piece of land is owned by one person who decides how the land is used. For example, imagine that Abdul owns 15 jeribs (a standard measure of land equal to .2 hectares in Afghanistan) of land. Nobody challenges his ownership of the land, and he has decided to use it for 10 years as a place for his home and as agricultural land. He could decide to sell his land, lease it, allow others to pass through it for a negotiated price (a practice known as an **easement**, discussed in part 4 of this chapter), or simply expand his house and use the land only for his residence. These are all his rights as a land owner, or, as discussed in the introduction, different sticks in his bundle of ownership rights. The land is his, and he may do what he pleases with it, unless his actions violate the law. He may not, for example, build a factory on the land that causes harm to his neighbors, according to Article 1932 of the Civil Code. Generally, a private owner may do whatever he wants to with his own land, unless he uses the land in a way that is not legal.

## 1.2 Leasing and Sharecropping

One of the ways an owner may use his land is to lease it to one person, or to many people. For example, imagine that Abdul owns a thirty jerib parcel of land, but only needs fifteen jeribs for his family to live and raise livestock. Asef, however, does not own any land, but has enough money to rent 15 jeribs of land from Abdul. Abdul may **lease** his land to Asef. This means that Abdul and Asef agree in writing that, for a specific amount of time, Asef may use Abdul’s land as he pleases, so long as he does not violate the law, or the terms of the lease he and Abdul negotiated and agreed to.

This creates a relationship in which Abdul is a **landlord**, and Asef is his **tenant**. Another way to describe this is that Abdul is the **lessor** (the person who owns and leases the land), and Asef is his **lessee** (the person leasing the land from the owner). This means that the land belongs to Abdul, the land is leased by Asef, and both have agreed that Asef will pay a particular price for his use of the land to Abdul. In Islamic Law, leases usually take the form of what is called a usufruct agreement. This means that the lessee may *use* the land for most purposes, such as agriculture or housing, but the lessor still holds the fundamental rights of ownership to the land, such as the right to sell the land. Before you continue, take a moment to read Article 59 and Article 60 of the 2008 Law on Managing Land Affairs, reprinted below.

### 2008 Law on Managing Land Affairs

#### Article 59

- (1) State and private lands shall be leased on the basis of a written agreement between lessor and lessee in accordance with the provisions of law.
- (2) Parties to an agreement shall have legal capacity and authority.

#### Article 60

The lease document shall contain the following terms:

1. A Description of lessor, lessee and witnesses[.]
2. A description of the characteristics of land plot(s) under lease.

3. Clarification of obligations of the parties to the agreement.
4. Confirming the lease period, the amount of lease charges, together with its due dates and payment procedure.
5. Conditions for the annulment of the agreement.

We see in these articles that there are certain requirements for those wishing to lease their land to others. In Afghanistan, property dealers should be registered with the Ministry of Justice, and should use standard contracts containing all of the information required above. In Article 60(3), we see a requirement for “Clarification of obligations of the parties to the agreement.” Another way to explain this would be to say that each person must be aware of the subjects of their lease agreement. The subject of the lease agreement may include conditions. A condition is a particular part of the lease that the people agree to. For example, let us imagine that Abdul’s 30 jeribs are in Nangarhar, and that his land is desirable as farming land. Abdul agrees to lease Asef his land for a period of three years for 500,000 Afghanis per month. As a condition of the lease, however, Abdul does not allow Asef to use the land for grazing of goats. He wants to preserve the quality of his land, and believes that long-term exposure to grazing goats ruins the agricultural quality of his land. Asef, a wheat and vegetable farmer, agrees to Abdul’s restriction, and rents Abdul’s land. Every year, Asef will continue to pay Abdul the agreed-upon amount. During that time, both Abdul and Asef must behave the way they agreed to in the lease terms. Abdul may not force Asef to leave if he continues to pay his rent, and Asef must pay his rent to be able to continue his use of the land.

One day, during the beginning of the second year of his lease with Abdul, Asef has the opportunity to buy four goats at a very favorable price. He decides to buy the goats, and brings them back to the land he is renting from Abdul. He goes immediately to Abdul’s house, and attempts to negotiate the right to have goats on the rented land. What do you think will happen? What right does each person have in the negotiation? A few results may occur. One result is that Abdul says that Asef may not graze goats on the land he is renting from Abdul. If he does so, Abdul will have the right to go to a court to terminate, or end, the lease agreement. Abdul can then **evict** Asef, meaning that he gains the right to remove Asef from the land, even against his will. In fact, if Asef has *already* used his land to let the goats graze, Abdul may be able to terminate the agreement even if Asef does not continue to allow them to graze. If the goats have already grazed on the land, Asef has already broken the written terms of the agreement. Another outcome, which may be favorable to both, is for Abdul to allow Asef to use the land for his goats to graze, but to charge Asef a price to do so. What price would you set? Would it be a high price? Or would it be a price to equal the loss of value of the land because of the damage the goats will do to it? There is no right answer, and much will depend on the relationship between Abdul and Asef, their financial positions, and many other factors. Land leases, like many other transactions, can become quite complicated!

Another form of leasing is a practice called **sharecropping**. In this system, a landowner leases out part of his land to a tenant. However, instead of paying the landlord in money, the tenant pays the landlord with the food or other crop that he produces on the land. For example, instead of paying Abdul money, Asef would pay him a certain amount of the food he was growing on Abdul’s land. Or, if Asef were using the land to raise sheep, Abdul could require that Asef pay him a certain amount of wool every year.

According to Article 41 of the Constitution of Afghanistan, foreigners are not allowed to own land. As a result, land transactions with foreign companies or individuals must be leases. An Afghan citizen (or the government, as explained below in part 1.5) owns the land, and leases it to the foreign person or

company. These lease agreement laws are very important in transactions involving foreign business. For more on this kind of lease relationship, see Chapters 7 and 8 on Natural Resources.

For examples of forms, please refer to Article 1398 of the Civil Code of Afghanistan.

### 1.3 Joint Ownership

Leasing could be called a kind of shared use of the land in question, with the owner retaining ownership rights to use the land (such as the right to sell or improve, or continue to make deals with the land), and the lessor only having temporary usufruct rights over the land for the time that he and the owner agree to the lease. There is a kind of ownership called **joint ownership**, where multiple people have full ownership control over a piece of land *at the same time*. This can happen in different ways. For example, inheritance can create joint ownership for the inheritors of a particular piece of property. A group of people can put their money together to buy property, each having rights over the land. Or, private (individual) owners of plots of land that are next to each other could share a wall or other piece of property where both owners share the duties to maintain the property.

#### Civil Code of Afghanistan

##### Article 1935

If ownership of a property is common among two or more people, each of them shall have the right to use it proportionate to his share and may take such action on it that does not cause harm to the other co-owner. Also, if the amount of common ownership is specified, its sale and utilization, while it is still common, shall be permissible and its use shall also be permissible, provided that it does not inflict harm on rights of other co-owners.

##### Article 1938

Co-owners of common property shall follow the majority vote and majority shall be calculated on the basis of the price of shares. If majority vote is not achieved, court may take necessary measures on the basis of request of one [of the] co-owners. Also, court may, if necessary, appoint a person to administer common property.

These articles are good examples for an explanation of some of the relationships between joint owners of property. Imagine a property (land) owned by Abdul, Asef, and Abdul's brother, Najibullah. Abdul and Asef each own 40% of the property, and Najibullah owns 20% of it. The value of their land has increased recently, and Abdul and Najibullah wish to sell the land. Asef, however, believes that the value will continue to increase, and does not wish to sell immediately. What do you think the result of their dispute will be? According to Article 1935, the three owners will sell their land. Because the share of the land owned by Najibullah and Abdul together ( $40\% + 20\% = 60\%$ ) is greater than Asef's share (40%), Najibullah and Abdul have the right to determine how to use the land. How could Asef stop them from selling the land? Is there any way that he may be able to use Article 1935 to stop the sale? Look at the last part of the Article. Is there another way they may be able to settle their dispute? How is Article 1938 involved? And how else could this dispute be settled?

Another kind of joint ownership is when two property owners own a piece of property that lies between their lands. Fences and walls are good examples of this kind of ownership. Imagine of a situation like that described in Articles 1922-1928 of the Civil Code. In this situation, imagine that four years have passed since Abdul leased Asef his land. During that time, Asef has managed his money well, so he buys the

land that he was leasing from Abdul. Now, Abdul owns the land he had been leasing from Abdul. Between their two properties, there is a wall that separates their lands. Asef has read Article 1927 of the Civil Code, which says that a “Neighbor who has not participated in expenses of construction of the wall shall only be recognized as sharer of the wall if he pays half of the expenses of construction of the wall and half of the price of the land on which the wall stands.” Asef now knows that, to have control over his share of the wall, he must pay Abdul half the cost of the wall. Now, because they each own land, and, after Asef pays Abdul, each own half of the wall, they both have control over it. However, their control over the wall is equal. Under Article 1923, Abdul may not change the position of existing wood beams in the wall without Asef’s permission. In the same way, Asef may not add to the wall’s height without Abdul’s permission. This is a good example of shared ownership. Generally, one owner may not change the shared property without the permission of the other owners.

### **1.4 Community Ownership**

Another kind of property ownership is very similar to joint ownership, but it is usually owned or used by more than two or three people. Instead, this kind of land is used by a larger group of people or an entire community. This is called **community ownership**. In some situations, community ownership is the same as joint ownership. A group of people may own property together, and may use it only as allowed by the other members of their group (according to Article 1935 of the Civil Code). Some community ownership is slightly different. For example, some land is owned by a family or clan for the benefit of the entire family or clan, with one person or a small group of people determining how to use it, but a larger group actually using the land. Or the group could decide together how to use the land. Some community property ownership is more like government ownership (explained further in part 1.5 below), or private ownership with leasing. The Civil Code does not have many articles related to this kind of ownership, but the 2008 Land Management Law has many articles concerned with community ownership and public land.

A good example of public, or community, land is land used by many people as pastureland for grazing livestock. Read the Article below from the Land Management Law.

#### **2008 Land Management Law**

##### **Article 82:**

- (1) Pastures are virgin and arid lands, on which state and individual possession has not been proved legally and they are deemed public property. An individual or the State cannot possess pasture lands, unless otherwise stipulated by the *Shari’a*.
- (2) Pastures shall be kept unoccupied for the sake of public requirements of local villagers (for cattle grazing, graveyard, threshing ground and etc.).

Between a quarter and a third of Afghan families in rural areas own no land, so the availability of common pastureland is extremely important. Some of these families lease houses or live in houses as part of a sharecropping agreement (as described in part 1.2). Many nomadic cultures also do not own land, but use pastureland that many people are allowed to use. In some cases, this land is owned by the government, and the government creates rules governing who may or may not use the land (this is

described more below in part 1.5). But in many cases, the government has stated that nobody may own this land, and that anybody who wishes to use the land as pastureland may do so.

There is a system that allows a person to claim an un-owned piece of pastureland as his own, and use it as he sees fit as private property. This is called the *Mawat* system. Imagine Asef is a nomadic herdsman who wants to own his own piece of land because of weather changes that have affected his nomadic life. In order to use land under the *Mawat* system, Asef must find land that nobody owns, and that nobody has cultivated or improved. He then must promise the government that he will improve or cultivate the land. At that point, if the local community or government approves his request, the land becomes his, turning it from community property into his own private property.

Generally, community property is land that many people may use for a particular purpose. A good example is a park. A park belongs to its manager or owner (usually a city or some other government entity), but, in a way, it belongs to everyone who uses it. Pastureland is similar. In fact, some pastureland in Afghanistan can only be made private property (owned by one person or a private group of people) through presidential decree! Can you think of any other kinds of property that are used this way? If so, think of it, and how it might be different from other community ownership examples, and from other kinds of ownership.

One other kind of ownership that some would call community ownership is *waqf* land. *Waqf* land is land whose owner has given ownership to others for a charitable purpose. This can include giving land to family members for future generations. It can also include giving land to a local community, or a local religious group or institution. Usually, the land is managed by a person or group of people chosen by the original donor (the person who gave the land). This kind of arrangement is called a **trust**. In addition to being charitable, a trust can serve the purpose of ensuring that the property is managed by chosen people, even after the death of the donor. *Waqf* is defined in the Civil Code in Article 343, and the Articles after. Can you think of any other kinds of property that are managed like this, or by an entire community?

### 1.5 Government Ownership

In Afghanistan, as in other countries, the government owns a significant amount of land. Some estimate that the amount of land the government owns at approximately 87%. Many Islamic governments view the ownership and preservation of land as a duty they owe to their citizens as it is their responsibility to represent God's ultimate ownership of the land. As one scholar puts it, "Islamic law recognizes the basic right of the individual to own property, but at the same time, it specifies certain things it considered not allowed for individual ownership." (Yahaya Y. Bambale, *Acquisition and Transfer of Property in Islamic Law* (Lagos: Malthouse Press Limited, 2007), 5). Thus, some kinds of land are held by the government for the public good. One example is natural resources, such as mines. The definition of government lands according to Article 3(8) of the 2008 Land Management Law is lands that are uninhabited natural lands (such as marshes, hills, and pastures), lands deemed public lands, and lands whose ownership cannot be proven. Even more kinds of property are government land. An example of this is Article Nine of the Constitution, quoted in the green box below.

There is a long history of government land ownership in Afghanistan. The land policies of different regimes in past generations have created confusion and, often, land simply belongs to the government because nobody else can legitimately claim it. Furthermore, there is much land that nobody wants to claim because it cannot be used for agriculture or other profitable purposes. This land is also owned by the government.

In addition to land that historically has been owned by the government, the Constitution, the Civil Code, and the 2008 Land Management Law all contain articles that speak of the government's role in property ownership. For example, see Article Nine of the Constitution of Afghanistan below:

### Constitution of Afghanistan

#### Article Nine:

Mines and other subterranean resources as well as historical relics shall be the property of the state. Protection, management and proper utilization of public properties as well as natural resources shall be regulated by law.

In many ways, the government acts just like a private landowner would. The government can rent out the use of land, it can sell the land, and it can use the land itself. One example of this is Article 64 of the Land Management Law, which allows the government to rent out land for beneficial public uses, such as agriculture. Similarly, government property may become private property permanently in certain conditions. For example, the government exchanges properties with a private owner, as detailed in Article 55 of the Land Management Law.

When the government acquires land that was once private property, this is called a **taking**. You will learn more about takings in Chapter 5. For now, you only need to know that a taking occurs when the government forces a private party to sell its land. This is usually to enable the government to complete a state function, such as building a road, a railway, or a pipeline, and it requires the government to pay the value of the property to the person whose property they took. For examples, read the following Articles from the Civil Code:

### Constitution of Afghanistan

#### Article 1988:

If mine, treasure or ancient relics are found in privately owned lands, their ownership shall belong to the government. In addition to rewarding owner of the land, the land shall be expropriated according to laws of expropriation.

#### Article 1991:

Unowned agricultural lands are property of government, acquisition of them without permission of government and in contradiction to provisions of law shall not be permissible.

These articles show the large role of the government in land management and ownership. You will learn more about other government functions that relate to land ownership below, in the **titling** section. But, as you can see from these and other Articles, the government often owns land just like any other property owner.

### 1.6 Conclusion and Discussion Questions

The sections above represent a group of different kinds of ownership, but they do not represent all possible owners. Can you think of any other groups or people that may own land? Land ownership is a complicated subject, but thinking about who owns land, what that means, and what owners may do with the land is a good place to start. After the discussion questions below, we will explore another subject: **titling**. But complete the questions below before you move on to ensure that you have a strong understanding of each kind of ownership.



1. Do you think that any type of ownership is preferable to the others? For example, why might community ownership sometimes be better than private ownership, and why might private ownership sometimes be better than community ownership? Why would the government wish to own some property, and why might it be the best owner or manager of certain properties?

2. Read each kind of property ownership listed above, and think of an example of each kind. Discuss and compare your examples with your classmates.

## 2. TITLING

### 2.1 What is titling?

In Part 1, we learned about all the different kinds of people or groups that can own property, and how their ownership is different from one another. But what if somebody asks how you know you own a piece of land? Imagine that you own 40 jeribs of land near Kabul. The land has been in your family since your grandfather bought it, and nobody questions your ownership. One day, your neighbor asks you, “How do you know you own your land?” You could say that you know you own it, and nobody challenges your ownership, and, in most situations, that would be enough to prove your ownership of the land. But what if somebody does challenge it? How can you prove that you own your land?

One way you could prove your ownership of the land is through a system of **titling**. Titling is a way to let people know who owns a particular piece of property. The phrase “**take title**” means to gain ownership of a particular thing. And a titling system is a collection of information about who has title to each piece of land in a particular area, or even a whole country. For example, if Najib wants to buy Walid’s land, Najib will pay Walid for the land. Najib will then take title to the land; this makes it Najib’s land. More information about buying and selling land can be found in Chapter 4. For now, we are focusing on what it means to own the land, and how to prove it. When Walid sells the land to Najib, one way to help Najib prove his ownership would be for him to give Najib the **deed** to his land. A deed is a piece of paper printed by the government that states a particular person owns a particular piece of land. In this case, the deed would say “This land belongs to Walid.” The deed would describe the location of the land so that Walid could prove that his land, and not another piece of land, belongs to him. After Walid gives Najib the deed, Najib could go to the nearest land management office, and ask the government to print a new deed for him so that the deed says “This land in this location belongs to Najib.” If the government approves, and Najib can prove that he bought the land, the government will print a new deed. Therefore, in the future, if anybody challenges Najib’s ownership of his land, he has a government-printed deed to prove that he owns it. And this deed would prove his ownership in almost all disputes. In short, a deed is proof of land ownership according to a larger titling system.

Another way to prove ownership is through what is called a **chain of title**. A chain of title is a way to show that, even if you do not have an official deed for a piece of land, you can prove who owned the land before you, and who owned the land before the previous owner, to create a chain of owners. After you determine who owned the property, you can create a history of the land that explains the land’s ownership and transfer. So if Najib and Walid are not able to obtain an official deed from the government or a court, what can they do if somebody challenges Najib’s ownership of the land? Imagine that Abdullah believes that the land that Najib has purchased from Walid belongs to him. Abdullah does not have any documents or deeds to support his challenge. How can Najib respond if he does not have a deed? One way is to create a chain of title. Najib may ask Walid to swear in front of a court or a jirga that he lived on the land

for five years, and then sold the land to Najib. Walid could also ask Parwin, who owned the land before Walid and sold the land to Walid, to come to the court or jirga. If Parwin swears that he owned the land for ten years before Walid, and then sold the land to Walid, the chain of title is stronger, and can now explain 15 years of ownership of Najib's land before Najib bought it. If Abdullah provides no proof to support his challenge, a jirga or court will probably find Najib, Walid, and Parwin's chain of title strong enough to support Najib's ownership of the land.

Creating a system to collect records of titling and ownership is a large task. It can be done in many ways. The most common is a centralized, government-run system that collects information about who owns what land, and keeps that knowledge in a **database**, a collection of information. In a titling system, land transfers are recorded, so if you want to know who owns a particular piece of land, you can learn that information at a government land management office. For example, in Turkey, land transfers and ownership are not recognized by the government until the buyer and seller sign an official deed and registry, and send the document to the Turkish Land Registry Directorates.

Building a working title system takes time and commitment. Governments that wish to create a system of titling must do **surveys**. In surveys, these governments send agents to every part of the country to collect information about who owns what land. These surveys are also called **cadastral surveys**, because they create a **cadaster**. A cadaster is a thorough and complete record of land in a particular area. For example, you could have a cadaster that has records of a particular province, or a cadaster that has land records for an entire country. Although they may seem like a new idea, land surveys, or cadasters, are a very old idea. One author notes that "cadaster has been found since the time of the Prophet Mohammed, what at his suggestion collective lands around the city of Makkah were marked out with stones." (Siraj Sait and Hilary Lim, *Land, Law & Islam: Property & Human Rights in the Muslim World* (New York: Zed Books, 2006), 22). The Ottomans had a very highly developed cadaster system that helped them know information about the lands of their people. In the past and in the modern era, when they have been established, title systems (sometimes also called **registries** or **registers**) are extremely useful and helpful in settling land disputes. They are also helpful as a tool for governments to determine how much tax is owed on each piece of land based on its value. When a survey has been completed, every transfer of land must then be registered with the government so that the government's cadastral records remain accurate.

Other than for determining taxation amounts and settling disputes, why would somebody want to have a system to prove who owns land? As one article puts it, when people do not know who owns land, it "not only discourages property holders from making an economic investment in their property, but also deprives the market economy of their participation and potential contribution." (Deputy Minister M. Sharif, "Land Administration and Management in Afghanistan" (Terra Institute, 2008), *available at* [http://www.terrainstitute.org/pdf/Land%20Admin\\_Afghan\\_Sharif.pdf](http://www.terrainstitute.org/pdf/Land%20Admin_Afghan_Sharif.pdf).) If you were a land owner, and you were not absolutely sure that you owned your land, would you improve the land? What if you improve the land, and, after spending money improving it, somebody else claims the land as his? Being unsure about whether or not you own land can be troublesome, and discourages owners from improving the land for this reason. When they cannot use the land as they please, it may remain unused, which is bad for the economy. If nobody in a community used their land because they all feared that somebody else could claim it, how would that community function? This issue will become even more important when you read about **mortgages** in Section 3.3 below.

1. Can you think of more reasons for why a person would want an official record of his ownership of a piece of land?
2. How would you design a title system? How would you start? Who would be responsible for collecting and updating information?

3. Abdullah wants to buy land from Mahmood. He knows that Mahmood has owned and has lived on the land for ten years, but does not know who owned the land before Mahmood. If Abdullah is worried that somebody may challenge his ownership of the land after he buys it, what should he do before he purchases the land?

## 2.2 Titling in Afghanistan

As in many countries, titling in Afghanistan has been complicated. Many people own no land. Furthermore, many Afghan citizens are nomadic, moving frequently, and using different areas of land as their own. Determination of who owns a piece of land is also made complicated by inheritance law. So, even when a piece of land is known and recorded in a registry, it can often be difficult to determine who actually owns and controls the land. These decisions are often left up to local communities and jirgas.

During the last 80 years, Afghanistan has attempted to create and update land registration databases. However, because of regime change and other complications, progress made by one regime in creating a registry can be lost by the next regime if the second regime does not continue the work. The government in the 1960s created a land registry for which land owners could tell the government how much land they owned. The government did this so that they could collect taxes from land owners. This created a land registry, but much information was still missing, and only a small amount of land was entered into the database. By 1978, only approximately 30% of Afghanistan's land area was entered into the database. Even that data was incomplete, because it was not updated often, so the government was not aware when land owners transferred land to another owner. The next effort to create a centralized registry happened in the late 1970s, during the communist regime. In 1978, the government redistributed much of Afghanistan's land to give to families that owned no land. Some families still have records of this land distribution, and, although land ownership was always recorded during this time, land holding was stable for some time. In 1996, the Taliban government took control. They did not view land ownership records as a high priority, and did not collect information about it. Their solution to questions about land law was to pass a law in 2000 that relied on visible occupation of land and the opinion of neighbors to a piece of land to determine land ownership. This meant that somebody, under this law, could claim land by living on it, and making sure their neighbors knew of their ownership of the land. Read the language below to see how the law put these terms in writing. What do you think of this law?

### Law on Land 2000

A farmer who has no legal document for his land, and whose land is not registered in the ownership and taxation book, may have a legitimate claim to the property recognized if, 1) no-one else claims the land; 2) there are signs of buildings and of farm activity by him; 3) neighbors testify that the land is his; and 4) local state authorities approve his occupation.

The current situation for land ownership and titling is not very clear. The Law on Managing Land Affairs of 2008, which changed the Law on Land passed in 2000, was approved by the Council of Ministers, but has not yet been approved or rejected by the Wolesi Jirga. Therefore, the status of this Law is current and binding on the Ministry of Justice's online Official Gazette database. Currently, only ten percent of rural property and thirty percent of urban property owners have official deeds given by a court or the government. Some of these deeds are old, and do not accurately show who owns the land. This does not

mean that ownership is impossible to prove. In fact, many people use an informal system that relies on custom, informal “receipts” from previous owners, local jirgas, and neighbors and communities, to help them prove their ownership of land if somebody challenges it. This means that there are currently many different ways to prove ownership of land.

### 3. RIGHTS, RESPONSIBILITIES, USES, AND FINANCING

#### 3.1 Servitudes

In previous sections in this chapter, you read about various rights that the owner of a land may exercise. These rights include the right to use the land productively, the right to exclude people from the land, the right to profit from the land, and others. However, ownership often comes with obligations as well as rights. In addition to the duty to use the land in accordance with the law, some land may be **encumbered**. Encumbrances are conditions **attached to** land. This means that they become a condition that is part of ownership of a particular piece of land. A common example of an encumbrance is called a **servitude**.

A servitude is a condition which allows people who do not own a particular piece of property to use the property in a specific way. For example, imagine that Samiullah owns land outside of Kabul. He would like to have access to a source of water, but does not have any water on his own land. His neighbor, Karim, has a small stream going through his property. Samiullah wants to negotiate with Karim to gain access to Karim’s stream. After a friendly negotiation, Karim agrees to allow Samiullah to cross his land to collect ten buckets of water per day from his stream in exchange for five jeribs of Karim’s land. The use of Karim’s land by Samiullah is called a **positive servitude** on Karim’s land, because it allows someone else (Samiullah in this case) to use it in a way that Karim could refuse without the servitude.

Compare this with a **negative servitude**, which would be an agreement in which Karim agreed *not* to do something he has the right to do on his land. For example, if Samiullah and Karim agree that Karim will not build a fence on his property that would make it difficult for Samiullah to access his water, that would be a negative servitude.

Samiullah’s use of Karim’s land to get to his water is also an example of a **personal servitude** because only Samiullah may use Karim’s land in such a way. If Samiullah and Karim agree that whoever owns Samiullah’s property may use Karim’s property to fetch water, this would be an example of a **predial servitude**. The difference between personal servitudes and predial servitudes is that predial servitudes **run with** the land. This means that, even when the land is transferred to another owner or user, the servitude still affects use of the land. So, for example, if Karim rents his entire property out to somebody else for usufruct rights (such as agriculture), the new user of the land (which Karim still owns) must also allow Karim to fetch his water, as the land is still affected by the servitude.

It is often said that servitudes “attach to” pieces of land when they are encumbered by these servitudes. This means that, when Samiullah’s land is sold, given or inherited, whoever is the new legally recognized owner of the land after the transfer has whatever rights Samiullah negotiated for his property. Just as the new buyer of Samiullah’s land may buy and live in Samiullah’s house as part of the property, he also has the right to use Karim’s water as part of his new property.

Imagine that, during their negotiations, in order to increase the value of his land in the future (because anyone who may want to buy Samiullah’s land in the future may also want access to water), Samiullah negotiates for the use of Karim’s water to be a predial servitude. Remember that a predial servitude runs with the land, even after the person who originally negotiated the servitude has transferred ownership of the land to someone else. A few years later, Samiullah decides to leave Kabul, and wants to sell his land.

Noor buys Samiullah's land. If access to Karim's water is a predial servitude on Karim's land, Noor may now use Karim's water in the same way that Samiullah has in the past.

Any servitude has both a **dominant estate** and a **servient estate**. The dominant estate is the property that has a positive right as a result of the servitude. The servient estate or landowner may no longer use his land in a way that would not be allowed with the servitude. In our example, Samiullah's estate is dominant because he gained a right through the servitude, and Karim's estate is servient because he gave up a right under the servitude. For examples of how the Civil Code defines a servitude, see articles 234 and 235 of the Civil Code of Afghanistan.

1. Samiullah's land does not have access to a public road. He recently bought a car, but wants to be able to drive his car from a public road to his house. Karim's property has direct access to a large public road, but blocks access from the road to Samiullah's house. What can Samiullah do? Can he seek to negotiate a deal with Karim to enable him to reach the road?

2. Article 1919 of the Civil Code of Afghanistan is important for this situation. It states that, if a piece of land is not connected to a public way, and connecting it to a public way would not be possible without great expense, the owner of that land may "possess to a necessary extent and use the neighboring land in return for just compensation". Does this Article change your answer to Question 1?

3. Samiullah's house currently has only one level. After the birth of his second child, he wants to build another level on top of the first. However, because of the angle of the sun, this would block light from entering Karim's house at most times of day. Karim does not want his light blocked. What can he do? Can he negotiate a servitude with Samiullah for compensation? Will this affect the rights of someone who buys Samiullah's land in a year?

4. Article 1908 of the Civil Code of Afghanistan says that "Full blockage of light from residence shall be considered major harm. No one may construct such building that blocks windows of neighboring residence and causes full blockage of light to it." Does this change your answer to Question 3?

### 3.2 Taxes

One part of property ownership that some may view as a disadvantage to owning property is paying taxes. One reason why many governments create titling systems (discussed above) is so that they may know whom to tax. If they know who owns property, they know whom to tax. Usually, how much a government taxes the owner of a piece of land is determined by how much the land is worth. The owner then pays a percentage of how much his land is worth every year as tax. This is called a **property tax**. For example, if Samiullah pays 20,000 afghanis for a piece of land, the government would know that his land is worth 20,000 afghanis. If the government decides to tax land at two percent per year, this means that Samiullah would have to pay the government 400 afghanis per year to own his land.

Currently, there is no official property tax in Afghanistan. It is common for some landowners to pay taxes to local communities, but the central government does not currently collect taxes based on land ownership. This was not always the case. From the 1930s until the 1970s, taxes were collected by the government on some land. But this practice stopped almost completely in 1978. Some land owners today use tax payment receipts from before 1978 as a way to prove that they own their land. But, again, land has not been taxed since then, and it is unlikely that it will be taxed formally again until the government creates a formal system of land titling and registration.

### 3.3 Mortgages

One large benefit of owning land is the ability to take out a **mortgage** on your land. To understand a mortgage, there are a few terms that you must understand. The first is what a **loan** is. A loan is simply when somebody gives (lends) you money that you must pay back at some point. Sometimes, loans come with **interest** rates. Interest is an amount of money that you must pay back to your lender (the person who lends you the money) on an agreed schedule, in addition to the original amount lent. Interest usually, but not always, is based on a percentage of the total loan amount. So, for example, imagine that Sadiq borrows money from Parwana. When they discuss the loan agreement, they agree to terms. Terms are another word for the conditions that both people agree to in an agreement. Parwana and Sadiq agree that Parwana will lend Sadiq 10,000 afghanis. Parwana and Sadiq are friends, but Parwana is worried about not being able to use that money for other things during the time that Sadiq is using it. So she and Sadiq agree that, in addition to paying back the 10,000 afghanis, he will pay her ten percent of that amount total amount. They also agree that Sadiq will pay her back part of the loan every year for five total years. So, in total, Sadiq will owe Parwana  $10,000 + 1,000(10 \text{ percent of } 10,000)$ , or 11,000afghanis. If he must pay an equal amount of the money back every year, he will pay Parwana 2,200 afghanis every year. 200 of those afghanis each year are to pay the interest.

But what if Sadiq does not pay Parwana back? This situation is called a **default**. If Sadiq does not pay his loan back, he defaults on his loan from Parwana. If Sadiq and Parwana's agreement was made without a contract, then Parwana's choices may be limited. She could seek aid from a jirga or from a court. If she had a contract that Sadiq signed, she probably has more options. A court may find that Sadiq owes her the money, and must pay her back.

You may be asking, "How is this related to property ownership?" That is a good question. There is a special kind of loan that depends on ownership of property. This kind of loan is called a **mortgage**. Imagine the situation between Sadiq and Parwana again. But imagine that Parwana works for a bank that lends Sadiq money. They agree to similar terms and similar payments. But this time, Sadiq requires more money for a project. Instead of the 10,000 afghanis from before, he requests a loan of 50,000 afghanis. He understands that lending him a large amount of money could be a risk for the bank. So, as a compromise, he agrees that, if he defaults on this payment (does not pay it back), the bank may take his home. In this situation, the person who takes the money is called the **debtor** (because he owes a debt to the bank) or the **mortgagor**. The debtor or mortgagor is also sometimes called the borrower. The Law on Mortgage of Immovable Property in Banking Transactions (approved in June, 2009) defines a mortgagor as "A Person that owns the Mortgaged Property and . . . owes Debt subject to a Mortgage." The person lending the money to the mortgagor (usually the bank) is called a **mortgagee**.

Taking possession of somebody's house if he defaults may seem harsh. However, if Sadiq thinks that he will have no trouble paying back the loan, then it is favorable for him. Instead of his home only having value if he sells it, he now has the ability to use the value of his home for other projects. He may buy livestock, or improve his land, or invest in a friend's business. Having a mortgage on his home enables him to use the value of his home as more than just a place to live. In this transaction, the money the bank lends to Sadiq is called **credit**. The Law of Banking in Afghanistan defines credit as "any disbursement or commitment to make a disbursement of a sum of money in exchange for a promise to repay of the amount disbursed and to pay interest; other secured or unsecured charges on such amount; any extension [of the due date] of a debt; any guarantee issued; and any purchase of a debt security or other promise to pay sum of money and to pay interest either directly or by a discounted purchase price." This is quite a complicated definition. But, basically, credit is an amount of money that one person (or bank) lends to another, when both parties understand that the amount will be paid back. As you have read in the past few pages, conditions can be agreed to in relation to the credit lent. But the term credit itself refers to the amount of money lent.

When the bank (or any other lender) has the option to possess (also called to take or to seize) property owned by the person to whom they are lending, the home is used to **securitize** the loan. In this situation, the house is the **security** for the loan. You could even say that the ability to take Sadiq's house if he defaults is what makes the Parwana and the bank feel secure enough to offer him the loan. Generally, securitized loans work well for the economy because they allow people who own property to use the value of the property for other things. Again, imagine Sadiq's situation. He knows that his home and the land it is on are worth approximately 5,000,000 afghanis. If he thinks that he can pay back the loan, and keep possession of his house, he is able to use the value of his house to give himself 50,000 afghanis. Otherwise, he would have to sell his house to be able to use its value as cash. If, however, he is not able to pay back the loan, the bank may seize his house. When the bank does this, it is using its power to use a **lien**. The Mortgage Law defines a lien as a "Charge against Mortgaged Property making it security for performance of obligations." This means that a lien is a right the bank has to take Sadiq's house if he defaults on the payment he owes to the bank. This is a good way to ensure that Sadiq pays the bank back for the money he has borrowed.

One other way to create an agreement similar to a mortgage is a **repurchase agreement**. A repurchase agreement is when the lender purchases the property from the borrower, and the borrower agrees to repurchase the same property for more money at a later date. For example, remember that Sadiq's property is worth approximately 5,000,000 afghanis. In a normal mortgage agreement, the bank would lend him 5,000,000 afghanis. Let us imagine that the interest rate is 10% total, and he must pay this over 4 years. So, Sadiq must pay the bank back a total of 5,500,000 afghanis (the original 5,000,000, and 500,000 of interest), paying 1,375,000 each year. In a repurchase agreement, the bank would buy Sadiq's property at the beginning. Sadiq would still be able to live on and use his land. And he would agree to buy the land back in four years for 5,500,000 afghanis total. He could agree with the bank to pay 1,375,000 a year, not as interest payments, but in order to pay the total repurchase price of the home in smaller amounts.

1. Imagine that you own a piece of property worth 100,000 afghanis. Your friend has started a business, and you believe that if you invest 100,000 afghanis in the business, you will both help your friend and make more money. You decide to seek a mortgage for your property. After speaking with the bank, they tell you that they will provide you with a loan. Would you request a repurchase agreement? Would you request a standard mortgage with an interest rate? What rate would you propose? Imagine that the bank offers you a 15% total interest rate to be paid over five years. How much will you pay the bank in total? How much will you pay the bank back each year?

2. In many transactions, a mortgage can be used to purchase the property that will be mortgaged. For example, Sadiq wants to buy a property worth 5,000,000 afghanis. However, he only has 2,000,000 available right now. He could go to a bank to borrow the remaining 3,000,000. Why might this be favorable? If the bank gives him a mortgage loan on this property when he purchases it, and they require a 10% total interest rate that he must pay over 5 years, how much will he pay the bank every year to pay back the loan?

The topic of mortgages and lending has been quite important in recent years in Afghanistan. Banking and lending laws have been passed in recent years, and banks are growing. Both the Law of Banking in Afghanistan, and the Law of Mortgage on Immovable Property are comprehensive. Read the sections below so that you can see how the ideas you read about above have been put into the Mortgage Law.

## **Law on Mortgage of Immovable Property in Banking Transactions**

### **Article 1:**

This law is created to regulate the affairs relating to mortgage of immovable property in banking transactions and to determine the rights and obligations of the parties.

### **Article 4:**

(1) The mortgage may be created and used on immovable property to secure part or all of a debt.

### **Article 6:**

(1) Loan Agreement shall be in writing, signed by both parties and contain the following:

1. Name of the Debtor . . . .
2. Commitment of the Mortgagor to fully repay the mortgage Debt.
3. Determination of the time and place and manner of repayment of the Debt or the relevant installments.
4. Manner of calculation and deduction of the paid installments.

After you read through the Law on Mortgage section above, pay attention to how each section matches part of the mortgage process described above. For example, what part of a mortgage does Article 6(1)3 describe? Which part of Sadiq’s work with the bank would this part be related to?

As you can imagine, mortgages can be complicated. The people negotiating a mortgage may agree to any conditions and repayment systems they desire. There must, however, be an “Agreement on maximum sum of money related to the mortgage debt” and “Full awareness regarding the rights and obligations of parties and compensation arising from Default on payment or Default on performance.” (Law on Mortgage of Immovable Property in Banking Transactions, Article 9(1)1 and 3). So, if both parties are aware of the terms of the mortgage agreement, they may agree to whatever payment structure works best for both parties. In Sadiq’s case, when he wants to mortgage his house for 5,000,000 afghanis, he can make small payments back to the bank for the first two years, and larger payments back to the bank for the last three years of the agreement. This is a common loan repayment system, because it allows the borrower to use more of the money he borrows in the beginning to make more money later. If this is the agreement, he does not have to worry about paying a large amount of money back to the bank in his first two years. Imagine that you want to take out a mortgage on your property. What kind of agreement would you want with the bank? How would you want to pay it back?

Finally, one requirement of mortgages under the law discussed above is that the borrower be able to show the lender title of the land he desires to mortgage. This is another example of the important functions that title serves, as a way to prove ownership of land. Why do you think banks, and the banking law, require or prefer title to be shown before they give a borrower a mortgage?

## **CONCLUSION**

Property law is one of the most important and common kinds of law in the world. Everybody understands basic property law. From a young age, we understand what possession is. We are taught what belongs to whom, how we may share, and what is expected of us and our property. Every child understands the



words “mine” and “yours.” As we understand property rights more and more, we come to realize that, although legal property rights are significantly more complicated than this basic understanding, these basic principles are still important. Titling is a way to tell people that a property is officially yours. Leasing is a way to give someone else property temporarily, even though it is still yours, and so on.

The reason that understanding property is important, even at a young age, is that property rights affect everybody. Even those that do not own land own some things. Nomadic cultures, for example, often do not own land, but they certainly own homes, even if those homes can be moved. Land is one of the most important kinds of property, and a perfect way to learn property, because it is immovable, it is important, and it is easy to understand the concept of owning land. Furthermore, people can do things with land they own that may not be possible with other property. Mortgages are a good example of this. Loans are sometimes given with non-land items of property as security. However, mortgages are a common type of loan, and typically require a piece of immovable property (land, or a building) to be used as security. Based on what we have learned in this chapter, why do you think this is the case?

Throughout this chapter, you have learned of many different kinds of ownership, and how the laws of Afghanistan affect ownership. Many different parts of the Civil Code, and the Law on Land Management affect what Afghan citizens may do with their property. But what changes will affect property ownership in Afghanistan in the future? In 2012, a New Draft of the Land Management Law was proposed, and has been submitted to the President’s Cabinet. This New Draft strengthens the 2008 Land Management Law, creates more of a role for customary land ownership, addresses government takings, and more. As of February, 2013, the Afghanistan Land Authority is creating a new land administration system. The new system will create a computer database for land registration and title. The new system is another part of the New Draft of the Land Management Law, but will mostly operate separately from other parts of the law. The new, computerized system will operate from Jalalabad, and will allow land owners to register their land officially with the government. As one article says, the new system “promotes legalization of property ownership, strengthens citizens’ land rights, and supports economic development through transparent ownership rights in partnership with Afghan institutions....”

As you read the next chapters in this book, remember the different kinds of property ownership you have learned in this chapter. As in many kinds of law, but especially in property law, each topic you learn will rely on what you have learned before. Complete the questions below to ensure that you have a good understanding of the topics in this chapter.

1. Re-read the passage above about the new system of land registration proposed by the government. Do you think that the system will be successful? If you wanted to design such a system, is there anything that you would change? What parts of the system would you keep? Explain each of your answers, and how it relates to what you have learned in this chapter.

2. You and your cousin wish to purchase a piece of land. The land is worth 100,000 afghanis. If you and your cousin each have 30,000 afghanis that you could use to purchase the land, how will you find the money to meet the 100,000 afghani purchase price? When you do receive the money, what kind of ownership will you and your cousin have on the land? How will decisions be made for what to do with the land?

3. After you purchase the land in Question 2, a man comes to you and your cousin, and says that the land is his, and that it was improperly sold to you. The person who sold you the land has a good reputation, and you know that he had the right to sell the land to you. How can you prove to the other man that you rightfully own the land?

4. After you have proved that you and your cousin own the land, the man from Question 3 comes to you and your cousin again. He apologizes for challenging your ownership of the land. But he claims that he

did so because the only way he is able to reach the nearest road is by driving across your land. He worries that, now that you own the land, he will no longer be able to reach the road. How can you and this man resolve this problem?

## CHAPTER 4: PROPERTY TRANSFERS

### INTRODUCTION

Recall from the earlier chapters that property ownership gives an owner several basic rights, including rights to control, use, mortgage, and transfer his property. This chapter considers how control over property is transferred from one person to another. It discusses how someone might **acquire** (gain possession or ownership of) property and why he might want to do so.

Article 40 of the Constitution of Afghanistan establishes that anyone may acquire property “unless limited by the provisions of law.” The laws limiting property acquisition include the Civil Law of the Republic of Afghanistan of 1977 (Civil Code), Law on Managing Land Affairs of 2008, Law on Mortgage of Immovable Property in Banking Transactions (Mortgage Law), Property Dealers (Estate Agents) Law of 2015 (Property Dealers Law), and the Law of Managing Land Affairs of 2008, all of which we consider in this chapter.

Property transfers are common. Consider today’s newspaper. There are advertisements offering to sell homes and to rent apartments. Consider the difference between buying a home and renting an apartment. When you buy a home, you obtain permanent rights to it. The seller gives up all of his rights forever; the property transfer is **irrevocable**. In contrast, when you rent an apartment, you do so for a specified period of time, perhaps a year. At the end of the year, you no longer have a right to live in the apartment; the property transfer is **temporary**. Thus, property transfers can either be irrevocable (permanent) or temporary (for a specified period of time). While a transfer entails a person gaining physical control over a house or apartment, it also refers to the transfer of legal rights to occupy that house or apartment. Buying property and renting property are just two of the ways a person might acquire control over property. A person also can inherit property from a relative or receive it as a gift.

Not all property transfers are voluntary. A **voluntary** transfer occurs when the owner agrees to give up his rights to the property. Property transfers also can be **involuntary**: when a person obtains control over property without the owner’s permission. For example, a person might acquire property by building a home on another person’s property and living in it. If the property owner does not assert his rights, the person who built the home may be able to claim ownership of the property. Such a property transfer is involuntary because the owner did not agree to it. In this chapter, we consider voluntary transfers. We consider involuntary transfers in a later chapter, Voluntary and Involuntary Takings.

This chapter considers how property is transferred from one person to another. It considers irrevocable and temporary transfers. The chapter is divided into five parts. First, we consider the general limitations on transferring property: who can transfer property and when a person may do so. This first section also provides an overview of the steps required to make a property transfer official and an overview of the **law of obligations**, which governs how people enter legally binding agreements.<sup>106</sup> Second, we consider **property sales**: when an owner permanently gives up his property rights in exchange for something of value like money. Third, we discuss temporary transfers like **leases**, a transfer of property for a specified purpose and for a specified

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<sup>106</sup> Note that there are two subcategories within the law of obligations: contractual obligations and extra-contractual obligations. The latter subcategory addresses civil responsibility, and other such matters. To be clear, the law of obligations discussed in this chapter refers only to the former subcategory: contractual obligations.

time. For example, a person might rent an apartment to live in for a year. The specific purpose is accommodation, and the duration is one year. The fourth section provides an overview of **inheritance**, when a person acquires land from a relative who has died. Because inheritance law is very complex, this section provides only an introduction. In the fifth section, we consider **gifts**: the transfer of ownership without equal compensation. This chapter focuses on **private transfers**, when property is transferred from one person to another person. The Agriculture and Mining chapters, Chapters 7 and 8, address acquiring and using government land.

Recall from the Ownership chapter that the law provides owners with ways to protect their property rights. Imagine that you want to buy land. What might you be concerned about? How could you be certain the seller actually owns the land? Next imagine that you want to lease a building that needs many repairs. What are your biggest concerns? If you repair the building, under what circumstances do you think the owner should reimburse you? If the owner wants to use the building before the end of the lease, should he be able to demand that you leave?

As you read this chapter, think about how and whether the law addresses these practical concerns.

## 1. GENERAL REQUIREMENTS

All property owners have a right to transfer their property irrevocably or temporarily.<sup>107</sup> This general principle is subject to certain limitations. First, a property transfer is not valid unless the owner and the acquirer satisfy all of the legal requirements.<sup>108</sup> As discussed in the chapter on ownership, property owners must record their ownership on a legal deed. Here we discuss how a legal deed is transferred from one person to another to record a change in property ownership.<sup>109</sup>

The law also limits who can transfer property and when a person may transfer property, which we discuss here. Then we consider how people acquire legal ownership of property, the process for transferring a legal deed to a new owner. We conclude with an overview of the law of obligations, which governs voluntary, legally binding agreements: **contracts**. Many voluntary transfers of property, like selling and leasing, occur on the basis of contracts.

### 1.1 Limitations on Transferring Property

The Constitution, Civil Code, and Law on Managing Land Affairs of 2008 limit who can transfer property and when it can be transferred. Many of these limitations seek to ensure that property transfers are voluntary. As you read, consider whether you agree with this conclusion. To what extent does the law ensure that property transfers are voluntary? Also consider what other purposes these limitations might serve.

#### 1.1.1 Limitations on who can transfer property

First, recall that Article 40 of the Constitution of Afghanistan establishes that anyone may acquire property “unless limited by the provisions of law.”<sup>110</sup> Article 41 of the Constitution contains one of these limitations: foreigners cannot own property, but they can lease it. Thus, under the Constitution, a foreigner

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<sup>107</sup> Law on Managing Land Affairs, Article 50, Law No. 958 (2008) [hereinafter Law on Managing Land Affairs of 2008].

<sup>108</sup> Civil Law of the Republic of Afghanistan, Article 2212, Law No. 353 (5 January 1977) [hereinafter Civil Code]; Law on Managing Land Affairs of 2008, Article 50.

<sup>109</sup> Law on Managing Land Affairs of 2008, Articles 5 and 51.

<sup>110</sup> Constitution of the Islamic Republic of Afghanistan, Article 40, No. 818 (27 January 2004) [hereinafter Constitution of Afghanistan] (emphasis added).

cannot buy, inherit, or receive property permanently (ownership), but a foreign can possess it for a specified period of time (leasing).

The Civil Code also limits who can transfer and receive property. Some of these limitations arise in the context of the Law of Obligations, which restricts who can enter contracts.<sup>111</sup> Many legally valid transfers of ownership occur on the basis of **contracts**. Thus, to be eligible to buy, sell, or lease property, a person must be able to enter a contract.<sup>112</sup>

The Law of Obligations begins with a presumption: everyone has the **capacity**, the legal authority, to enter a contract.<sup>113</sup> The right to contract is powerful. The right includes the right to sell, buy, and lease property.<sup>114</sup> This presumption in favor of contracting is true unless a person's "capacity is divested or limited by law."<sup>115</sup> Thus, unless a law prohibits a person from forming a contract, that person may enter a contract to transfer property.

Article 39 defines **age of majority** as eighteen years old, the age at which a person gains **complete legal capacity**. Having complete legal capacity allows a person to exercise all of his legal rights, including the right to contract. In defining the age of majority as eighteen, Article 39 suggests two limitations. Consider Article 39's text: "The major person, while being sane in concluding contracts, is recognized to have complete legal capacity." Major means persons older than eighteen years old. By specifying that people eighteen and older have the right to contract, Article 39 implies that people younger than eighteen might not have the right to contract. Also notice that the word "sane" qualifies "major person." This suggests that if a person is not sane, his right to contract may be more limited, even if he is eighteen or older.

Article 40 of the Civil Code confirms these inferences. Under Article 40, people younger than seven do not have the capacity to enter contracts. Article 40 also prohibits people who lack discretion from entering contracts; people who lack discretion include those who are not sane. Articles 41 and 42 state that people who are between seven and eighteen years have "**incomplete capacity**," explaining that they are "forgetful" and unable to make informed decisions. Someone with incomplete capacity has fewer legal rights than someone with complete capacity (persons older than eighteen and sane), but more legal rights than someone without capacity (children younger seven). A person with incomplete capacity may only enter a contract if a guardian, a person with the legal authority to ensure his wellbeing, assists him.

In sum, people are divided into three categories of capacity. First, children younger than seven do not have legal capacity. Second, persons aged between seven and eighteen years have incomplete legal capacity. And third, persons older than eighteen, and mentally sane, have complete legal capacity.

### 1.1.2 Limitations on when a transfer can occur; the consent requirement

Property cannot be transferred without the owner's, or owners', permission. Before a person can transfer property they must notify and get the **consent** (permission) of anyone with a legal and **present interest** in a property. A present interest is a right to property that a person can assert and enforce immediately. For instance, property owners have a legal and present interest in their property. A present interest in property is different from a **future interest** in property. A future interest is an interest that can be enforced and asserted only after the occurrence of a specified event. For instance, **heirs**—those who may receive property after a relative dies—do not have present interest in their relative's property. Their legal interest

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<sup>111</sup> Civil Code, Article 2210.

<sup>112</sup> Civil Code, Articles 1035(1) (transfer of ownership occurs on basis of contract), 2210.

<sup>113</sup> Civil Code, Article 542.

<sup>114</sup> Civil Code, Article 542.

<sup>115</sup> Civil Code, Article 542.

does not emerge until a specified event: the death of their relative. So an heir has a future interest in his or her relative's property.

Here we consider two situations in which people have a legal and present interest in property. First, the situation in which a property has more than one owner. Second, the situation in which a mortgagee has a legal interest in his or her property. Here's what these two situations have in common: before selling his or her property, a property owner must notify the other property owners and the mortgagees. It is, in short, a notification requirement.

### 1.1.2.1 Multiple owners, one property

Establishing who owns a piece of property is very important. Only property owners have the right to transfer property irrevocably (permanently) or temporarily (for a limited period of time).<sup>116</sup> Under the Civil Code and Land Management Law, all of a property's legitimate owners must approve and consent to a property transfer. If one of the property owners does not agree, the transfer will be invalid.<sup>117</sup>

Think about some situations in which more than one person might own a piece of property. For example, consider three brothers who recently inherited land from their father who died. Each brother owns one third of the land. One brother wants to sell the land. This brother must first notify his two brothers and get their permission to sell the land.<sup>118</sup> If one of the brothers does not agree, the sale will be nullified and invalid, because not all of the owners agreed to the sale. Joint ownership also might arise in the context of a business. For example, two business partners might own a building. The building can only be sold if both business partners agree to the sale.

### 1.1.2.2 Mortgagees

**Mortgagees** also can have a legal and present interest in property. Recall from the ownership chapter that a mortgagee receives a temporary legal interest in a property in exchange for loaning a property owner the money with which he or she purchases the property. Once the property owner repays the loan (the **mortgage**), the mortgagee no longer has a legal interest in the property. The mortgagee's legal interest is thus temporary and present.

Before a property owner can transfer mortgaged property, he must first obtain the mortgagee's consent. But what if the property owner sold his property without telling the mortgagee? How would the mortgagee protect his interest in the property and recover his money from the loan?

The Mortgage Law protects the mortgagee's legal interest in the property. If a property owner transfers mortgaged property without obtaining a mortgagee's consent, the property transfer will not affect the mortgagee's right to compensation. That is, the mortgagee still needs to be repaid for the loan. The transfer also will not have any effect on the mortgagee's interest in the property itself.<sup>119</sup> When a person acquires a property with a mortgage on it, the new owner must adhere to the terms of the mortgage and is responsible for repaying the mortgagee.<sup>120</sup>

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<sup>116</sup> Law on Managing Land Affairs, Article 50(1), Law No. 958 (31 July 2008) [hereinafter Law of Managing Land Affairs of 2008].

<sup>117</sup> Civil Code, Article 613, 1152; Law of Managing Land Affairs of 2008, Articles 56 & 58.

<sup>118</sup> Civil Code, Articles 1035(1) (transfer of ownership occurs on basis of contract), 1044 (emphasizing consent), 1053 (same) & 1099 (same), 2210 (transfer of property on basis of contract).

<sup>119</sup> Mortgage Law, Article 11(2).

<sup>120</sup> Mortgage Law, Article 16.

Consider how this process for mortgagees is different from the process for multiple owners. In the process for multiple owners, a property transfer is invalidated if the person transferring the property does not obtain the consent of all owners. The person who acquired the property must return it. But when a property owner fails to notify a mortgagee about a pending transfer, the new property owner (the acquirer) may keep the property but must repay the mortgagee. Why do you think the law forces the property acquirer to give the property back in the first situation (multiple owners) but allows the acquirer to keep the property in the second (mortgagees)?

As you think about this question consider how the interests of mortgagees and property owners differ. A mortgagee has an interest in the property only to the extent that he or she wants to be repaid. Property owners' interests may be much more varied. A property owner might plan to build a home on the property, plant crops, or start a business. A mortgagee does not have the right to use and possess the property. A mortgagee's interest in the property is limited; it does not extend beyond ensuring that he is repaid.

Now consider the effect these laws have on property acquirers. For example, imagine you purchase a property. The property owner does not tell you that the property is mortgaged so you pay the full market value. One year later, the mortgagee contacts you, demanding payment of the loan. The person you purchased the property from has left town, and you do not know where he went. What do you do?

## **1.2 Guide to Transferring Property through Sale Contracts**

Transferring property irrevocably, and transferring the legal deed to the new owner, requires completing four to five steps. An irrevocable, permanent transfer may occur in one of three ways. First, a person might buy property. Second, he or she might inherit it from a relative. Third, he or she might receive it as a gift. Articles 50 through 58 of the Land Management Law of 2008 provide a framework for how to transfer a legal deed to a new owner. The Civil Code adds specificity to the Land Management Law's framework.

As you read through the steps below, remember that property law is changing and that the process varies from one community to another. Also remember that not all property transfers occur through the process described here. In Kabul, for example, about sixty percent of the land transfers in 2005 were not legally registered.<sup>121</sup> Many of these transfers of ownership were recorded and documented in private homes and offices. Consider what purposes the legal process serves and why people might choose not to use it. Also consider the challenges that might arise by having more than one system for transferring ownership.

### **1.2.1 Seller and buyer negotiate a contract (property sales only)**

When a person buys property, he or she must first negotiate with the property owner. The seller and buyer must agree on several terms: the price, the obligations of each party (e.g., repairs), and timing (i.e., when the seller will transfer the property to the buyer). Once the parties agree on the terms, they will enter into a written and legally binding contract.<sup>122</sup> This contract will contain all of the agreed upon terms. Documenting the terms in writing protects both the buyer and the seller from later misunderstandings. Moreover, Article 2212 of the Civil Code affirmatively requires consideration of terms and other such formalities. If they are not, the sale will be voided. This Article thus underscores the importance of executing transfers in the required way. It also raises the following question: Do transfers executed

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<sup>121</sup> David Stanfield, Jonathan Reed, & M. Yasin Safar, Terra Institute, *Description of Procedures for Producing Legal Deeds to Record Property Transactions in Afghanistan*25 (24 September 2005), available at <http://www.terrainstitute.org/pdf/Description%20of%20Procedures.pdf> [hereinafter Terra Institute, *Description of Procedures for Producing Legal Deeds*].

<sup>122</sup> Civil Code, Article 2210.

without adherence to formalities—for instance, through customary law—have legal effect? The answer is no, and yet judges still recognize transfers executed through customary law. This is an interesting instance of a divergence between the letter of the law and how it is actually applied.

### 1.2.2 Primary court: applicant applies to the primary court

After the seller and buyer agree to the terms of a property transfer, they must verify ownership. First, they must bring an application letter to the primary court in the district where the property is located. If the court believes that the claimed property owner is the owner, primary court will prepare a new deed for the property (**qabalee qatae**).<sup>123</sup> To verify ownership, the application letter contains the following information:

- The property's boundaries, house number, district, and area;
- a signed statement from the village leader supporting the property sale;
- the names of the property owner and the person acquiring the property;
- a statement from the property owner and the person acquiring the property, agreeing to the sale;
- the sale price (if a property sale); and
- a statement about whether the property is mortgaged.

If the seller has a legal deed to the property, the seller's deed archive number and date the seller's deed was issued also must be included in the application.<sup>124</sup> If there is no official record, officials from the land department may visit the property and speak with neighbors to evaluate the application's truthfulness.<sup>125</sup>

The property owner also must publicize the pending property transfer to alert anyone who might have a claim to the property, including other owners and mortgagees.<sup>126</sup> Recall that all owners and all mortgagees must consent to a property transfer for it to be valid.<sup>127</sup>

### 1.2.3 Makhazan: search for the seller's deed and verifying ownership

After applying to the primary court judge, the property owner and property acquirer must travel to the **Makhazan**, located in the provincial court of appeals, which is where the property deeds are kept. The head of the Makhazan considers the buyer and seller's application and authorizes a search for the property's legal deed. Once the deed is located, both the head of the Makhazan and chief of the Makhazan consider the deed's authenticity.<sup>128</sup> If the head and chief believe that the deed is authentic, they will sign and stamp the document to verify the document's truthfulness.

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<sup>123</sup> Law on Managing Land Affairs of 2008, Article 5; *Description of Procedures for Producing Legal Deeds*, supra note 121, at 9; Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 69-70 (2005).

<sup>124</sup> Law of Managing Land Affairs of 2008, Articles 51 & 56; *Description of Procedures for Producing Legal Deeds*, supra note 121, at 12-13; Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 70 (2005).

<sup>125</sup> Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 70 (2005).

<sup>126</sup> Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 71 (2005).

<sup>127</sup> Law of Managing Land Affairs of 2008, Article. 50(1); Mortgage Law, Article 9(10)(1).

<sup>128</sup> *Description of Procedures for Producing Legal Deeds*, supra note 121, at 15 (all photos are from this report).





Makhazan document archives

Conflicts may arise if another person claims to own the property. Such conflicts are common and are considered in the dispute resolution chapter. Here we consider what evidence a person might use to prove ownership.

The most persuasive evidence of ownership is an **official document**, a document that has been registered and preserved by public officials. A **customary document**, any document that is not an official document, is less persuasive.<sup>129</sup> Signed letters, such as a letter from a village elder verifying ownership, are considered customary documents.<sup>130</sup> This ranking of documents for proving ownership is not absolute. The Civil Code recognizes that some official documents might be fake, for example a forged document.<sup>131</sup> To determine whether a document is forged, a court will consider whether anyone has altered the document by examining its signatures, seal, fingerprints, and photographs.<sup>132</sup> Of course, if a document is determined to be a forgery, it will be given no persuasive effect.

#### **Evidence of Ownership Practice Question**

Hamid enters a contract with Asa to buy Asa's land. As required, they publicize the pending sale. Naqib sees the notice about the pending property sale and believes that he owns the land. Naqib notifies Asa and Hamid. Asa has what appears to be an official deed to the land; Naqib has a letter from a village elder and a neighbor stating that Naqib owns the land.

How will the court consider Asa's and Naqib's evidence?

#### **Suggested Answer**

First, the court will note that Asa's official deed generally is more persuasive than Naqib's letter, a customary document. If Naqib raises doubts as to the official deed's authenticity, then the court may consider whether Asa's deed has been altered—i.e., whether the deed is a forgery. If Asa's official deed has indeed been altered, the court might conclude that Naqib's letter, a customary document, is more

<sup>129</sup> Civil Code, Articles 991 & 993.

<sup>130</sup> Civil Code, Article 997.

<sup>131</sup> Civil Code, Article 992.

<sup>132</sup> Liz Alden Wily, *Land, People, and the State in Afghanistan 2002-2012*, 56 (February 2013).

persuasive than Asa's legal deed, an official document rendered unpersuasive by forgery. One cannot trust a forged document.

Consider the purpose of this third step, verifying ownership. Whom does verifying ownership protect? Verifying ownership protects the actual property sellers, buyers, and mortgagees. Verifying ownership determines whether the person who claims to own the property is the legitimate owner and whether anyone else might have a claim to it. For a property transfer to be valid, of course, the actual owner must approve the transfer.<sup>133</sup>

#### 1.2.4 Land Management Office: verifying ownership and assessing property value

Once government officials have verified ownership, the property owner and property acquirer must go to a land management office, either the **Imlak** (rural property) or the **Melkiat** (urban property within city boundaries). The land management office verifies the location, boundaries, and ownership of the property. If the land management office has maps and current records of ownership for property, the office will use those documents to verify the applicants' property transfer application. If the property office does not have any maps or records of the property, land management officials may visit the property to verify the property's characteristics.<sup>134</sup>

The land management office also will determine how much the property is worth. This value will be used to determine the amount of taxes and fees the property owner and property acquirer must pay to the government to complete the transfer.<sup>135</sup> The assessment of the property's value will consider any changes to the property that may have occurred since the previous deed was recorded.<sup>136</sup> The officials will record the property's value in the tax book and in the principle land registration book.<sup>137</sup>

#### 1.2.5 Mustofiat: payment of transfer taxes

The last step is the payment of transfer taxes. In 2005, these taxes were two percent of the property's assessed value, the value determined by the land management office. To pay the transfer tax, the buyer and seller first must obtain a bill from the **Mustofiat**, the provincial revenue or tax collection office of the Ministry of Finance. They must then go to a bank to pay the tax bill and obtain a receipt to prove that they paid. Based on the receipt, the Mustofiat will certify that the two percent transfer tax has been paid.<sup>138</sup>

### Customary Law Transfers

Transferring property through customary law is common. It is often less expensive and more accessible, because it does not require paying government taxes and fees and does not require traveling long distances. The customary system also is more flexible with respect to evidence of ownership. Oral testimony from neighbors and community elders is considered legitimate evidence of ownership. By contrast, the legal system emphasizes written forms of evidence, like legal deeds.<sup>139</sup>

<sup>133</sup> Law of Managing Land Affairs of 2008.

<sup>134</sup> Description of Procedures for Producing Legal Deeds, *supra* note 121, at 16.

<sup>135</sup> Description of Procedures for Producing Legal Deeds, *supra* note 121, at 16.

<sup>136</sup> Law on Managing Land Affairs of 2008, Article 52.

<sup>137</sup> Law on Managing Land Affairs of 2008, Article 51.

<sup>138</sup> Law on Managing Land Affairs of 2008, Articles 5(3) (tax payment document); *Description of Procedures for Producing Legal Deeds*, *supra* note 121, at 5.

<sup>139</sup> Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 70-71 (2005).

### 1.3 Contract Law Overview

The Laws of Afghanistan and Islamic Law permit property transfers to occur on the basis of contracts, enforceable promises between two parties.<sup>140</sup> Here, we briefly review the law that governs these agreements: the law of obligations. First, we quickly review who has the capacity to enter contracts, which we already addressed in the discussion of limitations on who can transfer property. Second, we consider how contracts are formed between two parties and the difference between contracts and promises. Third, we discuss when a person might be able to cancel a contract that he has entered.

As you read this section, consider what concerns you might have when entering into a legally binding agreement with another person. How would you prevent later misunderstandings? How specific would you make the contract's terms (your mutual obligations to one another)? How would you document the agreement—in writing, orally, or otherwise?

#### 1.3.1 Capacity to form contracts

Recall that Civil Code begins with the presumption that anyone can enter a contract. (Civil Code Article 542) The right to enter a contract is limited by age and the ability to make informed decisions. (Articles 39 to 42) These limitations reflect the principle that contracts are valid only if they are voluntary.<sup>141</sup>

#### 1.3.2 Contract formation

A contract is formed by the mutual agreement of two parties. In order for a contract to be formed, one party must make an offer to exchange an item of value with the other party and the other party must accept the offer.<sup>142</sup> Contracts are legally binding promises made between two or more people. The contracting parties agree to do something, to not do something, or to transfer ownership of a property. As you learned at the beginning of this book, contracts can also be formed to regulate the use of property without transferring ownership of the property.

For a contract to be enforceable, a number of conditions must be met. First of all, contracts should be properly formed. This means that contracting parties should have genuine consent about what they promise. A contract must be clearly expressed through “words, writing or signs customarily used” to indicate that a contract has been formed.<sup>143</sup> In the context of property transfers, like property sales, leases, and donations, this expression must be written.<sup>144</sup> Expressing a contract in this manner ensures that the parties intend to be legally bound to fulfill their obligations under the agreement.

In addition to consent, contracting parties should have legal capacity. Legal capacity is a person's ability to engage in a particular undertaking. For example, a minor or an insane person generally does not have the required ability to form a binding contract. This is because such a person may not know the consequences of his undertakings and may not be able to fulfill his promises. In order for consent of parties to be valid, parties should have legal capacity.

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<sup>140</sup> Civil Code, Articles 1035(1) (transfer of ownership occurs on basis of contract), 2210 (same); Law on Managing Land Affairs of 2008, Articles 5 & 50 (legal deeds); Hamid Khan, *Practitioner's Guide: Islamic Law*, July 2013, 93. [http://inprol.org/sites/default/files/publications/2013/islamic\\_law\\_guide-july\\_2013\\_final\\_0.pdf](http://inprol.org/sites/default/files/publications/2013/islamic_law_guide-july_2013_final_0.pdf); Hamid Khan, *Practitioner's Guide: Islamic Law*, July 2013, 93. [http://inprol.org/sites/default/files/publications/2013/islamic\\_law\\_guide-july\\_2013\\_final\\_0.pdf](http://inprol.org/sites/default/files/publications/2013/islamic_law_guide-july_2013_final_0.pdf).

<sup>141</sup> Civil Code, Article 506 (offer and acceptance).

<sup>142</sup> Civil Code, Article 506 (offer and acceptance).

<sup>143</sup> Civil Code, Article 509.

<sup>144</sup> Law on Managing Land Affairs of 2008, Articles 4 & 53.

Contracts create binding commitments between parties, and these commitments are known as **obligations**. Contracts are one main source of obligations. Often times contracts are formed because parties want to exchange some form of value. The value exchanged or transferred as a result of a contract, also known as the **subject** of a contract, can be tangible, like property or money, or intangible, like a promise to provide a service, such as a lawyer agreeing to provide advice. Note, however, that it is not always a requirement that each party should transfer value to the other party. In certain types of contracts, only one party has an obligation without the other party being legally required to do anything. For instance, a gift is a contract under the legal system of Afghanistan and it requires only one party to transfer the subject to the other party. The law requires that the subject of a contract should meet certain requirements; contract subjects should be possible, lawful, and specific. Thus, a contract with a vague subject matter can be formed but is not enforceable.

There is one last requirement for contracts to be valid. The intention of parties, referred to as a **cause**, should be permissible. If the intention of parties is to engage in an unlawful activity, such a contract is still not valid.

### 1.3.3 Contract invalidation and cancellation

In some situations, a person may cancel (or **invalidate**) a contract even though he or she expressed his or her intent to be legally bound to the agreement. Here, we consider three such situations: when a person is threatened serious physical or financial harm (**aversion**); one or both parties made a mistake about information that was essential to the decision to enter the contract; and when one of the parties intentionally lies to the other (**fraud** or **deceit**).

**Aversion.** Threats to a person's physical or financial wellbeing may justify invalidating a contract because such threats render consent to enter into the contract involuntary.<sup>145</sup> The threats can range from grave and substantial (**complete aversion**) to less severe (**incomplete aversion**).<sup>146</sup> Both complete and incomplete aversion can invalidate a contract.<sup>147</sup> Interestingly, aversion does not automatically invalidate a contract. Rather, the person who involuntarily entered into the contract is given the choice of either accepting or rejecting the contract.

For example, imagine you are negotiating with Rameen to lease his apartment. You decide the price is too expensive so you turn down his offer. Rameen threatens to physically hurt you, so you reluctantly agree to his offer; you enter a contract to lease Rameen's apartment. Rameen's threat to harm you rendered your consent involuntary. You are not bound to the agreement to lease Rameen's apartment; i.e., you can either accept or reject the lease.

**Mistake of information or assumption.** A contract may also be cancelled if the parties entered into the contract on the basis of mistaken information or mistaken assumptions.<sup>148</sup> In order to qualify for cancellation under mistake, the mistake must be substantive or essential.<sup>149</sup>

Consider the following example: Abdul agrees to buy twelve jeribs of land from Samir. They negotiate a contract and apply to transfer the land at the primary court. When the land management office assesses the land, Abdul finds out that the land is only four jeribs in size. It is a surprise to both Samir and Abdul; both men had honestly thought the property was twelve jerbis in size. Importantly, the size of the land is substantive or essential to Abdul and Samir's agreement. The contract between Abdul and Samir is

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<sup>145</sup> Civil Code, Article 558.

<sup>146</sup> Civil Code, Article 558.

<sup>147</sup> Civil Code, Article 558.

<sup>148</sup> Civil Code, Articles 563 & 566.

<sup>149</sup> Civil Code, Article 564.

**voidable.** Both Samir and Abdul have the option of cancelling the contract, but neither is required to do so. They can ignore the mistake and proceed with the property sale as planned.

**Duty to Read.** Now consider the following: The contract between Abdul and Samir specified that the land was only four jeribs in size, but Abdul never read the contract. Abdul simply assumed that the property was twelve jeribs in size. Samir did nothing to mislead Abdul. Samir did not know that Abdul believed the property to be much bigger. Could Abdul void the contract despite the fact that he failed to read the contract?

No, Abdul cannot void the contract for failing to read it. Civil Code Article 568 contains the general rule that the parties must exercise diligence and good faith when entering a contract. While this does not explicitly include the duty to read, requiring parties to read their contracts is consistent with the general purpose of the article. That purpose is to encourage maintaining, as opposed to easily canceling, contracts. Thus, a person likely cannot cancel a contract on the ground that he failed to read it.<sup>150</sup>

**Fraud.** A contract also may be cancelled if one of the parties lies, misrepresents, or otherwise misleads the other party, and the other party enters into the contract on the basis of that fraud. Consider the following: After walking the property together, Samir lies to Abdul, telling him that the property is twelve jeribs in size, even though Samir knows that the property is only four jeribs in size. Abdul enters a contract to buy Samir's property.

The existence of **fraud**, intentional lies or intentional withholding of information about material facts, may allow a person to cancel a contract.<sup>151</sup> **Material facts** include those that would cause a person to reconsider whether he wanted to enter the contract.

For Abdul, a material fact may be the size of the property. Because Samir intentionally lied to Abdul about the property's size, Abdul may be able to cancel his contract with Samir.<sup>152</sup> To do so, Abdul must prove three elements. First, Abdul must prove that Samir knowingly lied to him so that Abdul would agree to buy the land. That is, he must prove Samir's lie was intentional. Second, Abdul must prove that he relied on Samir's lie when he agreed to buy the land. That is, he must prove the false statement was material to his decision. Third, Abdul must prove that his reliance on Samir's lie was reasonable.<sup>153</sup> If Abdul could have easily checked to see whether the property was in fact twelve jeribs in size, Abdul's reliance on Samir's lie may not have been reasonable. If Abdul's reliance was unreasonable, he would be bound to the contract. As discussed above, a person must be diligent when he enters a contract.<sup>154</sup>

Consider another example. Babur, a property dealer, is helping Azar lease his home. Azar's home suffered severe water damage after a pipe burst in the bathroom. The pipe has not been fixed. The damage is especially apparent on the walls of a bedroom in the basement. Babur knows that anyone who sees the damage may ask to inspect the house to ensure that it is in good condition. Thus, Babur paints the bedroom's walls to hide the water stains. Parsa is negotiating with Babur to lease the house. When he sees the fresh paint, Parsa compliments Babur for the property's good condition. Babur does not say anything about the broken pipes. Parsa enters a contract to rent the home for two years. Within one month the bathroom pipe begins to leak, flooding the bedroom in the basement. Is Parsa bound to the contract?

No. Parsa is not bound to the contract. First, Babur concealed a material fact from Parsa regarding the home's maintenance. The home had broken pipes that were known to flood the bedroom in the basement.

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<sup>150</sup> Civil Code, Article 568; Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 73 (2005).

<sup>151</sup> Civil Code, Articles 570, 571 & 575; Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 73 (2005).

<sup>152</sup> Civil Code, Articles 570, 571 & 575; Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 73 (2005).

<sup>153</sup> Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 73 (2005).

<sup>154</sup> Civil Code, Article 568; Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 73 (2005).

Second, this fact was material to Parsa's decision about whether to rent the home for the price offered. If Parsa had known about the broken pipes, he may have negotiated a lower price or he may have chosen to lease a different home. Third, Parsa's reliance was reasonable. Babur painted over the water-stained walls to conceal the water damage. Parsa had no reason to ask Babur about whether the home had broken pipes. Thus, Babur committed fraud. Under Articles 570 and 571 of the Civil Code, Parsa could invalidate the contract.

#### 1.4 Review

The Constitution and the Civil Code limit who property can be transferred to and when it can be transferred. Under the Constitution, foreign citizens can lease property but cannot own it. Thus, a foreign citizen cannot buy or inherit property. Second, to enter a contract to transfer property, a person must have the legal capacity to do so. Restrictions on who can contract reflect assumptions about a person's ability to make informed decisions, including assumptions based on age. Third, before a property owner can sell property, he must notify and obtain the permission of anyone who has a legal and present interest in the property, including other property owners and mortgagees.

For a transfer of ownership to be legally recognized, parties must record the transfer on a legal deed. The courts and land management office participate in this process by verifying ownership, ensuring the parties pay the required taxes and fees, and storing the documents. Conflicts may arise when more than one person claims to own the same property.

People agree to transfer property, including both property sales and leases, on the basis of voluntary, binding legal agreements, contracts. Under some circumstances, a person may cancel a contract. His ability to do so, however, is limited.

## 2. SELLING PRIVATE PROPERTY

A **property sale** occurs when a property owner permanently gives all of his rights to the property to a buyer in exchange for something of value, like money. Property sales occur on the basis of a contract.

Recall from the discussion above that there are certain limitations on who may own property, who may transfer property, and when a person may transfer it. These limitations also apply to property sales. First, both the buyer and the seller must have the capacity to contract. Second, neither the buyer nor the seller can be a foreign citizen. Third, before selling his property, the seller must obtain consent from anyone who has a present legal interest in the property, like other owners and mortgagees. Fourth, transfers of ownership must occur on the basis of a legal deed.

Here we address two concepts. First, we discuss when a person might have the authority to sell another person's property. Second, we consider **preemption rights**. Preemption rights are when someone might have the right to buy property before it is offered to anyone else. Third, we consider when a person who has purchased property can exercise his right to possess and use property. The right of ownership and the right of possession are distinct; they do not always go together. A person can own property but not the right to be on the property and use it, the right of **possession**.

### 2.1 Selling Another Person's Property

Civil Code Article 1152 acknowledges that a property owner may authorize someone to sell his property for him. This may occur both with and without the owner's approval.

When a property owner allows someone to sell property on his behalf, the resulting property sale is binding; i.e., the contract is valid.<sup>155</sup> In this situation, the property owner is the principal, and the person who sells the property works as an agent on his behalf. However, when the owner does not grant such authorization, the property owner may revoke (terminate) the property sale.<sup>156</sup> If the property owner (principal) cancels the contract and the buyer was not aware that the seller (the agent with whom he dealt) did not own the property, the buyer may demand that the seller return his money, even if the seller acted in good faith.<sup>157</sup>

There is an exception to the general rule. If a property owner fails to pay his **mortgage** (debt), the **mortgagee** (lender) may be able to sell the property owner's property. Recall from the ownership chapter that one of the benefits of owning property is the right to use the property to obtain a loan, a **mortgage**. Mortgagees agree to lend property owners money, in the form of a mortgage, on the basis of contract.<sup>158</sup> Through a mortgage contract, the mortgagee obtains legal interest in the property owner's property. The mortgagee's interest in the property incentivizes the property owner to repay the loan on time. If the property owner does not pay on time, the mortgagee may be able to sell his property.<sup>159</sup> The property is consideration for the loan.

Here, we first consider when a property owner might authorize someone else to sell his property. Second, we consider how a mortgagee might acquire and sell a property owner's property.

### 2.1.1 Property dealers

Under the Property Dealers Law and the Civil Code, a property owner can give **property dealers** permission to transfer property on his behalf.<sup>160</sup> Property dealers assist people with buying, selling, and leasing property. For example, a property dealer might identify potential buyers, or he might negotiate a contract to sell or lease property. In acting on behalf of others, a property dealer must ensure that all legal requirements are satisfied, including the process for transferring a property deed.<sup>161</sup>

In return for their assistance, property dealers receive a percentage of the value of the property sale or the lease.<sup>162</sup> The 2015 Property Dealers Law set their compensation at one percent, an expense that the buyer and seller (or lessor and lessee) often split, with each paying half of one percent (0.5 %).<sup>163</sup> However, if the property dealer makes a mistake and the sale or lease is rendered invalid, the property dealer must return the fee.<sup>164</sup> Such could include failing to acquire the true owner's permission or omitting a step in the property transfer process.<sup>165</sup>

## Funding a Property Purchase

What if a buyer wants to buy a piece of property but does not have enough money to pay the total cost?

<sup>155</sup> Civil Code, Articles 1152, 1153.

<sup>156</sup> Civil Code, Articles 1152.

<sup>157</sup> Civil Code, Articles 1154.

<sup>158</sup> Mortgage Law, Article 5 (requirements and options for creating a mortgage, focusing on the documentation).

<sup>159</sup> Mortgage Law, Article 9.

<sup>160</sup> Civil Code, Article 1152; Property Dealers (Estate Agents) Law, Article 1, Section 1, Law No. 1189 (17 October 2015).

<sup>161</sup> Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 71 (2005).

<sup>162</sup> Property Dealers Law, Article 18.

<sup>163</sup> Property Dealers Law, Article 18.

<sup>164</sup> Property Dealers Law, Article 18(3); Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 72 (2005).

<sup>165</sup> Civil Code, Article 2212 (all legal requirements must be satisfied); Law on Managing Land Affairs of 2008, Article 60 (same).

Recall from the Ownership chapter that a buyer that lacks money to pay a seller for the entire cost of property can obtain a loan or a mortgage on the property he would like to purchase.<sup>166</sup>

### 2.1.2 Owner defaults on mortgage; mortgagee acquires property

Property owners and those acting on their behalf (property dealers) are not the only people who might be able to sell property. If a property owner does not repay his mortgage on time, the mortgagee may be able to sell his property.<sup>167</sup>

Consider the following situation: Rameen owns land that is twelve jeribs in size. He would like to buy a five goats but does not have enough money. Thus, Rameen enters a contract with Hamid for a loan. Rameen uses his property as security for the loan. Here, Rameen is the borrower (**debtor**); Hamid is the mortgagee (**lender**). The contract for the loan requires Rameen to pay Hamid every six months, but Rameen does not make any payments for two years.

Under Article 9 of the Law on Mortgage of Immovable Property in Banking Transactions (hereinafter, Mortgage Law), Rameen must repay his debt according to the terms of his contract. If Rameen does not, then Hamid may be able to take possession of the property or sell it.<sup>168</sup> Before Hamid may do so, he must give Rameen one more opportunity to comply with the contract.<sup>169</sup>

First, Hamid must notify Rameen of his intent to acquire or sell the property.<sup>170</sup> Under Mortgage Law Article 28, this requires sending a letter to Rameen's last known address and to other mortgagees. Hamid also must publish a notice in a widely circulated local newspaper. The notice must indicate how much money Rameen owes, and it must indicate that Rameen can keep his property if he complies with the loan agreement. If Hamid plans to sell the property at auction, the notice also must indicate the date, time, and place of the auction.<sup>171</sup> After sending the notice, Hamid must give Rameen time to respond: sixty days if the property has a home on it and thirty-five days if it does not.<sup>172</sup>

When Rameen receives the notice, he has three options. He can keep his property by complying with the loan agreement.<sup>173</sup> Rameen also can ignore Hamid's notice and lose his property.<sup>174</sup> Or, Rameen can challenge Hamid's notice by asserting that he has fulfilled his obligations, that he was not given enough time to fulfill them, or that the notice inadequate because it did not comply with the applicable requirements.<sup>175</sup> Further, parties often include provisions in their mortgage agreements that extend beyond the requirements of the Mortgage Law and Civil Code, and these provisions could become significant in the event of a dispute.

Assume Rameen ignores Hamid's notice and does not challenge Hamid's claims. Now, Hamid has a few options. First, Hamid could collect all rents, profits, and other payments related to the property and use the payments to reduce Rameen's debt.<sup>176</sup> Hamid also could sell Rameen's property or take possession of

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<sup>166</sup> Civil Code, Article 1288.

<sup>167</sup> Mortgage Law, Article 9.

<sup>168</sup> Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 72 (2005).

<sup>169</sup> Civil Code, Articles 1861(1) & 1870(1).

<sup>170</sup> Mortgage Law, Article 25.

<sup>171</sup> Mortgage Law, Article 28.

<sup>172</sup> Mortgage Law, Article 25(3) & (4).

<sup>173</sup> Mortgage Law, Article 26.

<sup>174</sup> Mortgage Law, Article 25(3)

<sup>175</sup> Mortgage Law, Article 29.

<sup>176</sup> Mortgage Law, Article 25(3)



it by obtaining a court order.<sup>177</sup> If Hamid sells the property, he must use the money to satisfy Rameen's debt and must give any additional money to Rameem.<sup>178</sup>

### 2.1.2.1 Multiple Mortgagees

When many people have a financial interest in the same property, the relationships between property owners and mortgagees become very complex.<sup>179</sup> Financial interests in a property are ranked according to the type of interest and when the debt was incurred. Debt can be in the form of mortgages and other types of loans. Mortgagees have a right to recover debt before other creditors.<sup>180</sup>

If a property has more than one mortgagee, the mortgage attached to the property first has a **superior interest** in the property. This means that when the mortgagor repays his debt or when a mortgaged property is sold, mortgagees with superior interests are repaid first.<sup>181</sup>

## 2.2 Preemption Rights

Before selling property, a property owner must first determine whether anyone has the option to buy his property before anyone else. Such an option is called a **right of preemption**. A person might have a preemption right for the property as a whole or part of it. To acquire the property, the holder of a preemption right must pay the owner for the property, but the owner must offer to sell the property to him first.<sup>182</sup>

There are two types of preemption rights: preemption rights based on partnership and preemption rights based on proximity to the property. Preemption rights based on a partnership might arise if two people jointly own a business affiliated with a property. Preemption rights based on proximity arise when a person owns property that borders another person's property, an adjacent neighbor.<sup>183</sup>

Preemption rights based on partnership are divided into three categories. First, a partner could have a preemption right to buy the entire property, both the land and buildings.<sup>184</sup> Second, a person might have a preemption right to buy the land but not the buildings.<sup>185</sup> Third, a partner might have an interest in the rights associated with the property, like a right to an **easement** (the ability to enter or use property that one does not own), but not the right to its land or buildings.<sup>186</sup> If a property owner decides to sell his land, he must first offer it to people with partnership rights before he offers it to his adjacent neighbors or the public.<sup>187</sup>

Article 2221 of the Civil Code establishes a hierarchy of preemption rights. Partners have a higher priority right than adjacent neighbors, which allows a partner to buy the property before a neighbor. Partners that have a larger interest in the property have a higher priority than others.<sup>188</sup>

- a partner with a preemption right to the whole property had first priority;

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<sup>177</sup> Mortgage Law, Article 25(3), 27.

<sup>178</sup> Mortgage Law, Article 32.

<sup>179</sup> Mortgage Law, Article 4(3).

<sup>180</sup> Civil Code, Articles 1832, 1866, 1870.

<sup>181</sup> Civil Code, Articles 1832 (official mortgage takes priority over others), 1866-1894; Mortgage Law, Article 12-15.

<sup>182</sup> Civil Code, Article 2213.

<sup>183</sup> Civil Code, Articles 2213 & 2214.

<sup>184</sup> Civil Code, Article 2216.

<sup>185</sup> Civil Code, Articles 2216 & 2217.

<sup>186</sup> Civil Code, Article 2218.

<sup>187</sup> Civil Code, Article 2213.

<sup>188</sup> Civil Code, Article 2221.

- a partner with a preemption right to the land, but not the buildings, has second priority;
- a partner with a preemption right in the special rights of the property, like an easement, has third priority; and
- an adjacent neighbor has fourth (and last) priority.

### 2.3 Transfer of Possession

After property is sold and the transfer officially recorded, the buyer obtains ownership rights. But just because the buyer now owns the property does not mean he can take possession of the property immediately. Property rights include both the right to own property and the right to possess and use property. These rights are divisible. A property owner might sell his right to use and possess his property by, for example, leasing it. In a lease contract, the property owner temporarily sells his right to possess the property to someone else (the lessee). If the property owner sells his property while a lessee possesses it, the new owner must abide by the terms of the lease. He cannot take immediate possession of his new property.<sup>189</sup>

Consider the following three scenarios:

**Lessee buys property.** Asa is leasing property from Hamid for one year. As the lessee, Asa has possessory rights but not ownership rights. Asa has a right to be on the property and to use the property but he does not have a right to sell the property. By contrast, Hamid has ownership rights but not possessory rights. Hamid has no right to possess the property because he sold his possessory rights to Asa for one year. Hamid still has the right to sell his property, even though Asa temporarily owns the possessory rights to it. During the middle of the one-year lease, Asa enters a contract with Hamid to buy the property he possesses. When Asa officially obtains ownership, Asa can remain on the property. Under Article 2262 of the Civil Code, **material delivery** of the property, a physical transfer of the property from Hamid to Asa, is not required. Asa is already in possession of the property; he is living on it. Asa now has both ownership and possessory rights. He can use property, he can be on the property, and he can sell the property.

**Property owner sells property to a third party.** Asa is leasing the property from Hamid for one year. But Hamid does not sell the property to Asa. Instead, Hamid sells the property to Rameen, a third party. Asa has possessory rights, the right to be on and use the property. Rameen owns the property but does not have a right to be on it or use it because he is still bound to abide Hamid and Asa's lease. Asa owns the possessory right to the property until the end of his lease. At the end of Asa's lease, Rameen will acquire the possessory interest.<sup>190</sup> Asa, however, may terminate his possessory rights before the end of the lease. If Asa does so, he will not be able to get his possessory rights back unless he negotiates a new lease contract with Rameen.<sup>191</sup> Alternatively, the lease contract between Asa and Hamid may enable Hamid to transfer both the ownership and possessory interests in the property to a third-party buyer. Thus, if the contract were written in this way, then upon completion of the sale, Asa move out of the property and Rameen would assume both ownership and possessory rights. Asa, however, might be entitled to payment from Hamid, depending on the terms of the contract. In short, it is important to keep in mind that the applicable laws set default rules that parties often contract around.

**Mortgagor attempts make his property less valuable.** Recall that a mortgagee may be able to sell a property owner's property if the property owner fails to repay his debt. But, what if the property owner, out of spite, attempts to make the property less valuable by encumbering it with a lease so that the new

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<sup>189</sup> Mortgage Law, Article 33(2).

<sup>190</sup> Civil Code, Articles 2263 & 2265.

<sup>191</sup> Civil Code, Article 2266.

owner cannot immediately possess it? Under such circumstances, the new owner may be able to force the lessee to leave the property by obtaining a court order. To do so, he must prove that the former property owner with spite to make the property less valuable.<sup>192</sup>

## 2.4 Review

Property sales occur on the basis of contracts. To be valid a property sale, it must be voluntary, with the consent of everyone who has a legal interest in the property, and be recorded in an official deed. A property owner can authorize another person, such as a property dealer, to sell property on his behalf. When a property owner grants another person such permission, the contract for selling the property is valid. If a property owner does not grant such permission, the property owner has the option of ratifying the contract to make the sale binding.

Mortgagees also may be able to sell a property owner's property when a property owner fails to pay his debt. Before a mortgagee may do so, he must first notify the property owner and give him an opportunity to comply with the mortgage agreement. If the property owner does not comply within the allowed time, the mortgagee can either acquire the property or sell it after obtaining a court order.

Before selling property, property owners must determine whether partners or adjacent neighbors have a right of preemption, the right to buy a property before anyone else.

Finally, a possessor, like a lessee, can buy the right to own the property he is possessing. If he does so, he immediately obtains both the right of ownership and the right of possession. But the property owner does not have to sell the property to the lessee. Instead, the property owner can sell the property to someone else. Under such circumstances, the new property owner cannot assert his right to possess the property immediately. Instead, the new owner may have to wait until the lessee's right to possess the property ends, according to the terms of his lease with the former property owner.

## 3. Leasing

Not all transfers of property require a property owner to give up all of his rights to his property. A property owner may temporarily transfer his right to possess and use his property while keeping his ownership rights (a **lease**). The person who buys the right to possess or use the property is the **lessee**; the property owner is the **lessor**. A person can lease property from another person or from the government.

Here we consider transfers of possession, property leases, between two people. When someone leases land from the government additional rules apply. Though not covered here, these other rules are important in that particular context. The government is one of the main lessors of land and may allow people to lease land for up to ninety years.<sup>193</sup> People and private investors, both local and foreign, can lease land from the government.<sup>194</sup> The agriculture chapter will address these rules.

Recall that anyone can lease property; a person need not be a citizen of Afghanistan. The Civil Code, Law on Managing Land Affairs of 2008, and Rental Tax Law all govern the relationship between the lessor and lessee. First, we consider lease contracts and what they must contain. Second, we consider when a lessor or lessee can terminate a lease before the end of the **lease period**, the amount of time the lessee

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<sup>192</sup> Mortgage Law, Article 36.

<sup>193</sup> Law of Managing Land Affairs of 2008, Article 64 (noting the existence of the Private Investment Law); LANDac Factsheet 2012, *supra* note **Error! Bookmark not defined.**, at 5-6.

<sup>194</sup> LANDac Factsheet 2012, *supra* note **Error! Bookmark not defined.**, at 5-6.

agreed to rent the property from the lessor. In this context, we also consider the obligations that a lessee and lessor have to each other.

### 3.1 Establishing a Lease

Like property sales, a contract forms the basis of a lease between a property owner (lessor) and the person buying a temporary right of possession to the property (lessee).<sup>195</sup> Thus, as with property sales, the law of obligations governs the terms of a lease, including contract formation and cancellation, including the right to cancel a lease in the event of aversion, mistake, or fraud.

The Civil Code and Law of Managing Land Affairs of 2008 specify what terms a lease contract must include. A lease agreement must describe the property, including whether it has any crops on it. It also must indicate how, when, and what the lessee must pay the lessor, and it must specify how long the lessee owns the right to possess the property, the duration of the lease.<sup>196</sup> Leases that do not include all of the legally required information have no legally binding effect; they are **vitiating**.<sup>197</sup> A vitiating contract is one that lacks required information but that can be corrected by filling in that information.

Excerpts from a lease agreement are included in the box below. As you read the lease, consider whether you think it is clear. If you were the lessee, would you understand what was expected of you? How often must the lessee pay the lessor? What form of payment is required?

#### Lease Agreement

...

#### **2. TERM**

Unless earlier terminated, the initial term of this Lease shall be five (5) years from the Effective Date of this Lease. Unless extended as provided in Section 3, this Lease shall end on the earlier of (i) the termination of the Operating Lease Contract, or (ii) the end of the fifth (5th) year from the Effective Date (“Termination Date”).

...

#### **4. RENT**

4.1. The rent due under this Lease shall be twelve thousand five hundred Afghani (Afs 12,500) per month for the first five (5) years of the term of this Lease. In the event of the Renewal Term, each year thereafter, the rent shall increase as of the first day of such year to an amount equal to twenty-five thousand Afghani (Afs25,000) per month plus an amount equal to the annual inflation rate as published by the Ministry of Commerce and Industry.

4.2. The rent shall be paid annually in advance, on the first (1st) day of each year of the term hereof, by electronic payment to the account designated by the Grantor.

4.3. If any payment of rent is not received by the Grantor within thirty (30) days of its due date, the Contractor shall also pay to the Grantor a late charge, per month, equal to twenty-five percent (25%) of the annual rent payment under this Lease (the “Late Charge”) for each month such payment of rent is late.

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<sup>195</sup> Law of Managing Land Affairs of 2008, Article.59; Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 77 (2005).

<sup>196</sup> Law on Managing Land Affairs of 2008, Article 60; Civil Code 1324.

<sup>197</sup> Civil Code, Article 1324.

## **7. LESSOR'S DUTIES**

The Contractor shall have the responsibility to maintain the Premises in a clean condition and, if necessary, repair and restore the Premises to their original condition.

...

## **9. EVENTS OF TERMINATION**

This lease shall terminate if the lessor fails to pay rent plus penalty for three (3) consecutive months.<sup>198</sup>

### **3.1.1 Payment and duration**

A lessee can pay for the right of possession in different ways: “cash money, property, profit, or permissible pledge.”<sup>199</sup> Consider the last phrase, “or permissible pledge.” In addition to money, property, and profits (for example, a business’s earnings), a lessee and lessor have broad discretion in deciding what a lessee must give the lessor. A lessee who sells fruit might pay the lessor in mangos. A carpet maker might pay the lessor in carpets. And a painter could even pay by painting the apartment’s walls!

The lessee and lessor determine when payments are due. The lease agreement might require the lessee to pay the full amount before possessing the property. Or the lease agreement might require the lessee to make periodic payments throughout the lease period. The lease agreement also might allow the lessee to pay the lessor at the end of the lease period.<sup>200</sup>

Under Civil Code Article 1324 and Article 60 of the Law of Managing Land Affairs of 2008, whatever the lessor and lessee decide must be specified in the lease contract. However, if the lease agreement does not specify when the lessee must pay the lessor, local custom determines when payment is due.<sup>201</sup> Articles 1345 and 1346 of the Civil Code, which govern the duration of a lease, also recognize that lessors and lessees may omit terms from lease agreements. If the duration of the lease is not specified in the lease agreement, the duration of the lease shall be determined “according to current custom regarding the subject of the lease.”

Omitting terms like the duration of the lease or how payments must be made could lead to conflict. How might you establish what the customary leasing practices are? When a lease contract omits information (for example, how often a lessee must pay the lessor), the Civil Code requires the parties to consider leases that are similar in type. Similarity might be based on the property, lease duration, location, condition, and so on. How would you account for differences among properties? Some differences might suggest more frequent payments are necessary and other differences might suggest a lump sum payment at the end of the lease is all that is required. It may be difficult to agree on what is customary.

How specific do you think the terms of the lease should be? Compare the following two provisions:

1. The lessee will give the lessor some carpets every six months for the duration of the lease.
2. The lessee will give the lessor five carpets throughout the lease.

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<sup>198</sup> Premises Lease Contract between Ministry and Petroleum, Islamic Republic of Afghanistan (the Grantor) and the Contractor (draft 15 November 2013), available at [http://mom.gov.af/Content/files/CNG\\_Premises\\_Lease\\_Contract%20-%2012Nov13.pdf](http://mom.gov.af/Content/files/CNG_Premises_Lease_Contract%20-%2012Nov13.pdf).

<sup>199</sup> Civil Code, Article 1338.

<sup>200</sup> Civil Code, Articles 1339-44.

<sup>201</sup> Civil Code, Article 1373.

Assume that one of these will be the only provision in the contract regarding payment and duration. Which one of the two provisions would you prefer? Do you think the provisions protect the lessee? What about the lessor? How might you make the provisions more clear?

Both provisions have problems. The first option fails to specify the duration of the lease. It also does not specify how valuable the carpets must be or how many carpets the lessee must give the lessor. Could the lessee give the lessor a carpet that is the size of a dish towel? The second option does not specify how often the lessee must give five carpets to the lessor, how much the carpets must be worth, or how long the lease will last. Compare the specificity of these provisions to those in the Lease Agreement above.

### **3.1.2 Restrictions on leasing**

Because leases also occur on the basis of contract, the Civil Code limits who can enter a lease. The same limitations that apply to property sales apply here. There are restrictions based on age and restrictions based on mental capacity. Generally, people younger than seven cannot enter a contract for a lease.

Civil Code Article 1325 imposes an additional limitation on the duration of the lease. Consider Article 1325: “A person who is solely authorized to administer the property cannot fix the period of the lease for more than three years. If the lease period is determined for more than three years, it shall be reduced to three years, unless law provides otherwise.”

Whom does this provision address? Does it remind you of some of the relationships we discussed in the property sales section? A person who is *solely authorized* to administer property (on behalf of someone else). Article 1325 does not address property owners. Property owners have far more rights to their property than administering property alone. Among others, Article 1325 addresses the situation of a guardian of a minor who owns property. Thus, under the Article 1325, guardians cannot negotiate a lease that is longer than three years “unless law provides otherwise.” If you were a guardian and wanted to lease property for seven years, what other laws might you consider to determine whether you are allowed to do so? The Property Dealers Law, and the Law on Managing Land Affairs of 2008, and even the 2000 version of this law do not appear to address this issue. Thus, when a guardian negotiates a lease contract on behalf of the property owner, the lease cannot be longer than three years.

## **3.2 Obligations of the Lessee and Lessor and the Right to Terminate a Lease**

A lease contract generally specifies when a lease will end. Under some circumstances, the lessee or lessor may cancel a lease. Many of these circumstances arise when the lessor or the lessee has failed to honor his obligations, as defined either by the law or the terms of the lease contract.

For example, a lessee may terminate his lease for the following reasons: one of his family members becomes ill or dies; he is unable to cultivate the land because of a disaster, like a flood or an earthquake; the terms of his lease specifically allow him to do so; or if Law authorizes termination.<sup>202</sup> Before ending his lease of agricultural land, the lessee must give the lessor and the land management office three months notice.<sup>203</sup>

### **3.2.1 Lessor obligations**

In leasing his property, a property owner has a number of responsibilities. He must ensure that his property is well-maintained and in good condition. If he fails to do so, the lessee may be able to terminate

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<sup>202</sup> Law on Managing Land Affairs of 2008, Article 75.

<sup>203</sup> Law on Managing Land Affairs of 2008, Article 76.

the lease contract early. For example, imagine that you are leasing an apartment, and you become very ill because mold begins to grow in the apartment. Should you have a right to cancel the lease?

Under Article 1349 of the Civil Code, “[i]f the property that is being leased is in a state that inflicts great risk on health of lessee or that of people who live with him or of his employees or workers, lessee may claim rescission of contract, even if he has already waived this right.” As this Article makes clear, then, you would be able to cancel the lease due to “great risk on health” caused by the mold to you as the lessee. Interestingly, the right to cancel the lease under such conditions is so strong that it can be enforced even if it was waived in the lease contract. Thus, the lessor cannot contract around his obligation to provide an apartment that inflicts health risks.

Other provisions of the Civil Code may provide clarification in this regard as well. The Civil Code and Law on Managing Land Affairs of 2008 require the lessor to maintain the property in good condition. For example, under Articles 1351 through 1354 of the Civil Code, a lessor must correct and repair property defects if those defects would prevent the lessee from earning profits from the property.<sup>204</sup> If the lessor refuses to do so or if the property is destroyed, the lessee has two options. One, he can repair the damage himself and deduct the cost of repair from his lease payment.<sup>205</sup> There are two further considerations regarding the urgency of the damage under this first option. First, if the damage is not urgent, the lessee should obtain permission of the court before repairing the problem. Second, if the damage is urgent, the lessee can repair the problem without court permission and should retain proof of expenditures for the purposes of reimbursement. Under either scenario, the lessee should inform the lessor of the problem and his intention to fix it. Alternatively, the lessee can cancel the lease.<sup>206</sup> The lessee cannot interfere with a lessor’s attempt to repair the property. However, if the repairs interfere with the lessee’s ability to earn profit from the property, the lessee can either cancel the contract or demand that the lessor reduce the rent.<sup>207</sup>

The lessee’s right to cancel the contract for damage or destruction of property is not absolute. If the lessee was aware or could have easily found out about the damage when he entered the lease contract, the lessee does not have the right to demand that the lessor cancel the lease or reduce the rent.<sup>208</sup> But, recall the general principles governing contracts. If the lessor deceived the lessee, the he has committed fraud. And the lessee may cancel the lease contract when the lessor has committed fraud.<sup>209</sup> The Civil Code, however, places the burden of proving fraud or deceit on the lessee. Article 1376(2) of the Civil Code assumes that the lessee receives the property in good condition “unless evidence to the contrary is found.”

Generally, the Civil Code demands that the lessor honor his bargain with the lessee. The Civil Code also places the burden of repair on the lessor rather than the lessee. This is because the lessor is (or should be) more knowledgeable about the property. Reconsider the moldy apartment example. Given these two general principles, do you think you would have a strong argument to cancel the lease for the moldy apartment? It likely depends. If you were aware of the mold problem, you might be bound to the lease under Civil Code Article 1360. If you were not aware of the mold problem, then you might be able to cancel pursuant the discussion regarding Articles 1351 through 1354 above.

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<sup>204</sup> See also Law on Managing Land Affairs of 2008, Article 62 (all *essential* repairs as may required by local custom).

<sup>205</sup> Civil Code, Article 1352.

<sup>206</sup> Civil Code, Article 1352.

<sup>207</sup> Civil Code, Article 1355.

<sup>208</sup> Civil Code, Article 1360.

<sup>209</sup> Civil Code, Article 1364.

### 3.2.2 Lessee obligations

A person who leases property also must abide by certain obligations. If a lessee fails to honor his obligations to the lessor, the lessor may be able to demand that the lessee repair his property or demand that the lessee compensate him for the damage.<sup>210</sup>

Under Article 1367 of the Civil Code, a lessee cannot modify the lessor's property in a way that "causes harm." The Civil Code demands that lessees treat the property with respect; the lessor trusts the lessee with his property.<sup>211</sup> The lessee is "responsible for taking care of [the property]" and cannot use the property in a way that would damage it.<sup>212</sup> Under the Law on Managing Land Affairs of 2008, taking care of agricultural land requires a lessee to cultivate the land and protect its soil.<sup>213</sup>

In the event of minor damage, a lessee must repair it, unless the lease agreement states otherwise.<sup>214</sup> The lessee must also inform the lessor of any problems that arise with the property (for example, the windows or pipes begin to leak).<sup>215</sup> At the end of the lease, the lessee must return the lessor's property in the same condition that he received it in, unless he had no control over the damage that occurred.<sup>216</sup> When might a lessee have no control over damage that occurred? Imagine an earthquake that cracks a home's walls or huge rainstorm that washes away the dirt in a field. Such circumstances likely would qualify as damage over which the lessee had no control. However, the lessee still would be required to inform the property owner about the damage.

Consider how the lessee's obligations interact with the lessor's obligations. Recall that a lessee may be able to cancel a lease if damage to the property unexpectedly inhibits his ability to use it.<sup>217</sup> But the Civil Code also demands that the lessee inform the lessor of damage and requires the lessee to make minor repairs. First, consider why the Civil Code might allocate responsibility in this manner. Maybe the Civil Code seeks to place the burden on the person with the best access to the information. When property incurs minor damage, the person in possession of the property, the lessee, is in the best position to know about the damage. Thus, the Civil Code requires the lessee to inform the lessor of any problems that might arise.<sup>218</sup> It is not until the lessor refuses to repair the property that the lessee might be able to cancel the contract or otherwise demand compensation.<sup>219</sup>

Not all changes to property constitute harm. For example, Article 1368 of the Civil Code recognizes that lessees have the right to install appliances and to obtain basic utilities like electricity, telephone, and radio, so long as such changes do not harm the property.<sup>220</sup> Similar to the lessee's duty to treat the property with respect, the lessor must respect the lessee's reasonable requests to access services and modern conveniences. At the end of the lease, the lessee may be able to demand compensation for improvements if they increased the property's value and if the lessor agreed to the improvements in written form.<sup>221</sup> However, if the lessee made the improvements without the lessor's knowledge or if the

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<sup>210</sup> Civil Code, Article 1367.

<sup>211</sup> Civil Code, Article 1371.

<sup>212</sup> Civil Code, Article 1371.

<sup>213</sup> Law on Managing Land Affairs of 2008, Article 61.

<sup>214</sup> Civil Code, Article 1369; Law on Managing Land Affairs of 2008, Article 61(5).

<sup>215</sup> Civil Code, Article 1372.

<sup>216</sup> Civil Code, Article 1376.

<sup>217</sup> Civil Code, Articles 1351-1354.

<sup>218</sup> Civil Code, Article 1372.

<sup>219</sup> Civil Code, Article 1355.

<sup>220</sup> Civil Code, Article 1368.

<sup>221</sup> Civil Code, Article 1378; Law on Managing Land Affairs of 2008, Article 69.



lessor objected to the changes, the lessee may be required to remove the items and compensate the owner for any resulting damage.<sup>222</sup>

### **Damage to Property**

Hamza owns a building with several units. Ahmad, a bookstore owner, enters a contract with Hamza to rent a unit for his bookstore for three years. One year into the lease, Ahmad discovers that one of the windows is leaking. Eight months later, the leak has become very bad. Every time it rains, water floods into his store and damages his books. The leak has been bad for at least five months. Ahmad has not told Hamza about the leak. Ahmad also has not made any attempt to repair it. Ahmad comes to you for advice. What should Ahmad do?

Ahmad had a duty to tell Hamza about the leak. However, Hamza also has a duty to Hamza to ensure his property remains in good repair. It is difficult for Hamza to maintain his property, however, if his lessee, Ahmad, does not inform him about new damage.

Because the leak did not appear until one year after the lease began, it likely would be difficult for Ahmad to prove that Hamza intentionally deceived him. If taken to court, a judge likely would conclude that the damage was not Hamza's fault and that the damage may have occurred after Ahmad began leasing the property. A judge might instead find that Ahmad breached his obligation to Hamza by failing to inform Hamza about the leak, as required under Civil Code Article 1372. Moreover, because Ahmad already has waited eight months, the judge might conclude that Hamza damaged Ahmad's property and breached Ahmad's trust, in violation of Civil Code Article 1371. Thus, the judge might require Hamza either to repair the damage or to compensate Hamza for the repair.

### **3.2.3 Death of the lessee or lessor**

If a lessee or lessor dies before the end of a lease, the lease continues. If the lessee dies, the lessee's heirs will be responsible for honoring the terms of the lease agreement, including making payments on time.<sup>223</sup> This requirement, however, is not absolute. If the lessee's heirs cannot afford to pay for the lease or if they do not need the lease (e.g., the apartment is too big), they may terminate the agreement provided that they do so within six months of the lessee's death and they observe the contractually designated period for evacuation notification.<sup>224</sup> If the heirs wait longer than six months or do not observe the required notification, they will be bound to the lease agreement even if they meet one of the two conditions sufficient for release from the lease.

Why might the law create a presumption in favor of having a lease continue after one of the parties dies? One reason might be that it encourages people to enter contracts for leases; valuable land will be used. Property owners do not need to worry what will happen in the event that a lessee dies. Generally, they will be paid according to the terms of the lease agreement. Similarly, lessees do not need to worry what will happen if the property owner dies. Even in the event of the property owner's death, the lessee can remain on the property through the end of the lease. Recall that a similar rule governs property sales. Under Articles 2263 through 2266 of the Civil Code, a lessee has the right to remain on property that is sold. Finally, as with many provisions of the Civil Code, the presumption in favor of continuing the lease supports contracts as institutions. That is, it supports the view that cancellation of contracts should be the

<sup>222</sup> Civil Code, Article 1378.

<sup>223</sup> Civil Code, Article 1387.,

<sup>224</sup> Civil Code, Article 1387.

exception and not the rule. This encourages parties entering into contracts to consider their terms carefully and to abide their effect honorably.

### 3.3 Review

Leases, like property sales, are governed by contracts. Including specific terms in lease agreements can help avoid conflict. Important terms might include the duration of the lease; the amount of payment; how and when payments will be made; and expectations that parties have for each another. When lease terms are not sufficiently specific, courts apply the rules of contractual interpretation.<sup>225</sup> One important consideration in these ambiguous situations may be the customary law on the matter.

Lessors and lessees must respect each another. The lessor must ensure that the property remains in usable condition. Thus, the lessor must fix the property when problems arise. If the property becomes unusable or severely damaged, the lessee may be able to terminate his lease contract. The lessor also must allow the lessee to make reasonable improvements to the property, so long as they do not harm it.

A lessee may not damage the property, and he must actively care for it. When problems arise, the lessee must notify the lessor and fix minor damage. The lessee must return the property in the same condition he received it. If the lessee damages the property, he may be responsible for repairing it or for compensating the lessor for such costs.

If either the lessor or the lessee dies before the end of the lease, the lease agreement will continue unless the party seeks an exception.

## 4. Inheritance

When a person dies, the deceased's property is distributed among his heirs according to the Civil Code Articles 1993 through 2197.<sup>226</sup> Islamic Law also provides a set of rules to determine the distribution of one's property and its rules influence many of these code provisions. This distribution of property is called an **inheritance**. An **heir** is an individual who is eligible to receive a dead relative's property (the **deceased**) according to Islamic Law.<sup>227</sup> Heirs have a **future interest** in their relative's property. An heir's legal right to a relative's property does not become enforceable until the relative dies and the property has been distributed according to the provisions of the Civil Code. Property that can be inherited includes both movable property, like cars and livestock, and immovable property, like land and buildings.

If the deceased had debts, the deceased's property will first be used to satisfy those debts. Once all debts have been paid, the deceased's property will transfer to the deceased's heirs. The court is responsible for distributing the deceased's property.<sup>228</sup>

Inheritance law is complex. Here we provide a brief introduction. First, we will consider four basic principles of inheritance law. This framework is based on Civil Code's inheritance provisions and is one way to understand how inheritance law works. As you read through this section, consider whether you think this framework is accurate and whether you think other principles may apply. Second, we will discuss a series of requirements, or preconditions, that must be satisfied before inheritance can be distributed. These preconditions include the requirement that all of the deceased's debts be paid before inheritance can be distributed to heirs. We also will consider **wills**, which express how a person would

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<sup>225</sup> Civil Code Articles 705-729.

<sup>226</sup> Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 74 (2005).

<sup>227</sup> Law of Managing Land Affairs of 2008, Article 3(2).

<sup>228</sup> Law of Managing Land Affairs of 2008, Articles 3(2) & 24.

like his property distributed after he dies. Wills may depart from the Civil Code’s general distribution rules. We conclude our discussion of inheritance with an example. It will draw upon both the Civil Code provisions mentioned in the overview of inheritance law as well as some others. The goal of the example is to familiarize you with the Civil Code’s inheritance provisions.

This introduction to inheritance law does not consider significant portions of the Civil Code. For example, the discussion below does not consider how inheritance is allocated to distant relatives (**Dhawi-al-arham**), Civil Code Articles 2043 to 2050; the role of an **executor**, a person appointed by the deceased to oversee the distribution of property, Articles 2061 to 2067; or how debts shall be paid and how inheritance is distributed, Articles 2077 to 2102.

#### **4.1 Four Principles of Inheritance**

Inheritance under the Civil Code is based upon four principles: First, certain family members have an **inalienable right** to inherit a deceased family member’s property. An inalienable right is a guaranteed right that is not subject to sale or transfer. Second, heirs with a closer family relationship to the deceased are entitled to a greater share of the deceased’s property. That is, the proximity of the family relationship matters when it comes time to divide the deceased’s property. Third, women heirs are entitled to receive their share of the deceased’s property. Fourth, men receive a greater share than women, because historically they have been responsible for paying family expenses.<sup>229</sup> As you read through the Civil Code, consider how the Civil Code reflects these four principles. Also consider when the Civil Code may depart from these general ideas.

##### **4.1.1 Principle 1: The deceased’s spouse, parents, and children have an inalienable right to inheritance.**

Family members with an inalienable right to inherit property include the deceased’s spouse, parents, and children.<sup>230</sup> The right is inalienable because no one can take it from them and they cannot transfer the right to someone else. Consider Civil Code Articles 2024 through 2041, titled “Exclusion from Inheritance (Hajab).” Notice that Article 2032, under some circumstances, denies inheritance to brothers and sisters. Similarly, Article 2034 denies inheritance to nephews under some circumstances. None of the articles fully excludes the deceased’s spouse, parents, and children from inheriting the deceased’s property. Now consider Article 2027. Under Article 2027, six people shall never be fully excluded from inheritance: the deceased’s father, mother, son, daughter, husband, and wife. Article 2027 is unique. No other provision of the Civil Code grants an absolute right to inheritance.

##### **4.1.2 Principle 2: The proximity of the family relationship matters.**

Inheritance is divided according to the proximity of the family relationship. Under the Civil Code, direct family members, like the father, mother, son, daughter, wife, and husband, have first priority over the deceased’s property and are entitled to a greater share of it than other relatives.<sup>231</sup> Other relatives, like cousins, aunts, and uncles, receive inheritance only after the direct family members receive their share. Consider Civil Code Articles 2002 and 2004. Article 2002 notes that inheritance is allocated based on two different methods, the quota system and the residuary system. Which method is used depends on whether the heir’s relationship with the deceased is based on marriage, blood, or both. Those who are related to the deceased by marriage include the deceased’s father and mother, her children, her full sisters and

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<sup>229</sup> Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 74 (2005).

<sup>230</sup> Civil Code, Article 2027.

<sup>231</sup> Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 74 (2005).

brothers, her spouse, and her full grandfathers.<sup>232</sup> These relatives are entitled to inheritance under the **quota system**. Those receiving inheritance under the quota system are entitled to a specific share of the inheritance, the **farz**. The farz is allocated before the inheritance is distributed to those entitled to inheritance under the residuary system.<sup>233</sup> Consider Article 3 of the Law of Managing Land Affairs of 2008, which defines **family** as deceased's husband, wife, and unmarried children.<sup>234</sup>

Next consider Civil Code articles 2012 to 2023. These articles consider how inheritance is allocated under the **residuary system**. Per article 2012, **residuaries** include those heirs who do not receive inheritance under the quota system and those heirs who do. Residuaries receive whatever remains of the inheritance after the quota heirs have received their shares. The residuaries' rights to inheritance are secondary to the rights of the quota heirs. Residuaries include uncles on the father's side, Article 2016(4), and half sisters and half brothers, Article 2019(1)(3). Such relatives have more distant relationship with the deceased than those entitled to inheritance under the quota system, like the deceased's full sisters and brothers, children, and parents. Notice that there is some overlap between quota heirs and residuary heirs, like the sons, fathers, and full brothers noted in Article 2016. When an heir could inherit property under either the quota system or the residuary system, the heir is entitled to inheritance under both.<sup>235</sup> Given the proximity principle, allowing such heirs to inherit under both systems makes sense. Per the structure of the Civil Code, their ties to the deceased are especially strong.

#### **4.1.3 Principle 3: Women are entitled to inheritance.**

Women family members are entitled to their precise share of inheritance. Consider Article 40 of the Constitution of Afghanistan, “[n]o one shall be forbidden from owning property and acquiring it.” The Constitution protects the property rights of both men and women. The Civil Code's inheritance provisions reflect this protection. Civil Code Article 2006, within the Civil Code's quota system provisions, indicates that sons and daughters of the same mother will receive an equal share of inheritance, the “male and female share shall be equal in dividing.”

Under Islamic Law, women also are entitled to inherit property. Under customary law, however, women generally do not have a right to inherit a relative's property when there is a male heir.<sup>236</sup>

#### **4.1.4 Principle 4: Men generally receive a greater share of inheritance than women.**

When men and women have a similar relationship to the deceased, men generally receive a larger share of inheritance than women. This principle is based on the idea that men historically have been responsible for paying for family expenses.<sup>237</sup> Consider Civil Code Article 2007, which is within the Civil Code's quota system provisions. The husband of the deceased is entitled to half of the inheritance, while a similarly situated wife is entitled to one fourth of the inheritance. Consider Article 2019, which is within the Civil Code's residuary provisions. Under Article 2012(2), a male who qualifies as a residuary under Article 2019(1) receives twice as much inheritance as a female who qualifies as a residuary under the same provision. This principle is not always true. Consider Article 2006. Under Article 2006, sons and daughters of the same mother shall receive an equal share.

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<sup>232</sup> Civil Code, Article 2004.

<sup>233</sup> Civil Code, Article 2004.

<sup>234</sup> Law of Managing Land Affairs of 2008, Article 3(3).

<sup>235</sup> Civil Code, Articles 2002-03.

<sup>236</sup> Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 74 (2005).

<sup>237</sup> Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 74 (2005).

## 4.2 Conditions on Receiving Inheritance

Before inheritance is divided among a person's heirs, the Civil Code and Islamic Law state that the deceased's funeral expenses and debts must be deducted from his property.<sup>238</sup> These expenses and debts first are deducted from the deceased's movable property. If the movable property does not satisfy the deceased's debts and expenses, the debts and expenses will be deducted from his immovable real estate.<sup>239</sup>

After the deceased's expenses and debts have been satisfied, the remaining property, the **matruka**, is divided among the deceased's heirs.<sup>240</sup> First, property is allocated according to the deceased's **will**, if she has one. A will indicates how a person would like her property to be distributed after her death.<sup>241</sup> Speech, writing, or customary used signs all can be evidence of a will.<sup>242</sup> Note that customarily used signs are an exception that is only accepted where a person cannot write or talk. Once the conditions of the deceased's will have been satisfied, the deceased's property is allocated according to the Civil Code's provisions and the principles outlined above.

If the deceased has a will, it must be honored and given priority after the deceased's debts are paid.<sup>243</sup> Wills can distribute property to certain people and can give property away for charitable purposes, including to mosques, educational institutions, and the poor.<sup>244</sup> Those who receive property from a will must be notified. Their acceptance of the inheritance can be either express or implied.<sup>245</sup> If the acceptance must be express, the heir has thirty days to answer in writing. If the heir fails to do so and lacks a reasonable excuse, the will be considered void.<sup>246</sup>

Wills are subject to certain limitations. First, wills can only determine the distribution of one-third of the **matruka** unless the deceased's heirs authorize a larger distribution.<sup>247</sup> Second, the deceased cannot grant property to a foreigner, because foreigners cannot own property.<sup>248</sup> If a foreigner is identified in a will, the foreigner will receive a payment instead of the property.<sup>249</sup>

A final limitation on inheritance arises with respect to intentional murder. If a person intentionally murders the deceased, he is not entitled to inherit property under the Civil Code. This prohibition on inheritance applies broadly. It includes people who actually murder the deceased, those who assist in the murder, and those who provide false testimony that leads to the deceased's execution.<sup>250</sup>

## 4.3 An Example: Applying the Civil Code

Mirwais has a wife and a twenty-year-old son. He does not have any other relatives. Upon his death, he owed 500,000 afghani to a mortgagee and his funeral cost 50,000 afghani. Mirwais's moveable property

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<sup>238</sup> Civil Code, Articles 1997-1998, 2077, 2079 & 2087; Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 74 (2005); Wael B. Hallaq, *Sharī'a: Theory, Practice, Transformations*, (Cambridge UP: Cambridge 2009), 290.

<sup>239</sup> Civil Code, Articles 2079, 2080.

<sup>240</sup> Civil Code, Article 2087; Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 74 (2005); Wael B. Hallaq, *Sharī'a: Theory, Practice, Transformations*, (Cambridge UP: Cambridge 2009), 290.

<sup>241</sup> Civil Code, Article 2103.

<sup>242</sup> Civil Code, Article 2104.

<sup>243</sup> Civil Code, Article 1997.

<sup>244</sup> Civil Code, Articles 2110, 2115 & 2128.

<sup>245</sup> Civil Code, Article 2122.

<sup>246</sup> Civil Code, Article 2124.

<sup>247</sup> Civil Code, Article 2115.

<sup>248</sup> Constitution of Afghanistan, Article 41, Civil Code, Article 2000(2) & 2112(2).

<sup>249</sup> Civil Code, Article 2000; Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 75 (2005).

<sup>250</sup> Civil Code, Articles 1999 (inheritance) & 2119 (wills).

is valued at 1,500,000 afghani. His land and other immovable property is valued at 1,000,000 afghani. Mirwais has a written will that gives all of his property to his wife. Based on monetary value alone, how should a court distribute Mirwais's property?

When thinking about how to approach this problem, think about the principles described above. Who must be paid first? What effect does the will have? After the property is distributed according to the will, is there anything left? If so, who gets the property?

A table follows the suggested approach below; it may help guide you through solving this problem.

#### **4.3.1 Satisfy all debts and expenses.**

Mirwais has 550,000 afghani worth of debt and funeral expenses. Recall that under Civil Code articles 1997, Mirwais's debts and funeral expenses must be deducted from his property before inheritance is allocated to Mirwais's heirs, his son and wife. Mirwais's debts and expenses first are deducted from his movable property.<sup>251</sup> Here, the value of Mirwais's movable property is greater than his total debt and funeral expenses. After deducting the debts and funeral expenses, Mirwais's moveable property is worth 950,000 afghanis. Mirwais's immovable property value remains at 1,000,000 afghanis because the debt and expenses can be satisfied with Mirwais's movable property.

#### **4.3.2 Allocate inheritance according to Mirwais's will and the Civil Code.**

Per Mirwais's will, Mirwais would like all of his property to be given to his wife. Recall that under Civil Code Article 2115, in a situation where the will assigns more than one third of the whole property, the assignment will be automatically reduced to a one-third portion unless the successor agrees to a larger distribution. So in this example, the will can only allocate one third of Mirwais's property to his wife unless his son agrees to a larger distribution. If the son agrees to will, Mirwais's wife would receive 1,950,000 afghani worth of property, the total value of Mirwais's property after all debts and expenses have been satisfied. Mirwais does not have any other relatives, so no one else could object to this allocation.

Now, assume the son does not agree to giving his mother all of his father's property. Per the will and Civil Code Article 2115, Mirwais's wife would then receive one-third of the property that remains after the debts and expenses have been satisfied. She would receive 650,000 afghani worth of property from the will alone. Because Mirwais's son objected to the will, the Civil Code's provisions also must be considered. First, determine the amount of property remaining. Two deductions must be made from Mirwais's total property value: one, Mirwais's debt and expenses; two, the amount of property given Mirwais's wife according to his will and as limited by the Civil Code.

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<sup>251</sup> Civil Code, Article 2079.

<b>Property Value</b>		<b>Will</b>
Movable Property Immovable Property <b>Total Property Value</b>	1.5m afghanis 1m afghanis <b>2.5m afghanis</b>	Mirwais's will gives 100 percent of his property to his wife.
<b>Debt &amp; Expenses</b>		<b>Civil Code</b>
Debt Funeral Expenses <b>Total Debt&amp;Expenses</b>	500k afghanis 50k afghanis <b>550k afghanis</b>	<u>Article 1997: Allocation of Property</u> • Debts and expenses must be paid before distributing inheritance; • Wills have priority over the Civil Code's provisions
<b>Property Value After Debt &amp; Expenses</b>	<b>1.95m afghanis</b>	<u>Article 2007: Wife's Quota</u> • A wife with children is entitled to one eighth of the deceased's property
		<u>Article 2008: Son's Quota</u> • A son is entitled to half of the deceased's property
		<u>Article 2017: Son's Residual</u> • Sons, directly related by blood to the deceased, are entitled to the remaining inheritance
		<u>Article 2079: Debt &amp; Expenses</u> • Debts and expenses shall be deducted from moveable property before they are deducted from immovable property
		<u>Article 2115: Limitations on Wills</u> • Wills can only allocate one third of the deceased's property, unless the heirs eighteen or older agree to the will's distribution of property

#### 4.4 Review

The Civil Code's inheritance provisions are based on Sharia. Before inheritance can be distributed, all of the deceased's debts must be satisfied. The four-principle framework described above provides one way to understand the Civil Code's inheritance provisions. First, the deceased's spouse, parents, and children have an inalienable right to inheritance. Second, the proximity of the family relationship matters; close relatives receive more than distance relatives. Third, women are entitled to inheritance. Fourth, men generally receive a greater share of inheritance than women. Finally, recall that wills can change how inheritance is allocated among heirs. A will, however, can allocate up to one-third of the deceased's property by default, and as explained above, can exceed this limit under certain conditions.

#### 5. Other ways to transfer property

It is important to remember that while this chapter has focused on the most prevalent forms of property transfer, but it has not provided an exhaustive catalogue of the topic. One final topic that merits discussion, donations, will be presented in brief here.

Property transfers also occur when a person gives property to someone else without receiving any compensation or when two people exchange property with each other, **gifts or donations**.<sup>252</sup> As with other property transfers there are limitations on who can transfer property through gifts and requirements that must be satisfied before a property donation is considered legally valid. Under Article 1177 of the Civil Code, the person giving away the property, the **donor**, must have the capacity to make an informed decision. Under Article 1178, the donor cannot force it upon the **recipient**, the person who receives the gift. Rather, the recipient must voluntarily accept the property. Finally, as with other property transfers, the transfer must occur on the basis of a legal deed.<sup>253</sup>

One of the benefits of donating property is that owner can specify how the recipient must use the property.<sup>254</sup> The donor also is not responsible for any property defects, unless he intentionally conceals them or guarantees that the property is in good condition—that is, unless he commits fraud.<sup>255</sup>

#### Waqf: Charitable Endowments

Under Islamic Law, one special form of donation is called **waqf**, or a charitable endowment. According to the Hanafi School of Islamic jurisprudence, waqf is “is is of Ion of the corpus from the ownership of any person and the gift of its income or usufruct either presently or in the future, to some charitable purpose.”<sup>256</sup> To better understand this definition, we will break it into parts and discuss each one.

First, the definition tells us that waqf is property whose owner gives up his ownership rights. Unlike other transfers of property discussed in this chapter, when an owner gives up his ownership rights in forming a waqf, those rights do not transfer.<sup>257</sup>

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<sup>252</sup> Civil Code, Articles 1176, 1179 (mutual donation) & 1198 (discussing compensation).

<sup>253</sup> Civil Code, Article 1180 (formal paper); Civil Code, Article 2212 (all legal requirements must be satisfied); Law on Managing Land Affairs of 2008, Articles 4, 57 (legal deed requirement), & 60 (all legal requirements must be satisfied).

<sup>254</sup> Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 76 (2005).

<sup>255</sup> Civil Code, Article 1195.

<sup>256</sup> *Origin and Development of Islamic Law* Vol I, in *Law in the Middle East*, (eds. Majid Khadduri and Herbert J. Liebesny 1995), 203.

<sup>257</sup> *Real Property, Mortgage, and Wakf According to Ottoman Law* (1884), 82; *Origin and Development of Islamic Law*, supra note 256, at 208.



This is accomplished by giving the property to a **trustee**.<sup>258</sup> A trustee is a person or group that takes care of property and makes sure the property is used in the way the original owner instructed. While trustees manage the property and its usage, they do not own the property.<sup>259</sup>

Second, the definition tells us that the care of property and makes sure the property is used in the way the original o, [is given] to some charitable purpose.”haritable purposeeither starting immediately or at some future date, the income or usufruct created by the donated property will be given to a charitable purpose.

Putting these parts together, we can see that waqf is property that an owner gives up his rights to and the usufruct or income from the property is donated for a charitable purpose.

Now that we have a basic definition for waqf, we will begin to look at other important legal features of waqf. In particular, we will discuss the key characteristics of waqf and the types of waqf.

### **Key Characteristics of a Waqf**

There are six crucial features of waqf: consent of the owner, tangibility and permanence of the property, irrevocability, perpetuity, inalienability, and charitable purpose.<sup>260</sup> We will look at each one of these features in order.

First, in order for property to be deemed a waqf, the owner of the property must declare his desire to donate the property as a waqf.<sup>261</sup>

Second, the donated property must be tangible and permanent. This means that the donated property must be capable of physical possession and exist permanently. In practice, this mainly limits waqf to real property. However, there are four customary exceptions to the permanency requirement: movable property attached to immovable property, animals, books, and furniture.<sup>262</sup>

Third, a waqf is irrevocable. While some schools of Islamic thought and even those within the same school disagree, Hanafi jurisprudence says that once a declaration of waqf has been made, this decision is irrevocable.<sup>263</sup> This means that once an owner declares that he will give up some property as waqf, he may not take the property back.

Fourth, under Hanafi jurisprudence a waqf must exist in perpetuity. This means that once property becomes waqf, it remains a waqf permanently. It may not be made waqf temporarily.<sup>264</sup>

Fifth, waqf is unalienable. This means that once a waqf is established, the underlying property may not be sold, given as a gift, mortgaged, or transferred. It must remain with the trustee to which it has been given.<sup>265</sup> It is important to note that a waqf may be leased for a year without breaching inalienability. This is permissible because the lessee only gets to use the property, not own it. Since ownership does not change, the waqf has not undergone a transfer and does not breach inalienability. Leasing a waqf for longer may be prohibited because the longer the lease, the more it seems like the lessee has come to own

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<sup>258</sup> *Origin and Development of Islamic Law*, supra note 256, at 204.

<sup>259</sup> See “Trustee,” Merriam-Webster Online, available at <http://www.merriam-webster.com/dictionary/trustee>.

<sup>260</sup> *Origin and Development of Islamic Law*, supra note 256, at 205-06.

<sup>261</sup> *Id.* at 205.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 206-07.

<sup>264</sup> *Id.* at 207.

<sup>265</sup> Real Property, Mortgage, and Wakf According to Ottoman Law, supra note 257, at 83-84.

the land.<sup>266</sup> The ability to lease a waqf is not an exception to inalienability, rather it is an action does not breach the requirement at all.

There is, however, one exception to inalienability that allows someone to breach the requirement. If the original owner of the waqf property allows it or if the original property becomes no longer able to produce any benefit to fulfill the waqf's purpose, the underlying property may be transferred. This transfer may occur in two ways. The waqf may be sold and the proceeds used to buy new property to carry out the goal of the waqf or the waqf may be exchanged for an equivalent piece of property. The newly acquired property then becomes subject to the same conditions and put to use for the same purpose as the original waqf property.<sup>267</sup>

Last, the waqf must have a charitable goal. This means that the waqf must eventually be used for charity such as helping the poor or supporting a mosque. However, putting the property to use supporting charity or religion does not need to be the property's immediate use. The owner may designate that the property be used to help certain individuals first, such as the owner's family or the owner himself under Hanafi Jurisprudence, so long as that once these individuals die, the property is put to charitable use.<sup>268</sup>

Only property fulfilling these six characteristics may be considered waqf. In the next section, we will explore the types of waqf.

### **Types of Waqf**

Under the Hanafi School of Islamic thought, there are three types of waqf: waqf promoting religion, public waqf, and familial or private waqf.<sup>269</sup>

A waqf promoting religion is a waqf donation that gives property completely to a mosque. This property can be used as a site for a mosque or to create usufruct or income to support and maintain religious buildings.<sup>270</sup>

A public waqf is property used to help the poor or in support of the public more generally. Public waqf include property that support hospitals, schools, bridges, and other similar public properties. Like a waqf promoting religion, a public waqf may be either the site for the public institution or it may be used to generate income or usufruct to support the public place.<sup>271</sup>

Last, a familial waqf is property that is donated to support individual people. Generally, these people will be family members of the original property owner. The owner can even designate that future generations of his family should continue to receive the income or usufruct from the waqf. However, in order to be considered waqf, once the last individual designated by the owner dies, the waqf must then go on to support a charitable purpose.<sup>272</sup>

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<sup>266</sup> *Origin and Development of Islamic Law*, supra note 256, at 208-09.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 203-04, 206.

<sup>269</sup> See Real Property, Mortgage, and Wakf According to Ottoman Law, supra note 257, at 85-86.

<sup>270</sup> *Id.* at 85.

<sup>271</sup> *Id.*

<sup>272</sup> Petter C. Hennigan, *The Birth of a Legal Institution: The Formation of the Waqf in Third-Century A.H. Hanafi Legal Discourse* (Rudd Peters and Bernard Weiss eds. 2004), at xiv.

## SUMMARY

All of the property transfers we have considered in this chapter have been voluntary. Everyone with an ownership interest in a property must consent to a property transfer. As discussed in the chapter's introduction, not all property transfers are voluntary. The chapter on legal and illegal takings addresses involuntary transfers.

Voluntary transfers of property can occur through four different processes: property sales, leases, inheritance, and donation. These processes differ in terms of the interest a person acquires (or relinquishes), how the acquirer has the interest (permanent or temporary), and when a person might acquire the interest (present interest or future interest). When a person transfers his property, he need not relinquish all of his rights to it. In leasing property, a property owner retains his ownership interest and he transfers his possessory interest, the right to be on and use the property. The transfer of his possessory interest, however, is temporary. The property owner, as the lessor, retains a future interest in possession. Once the lease ends, the property owner regains his right to possess and use the property that he owns.

Property leases are different from property sales. In a property sale, a property owner permanently gives all of his rights, both ownership and possessory, to a new property owner. The new property owner, the buyer, will immediately gain an ownership interest in the property, once the legal formalities have been satisfied. The new owner, however, may have to wait before he can use and possess the property. This may occur if someone is leasing the property. The new owner must honor the interest of the current possessor, the lessee.

Mortgagees also have a temporary interest in property. Unlike lessees, however, mortgagees have a temporary ownership interest in the property rather than an immediate interest in possession. Thus, before a property owner can sell his property, he must first obtain a mortgagee's consent. Recall that a mortgagee's interest in the property arises from a monetary loan that he gave the property owner. A mortgagee's interest in the property ends once the property owner repays his debt. Thus, the mortgagee's has a temporary interest in the value of the property.

Unlike property owners, lessees, and mortgagees, heirs have a future interest in property ownership. An heir's interest arises once a relative dies. When a relative dies, they may obtain an ownership interest in property. Many of the Civil Code's inheritance provisions are based on Sharia.

A property owner also can give his property to another person or entity, a donation. Donations are different from property sales, because the owner does not necessarily expect anything in return for the property. Like property sales, however, donations must be voluntary. Both the property owner and the property recipient must agree to the property transfer. The property owner (donor) cannot force the recipient to accept. Recall that forcing someone to accept property would violate both the Civil Code's provisions governing donations and the principles of the law of obligations. Contracts are not voluntary if accompanied by a threat. Contracts that are not voluntary are invalid.

Below are my suggestions on how we can re-order the topics so that it is structured in a more logical way. In doing so, I have mainly considered the structure of the CCA and other book I have. If it is confusing, we can talk about it. If it takes a lot of your time to restructure everything, then I think it is not that necessary.

## CHAPTER 5: PROPERTY TRANSFERS WITHOUT PERMISSION

### INTRODUCTION

The Constitution of Afghanistan protects the right to own property. “Property shall be safe from violation.” (Constitution of Afghanistan, Article 40.)<sup>273</sup> The Civil Code provides similar protection to property owners: “Except by law, no one shall be disposed of ownership of his property.” (Civil Code, Article 1903.)<sup>274</sup> In this chapter, we consider two such exceptions to the right to own property. Under some circumstances, the government or a person may take away or limit an owner’s right to his property.

For example, consider the following scenario regarding the government taking away an owner’s right to his property: Abdul owns land with a large gold deposit on it. The government would like to extract the gold. To do so, the government must build a road across Abdul’s land. Would it be legal for the government to build a road and to extract the gold? Should the government be required to compensate Abdul for the use of his land? Should the government be required to notify Abdul before it takes his property?

Now consider this scenario regarding a person taking away an owner’s right to his property: Hamid, who owns property in Kandahar, fled the country in 1985. While Hamid was gone, Naqib began living on Hamid’s property. Naqib built a new house and began growing maize. Hamid returned in 2003 and wants Naqib to leave. Can Hamid force Naqib to leave?

In the sections that follow we will consider how the law answers these two questions. The exceptions to Constitution’s basic premise that “[p]roperty shall be safe from violation” are included the Constitution of Afghanistan of 2004, the Civil Law of the Republic of Afghanistan of 1977 (the Civil Code), the Law on Land Expropriation of 2000 (and the two amendments made to this Law; one in 2005 and another in 2010)<sup>275</sup>, and the Law on Managing Land Affairs of 2008<sup>276</sup>.

This chapter is divided into three parts. First, the chapter provides an overview of Afghanistan’s history as it relates to land. As you read the chapter, consider whether this history is reflected in the current law. Second, the chapter considers the first scenario from above: when the government can **expropriate** private property; that is, take property without the owner’s permission. Third, the chapter considers second scenario from above: when a person can occupy someone’s property without the owner’s permission, the law of **adverse possession**. As before, these laws are rapidly changing. The laws considered here reflect those in force as of summer 2015.

Before we begin, recall that property ownership includes a number of rights: the right to sell, the right to lease, and the right to occupy and use the property. Recall also that property is **divisible**; a property owner can divide his property into smaller lots and sell or lease these parts of it. We consider similar divisions of property in this chapter: a property owner could lose all of his property or only part of it. The loss might be permanent, similar to a sale of land. It might only be temporary, similar to a lease. Or it might be for only a limited purpose, similar to renting a room in a home for the purpose of living in.

<sup>273</sup> Constitution of the Islamic Republic of Afghanistan, No. 818 (27 January 2004) [hereinafter Constitution of Afghanistan].

<sup>274</sup> Civil Law of the Republic of Afghanistan, Law No. 353 (5 January 1977) [hereinafter Civil Code].

<sup>275</sup> Law on Land Expropriation, Law No. 639 (8 October 8, 2000) (amended, Law No. 794, 4 March 2005; amended, Law No. 1010, 30 June 2010) [hereinafter Law on Land Expropriation].

<sup>276</sup> Law on Managing Land Affairs of 2008, Law No. 958 (2008) [hereinafter Law on Managing Land Affairs of 2008]

As you read this chapter, think about the text of Article 40 of the Constitution of Afghanistan. The text leaves many terms undefined. This is perfectly normal; constitutions, after all, often express broader rights and prohibitions, leaving the details to be defined in statutory law. For example, Article 40 does not define the scope of the property right. This leaves open several questions that will be explored through the course of this chapter. As you read this chapter, also consider the important issue of Afghanistan's history and how land ownership has changed since the late 1970s. How should the law address these changes in ownership? If someone fled Afghanistan and later returns, should he have a right to the property he left behind?

### Constitution of Afghanistan

#### Article 40:

Property shall be safe from violation.

...

No one's property shall be confiscated without the order of the law decision of an authoritative court.

Acquisition of private property shall be legally permitted only for the sake of public interests, and in exchange for prior and just compensation.<sup>277</sup>

## 1. AFGHANISTAN'S RECENT LAND HISTORY

From 1978 to the early 2000s, many Afghan citizens lost their land. During this period, several government regimes asserted control over property. In 1978, the Communist Party seized power and enacted a constitution in 1980 that severely limited private ownership rights.<sup>278</sup> The Communist government distributed land to the poor, and many of these land distributions were not documented.<sup>279</sup> Subsequent leaders granted citizens more control over private property, but private ownership rights remained insecure.<sup>280</sup> In the early 1990s, unrest removed people from their land and forced some people to officially transfer ownership of their land to their oppressors.<sup>281</sup> During this period, there was also a lot of forgery of land ownership documents.<sup>282</sup> The unrest continued into the late 1990s. At that time, the Taliban gained considerable power and began taking property illegally.<sup>283</sup>

<sup>277</sup> As a note, the terms acquisition and expropriation will be used interchangeably in this chapter; i.e., they mean the same thing.

<sup>278</sup> Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, 37 (2005).

<sup>279</sup> Meredith L. Runion, *The History of Afghanistan* 107 (2007).

<sup>280</sup> Norwegian Refugee Council, *supra* note 278, at 39.

<sup>281</sup> Norwegian Refugee Council, *supra* note 278, at 39.

<sup>282</sup> Norwegian Refugee Council, *supra* note 278, at 50.

<sup>283</sup> Norwegian Refugee Council, *supra* note 278, at 39.

From 1978 to 2000, millions of Afghans fled the country. By 1980, two years after the Communist regime had seized power, 750,000 people had fled to Pakistan and more than 100,000 had fled to Iran.<sup>284</sup> By 1984, the number of Afghan refugees in Pakistan increased to nearly 4 million; the number of refugees in Iran increased to 2 million; millions of others fled their homes to live in other parts of Afghanistan.<sup>285</sup> This process of dispersal of a population is often referred to as a **diaspora**. This trend continued through the late 1990s.<sup>286</sup> From 2002 to early 2014, more than 5.7 million people returned.<sup>287</sup> This process of return of a population to its place of origin is often referred to as a **repatriation**. Many of those who returned found that another person occupied the land they once lived on. These returnees lacked the necessary documentation to prove that they once owned the property.<sup>288</sup> Whatever ownership documents they had before they left Afghanistan no longer existed.<sup>289</sup>

Since the early 2000s, the Government of Afghanistan has sought to restore land to people that lost it in the years since the 1978 Communist regime took control.<sup>290</sup> Certain articles describe how and under what circumstances land redistribution shall occur.<sup>291</sup> In 2002, the government established the Special Property Disputes Resolution Court to resolve property disputes, particularly those related to returning refugees.<sup>292</sup> In providing people with security in property ownership the government has two goals. First, it seeks to incentivize private investment. Second, the government wants to encourage people to develop and use their land.<sup>293</sup> Why might secure property rights help the government achieve these two goals?

As you read the two sections that follow, think about this history. Under what circumstances should the government be allowed to force someone to give up his land? And, under what circumstances should a person who has been living on and using someone's land gain ownership rights to that land?

## 2. GOVERNMENT EXPROPRIATION

The Constitution and the laws of Afghanistan allow the government to take private property without an owner's permission in limited circumstances. In this section we consider the legal limits on the government's authority to **expropriate** private land.

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<sup>284</sup> Runion, *supra* note 279, at 111.

<sup>285</sup> Thomas Barfield, *Afghanistan: A Cultural and Political History* 234 (2010); Runion, *supra* note 279, at 111.

<sup>286</sup> PBS, *A Historical Timeline of Afghanistan* (May 4, 2011), <http://www.pbs.org/newshour/updates/asia-jan-june11-timeline-afghanistan/>.

<sup>287</sup> UNHCR, 2014 UNHCR Country Operations Profile – Afghanistan, <http://www.unhcr.org/pages/49e486eb6.html> (last visited May 2, 2014).

<sup>288</sup> Ingrid Macdonald, Middle East Institute, *Landlessness and Insecurity*, Obstacles to Reintegration in Afghanistan, 3 (Feb. 9, 2011); Norwegian Refugee Council, *supra* note 278, at 46-47.

<sup>289</sup> Macdonald, *supra* note 288, at 3.

<sup>290</sup> Consider Law on Managing Land Affairs of 2008, Article 1.

<sup>291</sup> Norwegian Refugee Council, *supra* note 278, at 55. Consider also Law on Managing Land Affairs of 2008, Articles 29 to 33.

<sup>292</sup> Norwegian Refugee Council, *supra* note 278, at 55.

<sup>293</sup> Norwegian Refugee Council, *supra* note 278, at 52-53 (citing *Afghan Assistance Coordinating Authority, the National Development Framework*, Government of Afghanistan, Kabul, April 2002).

Under Article 40 of the Constitution, the government may only take private property if: (1) it is “for the sake of public interests”; (2) the government provides the owner with “prior and just compensation”; and (3) the government obtains an order from an “authoritative court.”<sup>294</sup>

The sections that follow consider the meaning of each of these requirements. First, we consider what it means for something to be “for the sake of public interests.” Next, we consider how you decide what constitutes “just compensation.” The Constitution and laws do not explicitly define the scope of these terms. Third, we consider who has the authority to determine when a proposed government activity is “for the sake of public interests” and how the government must compensate the property owner. Fourth, we consider how much property the government must compensate the owner for. For example, what if the government physically takes a small part of an owner’s property but makes a large portion of the property unusable: should the government compensate the owner for property it does not physically take?

Next, the section distinguishes between permanent and temporary takings of property. First, a **permanent taking** is when the government acquires ownership rights from the property owner without the owner’s permission; this is called an **expropriation**.<sup>295</sup> Expropriations are similar to the property sales considered in the property transfers chapter with one key difference: the government can take the property regardless of whether the owner agrees to the transfer. You may recall that in the property transfers chapter, there is a discussion of voluntary versus involuntary transfers. You can think of an expropriation as similar to an involuntary transfer because it occurs regardless of whether the owner wishes to transfer the property to the government. Second, a **temporary taking** is when the government uses an owner’s property for a limited period of time and for limited purposes. A temporary taking is similar to a property lease.

This section concludes with an example from Turkey in which an international court required the Turkish government to pay a property owner for the use of his property.

## 2.1. “For the Sake of Public Interests”

The government may only take someone’s property without his permission “for the sake of public interests.”<sup>296</sup> The Constitution and the laws of Afghanistan do not fully define what “public interests” might include. Could the government justify taking someone’s property to build a home for the president? What if the government wants to confiscate property to gain access to mineral resources or to build a road? Would those takings be “for the sake of public interests” as that phrase is used in the Constitution?

In short, it is somewhat unclear what constitutes public interest. A literal understanding would suggest that from which the public more generally benefits. If we look to a historical understanding of the term, the Law on Land Appropriation for Public Welfare of 1935, which is no longer in effect, defined public purposes to include: “roads, bazaars, water development, mosques, military installations, factories, hospitals, homes for the poor, sanatoriums, orphanages, government offices, water reservoirs for fighting fires, other construction and developments for public needs and all other developments that benefit the public in general.”<sup>297</sup> If the land was not used for the intended purpose, the owner could buy the land back

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<sup>294</sup> Constitution of Afghanistan, Article 40; *see also* Law on Land Expropriation, Article 2.

<sup>295</sup> Note that the term takings may be used in other legal contexts as well. For instance, in addition to expropriation, the terms usurpation, confiscation, and seizure all refer to different sorts of takings not relevant to the subject matter of this chapter.

<sup>296</sup> Constitution of Afghanistan, Article 40.

<sup>297</sup> Norwegian Refugee Council, *supra* note 278, at 60 (citing Land Appropriation for Public Welfare 1935, Article 2). The law was repealed in 1987, *see* Asian Development Bank, Afghanistan: Capacity Building for Land Policy and Administration Reform 51 (2007).

at the same price.<sup>298</sup> The Constitution of 2004 reflects the general principal of the 1935 Law on Land Appropriations for Public Welfare by limiting the government’s ability to confiscate private property. The government may only confiscate property “for the sake of public interests.”<sup>299</sup>

Reconsider the examples from above. Under the Law on Land Appropriation for Public Welfare, could the government take someone’s property to build a home for the president? Is a home for the president similar to a government office? Could the government take property to access mineral resources or build a road? Is access to mineral resources a “public need”? Would it benefit the “public in general”?

Now consider Article 3 of the Law on Land Expropriation of 2000 (as amended in 2005) and Article 1988 of the Civil Code. You will find the text of these laws below. Notice the similarities between these laws and the definition of public interests in the Law on Land Appropriation for Public Welfare.<sup>300</sup> Consider the above examples again (the president’s home, the mining access, and the road). Do these examples fit within Article 3 of the Law on Land Expropriation and Article 1988 of the Civil Code?

Before reading the articles below, think for a moment about why expropriation might be a good idea. Might there be circumstances under which expropriating land from an individual person, and compensating him for that expropriation, will achieve a greater good for the larger community?

### Law on Land Expropriation

**Article 3:** The council of ministers shall be empowered to expropriate a piece of land totally or partly for the following purposes:

1. Construction of manufacturing institutions, highways, railways, pipelines, extension of communication lines, power transmission cables, sewerage canalization, water supply network, religious mosques and schools, implementation of urban plans, and other public welfare entities.
2. Mining and extraction from underground reservoirs.
3. Lands with cultural or scientific importance, cultivatable lands, vast gardens and major vineyards, which have economic importance, and lands [planned] for jungles and dams may be expropriated in exceptional circumstances upon the approval of council of ministers, pursuant to permission by Sharia and law.

### Civil Code

**Article 1988:** If a mine, treasure, or ancient relics are found in privately owned lands, its ownership shall belong to the government. In addition to rewarding the owner of the land, the land shall be expropriated according to the laws of expropriation.

<sup>298</sup> Norwegian Refugee Council, *supra* note 278, at 60 (citing Land Appropriation for Public Welfare 1935, Article 11).

<sup>299</sup> Norwegian Refugee Council, *supra* note 278, at 60.

<sup>300</sup> Law on Appropriation of Property for the Public Welfare, Law No. 10 (9 November 1935) (repealed Law on Land Expropriation, Law No. 639, 1 July 1987).



Consider the themes that appear in Article 3 of the Law on Land Expropriation. Article 3(1) focuses on building structures that might benefit many people: public utility projects like highways, pipelines, communication lines and religious and educational facilities like mosques and schools. Article 3(2) addresses activities that might increase the government’s wealth through extracting natural resources like oil and coal. Article 3(3) authorizes expropriation only in “exceptional circumstances.” The listed items include taking lands with intellectual value like cultural or scientific importance and lands that might produce wealth like those that can be used to grow crops.

Does Article 3’s definition of “public interest” limit the government’s ability to legally acquire land? For example, could a government official acquire land to open a private food market? Certainly a food market would benefit a large group of people by allowing them to purchase food. But how is a food market different from the items listed in Article 3 of the Law on Land Expropriation? Should it matter whether the government official would keep all of the store’s profits for his personal benefit? Should it matter whether the shop has particularly high or low prices? A food market might not share enough in common with a highway, a manufacturing institution, or a religious mosque to be considered similar to the first items listed in Article 3(1). But, how narrowly or broadly should “other public welfare entities,” the last phrase of Article 3(1), be read? Note that this is a very important question. A narrow interpretation would constrain “public interest” to instances identical or highly similar to those examples mentioned in the law (highways, railways, pipelines, etc.). A broad interpretation would expand “public interest” to encompass the *purpose* behind the examples mentioned in the law—for instance, creating larger economic prosperity. There are benefits to both the narrow and broad approach, but there are dangers as well. Reading the law narrowly may prevent socially useful expropriations simply because such uses are not explicitly mentioned. But reading the law broadly may enable government officials to pursue their self-interest under the auspices of the public interest. Can you see how?

Aside from the Law on Land Appropriation for Public Welfare and the Law on Land Expropriation, the laws offer little insight into the meaning of “for the sake of public interests.” If you were a judge, what factors would you consider when deciding whether the government’s proposed use of private property satisfied the public interest requirement? Can the government take property for reasons other than those listed in Article 3 of the Law on Land Expropriation or Article 1988 of the Civil Code? Notice that Article 3 does not use the term “public interests.” Do you think the list of activities in Article 3 satisfies the Constitution’s “for the sake of public interests” requirement?

### Discussion Questions

In 2003, the government declared that all property in the government’s possession or that the government was using belonged to the government, regardless of whether the property was privately owned.<sup>301</sup> The government later leased some of this land to foreign investors.<sup>302</sup>

<sup>301</sup> Norwegian Refugee Council, *supra* note 278, at 54 (citing Legal Decree for Transfer of Government Property (8 / 1382) 2003, Article 1).

<sup>302</sup> Norwegian Refugee Council, *supra* note 278, at 54.

Does leasing land to private investors satisfy Article 40's requirement that property expropriations be "for the sake of public interests"? What other information might influence your decision?

## 2.2. "Prior and Just Compensation"

Before the government can take someone's property, it must provide him with "prior and just compensation."<sup>303</sup> The government must give a landowner something of value before it takes his land. But, what is "just compensation"? Is just compensation limited to monetary payments? Could the government give a property owner land in exchange for taking his property? What if the government gives the property owner something that is worth less than the property the government takes? Is that "just"?

This section considers the two elements of just compensation. First, what it does it mean for compensation to be "just"? Second, what is "compensation"?

### 2.2.1. The Meaning of "Just"

The Constitution does not define what "just" compensation means. What factors do you think the government should consider when determining how much to give a property owner when it takes land without an owner's permission?

Under Article 2 of the Law on Land Expropriation, the government must determine adequate compensation "*based on* the market price of land." The government must consider the land's location, its quality, and any buildings or crops the owner has on it.<sup>304</sup>

But what does it mean for compensation to be "based on" the land's market value? Does Article 2 limit the government's discretion when deciding how to compensate someone? Could the government pay someone an amount that is much less than the market value, so long as the government merely *considered* the market value? For example, the government might claim that to satisfy Article 2, and thus Article 40, of the Constitution it only needs to consider the market value of the land when it determines how to compensate a landowner for his property. Because government considered the value of the land, the compensation would be "based on" the land's market value. What do you think? Is the argument persuasive?

### 2.2.2. The Meaning of "Compensation"

Now consider the meaning of "compensation." Could the government give someone property as compensation instead of giving him money for it? What if the government took a successful vegetable

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<sup>303</sup> Constitution of Afghanistan, Article 40; *see also* Law on Land Expropriation, Article 2 ("adequate compensation").

<sup>304</sup> Law on Land Expropriation, Articles 8, 10, 11.

farm, 3 jeribs in size, and gave the owner barren land, 9 jeribs in size? Would that exchange satisfy the Constitution's "just compensation" requirement?

To justify the exchange, the government might argue the following: First, the government might claim that it *compensated* the owner by giving him land in exchange for the land that it took. Second, the government might claim that the compensation was "just" and "adequate" because it gave the owner three times as much land as he owned before. Moreover, in determining how much land to give the owner, the government considered the market value of the farm.

Money is the primary form of compensation, but under Articles 13 and 14 of the Law on Land Expropriation, the government may give the owner land as a form of compensation if the owner accepts it.<sup>305</sup> Moreover, if the government gives the owner land that is worth more than the property it takes, the landowner must pay the government for the difference in value.<sup>306</sup> Similarly, if the government gives the owner land that is worth less than the property it takes, the government must give the landowner additional compensation.<sup>307</sup>

Reconsider Article 2 of the Law on Land Expropriation and its requirement that compensation be "based on" the market price of land. Article 14 implies that compensation must be equal, at least when the government gives a property owner land in exchange for the expropriation. Given Article 14, do you think compensation also must be equal when the government gives a landowner money for confiscated land? As the discussion in section 2.4 below will make clear, the government will take into consideration several factors in determining the value of the property, including but not limited to location, size, and other qualities of the land.

### 2.3. Expropriation Procedures

In order to comply with the constitutional principles regarding protecting private ownership while still allowing government expropriation under certain exceptional circumstances, there should be procedures in place to ensure expropriation occurs as fairly as the Constitution prescribes. Under the Law on Land Expropriation, the Council of Ministers must approve a proposed expropriation of property.<sup>308</sup> These government officials will consider whether the government satisfies the constitutional requirements: whether the taking is "for the sake of public interests" and whether the government has provided the owner with "prior and just compensation."<sup>309</sup>

*Commission.* When a city or district confiscates property, it must form a five-member commission to determine how to compensate landowners. The five-person commission must include the property owner (or his agent), a representative from the government department seeking to expropriate the property, a representative from the city or district, a representative from the Ministry of Finance, and a representative from the Ministry of Justice.<sup>310</sup> Together, this group decides how to satisfy the Constitution's "just compensation" requirement. The property owner cannot delay the expropriation proceedings simply by

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<sup>305</sup> Law on Land Expropriation, Article 14

<sup>306</sup> Law on Land Expropriation, Article 14.

<sup>307</sup> Law on Land Expropriation, Article 14.

<sup>308</sup> Law on Land Expropriation, Article 10.

<sup>309</sup> Constitution of Afghanistan, Article 40; Law on Land Expropriation, Article 10.

<sup>310</sup> Law on Land Expropriation, Article 5.

failing to attend commission meetings. If the property owner or his agent fails to attend the commission meetings, the commission will make the decision about compensation without the owner's input.<sup>311</sup>

### **Law on Land Expropriation**

**Article 5:** In order to determine the damages incurred due to land expropriation, a commission shall be formed by the Municipality, composed of the following members:

1. The Owner or the user of the land, or their agent.
2. Authorized representative of the institution or administration for the needs of which the expropriation shall be carried out.
3. A representative from Kabul municipality.
4. A representative from The Ministry of Finance.
5. A representative from the Department for Defending Emirates Property, Ministry of Justice.

*Notice Requirement.* Before taking the land, the Council of Ministers must notify the property owner three months before the government takes the property and indicate the proposed level of compensation.<sup>312</sup> The government also must allow the property owner to harvest any crops the owner has on the land and to retrieve anything of value from the property, unless the government has an "urgent" need to use the land.<sup>313</sup> If the government destroys the crops before the owner can collect them, the government must pay the property owner for the damage.<sup>314</sup> Once the government has compensated the owner for buildings on the property, the owner must demolish any buildings on the property. Further, after the owner demolishes the buildings, he may keep the demolished property; for example, if he tears down his house, he may keep the bricks, wood, windows, etc. that used to make a house.<sup>315</sup> Should the owner refuse to do so, the government has the right to demolish the buildings.<sup>316</sup>

#### **2.4. The Amount of Land Expropriated**

When expropriating property, the government need not take a property owner's entire property. Rather, the government has the authority to take only part of the land. There are some circumstances, however, when the government must take all of the land rather than just part of it. For example, if the government makes it difficult for the owner to use part of his property, the government must compensate the owner for that part of his property as well.<sup>317</sup> Consider this requirement as you read the next section about temporary takings. Are there circumstances in which a temporary taking might become permanent?

<sup>311</sup> Law on Land Expropriation, Article 21.

<sup>312</sup> Norwegian Refugee Council, *supra* note 278, at 61; Law on Land Expropriation, Article 20.

<sup>313</sup> Law on Land Expropriation, Article 6(2).

<sup>314</sup> Law on Land Expropriation, Article 19(1).

<sup>315</sup> Law on Land Expropriation, Article 12.

<sup>316</sup> Law on Land Expropriation, Article 12.

<sup>317</sup> Law on Land Expropriation, Article 4.

### Discussion Question

Under Article 9 of the Law on Land Expropriation, the government does not need to compensate a property owner for the value any land that the government distributed to people from 1978 to 1992. Instead, when expropriating such property, the government needs to compensate property owners for only the value of buildings and trees.

Why might the law make this distinction? Consider the first section of this chapter, which provides a brief overview of Afghanistan's recent land history.

### 2.5. Temporary Use

If a government entity, such as a research organization or surveying agency, only intends to use property temporarily, the government is required to confiscate the land. (Law on Land Expropriation, Article 7) Thus, the government does not need to comply with Article 40's just compensation and "for the sake of public purposes" requirements.

Before the government can use private property temporarily, the government must get permission from the city government or regional director. The government also must request the owner's permission to use the land. (Law on Land Expropriation, Article 7(1)). If the government and the property owner cannot agree on the terms of the government's use of the property, the city mayor or the regional director may make the final decision and allow the government to use the private property. (Law on Land Expropriation, Article 7(2)). If the property is damaged as a result of the temporary government use, the government must reimburse the property owner for the damage. (Law on Land Expropriation, Article 18).

Consider how temporary use of property differs from expropriations. First, unlike expropriations, Article 7 of Law on Land Expropriation does not require the government to wait three months before using land temporarily. Second, unlike expropriations, the government does not have to compensate the owner of the property. Why do you think the law distinguishes between temporary and permanent uses of property?

Notice that "temporary" use is undefined. How long is "temporary"? Certainly, using someone's property for one day might qualify as a temporary use. But what if the government wants to use someone's property for one year? Five years? Twenty years? When does a temporary use become so long that the use should be considered permanent and subject to the Constitution's "prior and just compensation" requirement? Under Article 7 of the Law on Expropriation, city mayors and regional directors likely have the discretion to determine what is "temporary."

Notice also that under the Law on Expropriation, the government must reimburse property owners for any damage caused by the temporary use. But how do you determine how to compensate an owner for damage? Recall the discussion of "just compensation" above. In valuing damages, should the same factors that apply to just compensation apply to this situation? What if the damage is so extensive that the owner can no longer use his property? Does the permanent damage to the property make the government's use of the property permanent and thus subject to Article 40's constitutional requirements?

The Government of Afghanistan decides to build a railroad from Badakhshan Province, in northeastern Afghanistan, to Uzbekistan to export gold from the province. To protect the trains against robbers, the government will build security facilities. One large security facility will be located on Arash's land. Arash raises sheep on his land and has no other place to keep his sheep.<sup>318</sup>

Can the government take Arash's property?

Consider the following: Are the railroad tracks in the public interest? Are the security facilities in the public interest? If the government could build the security facility somewhere else, must the government use the location that causes less harm to Arash? Would it matter if the alternative site harmed Arash's neighbor? What factors might you consider if you were on the commission considering whether to approve the use of Arash's property?

The commission approves the expropriation of Arash's property. Now the government wants to use an additional 4 *jeribs* of Arash's land to store construction equipment temporarily. It plans to use this land for three years, in a place where Arash grows almonds. Almonds are a very valuable crop, and the trees are very expensive to grow. Wood from the trees can be sold for a lot of money. To store the construction materials, the government must cut down all of Arash's almond trees.

Can the government use Arash's property to store the construction materials? If so, must the government pay Arash for his almond trees? Must the government pay Arash for the lost proceeds from his almond crop? For how many years?

Is the use of Arash's property to store construction equipment temporary or permanent?

## 2.6. Comparative Law: An Example from Turkey and the European Human Rights Law

Under the European Convention on Human Rights, a government may only expropriate property if taking the property is in the public interest, if the taking does not excessively burden the property owner, and if the government provides compensation.<sup>319</sup> The European Court of Human Rights, which hears expropriation disputes, requires governments to provide compensation that is prompt, adequate, and effective.<sup>320</sup>

<sup>318</sup> Facts for the hypothetical gleaned from:

- Crops & livestock for Badakhshan: <http://afghanag.ucdavis.edu/country-info/Province-agriculture-profiles/badakhshan>
- Mineral resources (locations): <http://afghanistan.cr.usgs.gov/information-packages>
- Need for railroad to Uzbekistan: <http://www.bloomberg.com/news/2014-02-27/afghanistan-mineral-riches-won-t-go-anywhere-without-rail.html>

<sup>319</sup> Stefan Kirchner & Katarzyna Geler-Noch, *Compensation Under the European Convention on Human Rights for Expropriations Enforced Prior to the Applicability of the Convention*, 19 *Jurisprudence* 21, 23, 25 (2012).

<sup>320</sup> Kirchner & Geler-Noch, *supra* note 319, at 25.

Similar to Afghanistan, the European law does not define the scope of just compensation or even when a government must provide compensation for expropriated property.<sup>321</sup>

In 2013, the European Court on Human Rights, an **international court**, which hears disputes regarding international law, required Turkey to pay 184,000 euros to a family; Turkey had been using the family's land for a schoolyard without compensating the family for its land.<sup>322</sup> The international court issued the award even though the Turkey's courts had found the government's actions justified. According to the Turkish courts, the government was not required to compensate the family because the family could still use the land. Moreover, though the Turkish government was using part of the family's land as a school yard, the family still could sell or rent its land because the family still owned the land. The government had not acquired formal ownership rights from the family.

In requiring the Turkish government to pay the family for the land, the European Court on Human Rights explained that the government had interfered with the family's property right. The Turkish government was using the family's land for a schoolyard, which limited the family's ability to use the land and decreased the land's value. Because these circumstances prevented the family from fully enjoying its property rights, the court ordered Turkey to pay the family.

Consider the above facts in the context of Afghan law. Do you think an Afghan court would rule in favor of the family or the government?

In your opinion, do you think the Turkish courts or the European Court on Human Rights was correct? That is, should a government be required to compensate a property owner when it makes permanent use of private land even if the government not acquire official ownership rights to the land? As you think about this question, consider the incentives. If a government is not required to compensate people for the permanent use of their land, could the government simply use land without ever compensating property owners? What effect would that have on Article 40 of the Constitution?

### 3. ADVERSE POSSESSION

Recall from the property transfers chapter that property can change ownership when both parties agree to the transfer of ownership, as in property sales, inheritance, and donations. When a person possesses someone's property for a long period of time, he may be able to prevent the property owner from challenging his possession.

In this section, we consider the circumstances in which a property owner loses his right to force someone to leave his land, the law of **adverse possession**. The law of adverse possession reflects the idea that it is better to use land than to leave it unused.<sup>323</sup> As you read this section, consider the country's history of

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<sup>321</sup> Kirchner & Geler-Noch, *supra* note 319, at 25.

<sup>322</sup> Case of Ayangil and Others v. Turkey, Application no. 33294/03, European Court of Human Rights (6 Dec. 2011), available at [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"fulltext":\["Turkey%20AND%20nschool%20AND%20property"\],"sort":\["kdate%20Descending"\],"respondent":\["TUR"\],"documentcollectionid2":\["JUDGMENTS"\],"itemid":\["001-107725"\]}"; see also ECHR Fines Turkey 184,000 euros in expropriation case, DailyNews \(Sept. 24, 2013\), <http://www.hurriyetdailynews.com/echr-fines-turkey-184000-euros-in-expropriation-case.aspx?pageID=238&nID=55057&NewsCatID=351>.](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{)

<sup>323</sup> Norwegian Refugee Council, *supra* note 278, at 56.

refugees and the government’s current policy of restoring property to those who lost it after 1978. How do these factors make the law more complicated?<sup>324</sup>

This section includes four parts. It begins with a discussion of the Civil Code’s basic premise: landowners cannot challenge people who have possessed their land for fifteen years or more. Next, it considers what evidence a possessor must produce to prevent a landowner from challenging his occupation. Third, it considers four exceptions to the fifteen-year time limit on bringing claims against land possessors. The final part of this section describes the circumstances in which a possessor of property might be able to acquire ownership rights.

### 3.1. The Fifteen-Year Limit to Bringing Claims Against Wrongful Possessors

The Civil Code begins with the general principle that the passage of time alone does not extinguish any rights.<sup>325</sup> However, there are some circumstances in which a property owner loses the ability to prevent someone from occupying his property. For example, if someone wrongfully occupies property for fifteen years, the property owner might not be able to bring a claim against the possessor. Thus, the property owner might lose his right to use his land.<sup>326</sup> But, he does not necessarily lose his ownership rights. Under Article 965(2): a “[c]laim of rights . . . shall not be heard after lapse of fifteen years.”

Why might the distinction between possession and ownership matter? Consider what happens to the property after the possessor dies. Could the landowner or the landowner’s heirs regain possession of the property?

Now consider Article 2279 of the Civil Code. Article 2279 includes a requirement that is not in Article 967: the person seeking to prevent an owner from exercising his property rights must exercise “possessory actions” on the property for fifteen years without anyone raising an objection or a claim challenging his possession. Below we consider how a person can satisfy the “possessory actions” requirement of Article 2279.

#### Civil Code

##### Article 965:

- (1) Rights shall not extinguish due to lapse of time.
- (2) Claim of rights, on any basis, against disclaiming person shall not be heard after lapse of fifteen years, subject to observation of its special provisions and the following exceptions: . . .

. . .

<sup>324</sup> Norwegian Refugee Council, *supra* note 278, at 55. Law on Managing Land Affairs of 2008, Article 1.

<sup>325</sup> Civil Code, Article 965(1).

<sup>326</sup> Civil Code, Article 965(2).



**Article 2279:** An ownership claim, except inheritance, shall not be heard against a person who has possessed a real estate or other properties continuously for fifteen years without interruption and who has exercised possessory actions upon the property without any dispute or objection.

### 3.2. Evidence of Possession: “Possessory Actions” and the Continuous Possession Requirement

There are two components to the Civil Code’s “possessory actions” requirement: (1) the type of evidence a possessor needs to provide to demonstrate possession, and (2) the amount of evidence the possessor must produce over the fifteen-year period.

*Type of Evidence.* To prevent a property owner from asserting his property rights, the possessor must produce evidence of “possessory actions” for a period of fifteen years.<sup>327</sup> The Law on Managing Land Affairs of 2008 provides some insight into what might qualify as “possessory actions.” Generally, evidence of possessory actions requires the possessor to make physical changes to the property. For example, according to Article 8 of the Land Management Law of 2008, a person might demonstrate occupation by planting crops on the land or constructing buildings.

Why do you think the law requires the possessor to make physical changes to the land? Consider the property owner. How would a property know that someone is occupying his land?

*Amount of Evidence: Continuous Possession Required.* Under Civil Code Article 2283, a possessor does not need to produce evidence of “possessory actions” for the entire fifteen-year period. Instead, courts will consider evidence of possession from the beginning and the end of the fifteen-year period. They will assume the possessor occupied the property during the time period.<sup>328</sup> Moreover, it is important that the possessor use the property as the owner would have done during this period.<sup>329</sup> Courts will assume that the possessor’s occupation of the property was continuous.

Property owners can challenge the continuous occupation assumption by presenting evidence that the possessor did not occupy the property for the entire fifteen-year period.<sup>330</sup> For instance, an owner might have evidence that the possessor in fact lived elsewhere between the supposed beginning and end of the fifteen-year period, and the court would consider this evidence. After losing possession, the fifteen-year time period begins from zero, even if the possessor was forced off of the property. The possessor’s occupation must be continuous for the Civil Code Article 2279 to apply. The possessor cannot combine two separate periods of possession to preclude a property owner from bringing a claim against him.

Thus, the Civil Code does not require possessors to provide evidence of continuous possession. However, the Civil Code does require that possession be continuous. If a court finds that a possessor did not possess his property for part of the fifteen-year period, the property owner can challenge the possessor’s occupation of his property.

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<sup>327</sup> Civil Code, Article 2279.

<sup>328</sup> Civil Code, Article 2283.

<sup>329</sup> Civil Code, Article 2256.

<sup>330</sup> Civil Code, Article 2287.

### 3.3. Four Exceptions to the Fifteen-year Time Limit on Challenging Possessors

There are four exceptions to the fifteen-year limit on bringing claims against possessors. The first three exceptions make it easier for property owners to challenge possessors. The last exception, however, makes it easier for possessors to prevent property owners from bringing a challenge against them.

The first exception considers inheritance. In disputes over inheritance, a property owner has thirty-three years to bring a claim rather than fifteen.<sup>331</sup> Why do you think the Civil Code extends the amount of time for disputes related to inheritance?

The second exception considers government-owned property. When someone is occupying government property, the government can challenge the possessor at any time, even if the possessor has been occupying the land for fifteen years or longer.<sup>332</sup> So the fifteen-year time limit does not apply to the government. This article further notes that ancient relics and endowed properties are listed as exceptions.

The third exception acknowledges that people may have a good excuse for not challenging a possessor. Such an excuse would have to be raised by the party relying upon it. The time limit on bringing claims does not apply in three situations: first, if there is a legitimate excuse for the owner's absence; second, if the person is insane; third, if the person is a minor.<sup>333</sup> A legitimate excuse might include fleeing the country to avoid oppression. Another legitimate excuse is a time of war. However, if the person returns home, if an insane person becomes sane, or if a minor reaches the age of majority, the fifteen-year limit on bringing claims applies.<sup>334</sup> That is to say, the clock has been paused as long as the excuse lasted. Accordingly, a person bringing a claim based on an excuse should immediately challenge the wrongful occupier once he is able to do so.

The final exception benefits possessors who purchase the property they are occupying. If a possessor buys property and any of the owner's blood relatives are present but fail to object, then the sale is valid, regardless of whether the possessor has occupied the property for fifteen years.<sup>335</sup> (Civil Code, Article 2282). Thus, the Civil Code imposes a duty on an owner's relatives to contest a wrongful property transfer.

#### Discussion Questions

- 1) Recall Article 40 of the Constitution: "Property shall be safe from violation." Does Article 965 of the Civil Code conflict with Article 40 of the Constitution? If so, why? Is it possible to read Civil Code Article 965 and Constitution Article 40 to not conflict?
- 2) What might justify Article 965's fifteen-year limit on bringing claims to assert rights? Does the fifteen-year limit make more sense for some rights than others, for example claims for debt versus claims for land? Why or why not?

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331 Civil Code, Article 2280(1).

332 Civil Code, Article 2280(2). See also Civil Code, Article 482(2) (specifying that for "public lands" "[p]ossession, attachment and ownership by laps of time of these properties shall not be permissible."

333 Civil Code, Article 2281.

334 Civil Code, Article 2281.

335 Civil Code, Article 2282.

- 3) Judges have interpreted Article 965(2) of the Civil Code differently.<sup>336</sup> Consider the text of Civil Code Articles 965 and 2279. Do Articles 965 and 2279 transfer ownership? Why might transferring ownership matter? Recall that the original property owner generally cannot bring a claim against the possessor after fifteen years.

### 3.4. When a Possessor Can Claim Ownership

Recall that when people fled Afghanistan from 1978 to 2000 many of them left their official property documents behind. Recall also that the Law on Land Management of 2008 seeks to restore property taken after 1978.<sup>337</sup> In contrast to the Civil Code, the Land Management Law of 2008 grants possessors the right to own property in some circumstances.<sup>338</sup>

A person who is occupying property may be able obtain official ownership rights even if he lacks an official deed to the property. Under Article 8 of the Land Management Law of 2008, a person who possesses land shall be given ownership rights to the property if: (1) he has cultivated the land; (2) his neighbors and local government offices confirm that he possesses the land; and (3) no one else has claimed ownership of the property. However, the possessor will not be granted a right to own the land if the government **nullifies** (invalidates) his occupation of it.<sup>339</sup> Moreover, the government may require the possessor to pay for the land. If the land is high quality (class-one land) and is a large parcel (more than 10 *jiribs*, or 2 hectares, in size), the possessor must pay for the land in installments over five years.<sup>340</sup>

Consider the interaction between Civil Code Article 2279 and Article 8 of the Land Management Law of 2008. Civil Code Article 2279 prevents property owners from challenging possessors, but does not grant possessors ownership rights. Article 8 of the Land Management Law grants ownership rights to some possessors. Article 8 of the Land Management Law only applies when no one challenges property ownership.

Now consider the following situation: Abdul owns piece of property that Habiba has been occupying for sixteen years. Can Abdul prevent Habiba from obtaining ownership rights to his property by bringing a challenge sixteen years later, even though Civil Code Article 2279 prevents Abdul from challenging Habiba's occupation? As you think about this question, consider how Article 2279 of the Civil Code and Article 8 of the Land Management Law interact. The answer to this question depends on the scope of Civil Code Article 2279. Given the time limit in Article 2279, does Article 8 of the Land Management Law allow Habiba to establish ownership despite Abdul's challenge?

## CONCLUSION

Under the Constitution of Afghanistan, “[p]roperty shall be safe from violation.” This chapter considered two exceptions to this basic premise. First, it considered when the government can take private property without an owner's permission, an expropriation. To do so, the government must satisfy three requirements: (1) the government must take the property “for the sake of public interests”; (2) the

<sup>336</sup> Yohannes Gebremedhin, Terra Institute, *Legal Issues in Afghanistan Land Titling and Registration*, 13 (2005), available at [http://www.terrainstitute.org/pdf/Legal\\_Analysis\\_of\\_Land\\_Laws.pdf](http://www.terrainstitute.org/pdf/Legal_Analysis_of_Land_Laws.pdf).

<sup>337</sup> Norwegian Refugee Council, *supra* note 278, at 55. Law on Managing Land Affairs of 2008, Article 1.

<sup>338</sup> See Civil Code, Article 2279.

<sup>339</sup> Law on Managing Land Affairs of 2008, Article 8(2).

<sup>340</sup> Law on Managing Land Affairs of 2008, Article 8(2).

government must provide the owner with “prior and just compensation”; and (3) the government must obtain an order from authoritative court.<sup>341</sup> Generally, to satisfy the “public interests” requirement, the government must plan to use the property for the benefit of society. For example, the government might be able use private property to build hospital or a highway. The government likely cannot confiscate private property to build a home for a government official. The primary benefit of the home would extend primarily to the official and his family, not to society. The government also must give the property owner something of value before it takes his land. The government can give the owner money, it can give the owner land, or it can give him a combination of both money and land. The amount of compensation likely must reflect, or be about equal to, the value of the land it takes. In determining the value of property, the government must consider the location of the land, its quality, and any structures on it. An authoritative court should not authorize the taking of the owner’s property unless the government satisfies these constitutional requirements.

This chapter also considered when a person might be able to remain on someone’s property without the owner’s permission. When a person proves that he has occupied and used an owner’s property for fifteen years or more, the property owner cannot challenge the person’s wrongful occupation of his land. There are four exceptions to this fifteen-year time limit on challenging a person’s presence on land. For example, if the owner has a legitimate excuse for not challenging the possessor, the fifteen-year limit does not apply. A legitimate reason might include an owner who fled the country during the 1978 to 2000 period.

Recall that this part of the law is not very well defined. The law does not define the scope of terms like “just compensation,” “public interests,” “temporary,” or “property.” For example, does the Constitution protect a future interest property, such as a son’s interest in inheriting his father’s land? When does the government’s temporary use of property become permanent? Recall the example from Turkey, in which the government used private land for a schoolyard but allowed the property owner to keep official title to the land. If government activities on private property decrease its value or the owner’s ability to use it, should the government be required to compensate the property owner?

Now recall Afghanistan’s recent land history from 1978 to 2000, in which people fled the country, those in power took land illegally, and many property documents were forged. Also recall the explanation of land titling from the ownership and property transfers chapters. Does the legitimate excuse exception to the fifteen-year limit on challenging land occupiers address the concerns of people who lost their land during that period? Does the “legitimate reason” exception make it more difficult to achieve the government’s goal of making land rights more secure?

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<sup>341</sup> Constitution of Afghanistan, Article 40.

## CHAPTER 6: LIMITATIONS ON USE

### INTRODUCTION

Imagine you are in your home and have just prepared some tea. You sit down at your table, stir in some sugar, but before you can take your first sip you notice a horrible smell. Frantically, you search around your home for the source, but can find nothing. Finally, you look out of your window and you notice your neighbor, Fahim, is stirring something in a large barrel behind his home. As you step outside, it becomes clear that the barrel is the source of the foul smell. You greet Fahim and ask him what he is doing. He informs you that to make some extra money, he has decided to turn his home into a tannery, or a place that turns animal skins into nice leathers. You tell Fahim that the foul smell coming from the tannery is disturbing you and preventing you from enjoying your tea. Fahim quickly replies that it is his property and he can do whatever he likes on it. He tells you he needs the extra money. Furthermore, he adds that there is a shortage of leather goods in the community, and he is helping everyone out with his new business.



Yes, you say to yourself, it is Fahim's property, but should he be able to disturb his neighbors with how he uses it? Should it matter that he needs the extra money or that he claims his tannery is helping the community? You remember that property ownership gives the right to benefit from the use of your property, so you think that Fahim may be right. But something doesn't seem fair about the outcome.

In the textbook so far, you learned property ownership comes with a bundle of rights. You learned as a property owner you have the right to sell or lease your property. You also learned that you have the right to exclude others from your property. Additionally, you discovered that as a property owner you have the right to benefit from the resources on your property, and the right to use your property as you generally

see fit. But the rights you have learned so far are not absolute. In this Chapter, you will learn that those rights have important limitations.

But how much should the law limit your property rights? You have already learned that the existence of property rights can help the economy grow, encourage stability, and make everyone better off. But as you unfortunately discovered from the foul smell from your neighbor Fahim's new business, sometimes a person's use of his property can harm others. This is the first reason why the law might limit the manner in which a person uses his or her property—to prevent harm to others. To preserve one person's rights, sometimes it is necessary to limit another person's rights.

In the first section of this chapter you will learn about what limitations the law places on property use in order to prevent such harm. This will be referred to this as the **limitations on use due to private interests**. You will learn how the Constitution, statutory law, as well as Hanafi Jurisprudence places important limits on how you can use your property if that use affects another's interests. You will also learn that in certain situations, the law will prevent you from excluding other people from your property.

In the second part of this Chapter you will learn that the law also places limitations on how you use your property if that use is harming the public good. This will be referred to as **limitations on use due to public interests**. You will find that the Constitution and statutory law places great importance on protecting the public interest, and for that reason may limit the use of certain property rights. Finally, we will cover the topic of zoning. Note there may be other situations in which private parties may limit the use of land rights through contracts. Such contracts are beyond the scope of this chapter, but just realize that such contractual provisions can exist.

## 1. LIMITATIONS ON USE DUE TO PRIVATE INTERESTS

In this section we will discuss how the law resolves situations where someone's use of their property harms a private interest, such as the situation that occurred when your neighbor Fahim decided to turn his home into a tannery. First, we will discuss the statutory law that limits property use due to the existence of private harm. Then, we will explore how such situations are resolved under Islamic Law. Finally, we will discuss situations where the existence of private interests may limit a property owner's right to exclude other people from his property. As you read this section on private interests, think about what factors you would want to consider if you were a judge ruling on a case such as the one between you and your neighbor Fahim. Try to determine if you think the law takes those factors into account.

### 1.1 Harm to neighbors

This section will explore the law that governs the use of land that causes direct and indirect harm to others. **Direct harm** refers to a situation in which physical damage is done to someone's property, such as sewage flowing from one person's land to another's land—as if the tannin (the agent used in a tannery) had oozed from Farim's tannery onto your land and ruined your garden. **Indirect harm** refers to situations where air pollutants or odors drift onto another person's land—as was the case with your neighbor Fahim's tannery.

But first, let's delve a little deeper into why the law is concerned with what you do on your property? We posed the question earlier that if it is your property, shouldn't you be able to do what you please on it? The answer, as you will no doubt find in other areas of law, is not always clear. But first let us discuss

what is clear. To do this, let's first make distinction between what is **always forbidden** and what is **forbidden in certain situations**. Some acts are always forbidden, no matter where they are committed. These are acts such as theft, assault, or homicide—acts that are clearly prohibited by the law. If an act is illegal elsewhere, it is certainly illegal to do on private property. It would be a strange result if an illegal act such as theft were suddenly legal because it was committed on private property. Situations in which acts are always against the law, whether performed on public or private property, are easy. But it is not always so easy. There are difficult situations in which involve acts are forbidden only in certain circumstances. These are the situations where an action that would otherwise be perfectly legal, such as operating a tannery, is ultimately forbidden because it affects your neighbor's ability to enjoy his property.

But what makes these acts “forbidden in certain situations” so much more difficult to resolve than “always forbidden” acts is that both society and the property owner engaging in such actions have interests at stake. That is to say, Fahim has an interest in running a tannery in his yard, and society has an interest in Fahim producing nice leather goods that can be used by members of the community. These competing interests are what we will have to resolve throughout this section. Fortunately, the Civil Code and Hanafi Jurisprudence provide excellent tools to help us resolve such competing interests.

But the question still remains, why is the law concerned with these situations? One answer is that promoting peaceful relations among neighbors is one of the goals of any system of laws. Through the regulation of how you can affect your neighbor by using your property, the law is promoting friendly relations among neighbors. Such good relations among neighbors are essential to any society. You may recall that in a hadith from the Book of Virtue, Good Manners, and Joining of the Ties of Relationship, Abu Huraira spoke of the supreme importance of our duties to our neighbors, even noting wryly: “Gabriel kept impressing me about the importance of kind treatment toward neighbors (so much) that I thought he would confer upon him the (right) of inheritance.”<sup>342</sup> One reason the law regulates such land use is to promote this kind treatment of neighbors the hadith discusses.

Another reason is the overall goal of preventing harm. Laws that prohibit actions that are always forbidden, such as theft, exist in large part because they prevent harm. That is, when a theft occurs, someone is harmed. In that same way, you may be using your property in a manner, such as producing odors from a tannery, that causes harm to your neighbors, and society has an interest in preventing that harm. As you read through the rest of this section, try to keep these twin rationales in mind: one, promoting peaceful relations among neighbors; and two, preventing harm.

### **1.1.1 Statutory sources—An overview of excessive harm**

Now let's begin exploring the statutory sources of law. The 1977 Civil Code of the Republic of Afghanistan is the principle source of law regarding limitations of property to prevent private harm. Article 1900, discussing right of ownership, states that an “[o]wner may take action on his property within the limits of law.” The difficult question that must be answered is: What does “within the limits of the law mean”? This provision obviously includes the “always forbidden” actions discussed above, but how does it apply to other actions? One code provision that is helpful in answering this question is Article 9.

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<sup>342</sup> Raj Bhala, *Understand Islamic Law*, p. 494 (2011).

## Civil Code

### Article 9:

- (1) A person who transgresses his rights shall be responsible.
- (2) Transgression of rights occurs in the following cases:
  - 1 – Actions against custom.
  - 2 – Having the intention to infringe rights of another.
  - 3 – Triviality of interest of the person as compared with the harm inflicted on another.
  - 4 – Impermissibility of the interest.

Article 9 is a general provision, and covers all uses of rights, not just property rights. That said, we can use the general provision to help us arrive at some basic rules for restrictions on property rights. Article 9 covers something known as **abuse of right**. You may have encountered this term if you have studied Obligations. Article 9 tells that even if you have a right, you must not abuse or misuse that right, and if you do misuse that right, you are responsible for the harm. In short, rights are not absolute.

Now let's explore the provisions of Article 9 to help us figure out exactly what an abuse of right entails in the area of property rights. That is, how does Article 9 limit the use of property rights. As you can see, Article 9 gives four categories of acts that constitute an abuse of right. First, an abuse of right occurs if the interest in using that right in a particular way is impermissible. This sounds complicated at first, but it is not. An impermissible interest is one that is illegal. For instance, growing opium on your land is an impermissible interest, so it is an abuse of right. Second, an action against custom constitutes an abuse of right. Third, if your use of a right involves the infringement of the rights of another, it is an abuse of right. So we can now set out a basic rule based on these two provisions of Article 9—*the law limits the use of a property right when it is illegal, violates custom, or infringes on the rights of another*.

But as you will quickly see, without further guidance, that rule may not always help you reach an answer on what is and what is not lawful. For instance, is setting up a tannery an impermissible interest (is it illegal)? No. Is setting up a tannery against custom? Likely not. Do you have a right to sit in your home and enjoy your tea without having to smell foul odors from your neighbor's tannery? Probably not.

Fortunately, as you can see above, Article 9 gives us one other criterion to look at when deciding if an abuse of right has occurred. It states that a right is used unlawfully (an abuse of right) if the manner it is used harms another person and the interests of the person using that right is trivial compared to the harm inflicted. So initially we can say that if you have a situation where someone is using their property and that use is harming someone else or their property, then look at the size of the harm caused. Then



compare the interest the owner has in using his or her property with the size of the harm caused. If the interest is minor compared with the harm, then it is unlawful. The rule we arrive at is: *a property use is unlawful if it harms another and that harm is much greater than the owner's interest in using the property in the way that causes the harm.*

This rule is a good place for us to start. You can envision a scale, on one side is the owner's interest in using his or her land in a certain manner, and on the other side is the amount of harm caused by that use. The greater the harm, the greater the chance the scales will tip against a particular use of property. If the harm is sufficient and the interest is low, then such a use will be forbidden. You will hear this balancing of interests referred to as **cost-benefit analysis**. The Civil Code refers to a harm that is greater than the interest in the activity that creates the harm as **excessive harm**. After we conduct the balancing test (cost-benefit analysis), and we find the harm is too great to permit, the harm will be referred to as excessive harm.

### Civil Code

**Article 1906:** Excessive harm, be it new or old, shall be eliminated.

**Article 1907:** Excessive harm is one that causes breakage or destruction of buildings or prevents principle needs, namely the intended benefit from the property.

As you can see from Article 1907, the Civil Code provides a general definition of what is considered excessive harm. In that definition, the Civil Code gives us two categories of excessive harm—(1) harm that causes destruction of another's property, and (2) harm that prevents an owner from the enjoying the intended benefit of his or her property. The term **intended benefit** does not mean the benefits an owner or neighbors expect to receive from a property. Rather it is what law presumes to be the main benefit to expect from certain types of property. For instance, the law assumes the intended benefit of a residential property is for a family to be able to live there safely and comfortably. And the intended benefit agricultural land is for the owner to be able to use it to farm.

So you can see from Article 1907 that the Civil Code gives us a **general provision** regarding how to evaluate the harm caused by an activity. A general provision is a set of broad criteria we can use to determine if a situation is excessive harm or not. In addition to the general provisions, the Civil Code also has **specific situations provisions** of excessive harm. These are situations the government has decided will automatically constitute excessive harm. The government has made it easy for us in these situations. If you come across these situations, you can safely say the harm is excessive. There is no need for cost-benefit analysis in these situations.

It is important to note, however, that these specific instances provisions are illustrative of excessive harm, but are not an exhaustive list of actions that might constitute excessive harm. You may have encountered the difference between an illustrative and exhaustive list before when interpreting statutes. An **exhaustive list** is a list that contains every instance of a certain situation or act. An **illustrative list** provides examples of a certain situation or act, but does not provide every single example of that situation or act. So for example, if someone asks you, "which cities have you visited?" And you answer, "I have been to Kabul, Herat, Kunduz, Mazar-i-Sharif, Kandahar, Ghazni, and Fahra." Your answer is meant to convey every

city you have been to, and is therefore exhaustive. But if you answered, “I have been to many large cities, including Kabul and Herat,” the cities you listed would simply be illustrative of the type of cities you have been.

Before we explore the application of the Article 1907 general provision about excessive harm in detail, we will first explore the situation specific provisions. We will explore one provision in detail, to give you an idea about how such situation specific provisions will work in practice, and then quickly proceed through the rest to highlight what they cover. To begin, Civil Code Article 1908 is a specific situation provision that prohibits blocking the access of light to your neighbor’s building. It states that such “full blockage of light from residence shall be considered excessive harm.” This is one of those situations where you can determine excessive harm without the use of cost-benefit analysis discussed above. Full blockage of light constitutes excessive harm. Once we have determined excessive harm exists, we can then turn to Article 1906 for the remedy, which provides that “excessive harm shall be eliminated.” That would lead to the conclusion the object blocking the light would have to be removed.

### **Discussion Questions**

1. Can you make an argument that full blockage of light is excessive harm using only the general provisions of Article 1907?
2. Is the harm caused by the blockage of light indirect or direct harm?
3. You have a client who tells you almost all of his light is being blocked by his neighbor’s building. Would Article 1908 apply? If not, what provision would apply?

### **Suggested Answers**

1. The general provision of Article 1907 provides that harm is excessive harm if it prevents the owner from enjoying the intended benefit of his or her property. Full blockage of light would prevent the owner from enjoying the intended benefit of his or her property.
2. Because the damage being caused is not physical, such as sewage flowing onto your neighbor’s land, the harm would be indirect.
3. Because Article 1908 only prohibits “full blockage” of light, your neighbor could argue that 1908 did not apply to the situation because not all of your client’s light is being blocked, but only “almost all.” A strict reading of the statute would seem to preclude application of Article 1908. But it would be worth making an argument that “almost all” of the light is effectively full blockage and Article 1908 should

apply. This may work if more than 90% of the light is being blocked, but maybe not so for lesser blockage. Alternately, if Article 1908 does not apply, because what your client is experiencing is not “full blockage” you can then turn to Article 1907 and argue that the partial blockage of light is preventing your client from enjoying the benefit of his property. You would argue that the partial blockage is therefore excessive harm, and according to Article 1906, must be eliminated. This would involve the cost-benefit analysis (balancing test) discussed above.

Now you see how the situation-specific provisions work, we will briefly discuss the other situation-specific provisions in the Civil Code. The Civil Code has a number of situation specific provisions that cover building windows that can see into your neighbor’s home. If you have a situation where windows are at issue, you should first look to Article 1921 and Articles 1929 through 1931. The Civil Code also has a number of situation-specific provisions regarding shared walls and floors. You probably understand the potential for causing harm is great when your ceiling is another person’s floor and one of you wants to alter it. In those situations, first look to Articles 1922 through 1928. The Civil Code also has several situation-specific provisions regarding harm caused by water usage. For instance, Civil Code Article 1914 provides that if someone “irrigates his land in an unusual way that another person is harmed by it, he shall be considered liable.” This is a good example of direct harm.

You may have noticed that this article on water usage is not as easily applied as the “full blockage of light” provisions of Article 1908. That is because unlike the full blockage criterion, the “unusual way” criterion is much more ambiguous. What we mean by this is that a term such as “full blockage” is relatively easy to apply to a specific situation. But what constitutes irrigating in an “unusual way” is more difficult to determine and will require you as a lawyer to conduct further investigation as to what constitutes an unusual way of irrigating. Another provision that presents similar issues is 1932. It will probably be applicable to a great many situations, so it is important to take note of it.

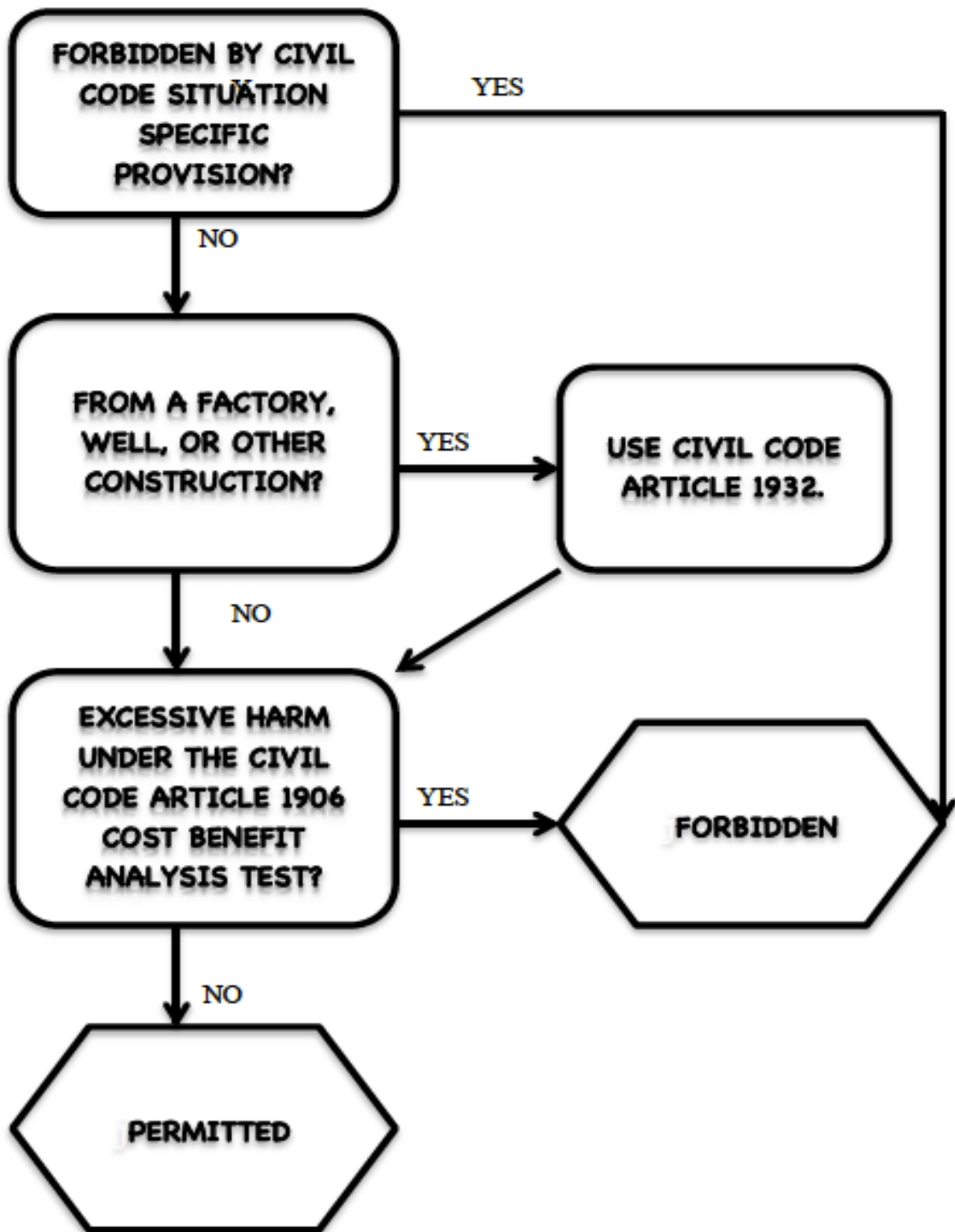
#### Civil Code

**Article 1932:** Factory, business enterprise, well and other constructions that cause harm to neighbors shall have to be constructed at a distance that does not cause harm to neighbors.

As you can see, Article 1932 falls between the general provision of Article 1907 and our situation-specific provisions. Article 1932 will probably be applicable in a wide variety of situations. In fact, it would appear this code provision covers the harm caused by Fahim’s tannery. If you can get a court to classify Fahim’s tannery as a business enterprise or other construction, the court will likely use Article 1932 to decide the case. Unlike the Article 1906 provision, which states excessive harm must be eliminated, there is no remedy listed for such harm. This means it is likely that if you find yourself in a situation covered by Article 1932 and you want the construction removed, you will have to conduct some balancing of the interests to determine if harm caused is excessive harm. The benefit of being able to point to Article 1932 is that a court will likely be more suspicious of such activities listed in Article 1932

if they are causing harm to neighbors, and you will have a better chance of demonstrating the harm is impermissible.

This completes our discussion of situation-specific provisions regarding property use. You should not feel the need to memorize all of these situation specific provisions. The important thing is to be aware they exist, so that if you have a situation where someone is being harmed by another's property usage, you know where to look. This is basic method you should take. First, look to the Civil Code and determine if there is a specific-situation provision regarding the harm caused by the property use in question. If so, apply the facts of your situation to the code provision. If there is no situation-specific code provision available, then turn to the general provisions regarding harm in Article 1907 or, if applicable, Article 1932. In the next part of this section, we will cover in depth how exactly we apply we determine if excessive harm exists under the general provisions. Below is a flow chart you can use as a guide when analyzing a private harm. We will add to this flow chart later when we finish discussing public harm.



### 1.1.2 The Use of Cost-Benefit Analysis to Determine Excessive Harm

Now we will explore how exactly to conduct the cost-benefit analysis to determine excessive harm. Recall that cost-benefit analysis is simply a way to refer to a balancing test that takes into account the harm being caused by an activity and weighs it against the interest another person has in engaging in that activity. In our discussion of this cost-benefit analysis, we will use Articles 1906 and 1907 as our principle sources, but will incorporate Hanafi Jurisprudence as well. We will do this because the development of the Civil Code relied heavily on Islamic law sources and principles, and it is often helpful to refer back to these Islamic law principles when determining how a general code provision should be interpreted and applied. For property use, Islamic law sources provide excellent guidance on how to determine whether “excessive harm” exists. Keep in mind that we only need to engage in this cost-benefit analysis if there is no situation-specific provision (such as the full blockage of light) in the Civil Code that covers the facts of the case.

Recall that Article 1906 requires that excessive harm must be eliminated, and Article 1907 provides some general criteria to look at to determine whether excessive harm exists. Professor Mohammed Hashim Kamali, an Islamic law expert, explains how, based on Hanafi Jurisprudence, such criteria can be applied in practice:

In the event where a manifest harm is inflicted on the community or another individual through the exercise of property rights, then the authorities must evaluate whether the harm is greater than the benefit that the owner seeks to realize by use of his right. If the harm is negligible and does not warrant imposing restrictions on the exercise of the basic right of ownership, then it must be tolerated. But if the harm to others is greater by comparison, the owner’s right of use may be limited to the extent needed to eliminate the harm, or whenever possible, to reduce it to a tolerable level.<sup>343</sup>

Don’t worry about this term “manifest.” It just means the harm is big enough, or obvious enough, for the court to get involved. You can think of a situation where someone is playing his rubab in the afternoon, and you can hear it in your home. This is an annoyance, but probably not big enough for a court to get involved, and therefore not manifest. But the smell from Fahim’s tannery is a big enough harm for the courts to get involved (at least you hope so!). This step is just there to screen out any cases that are clearly not causing enough harm for the legal system to get involved. So once we determine that a big enough harm exists for the courts to get involved, we then conduct our cost-benefit analysis, comparing the harm caused with the interests the person has in engaging in the harm-causing activity. If the harm is great compared to the interest, then it is “excessive harm.” Because it is excessive harm, the activity must be stopped or limited to an acceptable level.

Helpfully, Professor Kamali gives us some examples of what would be considered “excessive harm.” This is an example of an illustrative list. Such examples of excessive harm include:

- Opening a bakery next to a perfumery or drug store.
- Digging a well so close to his neighbor’s house as to draw and divert water from it.
- Opening a dumping yard for refuse disposal that is harmful to the neighbor.

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<sup>343</sup> Mohammed Hashim Kamali, *The Right to Life, Security, Privacy and Ownership in Islam*, p. 278 (The Islamic Texts Society 2008).

- Building a structure that overlooks and exposes the neighbor’s household to unsolicited viewing.<sup>344</sup>

Notice the last example, a building a window that overlooks a neighbor’s household, is covered by situation specific provisions in Articles 1921 and 1929–1931. That is one of those situations where we would not need to engage in the cost-benefit analysis because the code already has an answer for us. In other words, here the Civil Code has already done the cost-benefit analysis and reached the conclusion that the harm is excessive. You may also have noticed that these are all examples of indirect harm. You may wonder why Professor Kamali chose to only give examples of indirect harm. The answer is that the cases of indirect harm are the most difficult to resolve. If something your neighbor is doing is causing actual physical damage to your property, then it will almost certainly be excessive harm. To use Professor Kamali’s word, direct harm is manifest. Those are the easy situations. The harder situations are those that deal with odors, pollution and noise, where the harm is not so easy to see.

Samura bin Jundub had a palm tree, and its branches extended into a garden that belonged to a man from the Ansar, who lived with his wife. Each time Samara tried to reach the branches, it made the owner uncomfortable. So the man asked Samura if he would like to sell the tree. Samura replied he would. The man then asked Samura to remove the tree and cut it off, but he still refused. The man then complained to the Prophet and the Prophet asked Samura once again to consider selling his tree, but he refused again. Samura also turned down the Prophet’s suggestion that he should make a gift of it to the man. The prophet then told Samura, “you are inflicting harm.” The Prophet then told the man to “go and cut down the palm tree.”<sup>345</sup>

Abu Dawud

### 1.1.3 Preventing anticipated harm

Now we have completed our discussion of the process of performing a cost-benefit analysis to determine if excessive harm exists, you almost have all the tools you need. But there is still one item left to address before we move on. This tool involves what you do if you have a client who is worried something his neighbor is planning on doing is going to cause harm in the future. This would be the situation if your neighbor Fahim told you he was planning on building a tannery and you wanted to stop him before he started filling your home with foul odors. What you would be seeking here is something called **anticipatory intervention**. This is simply an order from the court to your neighbor not to engage in an activity before he or she begins that activity. The key difference between what we were discussing above is that the harm has not yet occurred. You just believe it will occur soon. The principle sources of law for this topic will be the Civil Code and Hanafi Jurisprudence. Article 796(2) of the Civil Code is the provision that covers preventing anticipated harm.

<sup>344</sup> *Id.* at 278–82.

<sup>345</sup> *Id.* at 278–79.

## Civil Code

**Article 796 (2):** If person faces risk by building of another person, he may demand its owner to make necessary arrangements in order to prevent the risk. In the owner does not take any action, that person may, upon obtaining permission of court, make those arrangements on the account of owner.

As you can see, Article 796(2) provides that when an owner of property believes someone else is going to use their property in a manner which would be harmful, the owner has the right to demand that action not be taken. And if the person planning on taking the harmful action says he intends to do so anyway, the owner can then ask a court for anticipatory intervention. But as you can see, Article 796(2) does not provide much help in telling us how a court should decide whether to grant anticipatory intervention. Thankfully, Hanafi Jurisprudence gives us a great deal of guidance on when a court should order anticipatory intervention. According to Hanafi Jurisprudence, whether a court will grant this anticipatory intervention is going to be function of two factors: (1) the size of the harm anticipated and (2) the likelihood the harm will occur.

For the first factor, the size of the harm anticipated, you already have all the tools you need to answer this question. For anticipatory intervention to be granted, the harm must be an excessive harm. You would use the same tools you learned so far to conduct a cost-benefit analysis to determine if the harm anticipated is excessive harm.

For the second factor, the likelihood of the harm occurring, Hanafi Jurisprudence sets out four scenarios that are based on the probability the harm will occur:

1. Almost Certain to Occur—there is a very high probability of the harm occurring.
2. Probable—the harm is likely to occur.
3. Uncertain—there is doubt as to whether the harm will occur.
4. Slight Chance—there is a low probability, or it is unlikely the harm will occur.

In the first two scenarios, in which harm is almost certain to occur or will probably occur, anticipatory intervention should be granted. In the last two scenarios, where it is uncertain that harm will occur or there is only a slight chance the harm will occur, anticipatory intervention is not justified. You may wonder, if we reach the same result in scenarios 1 and 2, and the same result in scenarios 3 and 4, why are there four different categories? Wouldn't two categories work just as well, and be less confusing? The answer is that different schools of Islamic jurisprudence will reach different conclusions from the results we have discussed. For instance, the Maliki and Hanbali schools will sometimes allow anticipatory intervention in scenario 3, when the harm is uncertain. While you should definitely focus on the results reached in the Hanafi School, there may be instances when you are called on to use a different approach based on the parties to the dispute. For instance, Article 131 of the Constitution directs courts to follow Shia jurisprudence in the event there is a matter before the court involving people from the Shia sect. This will occur only in rare cases, but you should be aware of it as you may encounter such a situation.



This concludes our discussion of limitations on use of personal property because of harm to neighbors. In this section, you have learned that the law is concerned with such use of personal property because it is seeking to promote peaceful relations among neighbors and because society has an interest in preventing harm. You learned that the law forbids property use that results in excessive harm, and the Civil Code contains both a general provision about what exactly excessive harm is, as well as situation-specific provisions that apply a narrow set of circumstances. You learned when you discover the facts of a case, that you should first search for a specific situation provision, and if none exists, to conduct cost-benefit analysis to determine if excessive harm exists. As we discussed, Hanafi Jurisprudence is helpful in guiding you when conducting this cost-benefit analysis. Finally you learned that if the harm has not yet occurred, you may obtain anticipatory relief if the harm is excessive harm and the harm is probable or almost certain to occur. Let's move on to the next topic.

## 1.2 Easements as a restriction on property rights.

Imagine you are back at your home. Thankfully, your neighbor Fahim has decided, after many complaints from neighbors, that perhaps setting up a tannery in the middle of town was not a very nice thing to do. He has decided to change his business to weaving, which will not emit foul odors that disturb his neighbors. So finally you can sit down and enjoy your cup of tea. It is a nice spring day, so you decide to sit outside. As you start to take your first sip, you notice another one of your neighbors, Jamila, crossing through your land, right through your wheat field. You greet Jamila, and respectfully ask her why she is walking on your land and harming your crops. She replies that the law permits her to pass because she has an easement. Confused, you head inside to figure out exactly what she is talking about. It seems you will never get to enjoy your tea.

In Chapter 3 you were introduced to this concept of an easement. You learned that the Civil Code Article 2340 defines an **easement** as “a right upon a real estate for the purpose of benefit to another person.” This just means someone other than the owner has the right to use part of the owner's property, or limit the owner's use of his or her property. Another way to put this is to say one property has rights over another property. For instance, an easement might involve the right of one of your neighbors to pass through your land to get to his or her house. This easement is called a **right of passage**.

Easements, however, are not limited to rights of passage. An easement might also entail a limitation on how high you can erect buildings on your land, or the types of buildings you can build on your property, or the manner you use your property. Also someone may have a right-of-way easement on a body of water such as a lake or a river that passes through your land. In this section, we will focus on rights of passage easements because they are a good illustration of how easements limit your property rights. But be aware that easements may entail other limitations on your property. It is important to note if you are entitled to an easement, such as a right of passage, the easement is attached to an immovable property, and cannot be separated. This is a little confusing. For instance, if you have a right of passage easement through your neighbor's land and you sell you land, the new owner has the right of easement now, not you.

In Chapter 3 you learned that an easement is a way of owning a property right. But another way of looking at an easement is from the perspective of the property owner who must let others use his or her land. If you are the property owner, and someone else has an easement on your property, then this easement is a limitation on your property rights. Specifically, it is a limitation on your right to exclude. Remember in Chapter 1 you learned that the right to exclude was one of your fundamental rights as a

property owner. In this section, we will explore the limitation the law places on this right because of private interests.

But why should the law limit your right to exclude? Surely, if it is your land, then you should be able to keep others off it. Yes, that is the case most of the time. In certain circumstances, however, the needs of others to use your land for limited purposes is so great that the law is willing to limit your right to exclude. That is, the law is willing to a place of limitation on the use of your property due to a private interest. Let's discuss an example. Assume your neighbor, Jamila, lives on five jeribs of land behind your home. But there is no public road that leads to her house. Unless Jamila is allowed to cross over your land, there is no way Jamila can get to her home (unless she happens to own a helicopter!). In such a situation, it only seems fair that the law might find a way to allow Jamila a limited right to cross over your land to get to her land. Of course, this would result in the law placing a limit on your right to exclude. In the rest of this section, we will first discuss how such limitations on your property rights through easements arise. Next, we will discuss the provisions of such easements. Finally, we will discuss how such easement rights end. For clarity, we will refer to the owner of the easement as the **easement holder**, and the owner of the real estate that contains the easement as the **property owner**.



**1.2.1 How easements begin**

First we are going to discuss exactly how someone, such as your neighbor Jamila, can obtain rights of easement, and in doing so, place limitations on your use of your property. There are two main ways they this can occur. The first is covered by Article 1919 of the Civil Code.

**Civil Code**

**Article 1919:** Owner of the land that is not connected to the public way at all or the way to it is insufficient or difficult, in a way that building sufficient way is not possible without huge expenses or big difficulty, may possess to a necessary extent and use the neighboring land in return for a just

compensation, provided that he does not exceed the customary limit and this right may only be exercised on the spot where the intended passage is made with the least harm.

So you can see Article 1919 covers our situation with Jamila. It is a long for provision, with many parts. Let's try to break it down into manageable parts so we can apply it. First, for Article 1919 to apply, the land Jamila owns must be "not connected to a public way." That is, Jamila's home is not connected to any public roads. Alternately Article 1919 may apply if Jamila's land is connected to a public road, but is really difficult for that road to be used for some reason. This might apply if the land is next to a mountain, and the road is on the other side of the mountain. If one of those two situations exists, either (1) no access via a public road or (2) very difficult access, then Article 1919 applies. Once we have determined Article 1919 applies, Jamila must be allowed to cross your property. That is, she must be given an easement.

But Article 1919 also specifies how Jamila must use this right. First, Jamila must pay you just compensation for this right. In this sense, the law has seen fit to compensate you for this limitation on your right to exclude. Next, according to Article 1919, Jamila cannot just cross your land wherever she wants, she must do so in an area that causes the least amount of damage to your property. So if you happen to be growing crops on your land, Jamila is not permitted to walk through those crops, but must walk around them. Additionally, Jamila's passage must be in accordance with custom. This will require you to investigate the local custom regarding such passage where such a situation arises.

In addition to the Article 1919 process for obtaining an easement, there is another manner that an easement can arise for rights of passage. A right of passage easement may also arise due to something called a **period of limitation**. A period of limitation is simply an ownership right that arises due to the longtime undisputed use of a piece of land. You discussed this concept with regard to transfer of ownership of a piece of property in Chapter 4. But it can also apply to easements. Article 2279 of the Civil Code provides that someone can gain an ownership right if they have used a piece of land a very long time in the same way that an owner would and no objections or disputes to this use have arisen during that time. Article 2279 states that this use must be for at least 15 years without interruption. Without interruption refers to continuous usage. For example, if you use a piece of land for ten years, move away for a year, then come back and use it for four more years, that would not constitute "without interruption" for 15 years.

So let's change our scenario with your neighbor Jamila a little to explore exactly how a period of limitation would work in practice. Imagine that Jamila has been your neighbor for 15 years. And during those 15 years she has crossed your property to get to her home almost daily. You have not objected when she crossed your land or ever told her to stop. According to Article 2279, after this continuous undisputed use by Jamila, she has gained a right of passage easement on your land. It is important to note, according to Civil Code Article 2342 that period of limitation can give rise to only a right of way easement. Period of limitation cannot give rise to any other type of easement. That is, it only applies to easement for right of passage.

### 1.2.2 Easement rights

Now that we have learned how an easement can arise, let's discuss what exactly someone can do once they have obtained an easement. First, of course, if someone has an easement, they can use it for that purpose. So for Jamila's right of passage, she can pass through your land to get to her home. But in addition to the basic rights of the easement, there are several other provisions with which you should be familiar. These provisions are covered in Articles 2355 through 2361 of the Civil Code. We will discuss these provisions briefly, but you should know that if you have a question about an activity in relation to an easement, you should refer back to these sections of the Civil Code.

#### Civil Code

**Article 2355:** The owner of the right of easement can embark on such actions that are necessary for usage of the right of easement, or that are essential for protection of the mentioned right; and he must use the mentioned right in a manner that it does not inflict harm.

**Article 2359:** The owner of the real estate that allows easement cannot take such actions that would harm the usage of the right of easement . . .

These two code provisions contain the most important points regarding easement provisions. First, notice that according to Article 2355, a person who owns an easement can take actions that are necessary for the use of that right. Examples of such action could be: clearing a path, laying down stones to allow ease of passage, or digging a ditch to keep water from washing out a road used for passage. But importantly, Article 2355 also states that such actions cannot inflict harm on the property. So for instance, if you decided to dig a ditch, but that ditch diverted water into the property owner's fields, damaging the crops, such action would be prohibited by Article 2355.

Importantly, Articles 2356 and 2357 state that the property owner normally should not have to take any action himself and is not obligated to pay expenses for any action taken by the owner of the easement under Article 2355. An exception to this is found in Article 2357—in the event the action taken by the easement owner under Article 2355 is beneficial to owner, the owner is obligated to pay expenses in proportion to his benefit. A situation like that might arise if the property owner routinely used the road built by the easement holder to get to different parts of his property. Also, according to Article 2358, in the event the property owner is obligated somehow to perform an action or pay money, he or she may discharge these obligations by simply transferring actual ownership of a portion of his or her property to the easement holder.

In addition, as you can see from Article 2359, the property owner is forbidden from taking action that harms the right of easement. Finally, Articles 2360 and 2361 cover situation where property is divided.

You shouldn't concern yourself with these right now, but just note such provisions exist to help you figure out situations where property is divided.

### **1.2.3 How easements end**

Now that we have discussed how easements arise, and how the provisions of easements work, we will briefly discuss how easements end. How an easement ends depends in part on how the easement arose in the first place. Remember, easements can arise because of necessity under the Article 1919 of the Civil Code discussed above, but can also arise due to a period of limitation. Recall period of limitation refers to the longtime undisputed use and can only result in right of way easements.

The end of easements that arise under Article 1919 are covered by Articles 2362 through 2366 of the Civil Code. Article 2362 provides that an easement ends if there was a set time limit on the easement when it was created and that time limit has since expired. Here you might envision a property owner selling an easement right to another person for five years. After the five years elapses, the easement ends. Additionally, an easement might end if either the real estate that allows the easement or the real estate that requires the easement is completely destroyed. Also, if both the property that allows the easement and the property that requires the easement are purchased by the same person, the easement ends. This makes sense—if the property owner and the easement holder are the same person, there is no longer any need for an easement. Finally, Article 2363 provides that if an easement “is not used for 15 years, it shall end.”

For easements that arise due to period of limitation, you can use Articles 2362 through 2366 as well, but an additional factor can end such an easement. This is covered by Article 2286, which states that an easement that arises due to a period of limitation “shall be stopped with [the] existence of the reasons that caused it.” This means that when the situation that made it necessary for the right of passage easement to exist disappears, so does a right of passage easement from a period of limitation. So, let's say for your neighbor Jamila, that after twenty years as your neighbor (5 years after she gained a right of passage because of a period of limitation), the municipal authorities decide to build a public road that reaches her land. When that occurs, Jamila's right of passage would disappear, and she can no longer cross through your land.

### **1.2.4 Concluding thoughts on easements**

This concludes our discussion of easements. In this section, you learned that an easement is a restriction of what a property owner can do on his or her land because of an obligation to another property owner. You learned easements can take many forms, including restrictions on the buildings you can construct on your property, limitations on how you can use your property, and restrictions on your right to exclude others from your property. We focused on one type of easement in this section; the most common, which is a right of passage easement. This kind of easement allows the easement holder to pass through land he or she does not own. You learned if a person cannot reach their home or it is very difficult to reach their home unless they pass through your land, the law requires you to let them pass after they pay you just compensation. You also learned that if someone passes through your land for greater than 15 years and you do not object, they can gain a right of passage easement. This process is called a period of limitation.

Next you learned that once a person has an easement, he or she can take actions necessary for use of the easement, such as constructing a path, as long as that action does not harm your property. You also

learned that as the property owner, you cannot do anything that harms the right of easement. Finally you learned the methods in which easements can end if they have a set expiration, if both properties are purchased by the same person, if the property of the easement holder is destroyed, or if the easement is not used for 15 years. You also learned in the special case of the period of limitation easement, such a right of passage ends if the reason for it ends, such as would be the case if the municipal authorities decided to build a road that reached your neighbor Jamila's home.

Easements are limitations on your rights as a property owner. The right-of-passage easement is specifically a limitation on your right to exclude. The law sometimes compels such limits on your right to exclude out of fairness. It would certainly be unfair if Jamila was unable to reach her home. Don't you agree? While we focused on rights of passage easements, there are many other ways you may be limited in similar ways. Later, in Chapter 7 you will learn a great deal about what exactly you are and are not allowed to do with respect to water flowing through your property. This too is a limitation on your property rights. Later, when learning about laws concerning water usage, try to think back to this chapter on limitations on use to see if you notice any similarities and differences with the laws we have discussed so far.

### **Application Exercise**

1. Your neighbor Jamila has a right of passage easement to reach her home through your land. You notice that Jamila has been walking through your wheat fields and smashing your crops. Jamila tells you that she is taking the shortest route through your property to her home, and because she has an easement, she is permitted to do so. Is Jamila correct?
2. You have another neighbor, Hamid, who has been passing through your land to get to his house for the last 20 years. Every time you see him pass through your land, you tell him he is trespassing and should use the road to get to his house. You have even complained to the Hoqooq about his trespassing. Hamid routinely tells you that he would have to walk an additional mile to get to his home via the public road, and because he has been walking across your property for so long, he now has obtained the right to pass because of a period of limitation. Is Hamid correct? If not, should you be required to give Hamid a right of easement after he pays you just compensation?

### **Suggested Answers**

1. No. Jamila is not correct. Recall that Article 1919 of the Civil Code states that a right of easement may "only be exercised on the spot where the intended passage is made with the least harm." Jamila is definitely causing harm to your crops by taking the shorter route through your wheat field. Jamila is violating Article 1919 by doing this. She is required to walk around your wheat field, even if it takes her a bit longer.

2. No. Hamid is not correct. Recall that according to Article 2279 of the Civil Code, for a period of limitation to result in a right of passage easement, there must be a continuous, undisputed passage for a period of at least 15 years. Because you objected to Hamid passing through your land and reported his trespassing to the municipal authorities, it was not undisputed. The law does not allow Hamid to assert a right to a period of limitation easement because of this. Additionally, the law does probably does not require you to provide Hamid with a right of passage easement after just compensation. Remember that Article 1919 of the Civil Code only requires you as the property owner to allow a right of passage easement if it is impossible or very difficult for a person to reach his or her home without passing through your property. An additional mile of walking most likely is not “very difficult” and Hamid would probably not be entitled to an easement after just compensation.

## **2. LIMITATIONS ON USE DUE TO PUBLIC INTERESTS**

You finally figured out exactly whether your neighbor Jamila actually had a right of passage easement through your land. But resolving the problem took so long that the nice cup of tea you were planning on drinking when you saw Jamila crossing your land is now quite cold. So you head back inside to brew a fresh pot. You walk to your sink, and reach to turn on your faucet. But as you turn the handle, a foul brown sludge pours out. What could have caused this, you wonder? You call up your neighbors Fahim and Jamila and ask them if they are having any problems with their water. Both Fahim and Jamila inform you that they too have brown sludge coming out of their water pipes. Fahim tells you that he has heard from many other people in town that they are having similar problems. Fahim tells you that he has heard from a friend that the problem with the water supply is the result of a new factory dumping waste into the nearby river. You tell Fahim this surely must be forbidden, but will go conduct some research to be sure.

In the previous section, you learned about ways the law will place restrictions on property rights due to the private interests. You learned that harming your neighbors from your use of your property is often forbidden, and that the law may place restrictions on your land rights because another person holds an easement. In this section, we will further explore restrictions the law places on property rights. But now we will be discussing how the law restricts property rights because they are harming a public interest.

Where a private interest generally involves just the well being of a single individual, a public interest involves the well being of an entire community of people. This community may be as small as a village or as large as the entire country of Afghanistan. Because it seems like your entire town is suffering due to the brown sludge in the water supply, this brown sludge is likely affecting the public interest. If the water supply can no longer be used, you are not the only one being harmed. The entire town is being harmed.

It is important to note, however, that there is not a clear dividing line between what constitutes a private harm and what constitutes a public harm. There are many overlaps between “harms to the public interest” and “harms to a private interest.” For instance, for the brown sludge coming out of your faucet, your private interest is certainly being harmed. But at the same time, the community as a whole is suffering as well. Some students find this overlap confusing. That is normal. But this overlap is also useful for you as a lawyer, because you are able to argue that a harm your client is experiencing is impermissible for two reasons—because it is harming private interests and harming the public interest.

In this section we will cover a variety of ways that potential or actual harm to the public interest can result in the limitations on how a person can use their land. First we will discuss the applicability of general

provisions in the civil code to public harm, where a business uses their property in a way that is causing excessive harm. Then we will briefly discuss the public interest in promoting the efficient use of agricultural land. This will involve a discussion of both land management laws and water use laws. We will next discuss environmental restrictions. This will mainly cover what sort of pollution is forbidden, but will also cover restrictions on such activities as hunting and fishing. Next we will discuss limitations on use due to the public's interest in preserving historical and cultural artifacts. If any of these terms is unfamiliar, don't worry, we will discuss them in detail. Let's get started.

## 2.1 Generally Applicable Civil Code Provisions

As mentioned above, there is often a great deal of overlap between what we call private harm and what we call public harm. And while that can be confusing, it is also helpful in that it allows you to use the same legal tools for many situations. The Article 1906 general prohibitions against excessive harm you learned in the first section of this chapter can often apply to situations of public harm as well. The same goes for Article 1932 prohibition against harms from business enterprises. So when you approach a situation of public harm, keep these provisions in mind because they are tools available in these situations as well.

## 2.2 Promoting the efficient use of agricultural land

In this section, we will discuss ways that the public's interest in the promoting efficient use of agricultural land may place limits on your property rights. You will learn that efficient use of agricultural land is promoted by certain restriction on property rights in both land management laws and laws covering water usage. But before we begin discussing the laws, let's define some terms we will be using. First, we will be discussing **arable land**. This is land that can be used to grow crops, such as wheat and fruit trees. If land is not considered arable, then it is either impossible or very difficult to successfully grow crops. Agricultural land that is not arable is land used for such purposes as raising livestock. Also, we will be referring to **efficient use of land**. By efficient use of land we mean the use of land that results in the biggest productivity with the least amount of waste.

Now that we've defined our keys terms, let's briefly discuss some of the reasons why we might be concerned with efficient use of agricultural lands. To begin, agricultural lands are often scarce. That is especially true for arable land. Only 12% of the land in Afghanistan is arable.<sup>346</sup> That means that crops can only be grown on a small fraction of Afghanistan. Because so little of the land available is useful for growing crops, the public has an interest in using that land in an efficient manner. While not everybody owns arable land, everybody has an interest in how that land is used. For instance, wheat is a major crop in Afghanistan. And wheat is a major part of the food supply. The public has a strong interest in making sure the land that produces the food supply is used wisely. So you see efficient use of such arable land is in the public interest. That is why the law may restrict property rights in order to promote efficient use of agricultural land.

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<sup>346</sup> "Afghanistan: Priorities for Agriculture and Rural Development," The World Bank, <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/EXTSAREGTOPAGRI/0,,contentMDK:20273762~menuPK:548212~pagePK:34004173~piPK:34003707~theSitePK:452766,00.html>.



Now let's discuss the laws that may limit what you can do with property due to the public interest in the efficient use of agricultural land. The applicable laws are the 2008 Law on Land Management, the 2009 Water Law, as well as the Civil Code of 1977. You will cover these laws governing agriculture and water use extensively in a later chapter. If our discussion of these laws seems brief, it is because we just want to cover the major points in this chapter to give you a general idea of how property rights can be restricted. Land and water law is a major area of property law you should focus on in detail, so we will devote an entire chapter to learning them.

### Law on Managing Land Affairs

**Article 90:** Construction of roads, buildings and establishments, and non-agricultural activities are not allowed on agricultural lands. In exceptional cases, the users are required to obtain in advance agreement of the ministry of agriculture, irrigation and water and approval by the *president of the Islamic Republic of Afghanistan*.

You can see that according to Article 90 of the Law on Managing Land Affairs, if you happen to own agricultural land, the law places a limitation on how you may use your land. The limitation is that you may not use it for non-agricultural purposes. In fact, the proper use of agricultural lands is so important to the public interest that the law requires you to obtain a permission from the President in order undertake non-agriculture activities on your land! In addition to the provisions in the Law on Managing Land Affairs, the Civil Code also has several provisions (Articles 1408, 1991, 1992) that promote the proper use of arable land.

Now let's work through an example. You have a client who wants to build a factory which manufactures tires for farming machinery. Your client tells you he has found a nice piece of land for his factory. It is just north of Kabul. The current owner has grown wheat on this land for many years, but has decided to move into the city. Your client tells you the land is priced very fairly and wants to buy it quickly before someone else does. How would you advise your client?

You should advise your client that such a purchase might not be wise. Because this land is agricultural, if he purchased it, he would not be permitted to use it for non-agricultural purposes according to Article 90 of the Law on Managing Land Affairs. If he buys it, he would have to wait for special permission from the President before he could build his factory. That permission is only given in exceptional cases. So there is a real risk that no permission would be granted and he would never be able to build his tire factory. True, your client's proposed factory will be to build tires for farming equipment, and farming equipment is used for agriculture, but that is not likely an argument that will work. Agriculture use likely does not cover the manufacturer of farming equipment.

In addition to the restrictions on how agricultural land may be used, the government promotes the efficient use of land by regulating the water supply. As you well know, agriculture is impossible without irrigation, so the public has a real interest in insuring the water supply is used wisely so crops can be grown. Because of this, the 2009 Water Law places restrictions on the amount of water a property owner

may use. You will learn the details of these restrictions in a later chapter. For now, just note that one reason such restrictions exist is to protect the public's interest in the food supply.

## **2.3 Environmental restrictions**

Now that we have discussed the limitations on use arising from the public's interest in efficient use of agricultural land, let's explore some of the environmental restrictions on property rights. Harm to the environment is harm to the public interest. We will discuss two major topics in this section. First we will discuss pollution and how the law restricts land rights to prevent excessive harm to the environment. Second we will discuss limitations on use due to the public's interest in biodiversity.

### **2.3.1 Restrictions on pollution**

Every citizen has an interest in preserving the environment. If hazardous waste is dumped in populated areas without proper precautions, it can lead to an increased risk of people developing diseases such as cholera, dysentery, and certain types of birth defects and cancers. It can also poison crops and kill wildlife. Because of this the government has determined it is in the public interest to restrict such dumping of hazardous waste. These laws are another example of a limitation on your property rights.

To understand this better, let's think of the fairness aspect. Suppose someone owns a large piece of land on which a factory is built, and that person buries waste from the factory in the ground. That person makes a great deal of money from the factory, but the buried waste seeps into the groundwater and contaminates the water supply. Others drink that water and get sick. Wouldn't it be unfair if that person was allowed to make a great deal of money from the factory, but could avoid the cost of the illness he was causing through pollution? This kind of harm that is being caused by the pollution is called an **externality**. An externality is a consequence of an economic activity that is experienced by unrelated third parties. The "consequence" here is the sickness from the pollution. The "unrelated third parties" are the people getting sick because of the pollution. Although we did not talk about it in such terms, the harm you felt due to Fahim's tannery was an externality as well. Fahim was engaging in economic activity (the tannery) that was causing harm (the odor) to unrelated third parties (you). The 2007 Environment Law seeks to ensure the costs of such externalities are paid for by the people who cause them. Article 5(5) states: "Persons who cause adverse effects, especially pollution, must bear the social and environmental costs of avoiding, mitigating and/or remedying those adverse effects."



In addition, the public has an interest in preserving the environment for future generations. The 2007 Environment Law Article (5)(4) states this justification for restrictions on property rights: “The present generation should ensure that the health, diversity, and productivity of the environment is maintained for the benefit of future generations.”

Now that we have covered the justifications behind such restrictions, let’s discuss the substantive law. The laws that cover the restrictions on property use due to the public’s interest in preserving the environment are contained in the 2007 Environment Law and the 2009 Water Law. The 2009 Water Law places restrictions on what a person can dump into streams, rivers, and lakes. The Article 31(1) of the Water Law provides that: “real and legal persons cannot contaminate water resources by using or discharging garbage, waste water, industrial waste, chemicals and toxics beyond the limit.” This term “beyond the limit” means that the government sets a limit on the amounts of such pollution that is permitted. Article 29(1) mandates that the National Environmental Protection Agency, in cooperation with the Ministry of Public Health and other relevant institutions, shall set these limits. So when determining if an act of dumping is illegal, you should consult these regulations that explain the limits for various types of pollution. As mentioned before, you will explore these water provisions in great detail in a later chapter.

The 2007 Environment Law overlaps in many ways with the Water Law, but also covers non-water pollution, such as the dumping of hazardous solid waste, and air pollution. Let’s look at some of the most important parts of the Environment Law, then we will discuss how they apply.

## 2007 Environment Law

**Article 13(1):** No person may undertake an activity or implement a project, plan or policy that is likely to have a significant adverse effect on the environment unless the provisions of Article 16 of this Act have been complied with.

**Article 27(1):** Unless in possession of and in compliance with a valid pollution control license . . . no person may discharge or cause or permit the discharge of a pollutant into the environment, whether land, air or water, if that discharge causes, or is likely to cause, a significant adverse effect on the environment or human health.

**Article 30:** No person may collect, transport, sort, recover, store, dispose of or otherwise manage waste in a manner that results in a significant adverse effect

These provisions will be the most helpful when approaching a problem of environmental restrictions on property use. Article 13(1) provides a general rule to follow—a prohibition on activities that cause **significant adverse effects** on the environment. According to Article 4(1) an adverse effect is “any actual or potential effect on the environment that may in the present or future harm the environment or human health or that may lead to an impairment of the ability of people and communities to provide for the health, safety, and economic well-being.” Article 13(1), as you see above, refers to “provisions of Article 16.” Article 16 is a special set of procedures that must be performed and plans that must be submitted to the government in order to gain approval for activities that may have significant adverse effects on the environment. This is a form of licensing requirement that the government uses to prevent harm before it occurs and to ensure only socially beneficial activities that may cause environmental harm are allowed. A licensing requirement can be used to manage potential harm before it occurs. Although we will not cover the Article 16 procedures, you should read through the provisions when you have time to get an idea of the requirements.

Article 27(1) is more specific than Article 13(1). It covers only discharge. Discharge would cover such activities as air emissions and dumping of liquid or solid waste. As you can see above, the same prohibition on significant adverse effects is the standard. You can also see that like Article 13(1), the government requires a license be obtained prior to discharging into the environment.

Article 30(1) is also a more specific provision. It covers waste management. An example of this would be if your neighbor Fahim decided he wanted to open a garbage dump on his property. As before, such activities that cause significant adverse damage are prohibited. The government, according to Article 31(1), also requires a person wishing to operate a waste management facility such as a garbage dump to obtain a waste management license.

You may have noticed a trend here—activities that cause significant adverse effects to the environment are generally prohibited. But some adverse effects on the environment are unavoidable. A society needs factories and landfills. The law handles the balance between adverse effects to the environment and the

need for economic activity through the granting of licenses. This is a way for the government to manage harm done to the environment before it begins, and by doing so, to limit harm to the environment to an acceptable level.

### 2.3.2 Biodiversity



Right now you may be wondering why there is a picture of a sheep in your property textbook. It does seem out of place. But this is no ordinary sheep. It is a species of sheep called an Argali, which is native to parts of Afghanistan. It is also endangered. That means the population of Argali is so low that it is at risk of becoming extinct. In this section, we will discuss how the law places limitations on land use to prevent species, such as this Argali, from becoming extinct. These are the limitations on use due to the public's interest in biodiversity.

The 2007 Environment Law defines biodiversity as the “variability among living organisms from all sources including terrestrial and aquatic ecosystems and the ecological complexes of which they are part, which includes diversity within species and between plants, trees and living organisms within ecosystems.” This term ecosystem simply means all the forms of life that make up a given area. This includes such things as trees, shrubs, bugs, bacteria, birds, fish, and mammals. The species of life that inhabit a certain area often are highly reliant on one another to survive. For instance, birds may eat the fish in rivers, the fish feed on insects, and those insects feed on algae. So the ecosystem would include the birds, fish, insects and algae. If pollution destroys the algae, the insects that eat the algae will die, then the fish that the insects will die, and the birds that eat the fish may perish. Another important aspect of biodiversity is that many insects help fertilize crops. Because of this they are necessary to the food supply. So you can see, biodiversity is a very important public interest.

Because of this very important public interest, the law places limits on how you can affect this biodiversity on your property. These restrictions are contained in Chapter 6 of the 2007 Environment

Law. Chapter 6 handles protection of biodiversity in two ways—through the designation of special areas and through the designation of protected species. In this way the Environment Law protects biodiversity both by protecting the habitat of the species and also by protecting the species themselves directly. A habitat of protected species is known as a “habitat/species management area.” Article 41(3) states that: “Destruction of habitats of protected species by any person, including the State, is prohibited, and offenders shall be duly prosecuted.”

The National Environmental Protection Agency has the power to decide which species are protected. Once the National Environmental Protection Agency designates a species as protected, you are no longer allowed to kill those species, even on your own property. Article 49 states: “the taking of all species listed as protected . . . is prohibited, except for prior authorization in the form of a permit.” The National Environmental Protection Agency can issue permits for captive breeding, artificial propagation, and scientific or educational purposes.

## **2.4 Protection of Historical and Cultural Properties**

After having completed our discussion about environmental restrictions on property use, we will now discuss how the public’s interest in preserving historical and cultural properties can limit property rights. You will learn that the law places major restrictions on how historical and cultural properties are treated, and these restrictions could result in significant limits on property rights.



Why should the law be concerned with historical and cultural properties? The answer to this question lies in Article 2 of the 2004 Law of the Protection of Historical and Cultural Properties. It states that: “historical and cultural properties of Afghanistan belong to the people of Afghanistan and are the manifestation of their participation in the evolution of cultural heritage of mankind.” So you see the historical and cultural property are really the property of every citizen. The public therefore has an interest in protecting its property. In fact, this interest was deemed so important that the Constitution, in Article 9, mandated the government take steps to protect such properties.

But before we go any further, let's set out exactly what we mean by "historical and cultural properties." The Law on the Protection of Historical and Cultural Properties, in Article 3(1-2), defines such properties as:

- (1) any product of mankind, movable or immovable, which has an outstanding historical, scientific, artistic and cultural value and is at least one hundred years old.
- (2) the objects which are less than one hundred years old, but which because of their scientific, artistic and cultural value, should be recognized as worthy of being protected.

Article 4 states that the Ministry of Information and Culture will make the final determination regarding which items less than one hundred years old qualify as historical and cultural properties. The Institute of Archaeology and the Department for Protection and Rehabilitation of Historical Monuments are required to survey the historical and cultural properties to determine the area limits. Once they have determined the area limits, "[n]o person can build or allow another to construct a building within the registered limits of an archaeological area, without the permission of the institute of archaeology."

Furthermore, according to Article 9, if you own land, you are not permitted to "take possession of cultural and historical properties unearthed or hidden, or excavate them." Additionally, per Article 11, you are not allowed to build on your land if it will endanger a historical or cultural property. And according to Article 16, "burial of the dead, digging wells, drains and ditches, burrowing, quarry mining with dynamite, building chimneys, driving heavy vehicles or any other operation, which cause loss and damage to historical properties" is forbidden without permission from the Institute of Archaeology. These are not all the prohibitions on property use, but these provisions give you a good idea of how restrictive the law can be regarding historical and cultural properties. The Law on the Protection of Historical and Cultural Properties is fairly short and it would probably be beneficial for you to read through it when you get a chance.

In addition to the restrictions on property use the Law on the Protection of Historical and Cultural Properties contain, there are also affirmative duties. For instance, if you find a historical or cultural property on your land, Article 19 states that you are "bound to inform the local administrative authority . . . within one week in urban areas and within two weeks in rural areas."

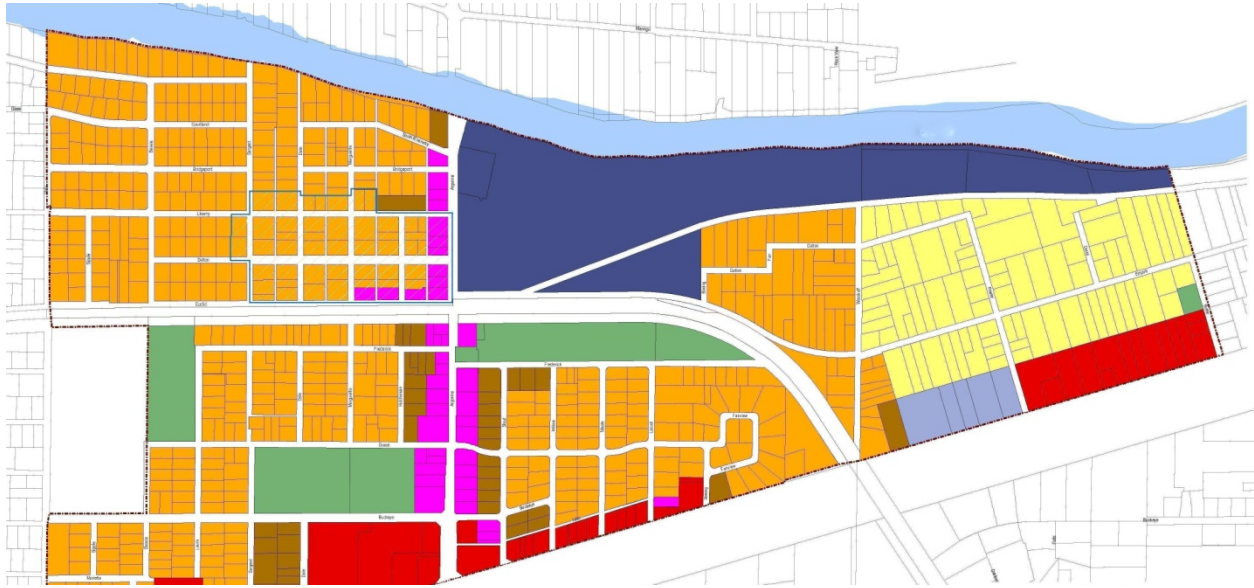
The Law on the Protection of Historical and Cultural Properties also provides the government authority to take land on which historical and cultural properties reside after paying just compensation to the land owner. This is referred to as expropriation. There will be a later chapter devoted entirely to this topic, so we will not get into detail on the topic now.

## **2.5 Concluding thoughts on the public interest**

We have reached the end of our discussion on the limit the law places on property rights to prevent public harm. We have covered a great many topics in this section, so let's briefly recap. You learned that law places many restrictions on property rights to prevent public harm. You first learned that many of the general provisions in the Civil Code covering the prohibition of excessive harm to private individuals can also be used to prohibit harms to the public interest. Next you learned that the law places restrictions on property rights to promote the efficient use of agricultural land. We discussed how if you have agricultural land, you cannot use it for non-agricultural purposes without special permission from the government. Next, you learned that the law places limitations on environmental harm by requiring special procedures and licensing before engaging in polluting activity that could have significant adverse effects.

We also discussed how the law protects the public's interest in biodiversity by designating special habitat areas and prohibiting the killing of protected species. Finally, we discussed the public's interest in preserving historical and cultural properties and how the law restricts actions that could damage such properties. Now that we have recapped our discussion of the way the law restricts property rights to prevent public harm, let's move on to our last topic: zoning.

### 3. ZONING AND CITY MASTER PLANS



You may be wondering what this strange map is, and why it looks like a child colored it randomly. But as strange as it looks, there are important reasons why each part of this map is colored in a different way. What you are looking at is a zoning map. This is also often referred to as a **city master plan**. A city master plan is a map that divides a city into different types of zones. Each type of zone is based on what sort of activity is allowed. For instance, the orange zones above are residential zones. That means only homes and apartments are allowed to be built there. The pink zones are a certain type of commercial zone—things such as offices, retailers, and service businesses. The red is a different type of commercial zone, with things such as warehouses and distribution centers. The dark blue zone is industrial. Only industrial activities such as cement plants, ore processing, and factories are allowed. The green zones are parks. These zoning restrictions are a limitation on property rights.

Let's think back to the beginning of the chapter, when your neighbor Fahim was operating a tannery behind his home, which prevented you from enjoying your tea. If such a city master plan were in place, you and Fahim would be living in one of the orange zones, where only houses are allowed. Because a tannery is a business, it would not be allowed in the orange zones. Fahim's tannery would only be allowed in the red commercial zone or the dark blue industrial zone. The problem between you and Fahim would have been prevented from ever occurring!



That is exactly why the government chose to employ city master plans—to make sure that people in their homes are not disturbed by too much noise, pollution, or foul odors. This can be achieved by allowing only certain activities in certain areas. This makes people happier in their homes and helps limit disputes that would otherwise arise between neighbors. Of course, there will still be disputes; for instance, your neighbor could very well decide to start playing loud music all night long. But city master plans help minimize the public and private harm from property uses by segregating homes, commerce, and industry.

The laws concerning city master plans are contained in the 2000 Municipal Law. The Municipal Law, in Article 5, requires that “the departments of Central Engineering and Urban Planning as well as their relevant branches shall prepare and modify master plans in cooperation and consultation with the municipalities.” Once these master plans are prepared, they are approved by “the Council of Ministers and by the head of the Islamic Emirate of Afghanistan.” After they are approved, the municipalities are responsible for implementing these plans.

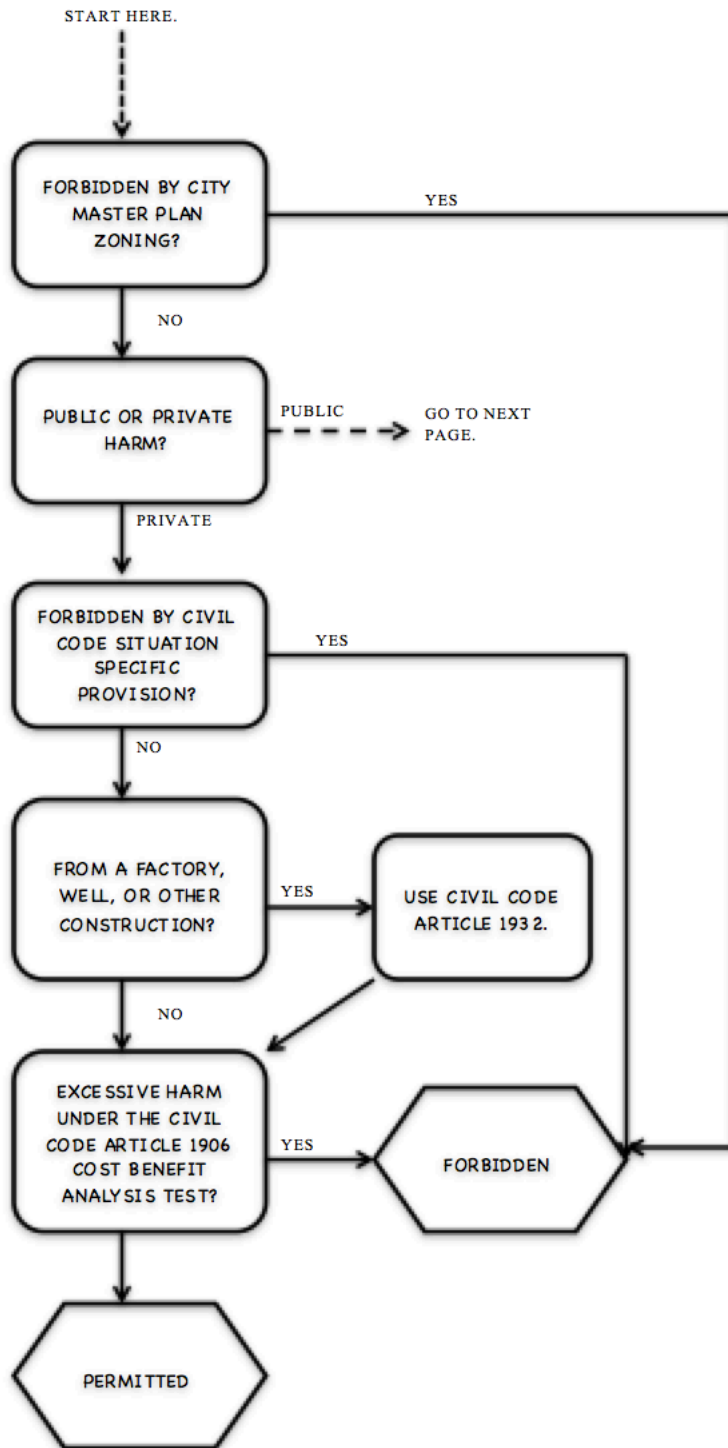
So you see the municipalities work in conjunction with the central government to prepare master plans. This preparation will involve careful study of a city to determine the best place to designate the different zones of permissible activity. Once prepared, they are approved by the central government, and then used by the municipal governments for city planning purposes. If such master plans work well, they can minimize the disputes between neighbors arising due to property use. City master plans limit public and private harms before they occur.

## **CONCLUSION**

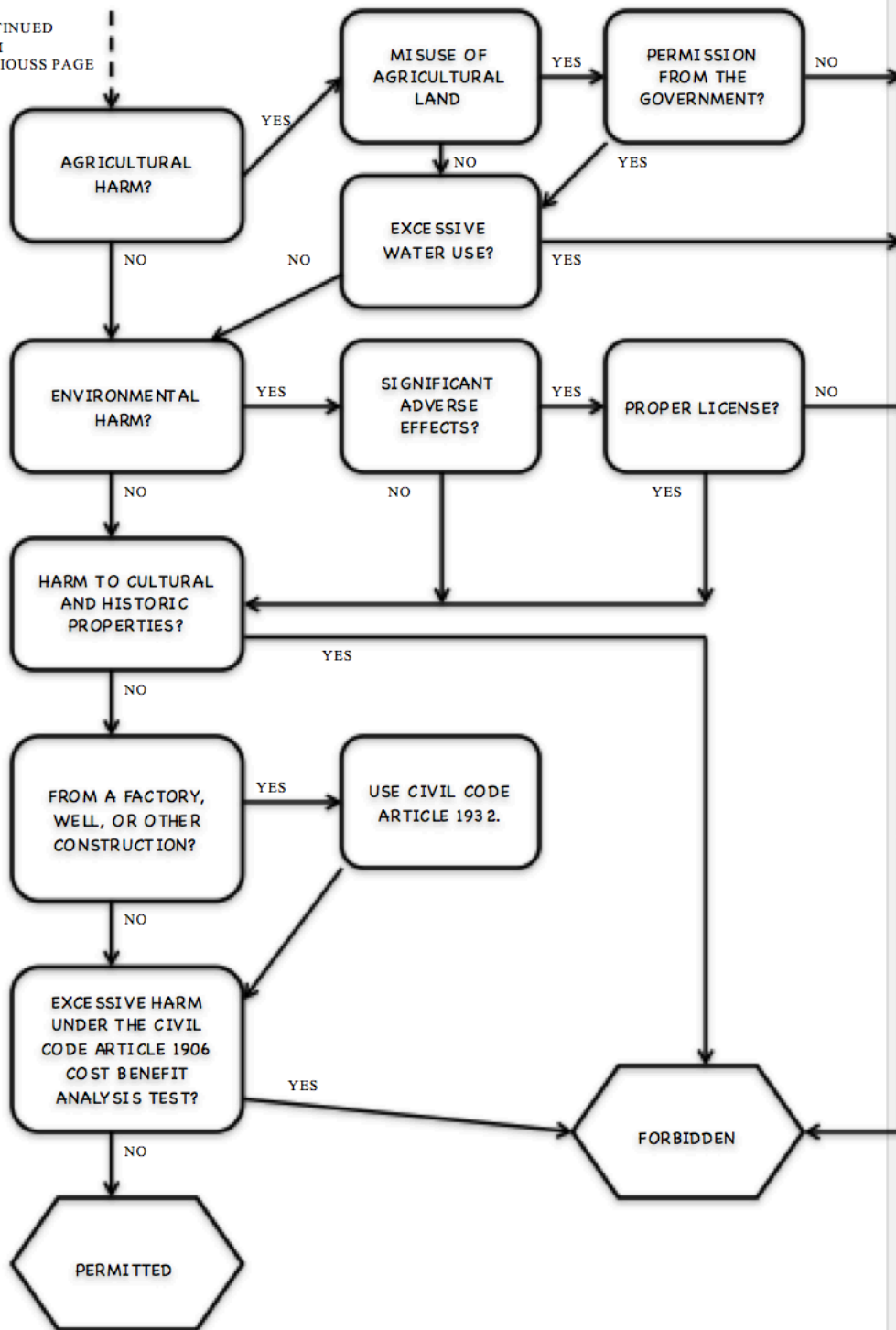
Now that we have discussed zoning, we are at the end of our discussion of limitations on use. So let us review what you have learned. Throughout this chapter, you learned about various ways the law places restrictions on property rights due to private and public interests. You learned that one of the ways the law limits property rights due to private interests is through easements. This was the case with when your neighbor Jamila had a right of passage through your property to get to her home. In addition to easements, you also learned that the law places limitations on property rights to protect against the private harm to your neighbors. This sort of harm is the kind you experienced when Fahim started up a tannery behind his home. You also learned that in addition to private harm to neighbors, the law places restrictions on property use to prevent harm to the public interest. This can be for such reasons as the public interest in efficient use of agricultural land, the prevention of excessive pollution, conservation of biodiversity, and protection of historical and cultural properties.

Now that you’ve learned about all these different types of harm the law seeks to prevent by limiting property rights, let’s return to the flow chart we discussed in the first section of this chapter. Now that we’ve learned about public harm and zoning, we can add to that flow chart to give you a tool to reference when you are attempting to determine if a certain type of harm from property use is permitted or forbidden. Just start at the top, and work your way through both pages and you should arrive at a satisfactory answer. These flow charts are no substitute from opening the statutes and searching for your answer, but they can be useful in directing you where to look.

As you read through these flow charts, you will notice some items appear twice. These are the general provisions in Articles 1906 and 1932 from the Civil Code. Remember how we talked about the overlap between public and private harm? This is the result. Although Articles 1906 and 1932 are most useful in preventing private harm, you can always supplement your argument that a public harm is forbidden by using these provisions as well.



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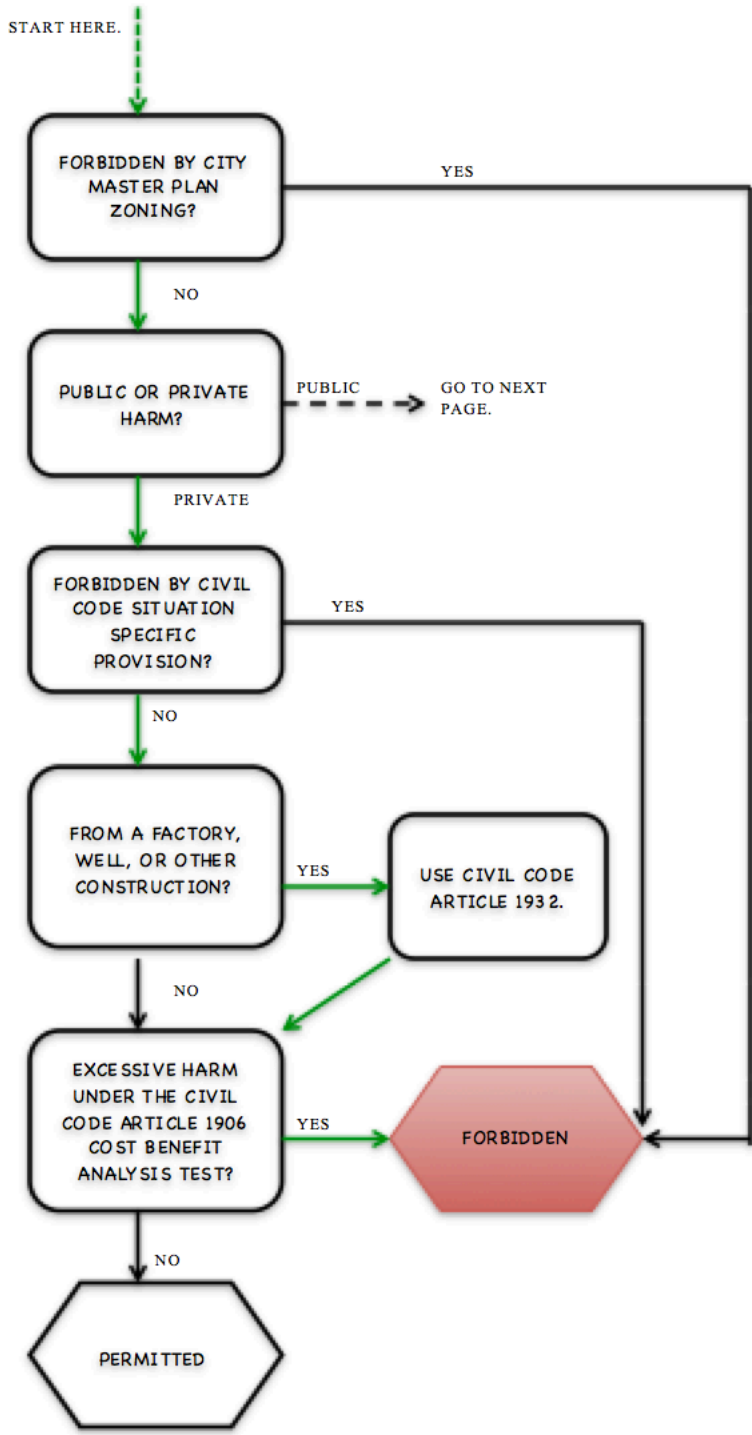
Now let's try to use the flow diagrams to help us figure out some of the problems we encountered in this chapter. Let's start with Fahim and his tannery. You do some investigating and determine the municipal authorities are still developing the city master plan and there are no zoning restrictions in your city yet. Now attempt to work through the flow chart to determine if Fahim's tannery is forbidden or permitted.

If you turn to the next page, you will see the answer. The green arrows represent the path you should have taken. From your research you learned Fahim's tannery is not forbidden by the city master plan, so we can move through that box to the "no" arrow. Next, after your review of the Civil Code, you found no situation specific provision that forbids Fahim's conduct. So you can proceed through to "no" arrow to the next box.

Although it is not necessarily so, you probably could argue that Fahim's tannery is either a business enterprise or "other construction." This takes us through the "yes" arrow, which directs us to apply Article 1932 of the Civil Code: "Factory, business enterprise, well and other constructions that cause harm to neighbors shall have to be constructed at a distance that does not cause harm to neighbors." Remember in our discussion earlier we discussed that even if the harm is covered by Article 1932, we still have to conduct the cost-benefit analysis test to determine if the harm is excessive. Article 1932 is useful because a court will be more suspicious of harm caused by activities covered by Article 1932 and therefore will be more likely to rule in your favor. Always use Article 1932 when you can.

So now we pass through the Article 1932 box to the Article 1906 box where we conduct the cost-benefit analysis test. On one side we have Fahim's interest in using his home in the tannery and on the other side we have your interest in not having to smell foul odors constantly. Because you are being prevented from the benefit of your home because of this harm, it is likely a judge will find the harm excessive. Once we have determined the harm is excessive we can move to the next box, which tells us the activity is forbidden.

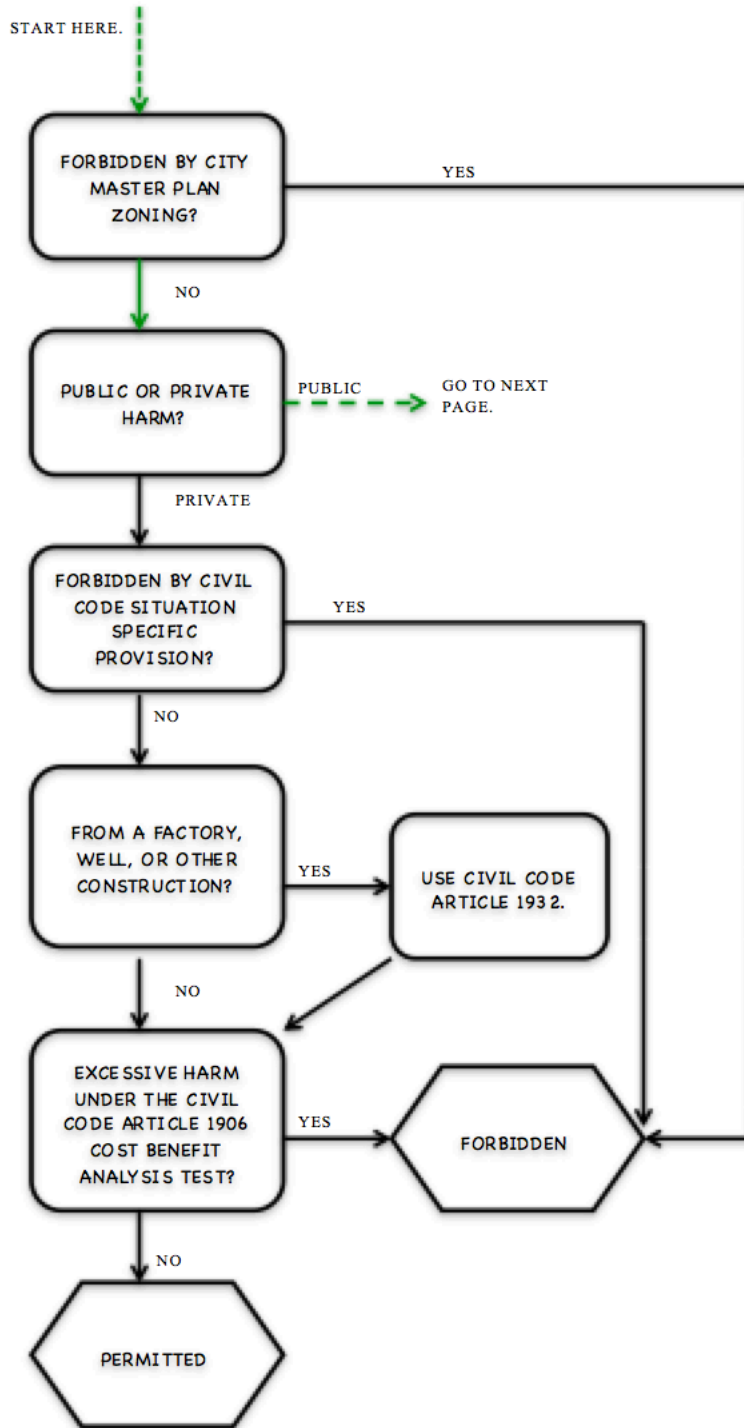
There's your answer!



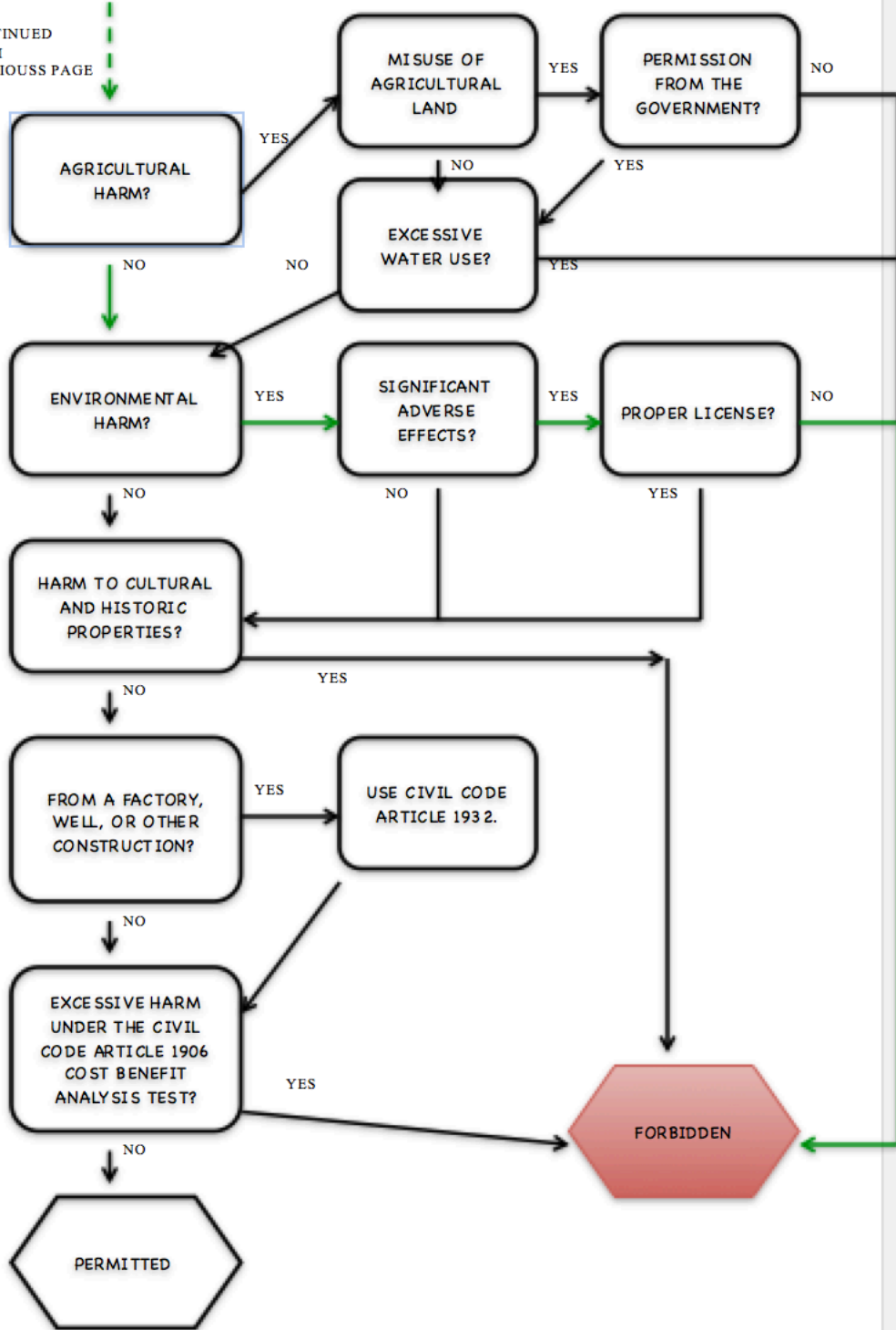
Now let's work through our second problem. Remember when you went to go make some tea and brown sludge came out of your faucet? You conducted some research and found that a factory was dumping chemicals into a nearby river where your town's water supply comes from. You went to the municipal office and discovered that no license had been granted by the central government to engage in such activities. Now let's work through the flow chart. This time you will have to work through both pages. The flow charts with answers are on the next page, but first try to work through the flow charts on your own to see if you arrive at the same answer.

First, we learned that there are no zoning regulation in your city yet, so we can move through the first box about city master plans through the "no" arrow. This takes us to the private or public harm box. Although this is probably one of those situations in which the harm is both public and private, let's go through the public harm arrow first. This takes us to the second page of the flow chart. The harm is not really an agricultural harm, so we move down through the "no" arrow.

This takes us to the environmental harm box. Dumping chemicals in a river is certainly an environmental harm, so we move through the "yes" arrow. That takes us to the significant adverse effects box. There is probably little question that contaminating the water supply is a significant adverse effect. So we can move through the "yes" arrow. This takes us to the box that deals with licenses. Recall any business that causes significant adverse effects to the environment is only allowed to do so with the proper licenses. Because you found in your research that the factory did not have a license, you can move through the "no" arrow. Following this arrow you arrive at your answer. The dumping is forbidden!



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Excellent work! You have arrived at the conclusion that both Fahim's tannery and the factory dumping chemicals into the river were forbidden. Fahim's tannery was forbidden because it was an excessive harm to his neighbor, and the factory's activities were forbidden because they were causing significant adverse effects to the environment (a public harm) without the proper license.

Now that all that is taken care of, perhaps you can finally sit down and enjoy a nice cup of tea.

## CHAPTER 7: AGRICULTURE AND WATER LAW

### INTRODUCTION

*Farhan is a wheat farmer whose family has lived and worked on the same farm in the province of Hilmand for over 100 years. His ancestors had built the farm with their hands. Attached to the farm is a piece of un-irrigated land that the family never used. Farhan fled from Afghanistan with many others from his village in Hilmand province to escape war and has recently returned to the country to reclaim his land. Since then, a powerful construction company has begun to build a housing complex on the portion of Farhan's land that has not been farmed. The housing complex will provide living quarters to 75 families. Who is more entitled to ownership of the land? How should this question be resolved? What should Farhan do?<sup>347</sup>*

**Agriculture** is farming or cultivation of animals and plants for sustaining human life. Issues on agriculture are closely related to issues on water because natural precipitation and irrigation of water are essential for the growth of farm crops and livestock. Together, agriculture and water feed the population of Afghanistan, so it is important that the systems in place for managing these resources function properly. This is why we study the relationship between the law and these topics.

- **2004 Constitution, Article 9:** Protection, management and proper utilization of public properties as well as natural resources shall be regulated by law.
- **2004 Constitution, Article 14** The state, within its financial means, shall design and implement effective programs to develop agriculture and animal husbandry, improve economic, social and living conditions of farmers, herders and settlers as well as the nomads' livelihood. The state shall adopt necessary measures or provision of housing and distribution of public estates to deserving citizens in accordance with the provisions of law and within financial possibilities.

Afghanistan is a high and arid country. Mountains and desert cover most of the land. This means that even though agricultural land covers fifty-eight percent of the total area, only twelve percent of this is actually **arable**, or useable for farming.<sup>348</sup> This means that arable land is a **scarce resource**, meaning that the amount available cannot fulfill all of human wants and needs.

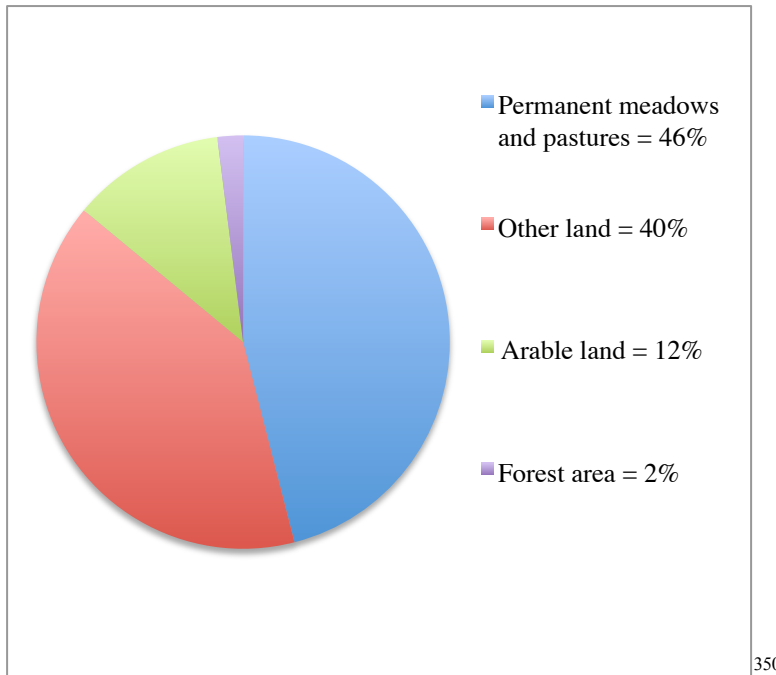
For the land to feed future generations of the country, it should be taken care of. This is achieved by curtailing **unsustainable practices**, or practices that will destroy the land over time, such as overgrazing and overcultivation. The 2006 National Development Strategy focuses on rural economic growth and includes a promise to facilitate more sustainable agricultural practices.<sup>349</sup> It also promises to make arable land more usable by building greater irrigation networks.

<sup>347</sup> Foschini, Fabrizio, "Land Grabs in Afghanistan: Nangrahar, the Disputed Rangeland," Afghanistan Analysts Network (2012), <http://www.afghanistan-analysts.org/land-grabs-in-afghanistan-1-nangrahar-the-disputed-o-rangeland/>.

<sup>348</sup> USAID, "Afghanistan – Property Rights and Resource Governance Profile," 4.

<sup>349</sup> USAID, "Afghanistan – Property Rights and Resource Governance Profile," 11.

: Distribution of Land Types in Afghanistan



The land is vested in (1) private individuals or entities; (2) communities; (3) the government; or (4) the public.<sup>351</sup> Seventy-eight percent of the population lives on rural land and twenty percent of the rural population is **nomadic**, meaning that they are without a permanent home or shift their location of residence based on the season.<sup>352</sup> The agricultural sector is the largest part of Afghanistan’s economy. For example, people own farmland, lease farmland, transfer farmland, work on farmland owned by others, and work to process and trade crops.<sup>353</sup> Landlessness is a growing problem in rural areas. More and more people are losing ownership of their land and working for others. They typically are forced to sell their land in periods of bad weather or other economic pressure.<sup>354</sup> At the same time, landlordism is also a growing problem. A few large owners of land are collecting more and more of it.<sup>355</sup>

Although the agricultural sector drives the Afghan economy, agricultural land has become especially vulnerable to **land grabbing**, or large-scale land acquisitions by powerful corporations and individuals, or the government, often for development purposes. Interests in urbanization directly compete with interests in maintaining land for agricultural use.

For example, as the city of Kabul expands farther into the countryside to accommodate a growing population, land grabbing of agricultural areas and designated “green zones” for housing and industrial

<sup>350</sup> Food and Agriculture Organization of the United Nations, “Afghanistan Country Profile,” <http://www.fao.org/countryprofiles/index/en/?iso3=AFG>

<sup>351</sup> USAID, “Afghanistan – Property Rights and Resource Governance Profile,” 6.

<sup>352</sup> *Id.* at 4.

<sup>353</sup> Wily, Liz Alden, “Looking for Peace on the Pastures: Rural Land Relations in Afghanistan,” Afghanistan Research and Evaluation Unit (2004), 8.

<sup>354</sup> Wily, Liz Alden, “Putting Rural Land Registration in Perspective: The Afghanistan Case,” Afghanistan Research and Evaluation Unit (2004), 3-5.

<sup>355</sup> Wily, “Peace on the Pastures,” 12.

development is a growing problem. Foreign investors seeking to develop an upscale Kabul New City adjacent to Kabul have faced opposition from agricultural and nomadic communities that currently use that land for growing crop and raising livestock.<sup>356</sup> Land grabbing is also common on the fertile land in Nagrahar, which is on the main route for refugees returning to Afghanistan from the east. More recently, fertile land surrounding the Nagrahar Canal has been leased to private investors seeking to divide it into residential plots and sell it.<sup>357</sup> Because of phenomena such as landlordism and land grabbing, agricultural land is becoming a scarce resource.

Water is also a scarce resource.<sup>358</sup> Eighty percent of the country's water resources come from snowmelt from the Hindu Kush Mountains and are contained in three main watersheds. Annual flooding, drought, pollution, lack of clean drinking water, disputes over access and ownership of water, and inefficient irrigation infrastructure are some of the main problems regarding water rights in Afghanistan today.<sup>359</sup>

**Irrigation** is an artificial infrastructure for transporting water to soil, so that the soil is well fed with water.

Over the period of war and conflict in Afghanistan during the past few decades, state management broke down. This led to the overuse of many public lands and degradation of many land and water resources.<sup>360</sup> Poor weather conditions further contributed to soil and watershed degradation, deforestation, and flooding.

Because of water shortages, only half of the country's arable land is cultivated each year. Eleven percent of the country has no water resources at all.<sup>361</sup> This means that there are many opportunities to redesign a better water management system.

Agriculture and water rights are some of the most pressing legal topics in Afghanistan today. They are the source of many serious conflicts – for example, tensions between nomadic and settled communities over the use of pasture land, disputes over the difference between government-owned land and public land that is entrusted to the government, claims to land from returning refugees, and disputes over fair division of shared waterways. The laws and policies that address these topics are often confusing and overlapping. They do not fit neatly into the doctrinal rules that you learned in previous chapters, but we will do our best to make sense of these topics within the context of the doctrinal rules. In this chapter, we will explain the institutional framework for governance of agriculture and water respectively, as well as the way that property issues discussed in other chapters of this book, such as ownership, transfers, limitations on use, and dispute resolution, intersect with the topics in agriculture and water. You will leave this chapter with an idea of the major areas of legal conflict in the agriculture and water sectors.

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<sup>356</sup> Foschini, Fabrizio, "Land Grabs in Afghanistan: Deh Sabz, the New and the Old," Afghanistan Analysts Network, <http://www.afghanistan-analysts.org/land-grabs-2-deh-sabz-the-new-and-the-old>.

<sup>357</sup> Foschini, "Land Grabs in Afghanistan: Nagrahar."

<sup>358</sup> Ministry of Rural Rehabilitation and Development, Islamic Republic of Afghanistan, "Strategic Intent" (2010), 10.

<sup>359</sup> IS Academie, "Afghanistan – Food Security and Land Governance Factsheet," 7.

<sup>360</sup> Department for International Development, "Islamic Republic of Afghanistan: Capacity Building for Land Policy and Administration Reform" (2008), 1.

<sup>361</sup> USAID, "Afghanistan – Property Rights and Resource Governance Profile," 11.

## 1. RELEVANT LAW AND POLICY

The body of law that governs agricultural and water resources is complicated. Over seventy rural land statutes exist. Some decrees of previous executive administrations have been reissued. Others have been amended without clear repeal of earlier versions. The statuses of decrees from the Taliban era are particularly uncertain. Some may be considered obsolete by judges and other legal authorities, even though they are not contrary to principles established the Constitutions of 1964 and 2004. Each existing law is supposed to be under review by the relevant ministry, but this process is incomplete.<sup>362</sup> For these reasons, we will focus only on the most important and recently enacted national laws that address the topics of agriculture and water.

The following is a list of major laws and policies that govern agriculture and water in Afghanistan today, for your reference. We will highlight several provisions from these texts during this chapter. As you look through this list, remember that *laws* are binding rules on the behavior of people and organizations, but *policies* are non-binding objectives that a governments sets for itself to achieve in a certain time period.

Name	Year	Relevance
Constitution	2004	Does not directly address land rights but guarantees the protection of private property. Allows for the State to compulsorily acquire private land for public purposes (discussed later in the chapter). <sup>363</sup>
Civil Code of Afghanistan	1977	Contains a number of provisions on owning, possessing, and transferring agricultural land. Also addresses water easements. The law mostly reflects Sharia principles of the Hanafi School.
Law on Managing Land Affairs	2008	The guiding law on land issues, aiming to create a unified and credible system for management of land affairs, to reflect the principles of the 2007 National Land Policy, and to address problems arising from land reforms of previous regimes. <sup>364</sup> Sets out definitions for various land types and classifications, requirements for land deeds, and government allocations of state land, land leasing, land expropriation, settlement of land rights, and restoration of lands. Recognizes Sharia. <sup>365</sup>  A major substantive concern with the law is that it fails to achieve its purpose in clarifying different types of land. We will discuss further on in the chapter. There are also procedural concerns with this and other laws, mainly whether or not the law has been properly approved of by parliament. <sup>366</sup>
Water Law	2009	Provides the basic framework for national integrated water infrastructure based on formalized institutions. Adopts a river basin approach under which natural river basin boundaries (not administrative boundaries) govern all aspects of natural resources management and planning. <sup>367</sup>

<sup>362</sup> Wily, "Peace on the Pastures," 31.

Law on Pasture and Public Land	2000	Describes in detail the different property rights associated with private pasture versus public pasture.
Law on Regulating Forest Affairs	2011	Establishes best practices for maintaining forest regions, including lakes, reservoirs, and dams. Prohibits conversion of forestland to agricultural land or animal pasture. <sup>368</sup>
Customary Law	-	The Ministry of Justice estimates that 90% of Afghans rely solely on customary law. The Civil Code recognizes the application of customary law to land rights. Customary law systems vary but share the following characteristics: customary village councils that use mediation and arbitration in dispute resolution, application of principles of apology and forgiveness. Customary law usually governs the use of water on private land. Customary law governs allocation of water through community-based systems. <sup>369</sup>
Sharia Law	-	The moral and religious code of Islam that forms the basis for much of the current written code on property law and that plays an important role in local dispute resolution. See Chapter 2 on Legal Framework for further detail.
National Land Policy	2007	Allows for the formalization of land rights in informal settlements, and addresses the overlap in different institutions' authority over questions of land rights.
Water Sector Strategy	2008	Lays out the principles of integrated water resources management (IWRM), which is based on water demand management, cost recovery, reallocation of water, and environmental conservation. Is the basis for the 2009 Water Law.
Rural Development Strategy	2010	Strives to contribute to poverty alleviation through the
		delivery of a comprehensive package of services for the rural

<sup>363</sup> IS Academie, "Afghanistan – Food Security and Land Governance Factsheet," 4.

<sup>364</sup> Katawazi, Nezamuddin, "Land Disputes and Governance in Afghanistan," *TransConflict*, <http://www.transconflict.com/2013/10/land-disputes-governance-afghanistan-110/>

<sup>365</sup> *Id.*

<sup>366</sup> Wily, Liz Alden, "Recommended Strategy for Competing High Pasture Claims of Settled and Nomadic Communities in Afghanistan," United Nations Environment Programme (2009), 26.

<sup>367</sup> USAID, "Afghanistan – Property Rights and Resource Governance Profile," 11.

Rural Development Strategy	2010	Strives to contribute to poverty alleviation through the delivery of a comprehensive package of services for the rural poor and to create an enabling environment for sustainable rural development.
National Plan for Sustainable Rangeland Management	2011	Strives to provide a framework for the Ministry of Agriculture, Irrigation, and Livestock and its development partners to facilitate a comprehensive national approach to

## 2. AGRICULTURE

### 2.1 Institutional Framework

Several different institutions are responsible for managing agricultural land in Afghanistan. Primary responsibility goes to the Ministry of Agriculture, Irrigation, and Livestock (MAIL).<sup>370</sup> Within MAIL, all land administration and registration is the responsibility of the Afghanistan Land Authority (ALA).<sup>371</sup> ALA also functions to recapture lands that it believes belong to the government and to lease those lands to investors to generate revenue for the government.

Along with MAIL, the Supreme Court of the Islamic Republic of Afghanistan, The Ministry of Energy and Water (MEW), the Ministry of Finance, the General Administration of Geodesy and Cartography, and relevant local departments are jointly responsible for aiding in land settlement administrative work.<sup>372</sup> Representatives of these institutions sit on a land settlement commission, a central commission for land management, and a provincial commission.<sup>373</sup> The land settlement commission oversees the settlement and documentation of land ownership rights and evaluates land for water rights and tax purposes.<sup>374</sup> A Cadaster team within the General Administration of Geodesy and Cartography conducts fieldwork to survey land plots and determine their official boundaries.<sup>375</sup> The central and provincial commissions help to coordinate and implement these field activities.

The courts draft deeds and issue orders for the transfer of title. They are also responsible for formal dispute resolution. The government established a Special Land Dispute Court in 2002 to focus on land disputes arising from the return of refugees, squatting, and the bridge between formal and informal institutions. *Shura* or *Jirga*, village councils, are active in land issues and dispute settlement in more informal ways. In fact, many people believe that these village councils are much more effective at handling disputes on the community level than the formal court system that is in place.<sup>376</sup>

<sup>368</sup> 2011 Law on Regulating Forest Affairs, Articles 28 and 37

<sup>369</sup> USAID, “Afghanistan – Property Rights and Resource Governance Profile,” 6.

<sup>370</sup> 2008 Law on Managing Land Affairs, Article 4.

<sup>371</sup> IS Academie, “Afghanistan – Food Security and Land Governance Factsheet,” 6.

<sup>372</sup> 2008 Law on Managing Land Affairs, Article 13.

<sup>373</sup> 2008 Law on Managing Land Affairs, Articles 14, 19, 20.

<sup>374</sup> 2008 Law on Managing Land Affairs, Article 15.

<sup>375</sup> 2008 Law on Managing Land Affairs, Article 16.

<sup>376</sup> USAID, “Afghanistan – Property Rights and Resource Governance Profile,” 8.

## 2.2 Owning and Titling

As discussed in Chapter 3, a person can own land through purchase, government land allocation, and transfer of ownership. Most people acquire rural land through inheritance transfers, which often precede death.<sup>377</sup> Therefore, most rural land ownership stays within the family.<sup>378</sup> Many farmers are tenants and sharecroppers who do not own land but use the land of others in exchange for rent or crops. Others are nomadic or semi-nomadic people who move from place to place and use land for temporary settlements and raising animals.<sup>379</sup>

The three main ways to use land are therefore through owning the land, leasing the land, or obtaining agreed rights of access to the land. If you own land, it legally belongs to you. If you lease land, you have an agreement with the owner to use it in exchange for payment. The main lessor of land today is the government, which is interested in leasing land to encourage investment. For example, the 2008 Law on Managing Land Affairs contains provisions that allow the government to partake in long land leases (50 years for fertile land and 90 years for virgin and arid land) to domestic and foreign investors.<sup>380</sup> The third way to use land is through right of access. If you have right of access to the land, you have obtained exclusive or non-exclusive rights to access land that is usually government owned.<sup>381</sup>

### 2.2.1 Types of Land

Before we discuss specific laws relating to agricultural land, it is important to have a general understanding of how land is classified. Like the institutional framework for agriculture, the classification of land and land ownership can be confusing and inconsistent. The 1977 Civil Code of Afghanistan, 2008 Law on Managing Land Affairs, various Presidential Decrees, Sharia, and other relevant laws all classify land differently.<sup>382</sup>

Consider the following definitions, taken from the Article 3 of the Law on Managing Land Affairs, while contemplating what the objectives of such a land classification system might be:

#### 2008 Law on Managing Land Affairs, Article 3 (excerpt):

- Agricultural Land: A landed area that can be used for agriculture in accordance with the provisions of the present law.
- Grazing (derelict) land (pastures, harvest ground, and inherited lands): Grazing lands are those virgin and arid lands in respect to which government or individuals' ownership has not been proved legally. If a person having loud voice and standing at the last home of village or town calls loudly, this land up to the place where the voice of the loud voice having person is heard, is considered to be grazing land.
- Endowed land area: Endowment is an endowed object that is dispossessed off the person who has endowed, but is not owned by the person for whom it has been endowed.
- *Mawat*, or virgin land: Land that has never been brought under cultivation.

<sup>377</sup> *Id.* at 6.

<sup>378</sup> Wily, "Peace on the Pastures," 29.

<sup>379</sup> IS Academie, "Afghanistan – Food Security and Land Governance Factsheet," 4.

<sup>380</sup> USAID, "Afghanistan – Property Rights and Resource Governance Profile," 6.

<sup>381</sup> IS Academie, "Afghanistan – Food Security and Land Governance Factsheet," 5.

<sup>382</sup> IS Academie, "Afghanistan – Food Security and Land Governance Factsheet," 4.



- Arid Land: Land which under normal conditions has not been cultivated for a period of 5 successive years, and which can be brought under cultivation after improvement or construction of a new irrigation system.

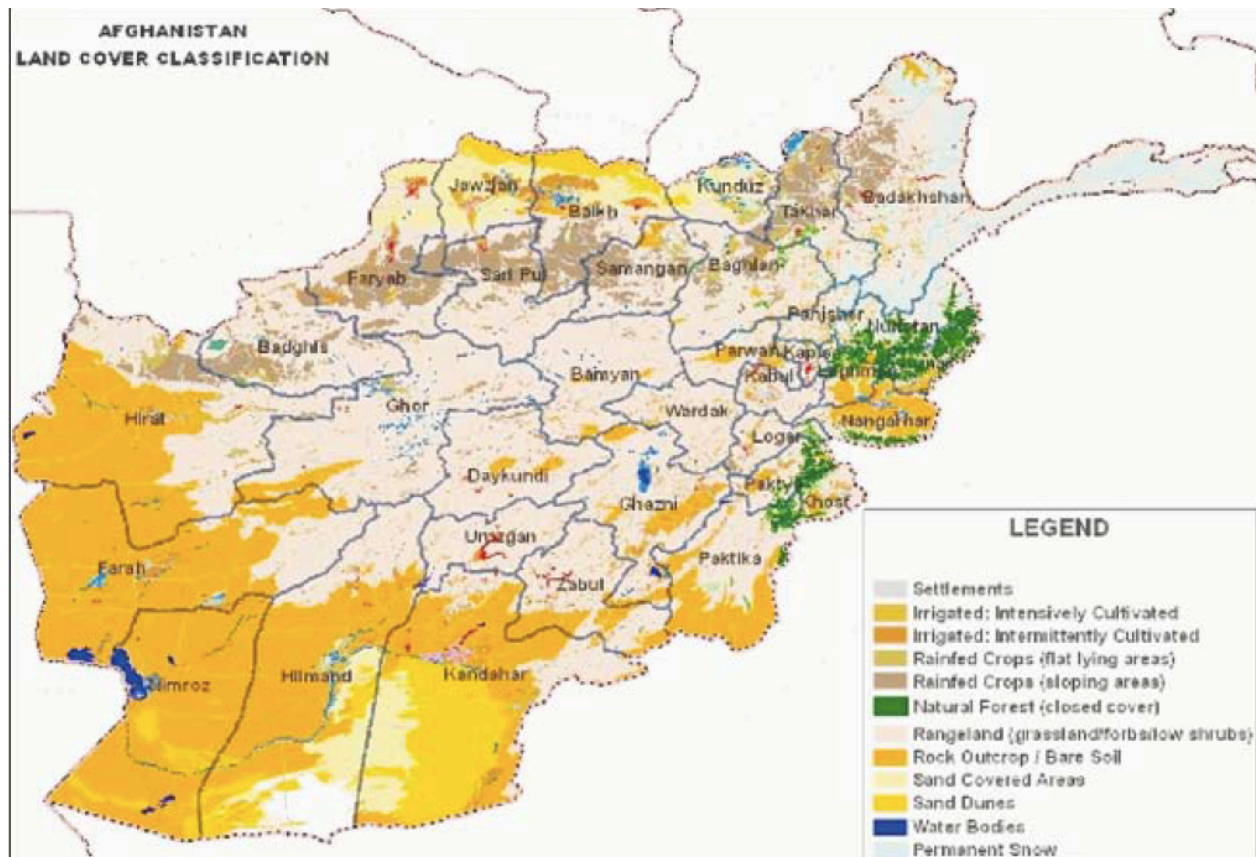
Have you seen or heard of these land categories in your own neighborhood? Do these definitions make sense to you? Can you see a clear difference between them? Notice that grazing lands, or pastures, are defined by their ownership as well as their boundaries. They are virgin or arid lands which neither the government nor private individuals legally own. Their boundaries include area within the distance a person's voice will carry when he is standing at the edge of a village or town. Do you think that defining the boundaries in this way applies to our lives today?

Pastureland is actually the most controversial type of land in legal disputes in Afghanistan today, so we should take some time understanding what pastureland means. In most basic terms, **pasture** is land that is used for grazing animals. Up to seventy percent of the total land in Afghanistan is used for this purpose. This figure includes land that some sources call "rangeland," as well as some areas that are technically defined as "wastelands" because they are rocky and difficult to use because of harsh climate and/or high altitude. Pastures extend from valley bottom paddocks to drier hillsides to plateaus within mountain ranges to steep mountainsides themselves.<sup>383</sup>

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<sup>383</sup> Wily, "Competing High Pasture Claims," 13-14.

## Land Classification in Afghanistan<sup>384</sup>



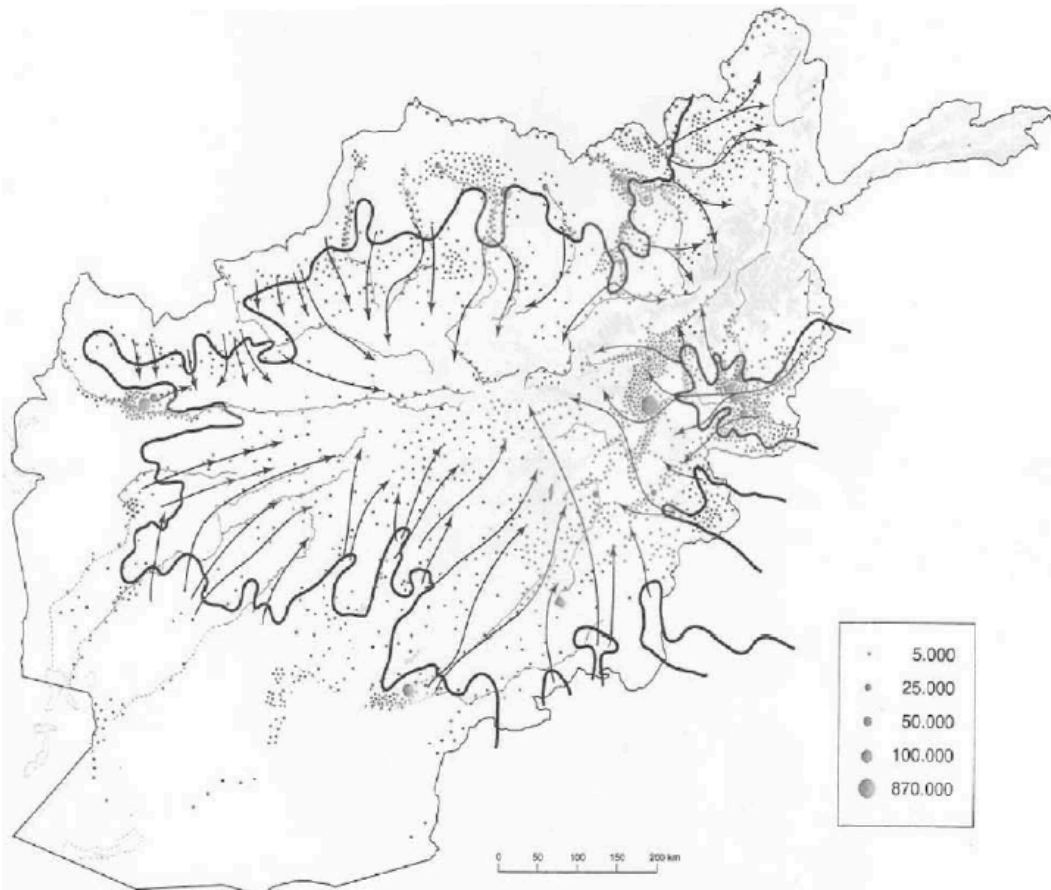
Both settled and nomadic rural Afghans depend on pasture to survive. This is a source of increasing conflict across the country. Nomadic communities frequently shift to the central highlands in the summertime to use the grasses that grow there after the snow melts and their home pastures are dry.<sup>385</sup> Part of the reason that conflict is growing is that the amount of usable pastureland has been deteriorating over the past half century. Overgrazing and the expansion of agriculture into traditional pastureland directly contribute to this deterioration. Pasture has become a scarce resource.<sup>386</sup>

<sup>384</sup> Wily, "Competing High Pasture Claims," 13.

<sup>385</sup> Wily, "Competing High Pasture Claims," 13-14.

<sup>386</sup> Wily, "Competing High Pasture Claims," 17.

## Migration Pattern of Nomadic Communities to Central Highland Pastures in the Summer<sup>387</sup>



### 2.2.2 Types of land ownership

Historically and in practice, all land in Afghanistan is privately owned, community owned, government owned, or publicly owned land. The 2007 National Land Policy affirms these four types of ownership.<sup>388</sup>

**Private land** is property owned by individuals, families, or businesses. **Community land** is property owned by communities and equitably available for use by all members of the communities, even if they own other properties. **Government land** has been acquired and registered as belonging to the government and is dedicated to public service provisions. **Public land** is land that belongs to the people of Afghanistan as a whole; it is entrusted to the government or a government agency for the benefit of all people. Public land is thought to include underground resources, charitable land, forests, and pastures.<sup>389</sup>

Many disputes relate to government land. The definition of “government land” is unclear, even though many different laws have tried to define it. Since the 1980s, there have been massive government efforts

<sup>387</sup> Wily, “Competing High Pasture Claims,” 14.

<sup>388</sup> Wily, “Competing High Pasture Claims,” 70.

<sup>389</sup> Wily, Alden Liz, “Current Land Issues in Afghanistan,” Afghanistan Research and Evaluation Unit (2003), 12.

to claim ownership of already allocated or unidentified land. The government has claimed ownership of lands that were once defined as community owned and privately owned. A series of presidential decrees have expanded the types of land that the government can own. The 2003 Legal Decree for Transfer of Government Property, for example, states that “all real property in the possession, custody or use of ministries or other government organs” is government lands. This declaration is broad enough to include up to eighty-five percent of all the land in the country.<sup>390</sup> The government has the legal right to claim private lands for itself if does so in the “public interest” and provides fair compensation. We will discuss this later on, when we talk about limitations on use.

The lines between government owned land and publicly owned land have become unclear. This is important because the role of the government as an owner of land is different from the role of the government as a trustee of public land.<sup>391</sup> If the government owns a piece of land, it can behave like a private owner of that land by selling or leasing it to agents, private individuals, or communities. If it is a trustee of that land, it protects the land on behalf of the public.<sup>392</sup>

Many of the newer land laws do not explicitly account for lands that would traditionally be considered community or publicly owned. For example, the 2008 Law on Managing Land Affairs, seen below, defines “private land” but does not define land that has traditionally been understood as belonging to a particular community. Private land belongs to individuals or non-governmental legal entities. The latter, according to Article 337 of the 1977 Civil Code of Afghanistan, means an organization, company, or association with legal capacity, but *not* a community.<sup>393</sup> “Government land” includes both registered government land and unregistered land “deemed public land.” It also includes land without any proven individual ownership, but the law does not specify if “individual ownership” includes community ownership.

<b>2008 Law on Land Management Affairs, Article 3 (excerpt):</b>	
• Private land:	○ Plot (s) of lands belonging to individuals or non-governmental legal entities.
• Government land:	• Plot (s) of orchard, irrigated and rain-fed lands, hills, parks, marshy lands, forests, pastures, reed-beds and other lands being registered in the principal book of the government lands.
	○ Lands, which are deemed public lands, but are not registered in the principal book of government lands. ○ Lands in respect of which individual ownership has not been proved legally during settlement.

Now that we have discussed types of ownership, we will return to the topic of pastureland in the context of ownership. In Article 82 of the Law on Managing Land Affairs, “pastures” are legally defined as publicly owned, virgin or arid lands without proven ownership by an individual or the government, unless Sharia dictates otherwise. Neither the government or an individual can behave as the landowner. In practice, pastures are used by their neighboring communities even though those communities are not the

<sup>390</sup> Wily, “Peace on the Pastures,” 31  
<sup>391</sup> Wily, “Current Land Issues in Afghanistan,” 2.  
<sup>392</sup> Wily, “Peace on the Pastures,” 45.  
<sup>393</sup> 1977 Civil Code of Afghanistan, Article 337.

complete legal owners. In Sharia, this concept is known as **partial ownership**, meaning that one is allowed benefit from a particular land but not allowed to transfer it. Pastures are “kept unoccupied for the sake of public requirements of local villagers,” but they do not belong to them.<sup>394</sup>

The 2008 Law on Managing Land Affairs’ view on pasture ownership is different from that of the 2000 Law on Pasture and Public Land. It defines pasture broadly as “all types of land including hills, deserts, mountains, riverbeds, forests, that have places where grass grows and supports animals.” It distinguishes between private and public pasture but explicitly states that private pasture can be “community owned.”

- How can different views on what pasture is and how pasture is owned be reconciled? Do you foresee any problems arising from the 2008 Law on Managing Land Affairs’ partial ownership definition of pasture?
- Imagine that you are the leader of a village that depends on a nearby plot of pastureland to feed your livestock. Over the summer, your village shares this piece of land with a nomadic community that travels down from the mountains. Over the past ten years, the population of your village has been steadily increasing. You need to raise more livestock and you need to expand your farming land so that you can grow more crops such as wheat and barley. Otherwise, your village will go hungry. Who do you think owns the pasture? What can you do? Is new legislation needed to address this issue?

### 2.2.3 Land registration

The basic unit for registering land is the deed. A **deed** is a formal legal document that certifies a person’s ownership of a piece of land. A deed can take the form of court-registered proof of land ownership or transfer, state or government decrees of purchase from the government, tax payment documents, water rights documents, registered customary deeds, and formal title deeds issues after legal settlement.<sup>395</sup> For a more detailed list of what can be a deed, see Article 5 of the 2008 Law on Managing Land Affairs. Primary court judges usually have responsibility to draft and archive legal deeds, and for rural land, the ALA office within MAIL certifies the identity of the landowner.<sup>396</sup> New deeds are granted after the owner has paid for the full price of the land.<sup>397</sup> Immovable agricultural installations, such as watermills, are also formally registered in land registration and tax books.<sup>398</sup>

The purpose of a deeds registration system is so that the government can keep track of land ownership and collect taxes on land. The government can lease land that it owns to investors. If people have legal title to land, they can use that land as **collateral**, promising to give up that land to a lender if they cannot repay a loan.<sup>399</sup> Also, people can prove their ownership of land when questions or disputes arise. Many successive governments in Afghanistan have tried to put into practice a formal registration system in Afghanistan, but they have met little success.<sup>400</sup>

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<sup>394</sup> 2008 Law on Managing Land Affairs, Article 82.

<sup>395</sup> 2008 Law on Managing Land Affairs, Article 5.

<sup>396</sup> USAID, “Afghanistan – Property Rights and Resource Governance Profile,” 8.

<sup>397</sup> 2008 Law on Managing Land Affairs, Articles 10-11.

<sup>398</sup> 2008 Law on Managing Land Affairs, Article 7.

<sup>399</sup> Foley, Conor, “A Guide to Property Law in Afghanistan,” Norwegian Refugee Council (2005), 53.

<sup>400</sup> Foley, “A Guide to Property Law in Afghanistan,” 41.

One problem is that when the registration system first began in the 1970s and 1980s, less than thirty percent of agricultural land was surveyed and registered. Today, less than ten percent of rural property is covered by legal deeds. Archived records are also often outdated and inaccurate.<sup>401</sup> The earlier land registration system relied on self-reporting by farmers, rather than a **cadastral system**, where land is formally measured and surveyed by professionals.<sup>402</sup> Because the size of the land influences taxes, some farmers underestimated the size of their farms.<sup>403</sup> Others overestimated the size of their farms to inflate their value.

Even after the switch to a cadastral system through the 2008 Law on Managing Land Affairs, problems persist.<sup>404</sup> The ALA records and court-based records do not always match.<sup>405</sup> Authorities have had difficulty assessing the difference between people who actually own land and people who are leasing the land owned by others. They have also had difficulty deciding how to register community owned land plots that belong to many people. For example, pastures and **rain-fed land**, which is land that depends on rainfall for agriculture rather than irrigation for agriculture, are often community owned and difficult to register.<sup>406</sup> Another problem is that under previous regimes, some people were forced to hand over their land in illegitimate transfers because of threats and intimidation.<sup>407</sup> It is difficult to verify their land ownership.

Because the land registration system is incomplete and land reform and government regimes in Afghanistan have changed over time, a formal deed is not the only way to prove ownership of a piece of land. The 2007 National Land Policy states that ownership may be documented through a property certification process conducted at the community level.<sup>408</sup> Courts have acknowledged proof of ownership through cadastral records, which are professional assessments of the land; records from previous regimes, including self-reported records, and customary documents. Customary documents include bills of sale and purchase, pawn agreements, wills, subdivisions of plots, and witness accounts by friends, relatives, and local leaders.<sup>409</sup> Even if no documentary evidence of ownership exists, if a person is putting the land to productive use, he may be able to claim ownership of it. Or else, the government may claim ownership of the land and then sell or lease the land back to the user.<sup>410</sup> For example, see the code provision below:

**2008 Law on Managing Land Affairs, Article 8:**

Where the landowner is not in possession of a deed and the land possessed by him has not been registered in the State properties book, and other individuals did not make claim for the ownership of the land, and where the signs of agricultural construction have been observed on the land, and where the landowners holding lands having joint borders with his land confirmed the location under his possession for 35 years and where it is not located under government project, the same land of till 100 jeribs shall be deemed his property on the basis of his possession as owner.

<sup>401</sup> USAID, “Afghanistan – Property Rights and Resource Governance Profile,” 8.

<sup>402</sup> Foley, “A Guide to Property Law in Afghanistan,” 42.

<sup>403</sup> USAID, “Afghanistan – Property Rights and Resource Governance Profile,” 8.

<sup>404</sup> Foley, “A Guide to Property Law in Afghanistan,” 41.

<sup>405</sup> IS Academie, “Afghanistan – Food Security and Land Governance Factsheet,” 5.

<sup>406</sup> Wily, “Peace on the Pastures,” 7.

<sup>407</sup> Foley, “A Guide to Property Law in Afghanistan,” 46.

<sup>408</sup> Wily, “Competing High Pasture Claims,” 70.

<sup>409</sup> Wily, “Peace on the Pastures,” 35.

<sup>410</sup> Foley, “A Guide to Property Law in Afghanistan,” 46.

(2) Where the government finds the documents superseding possession of the person mentioned in paragraph (1) of this article, the land shall be known as government property; and the following performances shall be observed in this case: Where the possessed landholding area is till (10) jeribs of first category land or equivalent to it, it shall, free of charge, be given under possession of landowner; and more than 10 jeribs equivalent of class one land category shall be sold to the landowner on the current market price and by installments of five years.

This means that a person can get formal ownership of a piece of land by possessing it and acting as the owner over a long period of time. The purpose of this law might be to allow a new way for informally owned land to become formally owned. It also might be to encourage people to invest in land that is not claimed by others. However, if a person takes a very large piece of land, he still must pay for it himself.

- What are pros and cons of a formal land registration system?
- When a title deed is formally issued for a piece of land, usually only one name is written on the ownership document.<sup>411</sup> What does this mean for land that in practice is family owned or community owned? Is there a better system for registration?
- Houshmand and Jahandar own two neighboring farms. They are fighting over 5 jeribs of land at the border of their properties that has a strip of lemon trees growing there. Houshmand has a government document from 1973 that includes the strip of lemon trees in his property. This document was based on Houshmand's own reports of what he owned. The village leader, Ahmed, states that the trees belong to Houshmand. Jahandar just recently bought his farm in 2014, and the court document certifying his purchase includes the strip of lemon trees as his property. Who has better claim to ownership of the lemon trees? Is there a way to reach an agreement? How can we tell if the documents are real and not forged?
- Kambiz permanently owns a farm in Panjwai where he grows cotton, but during some years when the cotton yield is bad, he also grows melons on a nearby piece of land for extra income. He has done this in seventeen of the last thirty-five years with no interference from other villagers. Kambiz now wants to claim formal ownership of his melon plot. Can he do this?

#### 2.2.4 Utilizing Property

Many of the laws in place express the idea that it is better to make use of land than to keep it idle. For example, once a person has possessed a property continuously for fifteen years, no one can make an ownership claim on that property in a court of law, unless it is an inheritance claim, which raises the limitation to thirty-three years.<sup>412</sup> The government can lease land that has been abandoned by its owner to other people until the owners or legal heirs of that land reappear to claim the property and the lease money.<sup>413</sup> The government has recently been interested in encouraging commercial investment in land, and it frequently issues decrees that allocate government land to private individuals. People can get

<sup>411</sup> Wily, "Competing High Pasture Claims," 24-25.

<sup>412</sup> 1977 Civil Code of Afghanistan, Articles 2279-2289.

<sup>413</sup> 2008 Law on Managing Land Affairs, Article 32.

government permission to acquire unowned agricultural or barren land if they put these lands to productive use.<sup>414</sup> Sometimes, the government also sells or leases publicly owned land, even though public land is supposed to belong to the general public.<sup>415</sup>

One of the problems with a policy of promoting land utilization is how to deal with land ownership of returning refugees. The rapid return of huge numbers of refugees to Afghanistan in recent years has put a strain on land. Many refugees are unable to return to their land because it is now occupied and used by someone else. Others who have been living on their land for some time have been displaced by returning refugees claiming to be the original owners.<sup>416</sup>

#### Farm Ownership of Returning Refugees, 2002-2004<sup>417</sup>

Period	% do not own land
March-December 2002	46.4
January-December 2003	60.4
January-April 2004	67.0

Data Source: UNHCR, 2004b.

- The 2004 Constitution directs the state to adopt “necessary measures for housing and distribution of public estates to deserving citizens in according with its financial resources and the law.” Should the government read this provision as a justification to allocate certain government owned lands to returning refugees? If so, should it impose any restrictions? Is this a fair policy?

### 2.2.5 Land Use by Nomadic Communities

Nomadic communities move in regular patterns during the year between warm and cold areas or between dry and wet areas. Many of these communities identify one main pasturing area as their home. The nomadic lifestyle is an adaptation to arid or semi-arid climates. Because water and arable land are scarce resources, they use an area and then move on before overgrazing occurs.<sup>418</sup> Even though nomadic communities change their location of residence, some have been migrating between the same areas of land for generations and view their right to use and occupy those lands as inherited. Some semi-nomadic communities practice a mix of the nomadic lifestyle and agricultural cultivation.

As mentioned earlier, disagreements between nomadic communities and settled agricultural communities over the use of pastureland is one of the greatest sources of conflict in Afghanistan today. As pastureland becomes scarcer and agriculture expands to feed a growing population, settled agricultural communities might try and claim ownership over pieces of pastureland used by nomadic communities. The conflict has

<sup>414</sup> 1977 Civil Code of Afghanistan, Articles 1991-1992.

<sup>415</sup> IS Academie, “Afghanistan – Food Security and Land Governance Factsheet,” 3.

<sup>416</sup> Foley, “A Guide to Property Law in Afghanistan,” 46.

<sup>417</sup> Wily, “Peace on the Pastures,” 13.

<sup>418</sup> Wily, “Competing High Pasture Claims,” 6.



reached points of extreme violence at some areas in the center of the country, where many nomadic communities will attempt to enter pasturelands in the summer.<sup>419</sup> Nomadic or semi-nomadic communities can legally acquire their own pastureland for grazing animals by identifying vacant land, applying to local authorities and stating their need for the land.<sup>420</sup> In practice, the authorities might not be so willing to grant them title to the land. Also, because land is becoming scarcer, the amount of vacant land available to claim is shrinking.

## **2.3 Transferring**

As discussed in the chapter on transfers, a person can transfer ownership or possession of a piece of land to another person. A landowner can transfer land permanently, or temporarily. The owner does not have to give up all of the property rights. He can specify which rights he is giving up in a written or oral agreement. In this chapter, we will briefly discuss permanent transfer of agricultural land. Because most conflicts arise from temporary arrangements between lessors and lessees, we will focus mostly on that topic.

### **2.3.1 Land Sales**

The rural land market ranges from very calm to very active in different parts of the country. The most active land markets occur where there is limited irrigated land, which is a scarce and valuable resource for farming. Sharia, formal, and customary law temper the growth of the land sales market. They require landowners wishing to sell their land to first offer it to their heirs and second to their neighbors. If both groups pass on their right of first refusal, the owner can offer the land on the open market. Therefore, these laws favor land transfers within people's own circle of family and friends.<sup>421</sup>

A landowner can transfer his property permanently or temporarily. Irrevocable transfer of landed property and immovable installations and equipment is supposed to take place through a written deed. After a person has paid the price of the land and secured the deed, then he will receive the land.<sup>422</sup> The transfer of land takes place with oversight of the court and the land management department.<sup>423</sup> Transferred land should be recorded in registration and tax books. In practice, sellers may not possess a written deed or buyers may not be able to secure new written documents. So many sales take place without official oversight.

The state can sell or distribute land, with priority to landless farmers whose land was possessed by the state in the public interest, a process we will discuss later in the chapter. The decision is made by MAIL, with the approval of the President. The land is considered borrowed until the point where it is completely paid for.<sup>424</sup> The land is distributed as long as it is not needed for some government project.<sup>425</sup> The government can sell virgin or arid land for the establishment of agricultural farms.<sup>426</sup>

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<sup>419</sup> IS Academic, "Afghanistan – Food Security and Land Governance Factsheet," 8.

<sup>420</sup> USAID, "Afghanistan – Property Rights and Resource Governance Profile," 6.

<sup>421</sup> USAID, "Afghanistan – Property Rights and Resource Governance Profile," 8.

<sup>422</sup> 2008 Law on Managing Land Affairs, Article 50.

<sup>423</sup> 2008 Law on Managing Land Affairs, Article 51.

<sup>424</sup> 2008 Law on Managing Land Affairs, Article 36.

<sup>425</sup> 2008 Law on Managing Land Affairs, Articles 39, 46.

<sup>426</sup> 2008 Law on Managing Land Affairs, Article 48.

### 2.3.2 Land Leases

In Article 1332, the Civil Code of Afghanistan defines a **lease contract** as “transfer of ownership of the concerned profit of the leased property by lessor, to lessee in exchange for a consideration that is replaceable.” In the agricultural context, a land lease is usually an arrangement between a lessor, the landowner, and a lessee, where the lessor gives the lessee permission to access and use the land in exchange for money or crops. The payment might be made periodically or at one time. When the lessor pays in money, this money is called **rent**. Rent agreements are most common when the lessee both uses and lives on the land. Besides rent agreements, there are also **sharecropping** agreements, where the lessee uses the land in exchange for a certain share of the crops that he cultivates. Some small farm owners work their own land and also sharecrop the land of others for extra income.<sup>427</sup> Farmers and landowners can agree to convert their sharecropping agreements into rent agreements.<sup>428</sup>

For example, suppose Asa owns two farms, but he only lives in one of them. He wants to make some extra income by leasing out his second farm. Suppose Fariad is a landless farmer who wants a place to stay. Asa and Fariad can make an arrangement where Fariad pays Asa 3000 Afghanis in rent each month, and Fariad can use the farm however he wants while he stays there. Suppose instead that Fariad has a small home in the same village as Asa’s second farm, but he has no land to farm on. Asa and Fariad might make a different type of arrangement where Fariad uses the Asa’s farm for cultivation but promises to give Asa one-third of his crop at harvest time. You can see how many different types of arrangements between lessors and lessees can exist, depending on their needs.

Note that the Civil Code of Afghanistan calls rent agreements “lease contracts” and calls specialized sharecropping agreements “farming contracts” and “gardening contracts.” A **farming contract** between a landowner and farmer addresses cultivation of land in such a way that harvest is divided between them in shares that they have agreed in contract.<sup>429</sup> If they have not been agreed upon in contract, the shares are determined by custom, or else divided equally.<sup>430</sup> A **gardening contract** between a landowner and gardener occurs when a landowner gives “tree and vine” to another person for the purpose of nurture and utilization, in exchange for portion of its fruit. In this arrangement, “tree” is defined as a plant that remains stable on the ground for more than one year.<sup>431</sup>

#### 1977 Civil Code of Afghanistan, Article 1412:

Conditions of validity of farming contract are:

1. Readiness of land for cultivation.
2. Determination of person who shall be obligated to provide seeds, fertilizer, pesticides and other essential expenses for cultivation.
3. Determination of person who shall be obligated to provide agricultural tools.
4. Delivery of land that is clean of cultivation to farmer, even if seeds belong to owner of land.

<sup>427</sup> Wily, “Peace on the Pastures,” 17-18.

<sup>428</sup> 1977 Civil Code of Afghanistan, Article 1423.

<sup>429</sup> 1977 Civil Code of Afghanistan, Article 1411.

<sup>430</sup> 1977 Civil Code of Afghanistan, Article 1426.

<sup>431</sup> 1977 Civil Code of Afghanistan, Article 1432.

To avoid conflict, it is important for there to be proof of agreement between the lessor and lessee. The easiest way to do this is through a specific written agreement that goes through the details of the arrangement, such as who will provide the farming tools and how frequently rent is paid or shares divided. If there is no proof of agreement, then the law will favor the rights of the landowner to his property, as shown in the code provision below. Therefore, no one can cultivate another person's land without formal permission.

**1977 Civil Code of Afghanistan, Article 2208:**

If a person cultivates lands of another person without permission of its owner and if the cultivated crops grow, the crops shall belong to the owner of the land.

The law accommodates the natural cycle of agricultural seasons. Unless a person cultivates someone else's land without permission, laws on land lease respect the right of the cultivator to physically reap the harvest of his labor.<sup>432</sup> For example, a landowner cannot issue a new lease on land that has been cultivated by someone else until after the cultivator has reaped his harvest.<sup>433</sup> Farming and gardening contracts that span a period less than the typical time for the fruit to fully grow are invalid.<sup>434</sup> If a landowner dies before the new fruits or crops have appeared, farmers and gardeners can legally continue their work, even without the consent of the property's heirs.<sup>435</sup>

What happens if a lease expires before crops or fruits have fully ripened? The right of a laborer to the harvest he has earned is strongly protected in the law. For example, if a rent agreement between a landowner and a lessee expires before the crops have ripened, without fault of the lessee, the lessee shall have the right to continue to possess the land for rent until the time of harvest.<sup>436</sup> If the situation occurs in a farming contract, the sharecropper will continue to cultivate the land until harvest, and the owner and sharecropper will split the agricultural expenses such as irrigation and reaping incurred in this period, proportionate to their shares.<sup>437</sup> If the same situation occurs in a gardening contract, the gardener has the option to continue his work until the fruit is fully grown without any fee. Many of these rules are better understood in light of a deep understanding of contract law, which is addressed in other textbooks.

If the harvest is completed and the lease has expired, then the parties can opt not to renew it. If the owner chooses not to renew the lease, he notifies the lessee beforehand so that there is time for transfer of land and any crops if needed.<sup>438</sup> If there will be a new lessee, then the current lessee should leave the land ready for a new round of cultivation.<sup>439</sup> Sometimes, crops on leased land perish, and the question arises of whether the lessee is still obligated to pay. If the crops perish because of circumstances out of the lessee's control, then he generally shall not have to continue to pay beyond that point.<sup>440</sup>

<sup>432</sup> 1977 Civil Code of Afghanistan, Article 1400.

<sup>433</sup> 1977 Civil Code of Afghanistan, Article 1399.

<sup>434</sup> 1977 Civil Code of Afghanistan, Article 1435, 1413.

<sup>435</sup> 1977 Civil Code of Afghanistan, Articles 1442, 1429.

<sup>436</sup> 1977 Civil Code of Afghanistan, Articles 1407, 1334.

<sup>437</sup> 1977 Civil Code of Afghanistan, Article 1428.

<sup>438</sup> 1977 Civil Code of Afghanistan, Article 1334.

<sup>439</sup> 1977 Civil Code of Afghanistan, Article 1410.

<sup>440</sup> 1977 Civil Code of Afghanistan, Article 1405.

- Why do you think the law goes such great lengths to protect a lessee’s right to his harvest?
- What are the advantages to having a written lease contract, rather than an oral one? Are there any disadvantages?
- Suppose Afshan, a landowner, and Delbar, a farmer, create a farming contract, where Delbar can use the farm in exchange for one-third of the crop that she grows. Halfway through the farming season, it seems like there will be a drought this year, and the crop yield will be poor. Afshan demands that Delbar start paying her a monthly fee until harvest. Can she do this? Why or why not?
- Suppose Afshan, a landowner in the Kunduz province, creates a farming contract with Delbar, a farmer who is new to the area. They agree that Delbar can use the farm in exchange for one-third of the crop that she grows. Halfway through the year, Delbar learns that it is the custom in Kunduz province for landowners to receive only one-fifth of the crop share through farming contract. She demands that they alter the agreement. Can she do this? Why or why not?

As we discussed in the previous chapter on land ownership and titling, in recent years, the government has appropriated a lot of privately owned, community owned, and publicly owned land, deeming it government owned land. The 2003 Legal Decree for Transfer of Government Property, for example, declares all properties that have been under state control for more than 37 years to be “state related.” These government owned properties, including pastureland, can be made available for lease through auction. Existing occupants have the right of first refusal.<sup>441</sup> This policy seems to defy earlier government initiatives to prevent certain lands, such as pasturelands, from being leased to private individuals for the purposes of industrial development or agriculture.<sup>442</sup> The 2008 Law on Managing Land Affairs grants MAIL the power to lease fertile lands for up to fifty years and uncultivated virgin or arid lands to for up to ninety years to private investors.<sup>443</sup>

There are advantages and disadvantages to the government’s new policies on land lease. The 2008 Law on Land Managing Affairs facilitates investment “for the purpose of encouragement attraction of private sectors to establish agriculture, livestock and orchard farms and so on.”<sup>444</sup> If people build on the land, then the value of that land will increase. However, if people cultivate land that has traditionally been used as pastures, these lands can become a site of conflict because pasture is a scarce resource.

How might the law be used as a means to encourage investment in agricultural projects?

## 2.4 Limitations on Use

As discussed in Chapter 6, limitations dictate what a person who owns or possesses land can and cannot do with that property. Limitations can be based on private interest and **public interest**, meaning for the welfare or wellbeing of the general public. Regarding agriculture, many of the private interest limitations concern what a lessee is allowed to do when occupying agricultural land. Many of the public interest limitations concern when the government is allowed to take private land and how agricultural land can be used in ways that reduce damage to the environment.

<sup>441</sup> Wily, “Peace on the Pastures,” 46.

<sup>442</sup> 2000 Law on Pasture and Public Land, Articles 66-67, in Wily, “Competing High Pasture Claims,” 66.

<sup>443</sup> 2008 Law on Managing Land Affairs, Article 64.

<sup>444</sup> 2008 Law on Managing Land Affairs, Article 64.

### 2.4.1 Private interest limitations

The most fundamental private interest limitation is that a person cannot use property in a way that causes harm to others. In the Civil Code of Afghanistan, this principle with regards to agriculture manifests itself in limitations on leases. As seen in the provision below, a lessee generally must keep the land suitable for future users by utilizing the land in accordance with customary agricultural practices avoiding uses that will create permanent negative effects. Uses with “negative effects” are those that will destroy the environment, such as overgrazing or overcultivation, or cause some other type of harm to other people.

**1977 Civil Code of Afghanistan, Article 1408:**

Lessee shall be obligated to utilize land in a customary way and take such actions on it that it remains suitable for utilization. Lessee may not utilize land, without permission of lessor, in such a way that causes such changes to land that their negative effects shall remain after termination of lease.

A more extensive list of a lessee’s obligations to the land can be found in Article 61 of the 2008 Law on Managing Land Affairs. For example, a lessee must keep waterways associated with land clean and compensate the owner for any he losses he causes to the land or equipment. He cannot transfer the land or use it as security.<sup>445</sup> The Civil Code of Afghanistan also contains some nuanced limitations on land use by farmers and gardeners.<sup>446</sup> A farmer cannot cut healthy trees located within the lands of the contract. Gardeners cannot cut trees and plant saplings without the landowner’s permission.<sup>447</sup> Farmers or gardeners cannot sublease the land they are using to another person without permission.<sup>448</sup>

### 2.4.2 Public interest limitations

Some of the public interest limitations on land prohibit people from using a certain category of land for an alternate purpose. For example, a person cannot claim ownership of government owned land.<sup>449</sup> He also cannot engage in non-agricultural activities, such as construction of roads and buildings, on agricultural land, without permission from MAIL and approval by the President.<sup>450</sup> Similarly, a person can face criminal penalties for converting one type of land to another. He cannot change forestland to agricultural land or use forestland as pasture for grazing animals.<sup>451</sup> The purpose of these laws is for the government to keep track of the types of land and maintain a distribution of types of land. Another purpose is to protect the country’s natural resources.

The main legal framework for preserving natural resources in Afghanistan is contained within the 2007 Environment Law. Limitations on land use presented in the 2007 Environment Law are based on the

<sup>445</sup> 2008 Law on Managing Land Affairs, Article 61.

<sup>446</sup> 1977 Civil Code of Afghanistan, Article 1420.

<sup>447</sup> 1977 Civil Code of Afghanistan Article 1438.

<sup>448</sup> 1977 Civil Code of Afghanistan Articles 1417, 1438.

<sup>449</sup> 2008 Law on Managing Land Affairs, Article 88.

<sup>450</sup> 2008 Law on Managing Land Affairs, Article 90.

<sup>451</sup> 2011 Law on Regulating Forest Affairs, Articles 28, 37.

principles of respecting nature and promoting sustainability.<sup>452</sup> **Sustainability** is maintaining the life-supporting capacity of natural resources so that they can meet the needs of future generations.<sup>453</sup> In other words, sustainability means to use the earth in a way that it is possible for others to use the earth in the future. In Articles 9 through 12, the Environment Law creates an institutional framework of national agencies that will be responsible for promoting sustainable management of the environment.

Part of the Environment Law's plan to promote the sustainability involves reintroducing indigenous plants and animals into the natural landscape of Afghanistan. This will bring diversity to the **ecosystem**, the community of living and nonliving species in the environment. It will also help to counter the rapid expansion of desert in the country. However, successful reintroduction of plants requires narrowing the amount of land available for pasture.<sup>454</sup> The National Environmental Protection Agency will also list which plant species are harvestable and which are protected. Farmers will not be allowed to grow protected species of plants.<sup>455</sup>

Is it fair that the 2007 Environment Law limits where pastoralists can graze their livestock and what farmers can grow? What are the benefits and drawbacks of these policies?

Public interest also prohibits land uses that operate against public order and manner. For example, poppy production for international opium trade is illegal in part because it disrupts public order by encouraging insobriety and corruption.

### **Illegal Opium Production**

One of the most thriving industries in Afghanistan today is the illegal production of poppy, used to create the drug opium. Afghanistan is a major source in the international drug trade for opium. The country is already a dominant supplier in the international drug trade for heroin. Because opium is a lucrative crop and a reliable source of income, production has soared in recent years. In 2013, production was forty-nine percent higher than it was the year before. Insurgent groups and even some corrupt officials encourage production of this crop because they can coerce farmers into receiving a cut of the profit.<sup>456</sup>

You will read about takings already in Chapter 5, but remember that the government can legally appropriate land privately owned by a person if it does so “in order to ensure public interests” and fairly compensates the owner for his property taken.<sup>457</sup> What constitutes fair compensation is an open question,

<sup>452</sup> 2007 Environment Law, Article 5.

<sup>453</sup> 2007 Environment Law, Article 4.

<sup>454</sup> 2007 Environment Law, Articles 44-45.

<sup>455</sup> 2007 Environment Law, Articles 47-49.

<sup>456</sup> Associated Press, “Afghan Opium Production at Record High,” *Al Jazeera*, November 11, 2013.

<sup>457</sup> 2008 Law on Managing Land Affairs, Article 21; 2004 Constitution, Article 40.

but it is usually determined by a committee of leaders and based on the current market values.<sup>458</sup> Compensation should include the value of the land, buildings on the land, and any trees or other plants on the land.<sup>459</sup> What constitutes public interest is also an open question, but it can include public projects such as roads, bazaars, water development, mosques, military installations, factories, hospitals, homes for the poor, government offices, and orphanages.<sup>460</sup>

The government is planning to appropriate 10,000 jeribs of land from a small farming community in exchange for just compensation. This farming community produces an excess of crop that feeds not just the community itself but also a small city 30 kilometers away. The government is planning to build a gas transmission pipeline through the community's land that will provide natural gas to city residents. What arguments can the farming community make to prevent the government from taking this land? How will the government respond?

## 2.5 Dispute Resolution

As discussed elsewhere in this textbook, Afghanistan's dispute resolution system is complicated. It includes formal administrative agencies and courts that are created by law to manage disputes. It also includes informal village councils and community-level mediation and negotiation techniques that many people argue are much more robust and effective than the formal system. It can be difficult to understand the processes that take place on a community level as an outsider because the processes are often based on local customs. Sometimes, a difficult conflict will travel back and forth between the informal and formal systems.

### 2.5.1 Formal and Informal Mechanisms

Land administration agencies and the courts are legally responsible for managing land-related disputes.<sup>461</sup> MAIL is the government agency that has primary authority over land and property matters, although municipal authorities have close oversight over local matters. Courts are organized on district, provincial, and national levels. Judges have administrative and arbitral functions – they issue title documents and maintain land ownership records but also arbitrate disputes. This means that judges have many responsibilities.<sup>462</sup> The job of judges is especially difficult because many judges have had inadequate training, lack the material resources to operate a courtroom, or are confused about the status of the laws, which have changed significantly in the past thirty years of shifting government regimes.<sup>463</sup> Many of the documents on which courts are supposed to adjudicate rightful ownership are missing.<sup>464</sup>

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<sup>458</sup> Wily, "Current Land Issues in Afghanistan," 11.

<sup>459</sup> Foley, "A Guide to Property Law in Afghanistan," 62.

<sup>460</sup> Foley, "A Guide to Property Law in Afghanistan," 60.

<sup>461</sup> 2008 Law on Managing Land Affairs, Articles 23, 81.

<sup>462</sup> Foley, "A Guide to Property Law in Afghanistan," 28.

<sup>463</sup> Foley, "A Guide to Property Law in Afghanistan," 28-29.

<sup>464</sup> Wily, "Current Land Issues in Afghanistan," 12.

In 2002, the government established a Special Land Dispute Court to take on land dispute cases, but the court failed to execute its purpose and was abandoned by 2005.<sup>465</sup> It consisted of a primary court and an appeals court. It was tasked with looking after returning refugees in Afghanistan and addressing their complaints, to hasten the process of resolving property disputes.” It did not have exclusive jurisdiction over land disputes involving refugees. These disputes could also be addressed at district or provincial levels, or else through informal mechanisms.<sup>466</sup> The court did not have the operational guidance or technical support that it needed to succeed to address an abundance of disputes and expand beyond Kabul. Its rulings were also inconsistent and public access to reasoning behind those rulings was limited.<sup>467</sup>

The 2007 National Land Policy acknowledges that disputes resolved through community-based methods that are not in contradiction to the law “shall be given full faith and credit by the formal justice sector.”<sup>468</sup> The volume of disputes in the country is too large for the formal sector to handle alone. The formal and informal sectors are trying to better coordinate their efforts.

The Afghan population resolves disputes primarily through informal mechanisms.<sup>469</sup> There are many ways for aggrieved parties to resolve disputes informally. They can take disputes to family members, neighbors, a notable community leader, or a *shura* or *jirga*, village councils.<sup>470</sup> In some areas, nomadic communities and sedentary farmers create shared-use agreements through these informal mechanisms.<sup>471</sup>

This type of decision making process is particularly useful in settling land disputes where there are overlapping claimants to a piece of land, and all of them hold some historical or legitimate claim to the land. Cases involving community owned land often fall in this category. While the courts emphasize a win-loss approach, informal dispute resolution mechanisms emphasize compromise. For an example of this, see below.

In the region of Hazarajat, there has been an ongoing territorial dispute over pastureland between the Hazara and a nomadic community. The Hazara community has a history of settlement in Hazarajat that includes customary use of the high pastures, even though this use has been disrupted over the past century by administrative policies that discriminates against the Hazara. The Hazara depend on the high pastures for animal grazing in the summer and as for fodder and woody fuel to survive the winter, when nomadic communities retreat to warmer regions. Meanwhile, many members of the nomadic community received written documentation in 1928 and 1929 that granted them legal right of priority to use the high pastures in the summer. Some members purchased that right. Both communities have rights to the pastures that need to be accounted for. Both communities need the pastures to survive.<sup>472</sup> The condition of the pastures has suffered from overuse. What dispute resolution mechanism would you recommend to these communities and why?

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<sup>465</sup> IS Academie, “Afghanistan – Food Security and Land Governance Factsheet,” 9.

<sup>466</sup> Foley, “A Guide to Property Law in Afghanistan,” 29-32.

<sup>467</sup> Wily, “Current Land Issues in Afghanistan,” 2.

<sup>468</sup> Wily, “Competing High Pasture Claims,” 70.

<sup>469</sup> USAID, “Afghanistan – Property Rights and Resource Governance Profile,” 9.

<sup>470</sup> IS Academie, “Afghanistan – Food Security and Land Governance Factsheet,” 8.

<sup>471</sup> USAID, “Afghanistan – Property Rights and Resource Governance Profile,” 9.

<sup>472</sup> Wily, “Competing High Pasture Claims,” 39.



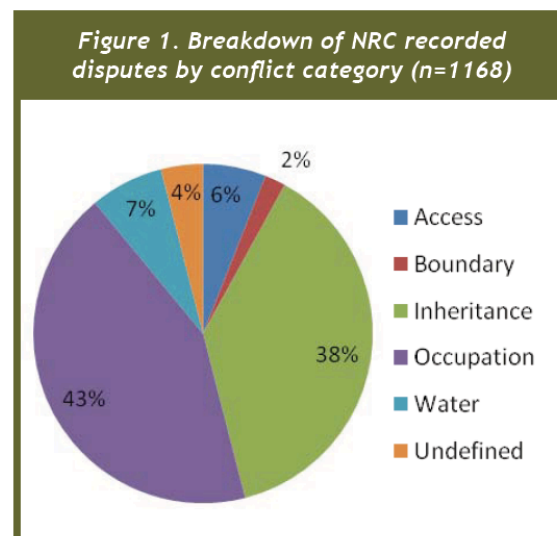
Keep in mind that once a dispute is resolved, the resolution might be temporary. When parties have negotiated shared agreements, for example, they might need to renegotiate these agreements in the future when circumstances change. Dispute resolution can be an ongoing process.<sup>473</sup>

## 2.5.2 Conflict areas

Land disputes constitute the largest portion of cases in the formal court system.<sup>474</sup> The major areas of land dispute are access, boundary, inheritance, occupation, and water.<sup>475</sup> These dispute categories are a way of understanding different types of disputes, but it is important to remember that some complicated conflicts contain many of these dispute categories within them. To explain the meaning of these dispute categories and recapitulate what we have learned about agriculture so far, we will briefly go through a series of stories and examples.

### Major Land Dispute Categories

Category Name	Definition
Access	Challenges to established rights of access; does not imply challenges to ownership
Boundary	Disputes over the location of boundaries
Inheritance	Disputes arising from the transfer of property rights following the death of a land owner, whether through the GCS or customary institutions
Occupation	Disputes arising where land is appropriated from one party by another
Water	Disputes regarding the allocation of water resources (disputes over land resources that carry important rights to water have also been assigned to this category)
Undefined	Cases in the ILAC database for which there was insufficient data to characterise the dispute



### 2.5.2.1 Access

Access disputes involve challenges to rights of access, such as in the context of leases and easements, not challenges to ownership. On agricultural land, they can occur in the context of leases, when lessors and lessees disagree on what rights the lessee has. This is most common when the lease agreement was made

<sup>473</sup> Wily, "Competing High Pasture Claims," 30.

<sup>474</sup> IS Academie, "Afghanistan – Food Security and Land Governance Factsheet," 9.

<sup>475</sup> Deschamps and Roe, "Land Conflict in Afghanistan," 7.

orally. The lessor and lessee might disagree on how much rent or crop share the lessor is entitled to, or whether or not the lessee will have access to the lessor's seeds and agricultural tools.

As discussed in detail earlier on, access disputes are most common in the context of pastureland. Because pastureland is often open access and publicly owned, it is typically easy for people to capture. Many communities might have overlapping rights to use and access a piece of pastureland, and they will might run into conflict over these rights, often along ethnic lines.

Access disputes can also occur where people with a right of access to a piece of land begin acting like owners of that land. For example, imagine a situation where two communities have been sharing use of pastureland for centuries, and one community decides to expand agricultural cultivation into that land and deny the other community access. Imagine another situation where the village leader legally owns a piece of pastureland through a deed, but in practice, the entire community has access to the land. If the village leader tries to one day deny the community access to that land on the basis of his deed, this could create conflict.

Communities that share land might have different ideas about how that land should be used. In some areas, nomadic communities have complained that settled communities have too many animals and cut down too many bushes, which overgrazes the land. They also complain that settled communities use public land in a way that destroys water resources. These practices are unsustainable.<sup>476</sup> Within a community, people who do not own animals might favor using land for cultivation rather than grazing purposes.<sup>477</sup>

### **2.5.2.2 Boundary**

Boundary disputes arise when there is disagreement over where boundaries are located. For example, where there is no fence separating two farms, the landowners might disagree over where one farm ends and the other farm begins. A formal land registration system that surveys land plots would help keep track of boundaries. However, as of now, the land registration system is incomplete. There are also concerns about the accuracy of official land surveys.

Boundary disputes may also arise when new boundaries are created. Imagine a situation where two communities have historically shared a piece of pastureland. The pastureland is understood as owned by one community, and the other community pays an annual access fee to use the land. The landowning community decides to raise the access fee, but the leasing community refuses to pay the surcharge. The landowning community then builds a stone wall around the pastureland to prevent the leasing community from accessing the pastureland any longer. The stone wall is a boundary.

### **2.5.2.3 Inheritance**

Inheritance disputes arise from the transfer of property rights following the death of a landowner. Because property is usually transferred within families after death, most inheritance disputes occur between family members. If the deceased member did not leave any written documentation of his will, then family members may disagree on how to divide his property and its assets.

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<sup>476</sup> Wily, "Competing High Pasture Claims," 29.

<sup>477</sup> Wily, "Competing High Pasture Claims," 72.

For example, in June 2003, the Yakawlang Primary Court in Bamyan Province ruled over an interesting inheritance case between siblings. Two sisters had gifted a piece of land to a brother, who cultivated the land. When the sisters died, their sons tried to reclaim the land by asserting that their mothers had been forced to hand it over to their brother. The brother produced a customary document that had been written in witness of the local *mullah*. Even though the sons claimed that the *mullah* could not be trusted because he was a close friend of their uncle, the court found that the *mullah* was a neutral party. Since the mothers had signed the document, the land remained in possession of their brother.<sup>478</sup> This case raises an important question about the issue of fraudulent deeds and if there is a way to prove whether deeds are real or fake.

Inheritance disputes also occur between communities. Because of complicated transactions and agreements between communities, shifting migration patterns, and shifting government regimes and policies throughout the twentieth century, disputes have arisen between communities regarding use of particular pieces of land.

#### **2.5.2.4 Occupation**

Occupation disputes arise when one party claims that another party has illegally appropriated his land. For example, this can occur when returning refugees claim ownership of a piece of land that is now occupied by someone else or when a powerful leader seizes privately owned land by force. A person also might claim that government has appropriated his land without a “public interest” purpose or without providing fair compensation.

In June 2003, the Yakawlang Primary Court in Bamyan Province ruled over an occupation dispute. A landlord who owned substantial irrigated and rain-fed land used this land as collateral for a loan. He failed to repay the loan, so MAIL took ownership of the land and leased it out. A group of four villagers in the community came to the court with documentation asserting that the land in question actually belonged to them, so the landlord never had the authority to occupy that land in the first place and MAIL never had the authority to seize it. After verifying the validity of the documents, the court ruled in favor of the four villagers and gave them back their land.<sup>479</sup>

In the Baghlan province, six-hundred-and-thirty *jeribs* of land were the center of an occupation dispute. The land is suitable for irrigation, but no irrigation structures exist there. The government is planning to build a dam nearby, which will not flood the disputed land but will flood neighboring areas. Because the neighboring areas will be unusable, the disputed land is now very valuable. A large number of families are claiming ownership of the disputed land.

#### **2.5.2.5 Water**

The last major category of land dispute is water rights. Water and agriculture are closely related. The term “water for food” describes water that is used in irrigated and rain-fed agriculture, livestock farming, forestry, and aquaculture. The agriculture industry is responsible for ninety percent of water consumption. Efficiency in water use is low. Sometimes up to fifty percent of water is lost as it is being used. New machinery for extracting water from wells can dry up available water supplies. The extracted water could

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<sup>478</sup> Wily, “Peace on the Pastures,” 40.

<sup>479</sup> Wily, “Peace on the Pastures,” 40.

be for personal use or could be sold commercially. Disputes have arisen over whether a landowner can dig a well very close to a water source for the purposes of extraction. Droughts and excessive flooding also strain these water supplies. Climate change in the coming years will cause further unstable weather patterns.<sup>480</sup>

Besides agriculture, water availability is important for many other productive activities. In households, water is needed for clean drinking supply and sanitation. In mining and industry, water is used as a solvent or a mode of transportation. In energy production, water is important in fueling hydropower plants for electricity generation.<sup>481</sup>

Disputes regarding water can include disputes over who has the right to own or access a particular water source, how water should be distributed within a community, or whether water is being used efficiently. Population growth and returning refugees have strained the demand for water further.<sup>482</sup> Water is an extensive and important topic that we want to explore further. To learn more about water rights, continue reading the next section of the chapter!

### 3. WATER

#### 3.1 Institutional Framework

A water distribution system can have many levels. The system might have different **canals** for transporting water that are connected by larger structures, such as **proportional dividers** that divide a flow of water into different sections. Different distribution systems can connect along rivers that form a **sub-basin**. Different sub-basins can together form a large **river basin**. These levels of organization are engineered through technology. These levels are often governed by different institutions.<sup>483</sup>

The institutional framework for water management has two levels. The first level is the community-based system for water allocation, which is based on traditional methods and customary law. Community-based systems typically control local canals and proportional dividers. The second level is a national water administration effort, which is rooted in the 2008 Water Sector Strategy and enacted through the 2009 Water Law. The national effort tries to create a method for governing the higher level of water distribution through sub-basins and river basins. Although integrating these two systems will be difficult, the Water Law recognizes the prevalence of community based systems and the role of custom in water management, and tries to incorporate these systems into its vision for change.

##### 3.1.1 Community-Based Systems

Customary law often governs water use on private land, resolution of water conflicts, and water resource conservation. Water governance has historically taken place at the village level. The most common system for local water governance is the *kareez* system. A *kareez* is an underground system that taps and channels groundwater for the purposes of irrigation and domestic supply.<sup>484</sup> In this model, the key leader is the *mirab*, and the *mirab* delegates authority to water sub-masters. Agreements between the *mirab*,

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<sup>480</sup> “Water Resource Management,” Islamic Republic of Afghanistan National Development Strategy (2008), 24.

<sup>481</sup> *Id.*

<sup>482</sup> *Id.* at 4.

<sup>483</sup> AREU 12

<sup>484</sup> *Id.*

farmers, and the local government determine water allocation. The *mirab* must have the social skills to address conflicts arising from water allocation strategy. The *saatchi* is the timekeeper who is responsible for ensuring that the flow of water turns among the different land plots according to the *mirab*'s water allocation plan. The *saatchi* must have the technical skills to watch over the turns and accommodate any impediments to the turns.<sup>485</sup> *Shura* or *jirga*, village councils, resolve disputes through customary law.<sup>486</sup> Note that in some cities, military commanders have taken control of water resources, effectively replacing the *mirab* and the *saatchi*.<sup>487</sup>

Often the *saatchi* will not have any substantial landownership in the community he supervises, or he may come from an entirely different community. This will prevent him from allocating water based on his own biases.<sup>488</sup> Do you think this is a good policy? Are there any drawbacks?

One interesting example of community-level water management is a traditional practice in which villagers come together to clean their water systems together, often to the sound of live instrumental music. Communities have historically devised unique ways to unite toward effective water management.

### 3.1.2 National System

The 2009 Water Law establishes an institutional framework for assessing the availability of groundwater reserves, managing water resources, water quality, irrigation and waste systems, and transnational water boundaries.<sup>489</sup>

The primary responsibility for oversight of water distribution systems goes to the Ministry of Energy and Water (MEW). It creates water distribution plans, gathers data, prepares weather forecasts, maintains power operation and storage systems, engineers new irrigation systems, issues water usage licenses, and mediates water disputes. It also establishes and oversees River Basin Agencies, River Basin Councils, and local Water User Associations.<sup>490</sup> The goal is for national water management to initially take place through a centralized process but gradually transition to a decentralized process at the river basin and sub-basin level.<sup>491</sup>

MEW works together with several other agencies to oversee water distribution. MAIL establishes irrigation associations to participate in decision-making process and promotes technologies and strategies for efficient irrigation.<sup>492</sup> For example, better water storage systems would ensure more stable water supplies. MEW also works with the Ministry of Mines, the Ministry of Public Health, the National Environmental Protection Agency, the Ministry of Urban Development, and the Ministry of Rural Rehabilitation and Development to devise plans, explore water resources, and ensure that drinking water

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<sup>485</sup> AREU Water 53-54

<sup>486</sup> IS Academie, "Afghanistan – Food Security and Land Governance Factsheet," 12.

<sup>487</sup> IS Academie, "Afghanistan – Food Security and Land Governance Factsheet," 7.

<sup>488</sup> AREU Water 53

<sup>489</sup> Water Law Article 8

<sup>490</sup> Water Law Articles 10, 12, 13, 14, 15, 16, 17, 18

<sup>491</sup> "Water Resource Management," 2.

<sup>492</sup> Water Law Article 11

is safe. MEW works with the Ministry of Foreign Affairs, the Ministry of the Interior, and the Ministry of Border and Tribal Affairs to manage international water boundaries.<sup>493</sup> Leaders of these various institutions make up the Supreme Council for Water Affairs and Management.<sup>494</sup>

See the table below for a summary of Articles 8 and 9 of the 2009 Water Law, which describes the allotment of water-related tasks between various government agencies. For a more detailed explanation of the roles of MEW and MAIL in water management, see Articles 10 and 11 of the Water Law respectively.

<b>Water-Related Task</b>	<b>Implementing Agencies</b>
Planning, management, and development of water resources	Ministry of Energy and Water**
Assessment and protection of groundwater reserves	Ministry of Mines** Ministry of Public Health National Environmental Protection Agency
Assessment and protection of surface water	National Environmental Protection Agency** Ministry of Agriculture, Irrigation, and Livestock Ministry of Energy and Water Ministry of Urban Development Ministry of Public Health Ministry of Mines
Determination of irrigation norms	Ministry of Agriculture, Irrigation, and Livestock** Ministry of Energy and Water Ministry of Transport and Aviation Ministry of Public Health National Environmental Protection Agency
Provision of water supply for drinking and livelihood in <i>urban</i> areas; sewage and sanitation	Ministry of Urban Development** Ministry of Energy and Water Ministry of Mines Ministry of Public Health Ministry of Agriculture, Irrigation, and Livestock

<sup>493</sup> Water Law Article 8

<sup>494</sup> Water Law Article 9

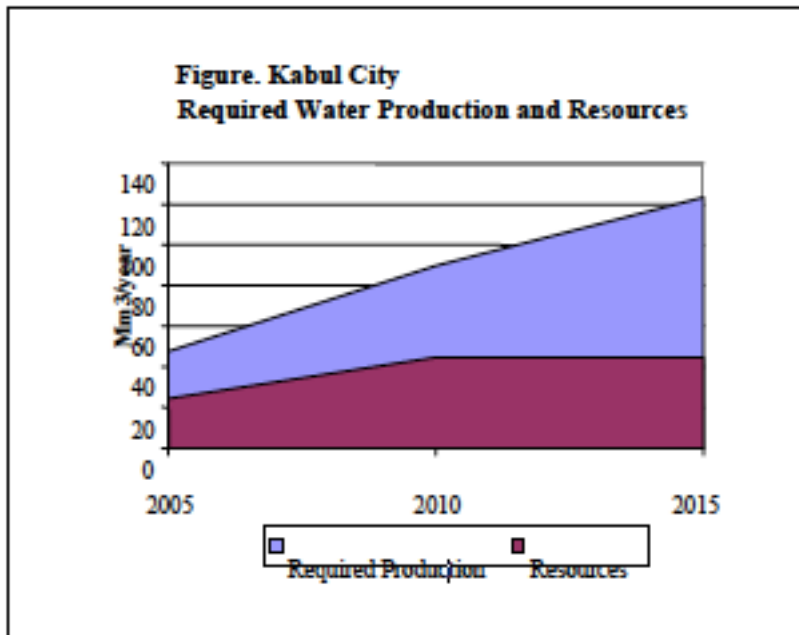
	National Environmental Protection Agency
Provision of water supply for drinking and livelihood in <i>rural</i> areas; sewage and sanitation	Ministry of Rural Rehabilitation and Development** Ministry of Energy and Water Ministry of Mines Ministry of Public Health Ministry of Agriculture, Irrigation, and Livestock Ministry of Urban Development National Environmental Protection Agency
Right-of-way determination for water resources; maintenance and protection of large infrastructure	Ministry of Energy and Water** Ministry of Agriculture, Irrigation, and Livestock Ministry of Mines Ministry of Rural Rehabilitation and Development
Management of international water boundaries	Ministry of Energy and Water** Ministry of Foreign Affairs Ministry of Interior Ministry of Border and Tribal Affairs.
Coordination of water affairs	Supreme Council of Water Affairs Management

Although the national system for water management has been laid out in theory, actual implementation will be challenging. The government has succeeded in laying out a framework for a national system, researching the feasibility of new projects, repairing some water distribution structures, and constructing new wells, pumps, toilets, and sanitation and supply systems in some parts of the country.<sup>495</sup> However, it lacks human and financial resources, certain important data, adequate infrastructure in many areas, and a clear plan for coordinating its efforts.<sup>496</sup> Currently, water demand greatly exceeds water supply.

<sup>495</sup> “Water Resource Management,” 5.

<sup>496</sup> *Id.* at 6.

## Water Demand Versus Supply in Kabul<sup>497</sup>



Some people argue that the national model has been developed without understanding of how existing community-based systems operate.<sup>498</sup> Local Water User Associations created by the new Water Law might interfere with and try to supplant traditional community-based systems. These Water User Associations will have the power to charge users fees for water supply.<sup>499</sup> Many farmers fear that the fees will be unaffordable.<sup>500</sup>

What are the advantages and disadvantages of a national water distribution system? Do you believe there are ways to integrate the national and community-based systems?

Some critics of water management at the national level argue that the involvement of too many players and agencies will cause confusion, lack of coordination, and excessive bureaucracy. What are your thoughts?

Even though the 2009 Water Law largely focuses on a national system for water management, it acknowledges the role of custom in Article 6, stating “Water resources may be used according to the provisions of this law with due consideration for the praiseworthy customs and traditions of the people to meet the needs for drinking water, livelihood, agriculture, industry, public services, energy production, transportation, navigation, fisheries and the environment.” What does it mean when the law recognizes custom in this way, and what happens when law and custom disagree?

<sup>497</sup> *Id.* at 23.

<sup>498</sup> Thomas, Vincent, Mujib Ahmad Azizi and Ihsanullah Ghafouri, “Water Rights and Conflict Resolution Processes in Afghanistan: The Case of the Sar-i-Pul Sub-Basin,” Afghanistan Research and Evaluation Unit (2012), 4-5.

<sup>499</sup> 2009 Water Law, Article 7.

<sup>500</sup> IS Academie, “Afghanistan – Food Security and Land Governance Factsheet,” 7.



### 3.2 Owning and Possessing

Both the 2008 Water Sector Strategy and the 2009 Water Law articulate that water is public property managed by the government.<sup>501</sup> This is based on the Sharia principle that the right to water is comparable to the rights to breathe and see daylight.<sup>502</sup> The Civil Code of Afghanistan further states that rivers and tributaries are public property and every person can irrigate lands from that water, except where it is contrary to public interest or special laws.<sup>503</sup>

When a community shares access to a water source, right to use water is allocated in **turns**. A person's turn indicates the time and amount of water that they have been legally allocated.<sup>504</sup> On his turn, he receives water through a *jui*, which is a small canal that branches from a higher-level canal and supplies water directly to a plot.<sup>505</sup> The distribution of water rights deriving from public streams is determined proportional to each land's need for irrigation.<sup>506</sup> Conflict could occur if there is disagreement about how much irrigated water each land plot needs.

Sometimes, water turns do not occur exactly as planned. A water turn might not start on time. A farmer may miss his turn for unexpected reasons.<sup>507</sup> Water stealing and tampering or mismanagement of turns cause conflict as well. In Sar-i-Pul, the provincial *mirab* uses a wooden stamp to detect water thieves. He stamps the maximum level of water authorized to enter the canal on the inside bank of the canal. If the mark gets washed away, he knows that water stealing has occurred.<sup>508</sup> Another tool popular for measuring water turns is the *fenjaan*, or ancient Persian water clock, which is a big pot full of water and a bowl with small hole in the center. When the bowl becomes full of water, it sinks into the pot, and the *mirab* empties and resets it. He records the number of times the bowl sinks with small stones in a jar.<sup>509</sup>

Stamp For Regulating Water Flow



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<sup>501</sup> 2009 Water Law, Article 2.

<sup>502</sup> NRC 68

<sup>503</sup> 1977 Civil Code of Afghanistan, Article 2347.

<sup>504</sup> 1977 Civil Code of Afghanistan, Article 2346.

<sup>505</sup> Thomas, et al., "Water Rights and Conflict Resolution Processes," viii.

<sup>506</sup> 1977 Civil Code of Afghanistan, Articles 1911, 2349.

<sup>507</sup> Thomas, et al., "Water Rights and Conflict Resolution Processes," 53.

<sup>508</sup> *Id.* at 48.

<sup>509</sup> Wikipedia, "Qanat," <http://en.wikipedia.org/wiki/Qanat>.

## Persian Water Clock for Regulating Water Flow



New laws assert that water is free, but the government can impose fees on the public for the costs of investing in water service infrastructure and services.<sup>510</sup> Use of water for purposes other than drinking and other domestic use, harmless navigation, and fire extinguishment now require a government permit.<sup>511</sup>

Restrictions on water use may apply to water use for commercial purposes. There are different standards of water quality for different uses of water. The standards for quality of drinking water, quality of irrigation water, and quality of industrial wastewater are independently determined.<sup>512</sup> Under the oversight of administrative authorities, waterways can be used for power generation, government projects, construction of deep wells, and transportation.<sup>513</sup>

When water is used for agriculture, MAIL can delegate responsibility for distribution to regional Irrigation Associations. The Irrigation Associations can delegate responsibility for community-level distribution to local *mirabs*.<sup>514</sup> In practice, about eighty percent of irrigation networks in Afghanistan are currently managed solely by local communities, although the more modern irrigation networks are under national control.<sup>515</sup>

Although water sources are publicly owned, access to water can be privately owned, for example through construction of private canals or private water collection devices. Private and communal land ownership in Afghanistan usually includes the rights to surface and groundwater on that land, although sometimes the waterway can be owned through a separate deed.<sup>516</sup> A landowner may choose to construct a private canal to transport public water to his property or use machinery such as a well to extract the water on his or her property.

The Civil Code of Afghanistan acknowledges private ownership of artificial waterways and water reserves. For example, if a landowner constructs an irrigation channel for his own land, then other people may not use that channel without his permission.<sup>517</sup> Imagine that several small restaurants and car washes are located along a highway that runs between a mountain on the right and a river on the left. Typically,

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<sup>510</sup> 2009 Water Law, Article 7.

<sup>511</sup> 2009 Water Law, Article 19.

<sup>512</sup> 2009 Water Law, Article 24.

<sup>513</sup> 2009 Water Law, Articles 25, 26, 27, 38.

<sup>514</sup> 2009 Water Law, Article 23.

<sup>515</sup> USAID, “Afghanistan – Property Rights and Resource Governance Profile,” 11.

<sup>516</sup> *Id.*

<sup>517</sup> 1977 Civil Code of Afghanistan, Articles 1910, 2348.

snowfall from the mountain flows into the river and is publicly owned. The business owners can opt to built small pools on the mountain for collecting water and pipes for transporting their water downhill, thus converting some of the publicly owned water into privately owned water for their business operations.

Landowners who privately own water are still required to consider the needs of their neighbors.<sup>518</sup> They must prevent harm to public interest and use water proportional to the land they intends to irrigate.<sup>519</sup> A landowner who is constructing an irrigation network that runs through the land of others, must obtain a **water easement**, or the right to allow water to pass through the lands of others to reach his own land, unless there is some alternative way for him to obtain water. A landowner is obligated to allow water flow through his land to others' lands farther from the water source and the nearest public stream, in exchange for just compensation.<sup>520</sup>

A community or multiple communities can own water. They will often choose to outline the rules for sharing in an oral or written water sharing agreement.<sup>521</sup> Lack of clarity regarding the terms of the agreement could be a source of conflict. When water is shared, all community members have an obligation to make necessary repairs on the waterway at the request of any community member.<sup>522</sup> Sometimes communities sharing pastureland enter conflict when one community tries to construct an irrigation network for agriculture on that pastureland, without the permission of the other community.<sup>523</sup>

How should the government decide which uses of water are most important? Why do you think there are different water quality standards for different uses of water?

On one side of a large river, there is a farming community. On the other of the river, there is a growing town. The river is the water source for both areas. The farmers need water for irrigation. Increasingly, the town needs water for electricity generation. Is there any way for the farmers and the town residents to come to an agreement on how to use the water?

Aamir owns a farm with a small irrigated stream that flows through his farm to the rest of the village. His farm is located close to the river that supplies water for the stream. Aamir just purchased two cows and wants to build a stable to keep the cows on his property. To build the stable he will have to cut off the water supply from his downstream neighbors. Is Aamir able to do this? Why or why not?

Sometimes, changing weather patterns such can shift existing land ownership structures. If a flood submerges a person's land, he still owns the land even if he can no longer use it.<sup>524</sup> New land created by climate change is typically owned by the state. For example, if a flood creates new land, even if the new land is attached to a person's private property, that new land is state property.<sup>525</sup> Similarly, when a river's

<sup>518</sup> 1977 Civil Code of Afghanistan, Article 1912.

<sup>519</sup> 1977 Civil Code of Afghanistan, Article 2349.

<sup>520</sup> 1977 Civil Code of Afghanistan, Article 1917.

<sup>521</sup> Thomas, et al., "Water Rights and Conflict Resolution Processes," 43.

<sup>522</sup> 1977 Civil Code of Afghanistan, Article 1918.

<sup>523</sup> Thomas, et al., "Water Rights and Conflict Resolution Processes," 23.

<sup>524</sup> 1977 Civil Code of Afghanistan, Article 2198.

<sup>525</sup> 1977 Civil Code of Afghanistan, Article 2199.

water level decreases and thus new lands emerge along the riverbanks, those lands are state property.<sup>526</sup> If shifting river directions creates new land, those new lands are regulated by special law.<sup>527</sup>

### 3.3 Transferring

Farmers who own different plots of land at different locations along the *jui* can transfer turns of communally shared water from one plot to the other. For example, if water is limited, they might transfer their turn from a downstream plot to an upstream plot. This way, they can use their water share more efficiently by focusing on a single plot. They can also transfer their turn to other community members, and they might do so through a lease agreement per turn or for the entire irrigation season. To transfer turns, they must notify the *saatchi* so that he can adjust the duration of water turns.<sup>528</sup>

When a waterway is privately owned, the right of water can be inherited or its usage granted to successors in a written will.<sup>529</sup> Typically, a water right associated with a piece of land transfers with the land. However, a landowner can also sell, donate, or lease the water right to someone else when it is in excess and will be used for irrigation purposes.<sup>530</sup> In some places, wealthier members of a community provide poorer members with access to water by transferring water rights to them either formally or informally.<sup>531</sup>

Suppose the Basher family is a wealthy family with a large estate and a river that flows through their property. They have always more water than they needed, so they have donated excess water to other members in their community for many years. This year, however, the area has experienced a severe drought. The Basher family no longer wants to supply water to others. Are they obligated to continue donating water?

The right of lessees to use the water on the land they are leasing is strongly protected. They enjoy this right of stream and waterway even if it is not mentioned in the lease contract.<sup>532</sup> If the land becomes flooded or the water supply is cut off, then the rent will not be enforced as long as the situation was not the lessee's fault.<sup>533</sup> If Parween is leasing land for cultivation from Rafi and there is a drought that cuts off the water supply, Parween will not have to continue paying Rafi rent. If the water supply were depleted instead because Parween carelessly threw animal waste into the clean water supply, then Parween would have to continue paying rent.

In current practice, water is free to all communities, and communities have autonomy over how to divide water among themselves. Under a system known as *ashar*, community members participate in productive labor such as cleaning and repair of waterways in exchange for their share of water.<sup>534</sup> The 2009 Water Law intends to gradually convert existing water rights to permits granted by regional River Basin

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<sup>526</sup> 1977 Civil Code of Afghanistan, Article 2200

<sup>527</sup> 1977 Civil Code of Afghanistan, Article 2201.

<sup>528</sup> Thomas, et al., "Water Rights and Conflict Resolution Processes," 46.

<sup>529</sup> 1977 Civil Code of Afghanistan, Article 1915.

<sup>530</sup> 1977 Civil Code of Afghanistan, Article 1916.

<sup>531</sup> USAID, "Afghanistan – Property Rights and Resource Governance Profile," 11.

<sup>532</sup> 1977 Civil Code of Afghanistan, Article 1402.

<sup>533</sup> 1977 Civil Code of Afghanistan, Article 1404.

<sup>534</sup> USAID, "Water Users Associations in Afghanistan" (2006), 25.

Agencies.<sup>535</sup> Water User Associations will preserve the *ashar* system, but they will be required to collectively apply for permits to use water for purposes such as development projects, disposal of waste and drainage, agricultural and purposes. Sale or purchase of these permits is legally prohibited.<sup>536</sup> Some critics doubt the feasibility of a permit system. Others argue that political alignments will interfere with the process of issuing permits.<sup>537</sup>

### 3.4. Limitations on Use

Recall the two main principles of limitations on use – that a property right should not be used in a way that excessively harms private individuals or in a way that counters public interest. For example, extracting too much water from a stream that runs through several neighboring properties might deprive neighbors from sufficient water for drinking, bathing, and farming. Dumping waste into a stream on one’s property that converges into a river can pollute the supply and destroy the environment by hurting the local population of fish and other wildlife.

#### 3.4.1 Private Interest Limitations

The main principle in guiding private interest limitations on the right to water is that a person cannot exercise his right in a way that causes private harm to others. For example, a person building on someone else’s land cannot remove a waterway from that land without the owner’s permission.<sup>538</sup> Even if a private right of water passage, the right of the watercourse, or the right of water use has existed for a long time, if that right is causing “obvious harm” to others, it will be terminated.<sup>539</sup>

Under the 2009 Water Law, a person who blocks or destroys water resources, removes measurement devices, reroutes the water flow or distribution, encroaches public water resources, or pollutes water “beyond the permissible limit” will be punished.<sup>540</sup> Note that the meaning of “permissible limit” is not defined in the Water Law and is subject to interpretation.

For a landowner to be criminally liable, however, the harm to others must be intentional. For example, if a landowner is irrigating his land “in a usual way” and water flows accidentally onto another person’s crop and destroys it, then the landowner is not criminally liable.<sup>541</sup> This is because he did not intend to destroy the crops, so the destruction is not his fault.

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<sup>535</sup> 2009 Water Law, Article 20.

<sup>536</sup> 2009 Water Law, Article 21.

<sup>537</sup> Thomas, et al., “Water Rights and Conflict Resolution Processes,” 120.

<sup>538</sup> 1977 Civil Code of Afghanistan, Article 2353.

<sup>539</sup> 1977 Civil Code of Afghanistan, Article 2351.

<sup>540</sup> 2009 Water Law, Article 35.

<sup>541</sup> 1977 Civil Code of Afghanistan, Article 1914.

Suppose Deena's children have been throwing trash in a stream that runs through to the neighbor's land plot, without Deena's knowledge. The neighbors use that water for drinking and bathing. Is Deena liable for damages that her neighbors suffer? Is she criminally or civilly liable?

### 3.4.2 Public Interest Limitations

A person cannot exercise his right to water in a way that negatively affects public health or the environment. Dam owners, for example, must employ technical staff to ensure compliance with dam safety norms.<sup>542</sup> A person cannot construct a gutter or a cesspool in public territory in a way that is disruptive or unhygienic.<sup>543</sup>

The main environmental limitations on water rights are stated in the 2007 Environment Law and 2009 Water Law. All people must take into account protection of aquatic ecosystems and prevent pollution of water resources in their behavior.<sup>544</sup> All landowners must comply with waste management practices, prevent water pollution, and remedy water pollution if it occurs.<sup>545</sup> Those who own large water development projects must assess the negative environmental impacts of those projects and take care not to damage the needs of other water users.<sup>546</sup> Government institutions should consider sustainable water use practices, human health, and natural ecosystems when planning.<sup>547</sup>

#### 2009 Law, Article 30:

(1) Real and legal persons cannot contaminate water resources by using or discharging garbage, waste water, industrial waste, chemicals and toxics beyond the limit. (2) A violator, based on this law, is required to compensate for losses and shall be punished depending on the circumstance

The most strongly worded environmental limitation on water use is in Article 30 of the 2009 Water Law, which threatens to fine and even punish wrongdoers. However, it also states that these consequences will occur if people contaminate water resources "beyond the limit." It does not provide any guidelines for what this limit would be.

Do you think that the 2007 Environment Law and 2009 Water Law are forceful enough? Do the provisions sound like strict laws or guidelines? What types of additional laws or policies can the government put in place to ensure that people are motivated to keep water resources clean?

<sup>542</sup> 2009 Water Law, Article 33.

<sup>543</sup> 1977 Civil Code of Afghanistan, Article 2354.

<sup>544</sup> 2007 Environment Law, Article 34.

<sup>545</sup> 2007 Environment Law, Article 35.

<sup>546</sup> 2009 Water Law, Article 32.

<sup>547</sup> 2007 Environment Law, Article 34.

### 3.4.3 Permits and Fees

As of the 2009 Water Law, the use of water resources without a permit is not permissible except under a few circumstances. If the water is for drinking or other basic needs and less than five cubic meters per household, if the water is for navigation and causes no damage, if the water is for extinguishing a fire, or if the water right exists and waiting to be converted into a permit, then no permit is required.<sup>548</sup> It is unclear how long it will take for all existing water rights to be converted or how strictly the government will treat the lack of permit. Under the 2009 Water Law, it does seem clear though that all new water rights, besides the exceptions, will require an official government permit from MEW and any other relevant institutions.<sup>549</sup>

Under the new law, the government also has authority to charge a fee for water services. If a person does not pay the fee or uses water services in an unclean manner, his right to water can be suspended.<sup>550</sup> It is unclear when fees will be implemented or how strictly they will be enforced.

### 3.5. Dispute Resolution

Most disputes concerning the *jui* are resolved at the community level through local leadership. If the *saatchi* or *mirab* cannot prevent a conflict, then it will typically pass on to the *shura* or *jirga*, village councils. The emphasis is typically on compromise and limiting escalation of the conflict rather than a strict application of the law on water rights. If a conflict were to occur at the sub-basin or river basin level, then perhaps local government officials would get involved in the dispute resolution process. Therefore, the type of dispute resolution chosen may relate to the level of conflict. It is rare for a dispute to go through the formal court system.<sup>551</sup>

At the *jui* level, a conflict may involve the distribution of water between two neighboring fields cultivated by two different farmers. At the inter-community level, there may be a conflict at the divider structure that splits water between multiple communities. At the inter-provincial level, conflict may involve a clash between different distribution systems along the same river.<sup>552</sup>

#### Distribution Design

The design of a water distribution system can reflect a community's beliefs about water rights and can also be a cause of conflict. A branch system has permanent proportional dividers that automatically divide the flow of water according to the width of the branches. A hierarchical system has gradually adjustable offtakes that can alter the flow of water depending on circumstances. A branch system conveys a rigid distribution of water rights but it is more likely to prevent water stealing. A hierarchical system allows for flexibility but is more easily misused because it is adjustable.<sup>553</sup>

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<sup>548</sup> 2009 Water Law, Article 19.

<sup>549</sup> 2009 Water Law, Article 21(4).

<sup>550</sup> 2009 Water Law, Article 28.

<sup>551</sup> Thomas, et al., "Water Rights and Conflict Resolution Processes," 1-2, 108.

<sup>552</sup> Thomas, et al., "Water Rights and Conflict Resolution Processes," 12-13.

<sup>553</sup> *Id.* at 14.

*Branch system on left and hierarchical system on right*



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In the Jawzjan province, there was a conflict along the Nahr-i-Salmazan canal between villages. Several villages each had their own *jui* deriving from the canal. One such *jui* belonged to the village of Qawchin. Until 2008, each village received water proportional to the amount of land it owed. The division structure was dysfunctional and wooden, and it was agreed that Qawchin did not receive enough water. Qawchin farmers and others would try to steal water by poking holes into the wooden structure to increase their flow.

A non-governmental organization (NGO) embarked on a universally agreed upon project to replace the wooden structure with a concrete structure that would prevent misuse. The Qawchin elders agreed to the project orally, but no written contract was made. All of the villages invested in the project. Ultimately, the Qawchin elders felt that their share had been reduced. A dispute erupted between Qawchin elders and elders from the downstream villages. The meetings between the elders did not create a resolution, so they approached the local Water Management Department (WMD). The WMD allowed the Qawchin to create an illegal branch in the system slightly further downstream by cutting into the bank of the canal. The downstream elders were displeased, and the parties approached the Provincial Governor and Provincial Council for intervention. Ultimately, the Provincial Council directed that the Qawchin opening constructed by the NGO should be closed and the illegal branch be left open. From this decision, Qawchin's proportion of water would increase by five percent.

The purpose of this story is to illustrate the politics of distribution design. It is also to show how dispute resolution can be a lengthy process. If a conflict is difficult to resolve, then mediation can escalate from the village level to the provincial level, and even the national level. As dispute resolution escalates, the ultimate resolution becomes increasingly non-consensual. This means that the resolution is more of a win-lose situation than a compromise agreed upon by all parties.

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<sup>554</sup> *Id.*



## CONCLUSION

The importance of effective agriculture and water laws and policies is paramount. These laws and policies should seek to maximize the population's access to natural resources for productive purposes but also preserve these natural resources for future generations. For nearly three decades since 1976, agricultural output fell by almost four percent each year, and half of the country's livestock perished from 1997 to 2004.<sup>555</sup> As of 2009, only 25 percent of the country's available water is safe for drinking.<sup>556</sup> As the growing population strains the resources further, new laws and policies must juggle and prioritize competing interests, such as the use of water for domestic, agricultural, or industrial purposes, and preservation of rural agriculture versus expansion of urban development. It is believed that better organization of agriculture and water resources can also bring about peace and productivity in the country by distributing necessary sustenance and creating new employment opportunities.<sup>557</sup>

There are many reasons to be hopeful. Already, the government has made progress in instituting a legal and policy framework for better management of agriculture and water. For example, a new draft of the Law on Managing Land Affairs was circulated in 2011, although it has yet to be enacted. The new Afghanistan Commercial Land Agency (ACLA) will streamline the process for leasing government land for sustainable and productive uses.<sup>558</sup> The Land Reform in Afghanistan (LARA) Project has worked with MAIL and other government agencies on land titling, land use mapping, and land tenure security reforms.<sup>559</sup> Yet, as you have seen, much work remains to be done. Having been exposed to areas of legal and policy-related conflict in agriculture and water, you are on your way to being a future change maker in these sectors!

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<sup>555</sup> Rahimi, Mohammad Asif, "Can Afghan Agriculture Grow Peace?," Ministry of Agriculture, Irrigation, and Livestock, <http://mail.gov.af/en/page/5190>.

<sup>556</sup> USAID, "Afghanistan – Property Rights and Resource Governance Profile," 11.

<sup>557</sup> Rahimi, Mohammad Asif, "Can Afghan Agriculture Grow Peace?," Ministry of Agriculture, Irrigation, and Livestock, <http://mail.gov.af/en/page/5190>.

<sup>558</sup> Ministry of Agriculture, Irrigation, and Livestock, "Land Lease One Stop Window" (2009), [http://mail.gov.af/Content/Media/Documents/Land\\_Lease\\_One\\_Stop\\_WindowConceptNote04April200926112010224636372.pdf](http://mail.gov.af/Content/Media/Documents/Land_Lease_One_Stop_WindowConceptNote04April200926112010224636372.pdf).

<sup>559</sup> USAID, "Land Reform in Afghanistan" (2013), <http://www.usaid.gov/news-information/fact-sheets/land-reform-afghanistan-lara>.

## CHAPTER 8: MINERALS & HYDROCARBONS

### INTRODUCTION

Afghanistan has long been known as a land rich in **natural resources**. Natural resources are materials that have economic value when they are extracted from their native state.<sup>560</sup> Two types of natural resources in Afghanistan are **minerals** and **hydrocarbons**. Mineral deposits are concentrations of minerals or bodies of rock that are economically possible to extract.<sup>561</sup> Hydrocarbon deposits are natural concentrations of oil or natural gas.<sup>562</sup> In Afghanistan, the development of these natural resources began thousands of years ago and has not stopped since then. For example, locals in Badakhshan have mined deposits of the blue-colored gemstone lapis lazuli for approximately 8,000 years.<sup>563</sup> The ancient city of Mes Aynak in Logar is named after the enormous copper deposits beneath its surface.<sup>564</sup> And natural gas has been produced in Jowzjan since the 1960s.<sup>565</sup>

However, recent geological studies indicate that Afghanistan's mineral and hydrocarbon deposits may be far greater than anyone ever realized. In fact, geologists in 2010 estimated that these resources might be worth as much as USD \$1 trillion.<sup>566</sup> These studies also confirm that Afghanistan possesses not just lapis lazuli, copper, and natural gas. Afghanistan also contains significant amounts of iron, gold, lithium, aluminum, and other valuable resources.<sup>567</sup> With Afghanistan each year producing goods and services worth approximately USD \$20 billion,<sup>568</sup> the country's mineral and hydrocarbon deposits may provide a means to generate economic growth for years to come.

Some foreign investors have already entered the Afghan market because of the country's mineral and hydrocarbon deposits. In 2007, for example, a Chinese company won a USD \$3 billion contract to develop the copper deposits at Mes Aynak in Logar.<sup>569</sup> A group of Indian and Canadian companies in 2011 won an even larger contract to develop a massive iron mine in Bamiyan.<sup>570</sup> And another Chinese company in 2011 secured the rights to develop oil deposits in Sar-e Pul and Faryab.<sup>571</sup> But how did these investors secure these mineral and hydrocarbon licenses? What are the laws governing these agreements? What is the Afghan Government's role in regulating the country's natural resource development?

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<sup>560</sup> Henry Campbell Black, *Black's Law Dictionary 6th ed.* St. Paul: West, 1027.

<sup>561</sup> 2014 Minerals Law, Article 3(5).

<sup>562</sup> 2009 Hydrocarbons Law, Article 2(1).

<sup>563</sup> Peter Roger Moorey, *Ancient Mesopotamian Materials and Industries: The Archaeological Evidence* (Winona Lake, Indiana: Eisenbrauns, 1994), 86-87, accessed November 16, 2013, [books.google.com/books/about/Ancient\\_Mesopotamian\\_Materials\\_and\\_Indus.html?id=P\\_lxuott4doC](http://books.google.com/books/about/Ancient_Mesopotamian_Materials_and_Indus.html?id=P_lxuott4doC).

<sup>564</sup> Bill Carter, *Boom, Bust, Boom: A Story About Copper, the Metal that Runs the World* (New York: Simon & Schuster, 2012), 237.

<sup>565</sup> Afghanistan Chamber of Commerce, "Mining," accessed November 18, 2013.

<http://www.afghanchamber.com/about/Mining.htm>.

<sup>566</sup> James Risen, "U.S. Identifies Vast Mineral Riches in Afghanistan," *New York Times*, June 14, 2010, accessed November 16, 2013, <http://www.nytimes.com/2010/06/14/world/asia/14minerals.html>.

<sup>567</sup> *Ibid.*

<sup>568</sup> World Bank, "Afghanistan: Data," accessed November 16, 2013, <http://data.worldbank.org/country/afghanistan>.

<sup>569</sup> Risen, "U.S. Identifies Vast Mineral Riches in Afghanistan."

<sup>570</sup> Abdul Qaddir Siddiqui, "Indian, Canadian Firms to Develop Hajigak Iron Mine," *Pajhwok*, November 29, 2011, accessed November 16, 2013, <http://www.pajhwok.com/en/2011/11/29/indian-canadian-firms-develop-hajigak-iron-mine>.

<sup>571</sup> Matthew Green & Leslie Hook, "CNPC Close to Afghanistan Oil Deal," *Financial Times*, September 5, 2011, accessed November 16, 2013, <http://www.ft.com/intl/cms/s/0/fd9aeb80-d7d2-11e0-a5d9-00144feabdc0.html#axzz2kqYYdPZn>.

To answer these questions, we have to look at the law of property in Afghanistan. This body of law tells us who owns land and how people may use that land. However, because of the unique economic characteristics of minerals and hydrocarbons, a special body of property law applies to land on which these resources are found and how the resources can be extracted and used in Afghanistan. This is the body of law that we will study throughout this chapter. So where do we find these laws?

The Constitution of Afghanistan recognizes the unique legal status of minerals and hydrocarbons, and this is the document that we must first consult. As you will recall, the Constitution of Afghanistan is the country's most authoritative legal source, and anything the Constitution of Afghanistan says about minerals and hydrocarbons is superior to all other legal sources. If you examine the provisions of the Constitution of Afghanistan, you will see that Article 9 provides us with our starting point. Article 9 states that "mines and other subterranean resources . . . shall be the property of the State" and that "the protection, management, and proper utilization of . . . natural resources will be regulated by law."

Since the ratification of the Constitution of Afghanistan in 2004, the National Assembly has passed two laws that apply to Afghanistan's state-owned mineral and hydrocarbon resources: the 2014 Minerals Law and the 2009 Hydrocarbons Law. These are not the only laws that govern natural resource development in Afghanistan. Other laws and regulations complement and assist these two laws. Yet because studying all of these different laws and regulations could easily fill up an entire book, we will focus most of our attention on the Minerals Law and the Hydrocarbons Law, while leaving some room toward the end of the chapter to discuss some of the other laws and regulations that impact natural resource development.

Once we reach the end of the chapter, you will gain greater familiarity with natural resources and with the provisions of the Minerals Law and Hydrocarbons Law by studying nine main concepts: (1) an overview of natural resources, (2) the ownership of Afghanistan's minerals and hydrocarbons, (3) the government institution overseeing Afghanistan's minerals and hydrocarbons, (4) the geographic areas where mineral and hydrocarbon operations may occur, (5) the contracts that the Afghan Government awards for mineral and hydrocarbon operations, (6) the regulatory process for approving those contracts, (7) the legal entities permitted to conduct mineral and hydrocarbon operations, (8) the regulations governing mineral and hydrocarbon operations, and (9) the dispute resolution system that pertains to mineral and hydrocarbon operations.

## 1. NATURAL RESOURCES: THE EXTRACTIVE INDUSTRIES

Before exploring the details of Afghanistan's mineral and hydrocarbon laws, it is useful to first provide some basic definitions about natural resources so that we understand exactly what we are studying in this chapter. As you will learn in this Section, the term natural resources includes far more than just minerals and hydrocarbons. Although minerals and hydrocarbons are certainly examples of natural resources, natural resources law involves far more than what we can study in this chapter alone. By understanding what natural resources law includes, you will better understand that Afghanistan's minerals and hydrocarbons laws address only a fraction of Afghan property law.

As we explored briefly in the Introduction, natural resources involve "any material in its native state which when extracted has economic value."<sup>572</sup> Natural resources are substances that we find buried in land, located on the surface area of land, or within waterways.<sup>573</sup> As the term natural resources suggests,

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<sup>572</sup> Henry Campbell Black, *Black's Law Dictionary*.

<sup>573</sup> *Ibid.*

these materials are naturally occurring, meaning that they are produced organically in nature without any human or machine labor. Natural resources can be hard materials, like rocks or timber.<sup>574</sup> Alternatively, natural resources can be liquid substances, like oil or water.<sup>575</sup> The important thing to remember as we proceed in this chapter is that natural resources are naturally occurring.

But these substances can gain greater importance to people when we remove them from their natural states. When we label these substances as “resources,” we mean that these materials are of use to people or that they are otherwise of value to people.<sup>576</sup> They are substances on which we rely as humans. The way to realize that utility or value is to **extract**, or remove, these resources from the ground or surface area.<sup>577</sup>

Can you think of natural resources that you use? The reality is that you encounter natural resources all the time in your daily lives. Afghanistan’s rivers, which may have helped to grow the food you ate this morning, are natural resources. The building that you woke up in this morning might be made of timber or steel, which are derived from the natural resources wood and iron. The vehicles that you saw on the roads today are powered by petrol, which comes from the natural resource oil. The basic fact is that natural resources are all around us. They are fundamental to our way of living, and life would not be possible without them.

Because there are so many different types of natural resources, it is impossible to study all of them in a single chapter. As we discussed at the beginning of this Section, we will concentrate on only a small portion of natural resources in this chapter. More specifically, we will focus our attention on Afghanistan’s **extractive resources**. For our purposes, we define extractive resources as including only the mining, oil, and gas industries.<sup>578</sup> Therefore, extractive resources do not include water, which is the subject of the preceding chapter, but the term would include items such as gold that can be found in water. Extractives resources also would not encompass forestland or wildlife.

However, extractive resources do include some of the most economically valuable natural resources in the world today. As we discussed in the Introduction, recent studies have suggested that Afghanistan’s mineral wealth may be as high as USD \$1 trillion.<sup>579</sup> As the map on the next page reveals, that mineral wealth is scattered throughout the country. This mineral wealth includes materials such as iron ore, which is used to make steel,<sup>580</sup> as well as copper, which is used to make various kinds of pipe and wiring systems.<sup>581</sup> But Afghanistan’s mineral wealth also includes substances that you may never have heard of, such as cobalt, which is used to make jet engines and gas turbines,<sup>582</sup> and lithium, which is often used in electronic equipment.<sup>583</sup>

Aside from these materials, which are often extracted in large-scale mines, Afghanistan’s mining sector also includes items known as **quarry and construction materials** that are used for everyday purposes. These quarry and construction materials include items such as sand, crushed stones, and gravel—

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<sup>574</sup> Ibid.

<sup>575</sup> Ibid.

<sup>576</sup> Ibid.

<sup>577</sup> Ibid.

<sup>578</sup> “Afghanistan,” Extractive Industries Transparency Initiative, accessed January 24, 2014, <http://eiti.org/Afghanistan>.

<sup>579</sup> Risen, “U.S. Identifies Vast Mineral Riches in Afghanistan.”

<sup>580</sup> “Steel Production, Coking Coal,” World Coal Associate, accessed January 24, 2014, <http://www.worldcoal.org/coal/uses-of-coal/coal-steel/>.

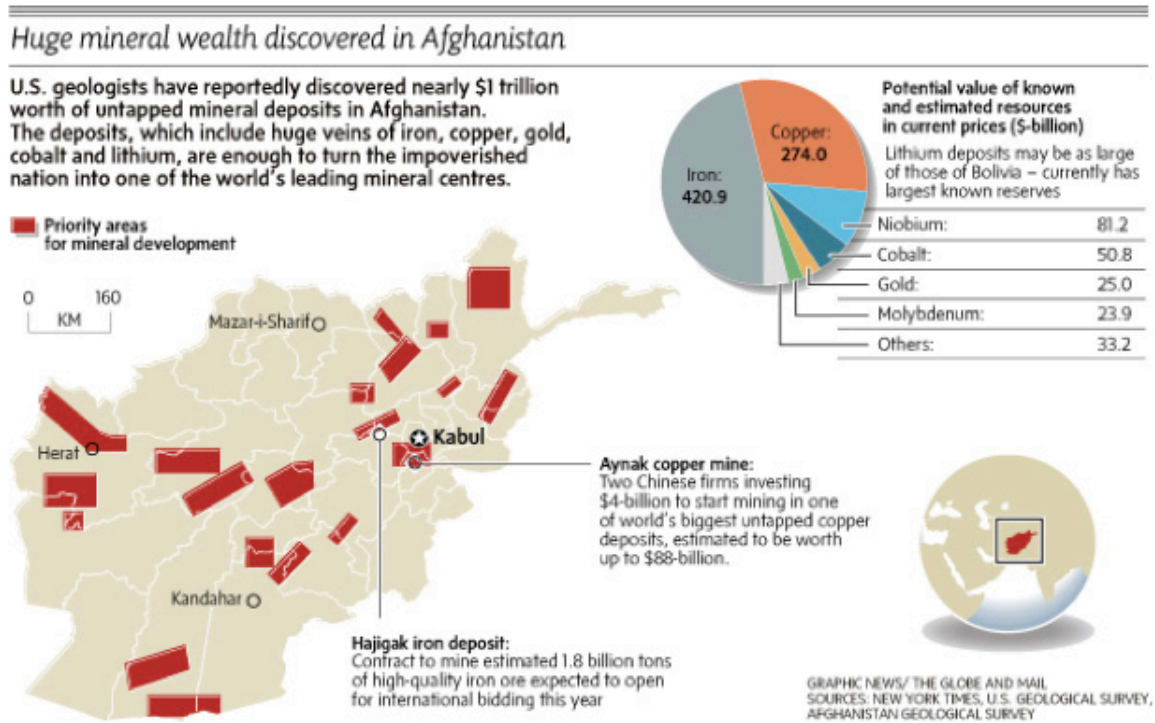
<sup>581</sup> “Copper: Characteristics, Uses, and Problems,” General Services Administration, accessed January 24, 2014, <http://www.gsa.gov/portal/content/113058>.

<sup>582</sup> “Cobalt” Minerals Education Coalition, accessed January 24, 2014,

<http://www.mineralseducationcoalition.org/minerals/cobalt>.

<sup>583</sup> Risen, “U.S. Identifies Vast Mineral Riches in Afghanistan.”

materials that are used for creating roads and buildings.<sup>584</sup> Simply put, Afghanistan’s mineral wealth includes items used both for industrial purposes as well as items that you may have encountered on a more routine basis.



The other components of Afghanistan’s extractive resources are oil and natural gas.<sup>585</sup> Oil is a liquid hydrocarbon that can be refined into diesel fuel, gasoline, heating oil, jet fuel, and other energy products.<sup>586</sup> Natural gas is a hydrocarbon that is found in a gaseous, not a liquid, form.<sup>587</sup>

Unlike Afghanistan’s mineral resources, Afghanistan’s oil and gas deposits are mainly concentrated in a single geographic area along the country’s northern border.<sup>588</sup> This is because Afghanistan’s oil and gas deposits are a part of large underground oil basins that extend into Central Asia. Those basins include the Amu Darya Basin, named after the Amu Darya River that forms part of Afghanistan’s border with its three Central Asian neighbors. The Amu Darya Basin is Afghanistan’s main deposit of natural gas.<sup>589</sup> Another hydrocarbon basin in Afghanistan is the Afghan-Tajik Basin, which is concentrated along the Afghanistan-Tajikistan border in the north-central and northeastern part of the country. That basin is Afghanistan’s main oil deposit.<sup>590</sup>

<sup>584</sup> Minerals Law, Article 3(25).

<sup>585</sup> “Afghanistan,” Extractive Industries Transparency Initiative.

<sup>586</sup> “Petroleum & Other Liquids,” Energy Information Agency, accessed January 29, 2014, [http://www.eia.gov/dnav/pet/tbldefs/pet\\_pri\\_spt\\_tbldef2.asp](http://www.eia.gov/dnav/pet/tbldefs/pet_pri_spt_tbldef2.asp).

<sup>587</sup> “Natural Gas,” Energy Information Agency, accessed January 29, 2014, [http://www.eia.gov/dnav/ng/TblDefs/ng\\_prod\\_ngpl\\_tbldef2.asp](http://www.eia.gov/dnav/ng/TblDefs/ng_prod_ngpl_tbldef2.asp).

<sup>588</sup> Alistair Osborne, “War-torn Afghanistan Issues Oil and Gas Tender,” *Telegraph*, October 7, 2013, accessed January 25, 2014, <http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/10362079/War-torn-Afghanistan-issues-oil-and-gas-tender.html>

<sup>589</sup> “Oil & Gas Resources,” Ministry of Mines, accessed January 25, 2014, <http://mom.gov.af/en/page/4788>.

<sup>590</sup> Ibid.

The map below provides a glimpse of where Afghanistan's main oil and gas deposits are located.<sup>591</sup>



Together, Afghanistan's mineral and hydrocarbon resources are incredibly valuable. These extractive resources are valuable mainly for two reasons. First, there is a high demand for these resources because they are essential elements of modern-day life.<sup>592</sup> They are used to construct the buildings in our villages. They provide us with energy to heat our homes. They give us the electricity that lights our cities. The second reason that extractive resources are valuable is because they are **non-renewable resources**.<sup>593</sup> This means that once people remove them, they cannot be replaced. In other words, there is a limited supply of extractive resources.

These two characteristics of (1) economic value and (2) non-renewability help explain why there must be laws to govern these resources. Think about what would happen if there were no laws to govern these resources. For example, imagine that a large deposit of lapis lazuli is located in Badakhshan Province. Let's imagine that geologists have estimated the value of the lapis lazuli at several million U.S. dollars. Without any laws governing this lapis lazuli deposit, what do you think would happen?

There might be competing claims of ownership over the lapis lazuli deposit. There might be attempts among the people that live around the lapis lazuli to extract the resource as quickly as possible so that their competitors could not extract any. There might also be pollution from extraction because people might not dispose of the waste products in the proper way. In addition to these concerns, the absence of sound regulations could also weaken the central government and could give rise to smaller regional powers that control the resource deposits. This could lead to inequality between provinces that are rich in resource deposits and those that lack resource deposits. In sum, the lack of laws could mean chaos.

In this next Section, we will discuss how Afghanistan has attempted to prevent the types of problems that can arise when laws are not in place to govern extractive resources.

<sup>591</sup> "Power and Gas Sectors," Afghanistan Reconstruction Trust Fund, accessed January 29, 2014, <http://www.artf.af/research/resource-corridor/power-and-gas>.

<sup>592</sup> Henry Campbell Black, *Black's Law Dictionary*.

<sup>593</sup> Graham A. Davis, "Trade in Mineral Resources," World Trade Organization Staff Working Paper 1 (2010), [http://www.wto.org/english/res\\_e/reser\\_e/ersd201001\\_e.pdf](http://www.wto.org/english/res_e/reser_e/ersd201001_e.pdf).

## 2. OWNERSHIP OF AFGHANISTAN'S EXTRACTIVE RESOURCES

Now that we have established that we must have laws governing Afghanistan's extractive resources, we can now discuss the legal framework governing these resources in Afghanistan. As we learned in the Introduction, the legal framework governing extractive resources involves a blend of constitutional and statutory principles. Because constitutional principles are superior to statutory principles, we will first discuss the constitutional doctrine that applies to extractive resources. Then, we will turn to the specific laws passed by the National Assembly that apply in this area.

### 2.1 The Constitution of Afghanistan

The Constitution of Afghanistan provides the general legal framework for Afghanistan's extractive resources. The Constitution of Afghanistan is the country's most authoritative legal source, and citizens and governmental agencies alike are required to follow its provisions. Article 9 of the Constitution of Afghanistan provides us with the most authoritative legal principles on minerals and hydrocarbons. Article 9 explains, "mines and other subterranean resources . . . shall be the property of the State" and that "the protection, management, and proper utilization of . . . natural resources will be regulated by law."

#### Constitution of Afghanistan

**Article 9:** Mines and other subterranean resources as well as historical relics shall be the property of the state. Protection, management, and proper utilization of public properties, as well as natural resources, shall be regulated by law.

The Constitution of Afghanistan therefore establishes that the Afghan Government retains all ownership of extractive resources in Afghanistan so long as the resources are not extracted from the earth. This is a fundamental proposition, and it is one that we will talk about throughout this chapter. This provision means that any unextracted mineral, oil, or natural gas deposit in the country belongs exclusively to the Afghan Government. If you think back to the example of the lapis lazuli deposit that we just discussed in Section 1, Article 9 means that no private party will have a legal right to that resource. No local family would be able to claim ownership over the lapis lazuli. No foreign company would be able to develop the resource. Rather, Article 9 means that the Afghan Government will have the sole legitimate claim to that lapis lazuli.

Because Afghanistan's mineral and hydrocarbon resources have an estimated value of USD \$1 trillion and because these extractive resources are scattered throughout the country,<sup>594</sup> you might wonder how it is possible for the government to administer Afghanistan's extractive resources all on its own. That question can be answered by examining the second part of Article 9. As you can see, Article 9 states that "the protection, management, and property utilization" of Afghanistan's extractive resources "will be regulated by law." In other words, the National Assembly has the authority under Article 9 to pass laws to further define the legal framework governing Afghanistan's extractive resources. These are the laws that we must study to more completely understand the legal framework governing Afghanistan's extractive resources.

Since the ratification of the Constitution of Afghanistan in 2004, the National Assembly has used its authority under Article 9 to pass two main laws that directly address extractive resources: the Minerals

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<sup>594</sup> Risen, "U.S. Identifies Vast Mineral Riches in Afghanistan."

Law and the Hydrocarbons Law.<sup>595</sup> We will discuss these two laws in detail throughout this chapter. Through our study, we will learn that these laws allow the Afghan Government to cede rights to explore for and exploit mineral and hydrocarbons resources to private persons.<sup>596</sup> The Afghan Government may be the true owner of the country's extractive resources, but the government can contract with private parties to explore and exploit these profitable resources. This is how Afghanistan might be able to realize the value of its extractive resources.

## 1.1 The Minerals Law

The Minerals Law provides the legal framework for mineral resources in Afghanistan. As you will recall from earlier in the chapter, the term “minerals” includes materials located in large-scale mines, such as iron mines and copper mines. But it also includes everyday items that are known as quarry and construction materials, such as sand and gravel.

To regulate these materials, the National Assembly first passed the Minerals Law in 2005, one year after the ratification of the Constitution of Afghanistan in 2004.<sup>597</sup> In 2009, the Minerals Law received significant amendments, which were approved in 2010. Just two years after that in 2012, another version of the Minerals Law was introduced, and that 2012 version received all the relevant approvals from the National Assembly and the President in 2014. This 2014 version of the law is the one that we will discuss throughout this chapter.

The new 2014 Minerals Law is comprehensive. It addresses nearly every area that you can imagine in the area of minerals law, as confirmed by Article 2 of the law.

### Minerals Law

#### Article 2: Objectives

The objectives of this Law are:

- (1) To regulate the development and appropriate use of mineral resources of Afghanistan;
- (2) To regulate and manage the reconnaissance, exploration and exploitation activities of mineral resources in Afghanistan;
- (3) Economic self-sustainability of Afghanistan through the development of its minerals' sector;
- (4) To ensure that mineral resources are developed and managed according to best international practice;
- (5) To secure optimal benefit from minerals' extraction and processing;
- (6) The sustainable development of mineral resources and prevention of its wastage while considering the mitigation of negative environmental and social impacts;
- (7) To support and to promote a fair domestic and international investment environment in the mining sector; and
- (8) To promote peace and security through social and economic development activities in mining communities.

<sup>595</sup> “Market Prospects,” Afghanistan Investment Support Agency, accessed January 25, 2014, <http://www.aisa.org.af/brochures/Mining1.pdf>.

<sup>596</sup> Hydrocarbons Law, Article 3(2); Minerals Law, Article 5.

<sup>597</sup> “The Minerals Law,” Ministry of Mines, last modified May 2012, [http://mom.gov.af/Content/files/Mineral\\_Law\\_Consultation\\_English.pdf](http://mom.gov.af/Content/files/Mineral_Law_Consultation_English.pdf)



Consistent with Article 9 of the Constitution of Afghanistan, the Minerals Law reiterates that all minerals in Afghanistan are the property of the state and that all mineral operations must be controlled and regulated by the state.<sup>598</sup>

However, one of the most significant provisions is located in Article 5(3) of the Minerals Law. This provision provides that “[a]ll mineral activities in the country [Afghanistan] shall be undertaken after a license or authorization or contract is granted in accordance with the provisions of this Law and the relevant Regulations.”

### **Minerals Law**

**Article 5(3):** All mineral activities in the country [Afghanistan] shall be undertaken after a license or authorization or contract is granted in accordance with the provisions of this Law and the relevant Regulations.

As we just mentioned, the Minerals Law confirms that private persons unaffiliated with the Afghan Government may be able to participate in mineral exploration or exploitation if the Afghan Government authorizes them to do so. Article 9 of the Constitution of Afghanistan may give ownership of natural resources to the Afghan Government, but this does not mean that the state should also perform exploration or exploitation as well. Rather, just as Article 10 of the Constitution of Afghanistan confirms, the Minerals Law also confirms that involvement of the private sector is needed to help foster the development of a successful market economy and successful extractive resources sector.

Throughout this chapter, we will discuss how private parties navigate the process for obtaining permission to become involved in extractive resource operations, and we will explore the legal rights associated with this permission, as discussed in the Introduction.

### **2.3 The Hydrocarbons Law**

The second main law that pertains to extractive resources in Afghanistan is the Hydrocarbons Law of 2009. As you will recall from earlier in the chapter, the term hydrocarbons includes both oil and natural gas. Oil is a liquid hydrocarbon that can be refined into products such as gasoline or heating oil. Natural gas is a hydrocarbon that is found in a gaseous rather than liquid form.<sup>599</sup> The Hydrocarbons Law addresses both of these substances and all of the legally permissible operations associated with them. The Hydrocarbons Law first entered into force in 2005.<sup>600</sup> Just as the National Assembly added amendments to the Minerals Law in 2009, it also amended the Hydrocarbons Law during that year. The Hydrocarbons Law has not been updated since 2009, so the 2009 version of the Hydrocarbons Law is the one that we will discuss throughout this chapter.

As with the Minerals Law, the Hydrocarbons Law is extensive. It addresses nearly every aspect of hydrocarbons law that you can imagine.

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<sup>598</sup> Minerals Law, Article 5(1-2).

<sup>599</sup> “Natural Gas,” Energy Information Agency.

<sup>600</sup> “Market Prospects,” Afghanistan Investment Support Agency.

Just like the Minerals Law, the Hydrocarbons Law derives its authority from Article 9 of the Constitution of Afghanistan. Article 3(1) of the law reestablishes that “[a]ll Hydrocarbons located on or underground in the territory of Afghanistan shall in accordance with the law be the exclusive property of the State.” At the same time, Article 3(2) of the Hydrocarbons Law also establishes that “[a] Person may conduct hydrocarbon operation[s] based on license granted by the Ministry of Mines in accordance with the provision of this Law.”

### **Hydrocarbons Law**

**Article 3(2):** Hydrocarbon Operations within the territory of Afghanistan shall be conducted with the permission of state. A Person may conduct hydrocarbon operation[s] based on license granted by the Ministry of Mines in accordance with the provision of this Law.

Therefore, the Hydrocarbons Law also supports the notion that private persons are allowed to become involved in hydrocarbon operations within Afghanistan if the Afghan Government provides permission. We will discuss the process for obtaining this permission and the legal rights associated with this permission throughout this chapter.

#### **2.4 Combining the Minerals Law and Hydrocarbons Law**

As you may have noticed, because both minerals and hydrocarbons are both extractive resources, the Minerals Law and Hydrocarbons Law address very similar issues. Because the Minerals Law and the Hydrocarbons Law contain so much overlap—and because each is too comprehensive to study on its own, just as the regulations that complement these two laws are too detailed to study in this chapter—we will examine their general provisions together. Only when the two laws differ substantially will we separate the two laws and examine their individual provisions.

Therefore, for the remainder of this chapter and as we outlined in the Introduction, we will explore the Minerals Law and Hydrocarbons Law together by examining the following main concepts: (1) the government institution that oversees these extractive resources, (2) the geographic areas where extractive resource operations may legally take place, (3) the types of contracts available for extractive resource operations, (4) the regulatory approval process for finalizing these extractive resource contracts, (5) the legal persons that may contract with the Afghan Government to participate in extractive resource operations, (6) the regulations that those involved in extractive operations must respect, and (7) the dispute resolution processes available for extractive resource operations.

#### **2.5 Other Laws and Regulations Impacting Extractive Resources**

Although our focus in this chapter will be on the Minerals Law and the Hydrocarbons Law, you should be aware that these are not the only legal sources that impact extractive resource development in Afghanistan. As you know, there is a hierarchy of laws in Afghanistan, with the Constitution of Afghanistan at the apex, followed by laws passed by the National Assembly. However, there is also a body of other laws regulations that government agencies have developed to complement the laws passed by the National Assembly.

In the extractive resource sector, other laws passed by the National Assembly as well as regulations written by government agencies are important to consider as well. These legal sources are not always directly related to mineral or hydrocarbon development. For example, some laws passed by the National Assembly affect such things as business operations, contract formation, environmental protection, and

labor and employment issues. But they also affect the extractive resource sector. Some of the regulations that are important in this area, however, more directly pertain to mineral and hydrocarbon development.

However, because studying all of these laws and regulations would simply take too much time, we will devote only so much attention to them in this chapter, which we will do toward the end of the chapter. Still, it is important for you to at least be aware that there are other legal sources besides the Minerals Law and the Hydrocarbons Law.

### **3. INSTITUTIONAL STRUCTURE: THE MINISTRY OF MINES AND PETROLEUM**

Let's think back to the example of the lapis lazuli mine in Badakhshan. Imagine that a company wants to develop that lapis lazuli. The company is unsure if anyone has already claimed the rights to extract the lapis lazuli. Perhaps the government remains the sole entity with a legal claim to the lapis, as it is the true owner under Article 9 of the Constitution of Afghanistan. Or perhaps the government has already ceded the rights to exploit the lapis lazuli to a private entity, which the government may do under the Minerals Law. How does the company discover if someone already has a legal claim to the lapis? To whom in the government should the company turn to get its questions answered?

Both the Minerals Law and the Hydrocarbons Law provide answers to these questions. As we just discussed in Section 2, the legal framework governing Afghanistan's extractive resources is designed to encourage private sector participation in the exploration and exploitation of these resources. Therefore, both the Minerals Law and the Hydrocarbons Law seek to provide as much clarity as possible for those interested in participating in extractive resource operations. To facilitate such participation, various Afghan Government agencies help to administer the extractive resources sector. We will discuss the role of each of these agencies throughout this chapter. However, one Afghan Government agency plays such a fundamental role in administering Afghanistan's extractive resources that we must first discuss its functions before proceeding any further. That agency is the Ministry of Mines and Petroleum. Often, this ministry is referred to simply as the Ministry of Mines, but we will address the ministry by its full name throughout this chapter.

Both the Minerals Law and the Hydrocarbons Law vest the Ministry of Mines and Petroleum with tremendous power. According to Article 6(1) of the Minerals Law, for example, "[t]he Ministry of Mines and Petroleum is . . . the authorized agency to regulate mineral activities in Afghanistan." Similarly, Article 5(1) of the Hydrocarbons Law provides that the Ministry of Mines and Petroleum shall have the duty and authority "[t]o formulate and implement policies relating to Hydrocarbons and their development, including policies for the promotion of private investment in the field of Hydrocarbon Operations."

#### **Ministry of Mines and Petroleum's Meetings with Private Industry**

To fulfill its obligation to promote the development of Afghanistan's mineral and hydrocarbon wealth, the Ministry of Mines and Petroleum regularly holds meetings and workshops with representatives of private companies to hear about their expectations and the challenges that they are facing.<sup>601</sup>

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<sup>601</sup> Ministry of Mines and Petroleum, "The Workshop for Encouragement of Investment Held at MoMP," May 26, 2014, accessed September 2, 2014, <http://mom.gov.af/en/news/33353>.

What do you think might be some of the challenges or concerns that local and international companies may have with regard to investing in the mineral or hydrocarbon sector? How should such concerns be addressed by legislation?

These provisions establish the Ministry of Mines and Petroleum as the single most important governmental authority entrusted with the administration and promotion of Afghanistan's extractive resources. But how exactly does the Ministry of Mines and Petroleum perform its statutory duties? What do those duties actually involve?

If you examine the provisions of the Minerals Law and the Hydrocarbons Law, you will notice that the Ministry of Mines and Petroleum performs crucial functions in all areas of the extractive resources sector. In fact, the duties of the Ministry of Mines and Petroleum largely reflect the entire life cycle of an extractive resource operation. Although the Minerals Law and the Hydrocarbons Law list far more duties and authorities than we can discuss in a single chapter, the basic components of the Ministry of Mines and Petroleum's functions include the following tasks. For a visual representation of the main tasks, look to Figure 1 on the following page.

- (1) **Classifying land as available or prohibited to extractive resource operations:** The Ministry of Mines and Petroleum has the authority to propose which geographic areas are open or closed to extractive resource operations.<sup>602</sup> As you will learn in the next Section, the Minerals Law identifies several factors that the Ministry of Mines and Petroleum should take into consideration in making these determinations. The Hydrocarbons Law designates certain areas by default as prohibited to extractive resource operations.
- (2) **Classifying the deposits in a given area as mines, quarries, oil, or natural gas:** The Ministry of Mines and Petroleum is responsible for classifying extractive resource deposits.<sup>603</sup> As you will learn in Section 5, the governmental approval process for finalizing an extractive resource contract is dependent upon the nature of the underlying extractive resource deposit. Therefore, the classification that the Ministry of Mines and Petroleum assigns to extractive resource deposits impacts the regulatory approval process.
- (3) **Arranging bidding processes for extractive resource deposits:** Many of Afghanistan's mineral and hydrocarbon deposits remain unexplored or unexploited. Because the Afghan Government retains ownership over all extractive resources under Article 9 of the Constitution of Afghanistan, the Afghan Government alone has the authority to sell the rights to develop those resources to a private party. In many cases, this means that a competitive bidding process will take place. The Ministry of Mines and Petroleum is in charge of coordinating this process on the Afghan Government's behalf.<sup>604</sup>
- (4) **Approving extractive resource contracts or submitting the contracts to other governmental authorities for approval:** As you will learn in Section 6, when we discuss the regulatory approval process, different government bodies have the duty to authorize different types of extractive resource contracts. In some instances, the Ministry of Mines and Petroleum itself will have the authority to finalize a certain contract. In other situations, however, the Ministry of Mines and Petroleum is responsible for referring an extractive resource contract for approval to a higher governmental authority, such as the Inter-Ministerial Commission or the Cabinet.<sup>605</sup>

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<sup>602</sup> Hydrocarbons Law, Article 5(2); Minerals Law, Article 12.

<sup>603</sup> Hydrocarbons Law, Article 5(1); Minerals Law, Article 7(7-8).

<sup>604</sup> Hydrocarbons Law, Article 5(23); Minerals Law, Article 7(3, 11).

<sup>605</sup> Hydrocarbons Law, Article 5(5); Minerals Law, Article 7(3, 5).

- (5) **Recording mineral and hydrocarbon rights in a central registry:** One of the main tasks of the Ministry of Mines and Petroleum is to register which party maintains the rights to explore for or to exploit extractive resource deposits. This function provides certainty for extractive resource contractors because they will know for sure which geographic areas that they are legally allowed to work on. A central registry also alerts other people that they are excluded from working in areas already under contract, which is a main function of property rights.<sup>606</sup>
- (6) **Determining surface rental fees and royalty rates that extractive resource contractors have to pay to the government:** The Ministry of Mines and Petroleum is responsible for helping to determine **surface rental fees** and **royalty rates** that mineral rights holders and hydrocarbon rights holders have to pay.<sup>607</sup> Surface rental fees are annual fees that extractive resource contractors pay to use land.<sup>608</sup> Royalty rates are percentages of the net benefit that extractive resource contractors reserve for the government.<sup>609</sup> Determining these royalty rates is a crucial task because they determine how much revenue the Afghan Government receives for its extractive resources.
- (7) **Monitoring compliance with, renewing, and withdrawing extractive resource contracts:** Mineral and hydrocarbon contracts last for only a certain amount of time. During the lifetime of a contract, however, the Ministry of Mines and Petroleum may terminate certain contracts if the contractor violates applicable laws, such as labor laws, safety laws, or environmental laws. Alternatively, the Ministry of Mines and Petroleum can extend a contract if the contract expires and if the contractor wants to keep its existing operations in place.<sup>610</sup>
- (8) **Enacting regulations to address issues not expressly addressed by the Minerals Law or Hydrocarbons Law:** The Minerals Law and the Hydrocarbons Law are extensive. But they do not discuss every single aspect of the minerals or hydrocarbons industry. Both laws recognize their shortcomings and empower the Ministry of Mines and Petroleum to enact regulations consistent with the purposes of the laws so that the Ministry of Mines and Petroleum can more fully administer the extractive resources sector.<sup>611</sup>

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<sup>606</sup> Hydrocarbons Law, Article 5(11); Minerals Law, Article 8(2).

<sup>607</sup> Hydrocarbons Law, Article 5(8-9); Minerals Law, Articles 82-83

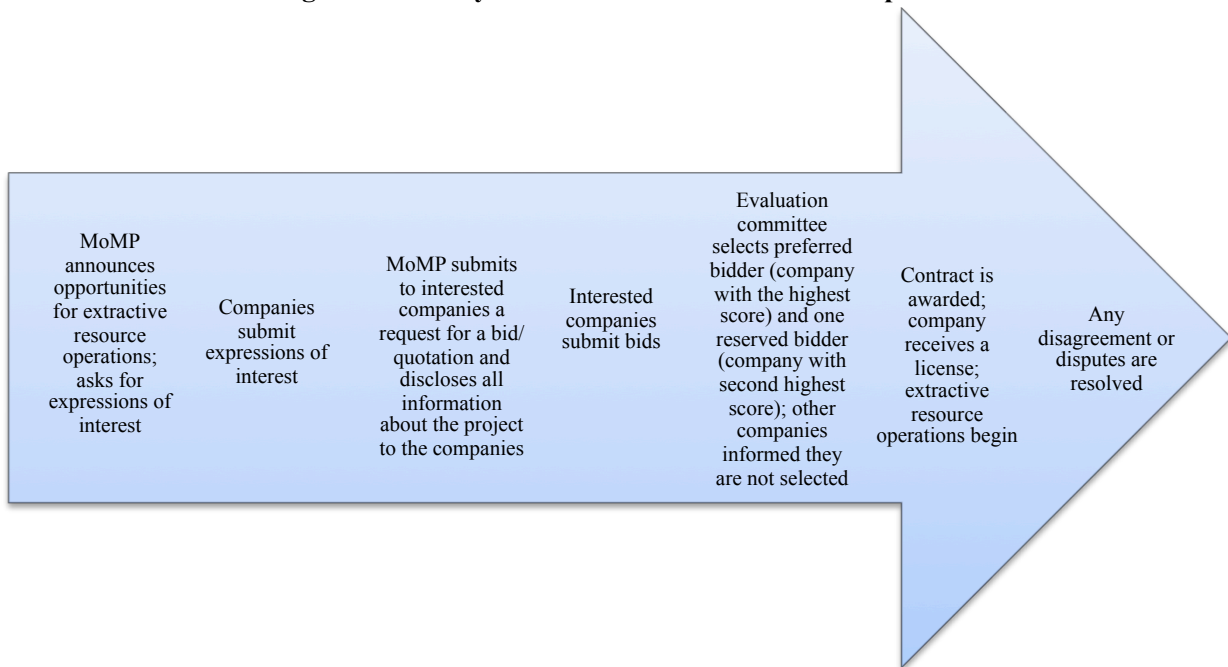
<sup>608</sup> Hydrocarbons Law, Article 65; Minerals Law, Article 3(29).

<sup>609</sup> U.S. Geological Survey, *2012 Minerals Yearbook: Afghanistan* (2013), <http://minerals.usgs.gov/minerals/pubs/country/2012/myb3-2012-af.pdf>.

<sup>610</sup> Hydrocarbons Law, Article 5(12); Minerals Law, Article 7(4, 6).

<sup>611</sup> Hydrocarbons Law, Article 5(13); Minerals Law, Article 6(1).

**Figure 1. Life Cycle of an Extractive Resource Operation**



As you can see, the Ministry of Mines and Petroleum performs a function at nearly every stage of the extractive resource development process. Why is it necessary for the Ministry of Mines and Petroleum to be so involved in this area of the law?

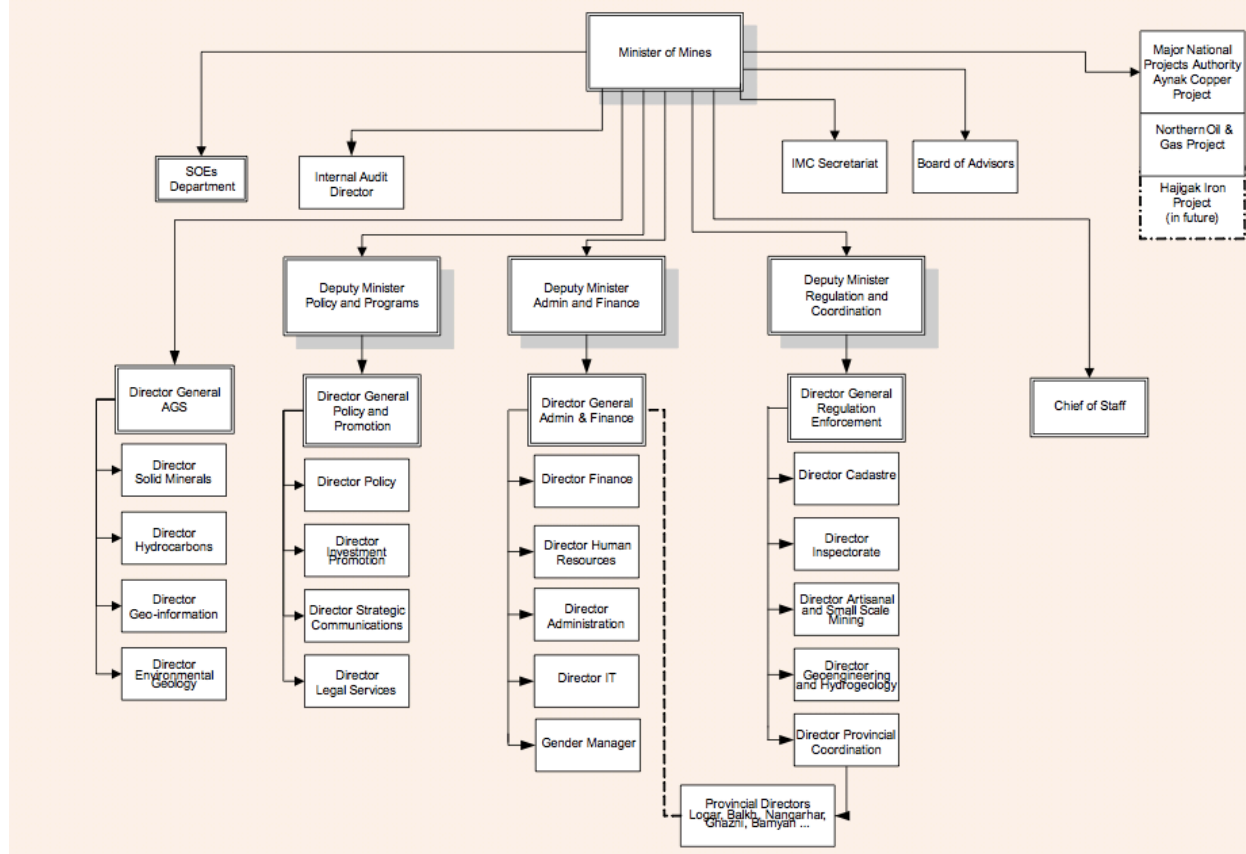
If you think back to the Introduction to this chapter, you will recall that Afghanistan’s mineral and hydrocarbon deposits are considered a great potential source of revenue for Afghanistan.<sup>612</sup> However, most of Afghanistan’s lucrative mineral and hydrocarbon resources remain unexplored or unexploited. By empowering the Ministry of Mines and Petroleum with the authority to nurture the extractive resource sector and to encourage investment, Afghanistan might be able to realize the full value of its resources. Because the Ministry of Mines and Petroleum performs such a wide variety of functions, the agency contains many different directorates and offices. The organizational chart on the following page provides a glimpse of the Ministry of Mines and Petroleum’s structure.<sup>613</sup> As you will see, the Ministry of Mines and Petroleum includes a number of different components. Among the more important ones for our purposes is the Legal Services component, which is part of the Policy and Programs branch.<sup>614</sup> The Legal Services component takes care of all of the legal issues affecting the Ministry of Mines and Petroleum. Aside from the Ministry of Mines and Petroleum, there are some other governmental bodies that also perform important functions in extractive resource development, such as the National Assembly, Inter-Ministerial Commission (Commission), and Council of Ministers (Cabinet). Their roles are discussed later in the chapter.

<sup>612</sup> Risen, “U.S. Identifies Vast Mineral Riches in Afghanistan.”

<sup>613</sup> “Business Plan 2010-2015: Synopsis,” Ministry of Mines, accessed January 28, 2014, [http://mom.gov.af/Content/files/Business%20Plan%202010\\_Synopsis\\_28Aug\\_am.pdf](http://mom.gov.af/Content/files/Business%20Plan%202010_Synopsis_28Aug_am.pdf)

<sup>614</sup> Pajhwok Afghan News, “Special Mines Page,” accessed September 3, 2014, <http://mines.pajhwok.com/ministry-ofmines-and-petroleum>

Below: The new organisational structure of the Ministry of Mines



#### 4. GEOGRAPHIC AREAS AVAILABLE FOR EXTRACTIVE RESOURCE OPERATIONS

We learned in Section 1 that Afghanistan’s extractive resource deposits are scattered throughout the country. Afghanistan’s mineral deposits, including both large-scale mines and smaller-sized quarry materials, are located in every corner of the country.<sup>615</sup> Although they are not quite as widespread throughout the country, Afghanistan’s hydrocarbon deposits still extend throughout a substantial portion of the northern part of the country.<sup>616</sup> But is all the land that contains mineral or hydrocarbon deposits available for extraction under the law? Are there reasons why the Afghan Government might want to protect land from extractive resource operations even if it contains minerals or hydrocarbons? Let’s think back to the example of the lapis lazuli mine in Badakhshan that we have been discussing in this chapter. Imagine that the lapis lazuli mine is located just twenty meters from the boundaries of a village in which 250 people live. It is also just ten meters from that village’s main source of water, which the villagers use to drink, to wash their clothes, and to bathe. If the lapis lazuli extraction takes place, the operation will produce constant sound and is likely to create waste products that will pollute the village’s water source. Does the law allow for the lapis lazuli extraction to take place? Should the lapis lazuli operation take place?

To answer this question, we again have to look at the Minerals Law and the Hydrocarbons Law. Both the Minerals Law and the Hydrocarbons Law discuss the geographic areas where extractive resource operations may legally take place. Many areas are available for extractive resource operations under the

<sup>615</sup> Risen, “U.S. Identifies Vast Mineral Riches in Afghanistan.”

<sup>616</sup> “Oil & Gas Resources,” Ministry of Mines.

law, but there are certain areas that the Minerals Law and Hydrocarbons Law do not want developed unless the benefits of development are particularly compelling. We will discuss these areas throughout this Section.

#### **4.1 Areas Prohibited for Both Mineral and Hydrocarbon Operations**

As you know, the Minerals Law and the Hydrocarbons Law are two separate laws that address two different types of extractive resources. Still, they both preserve the principle that extractive resource operations should not be allowed to take place on all land. Rather, some land might have such special importance that extractive resource operations would be prohibited on it.

Article 15 of the Hydrocarbons Law, for example, contains an explicit list of areas on which no hydrocarbon operations may take place:

- (1) Land containing archaeological or cultural remains;
- (2) Land within one hundred meters of a state-owned building or a dam;
- (3) Land that is part of an airport;
- (4) Land used or owned by the Ministry of Defense;
- (5) Any land used for public roads, highways, railways, pipelines, or other public utilities;
- (6) Land that is subject to unresolved claims over ownership; and
- (7) Any land declared unauthorized through a decree from the States.

Similarly, Article 36(2) the Minerals Law confirms that the following areas are excluded from mineral operations unless the Cabinet specifically approves such mineral operations:

- (1) In respect of part of a license area dedicated for the purpose of securing any public interest;
- (2) The area within fifty (50) meters of any land dedicated as a place for cemetery, a place of religious or cultural significance;
- (3) Land that is located within one hundred (100) meters of an oil or gas installation, pipeline or other relevant facilities;
- (4) Land that is located within fifty (50) meters of any land reserved for the purpose of construction of any railway, highway or waterway;
- (5) Land which is located within two hundred (200) meters of any town or village, unless it has acquired the written agreement of the Ministry of Urban Development Affairs or the Municipality in this regard; and/or
- (6) Land which is dedicated as a legally protected area.

Can you see why these lands would be off-limits to extractive resource operations? Imagine that an extractive resource deposit is located underneath the Kabul-Kandahar Highway. If the extractive resource operation takes place, no vehicles would be able to use the highway to travel the distance between these two major cities. The travel disruption could negatively affect food deliveries, business meetings, or family visits. Therefore, it might make sense to prohibit this kind of extractive resource operation.

However, you will recall that there is not an absolute ban on extractive resource operations in these seven areas. The Ministry of Mines and Petroleum may still decide to approve a proposed extractive resource operation in one of these areas if the benefits of doing so are greater than the costs.<sup>617</sup>

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<sup>617</sup> Ibid.



### Case Study: Aynak Copper Mine in Logar Province<sup>618</sup>

The areas that the Minerals Law identifies as prohibited to mineral operations was at issue in a major mining project that began in 2007. In 2007, the Metallurgical Corporation of China (MCC) won the rights to exploit the Aynak copper mine in Logar Province in a deal valued at USD \$3 billion. At the time, the deal was the largest-ever foreign investment in Afghan history. Although Aynak contains some of the world's largest untapped copper deposits, the site also contains other rare and prized items: Buddhist relics.

The city of Mes Aynak is an ancient Buddhist city, and many ancient Buddhist remains were left buried in the ground by the city's original residents. Therefore, MCC and the Afghan Government were presented with a problem after they finalized the contract to extract the copper. As you know, the Minerals Law confirms that land containing "religious or cultural significance" could be prohibited to mineral operations. In this case, the Ministry of Mines and Petroleum allowed the mineral operation to advance, but only under certain conditions. Under a deal negotiated with MCC, archaeologists were given a three-year time period during which they could remove the Buddhist relics.

Now that you have familiarized yourself with the geographic areas where extractive resource operations may take place, let's think back to the lapis lazuli mine located close to the village in Badakhshan. Would the operation be permitted to proceed? As you can see, the Minerals Law would prohibit the development of the lapis lazuli mine because the mine would be less than 200 meters away from the village. Therefore, only if the mine developer can get special approval from the Minister of Urban Development Affairs or from the local municipality would the project be able to advance.

#### 4.2 Government Expropriation of Private Land

An interesting topic in extractive resource law involves land that is owned by a private party that is already being used for a purpose other than an extractive resource operation. Although Article 9 of the Constitution of Afghanistan gives the Afghan Government ownership rights over minerals and hydrocarbons, that provision does not mean that the Afghan Government owns the land that sits on top of those resources. It is entirely possible for a private party to have a legitimate legal claim to the surface land. It is also entirely possible that the private party would not want an extractive resource operation to take place on its land.

This is a complicated area of the law, but both the Minerals Law and the Hydrocarbons Law—along with the Constitution of Afghanistan—address this issue. Under Article 40 of the Constitution of Afghanistan, Article 68 of the Hydrocarbons Law and Article 35(2) of the Minerals law, the Afghan Government possesses the authority to **expropriate**, or take, land that does not belong to the government for mineral or hydrocarbon development purposes.

However, there are restrictions on the government's authority to expropriate land. First, the expropriation must be in the public interest.<sup>619</sup> This means that the benefits of expropriating the land must be greater

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<sup>618</sup> Hamid Wahed Alikuzai, *A Concise History of Afghanistan in 25 Volumes* (Trafford: Bloomington, 2013), 665.

than the disadvantages of expropriating the land, including the inconvenience that the expropriation would cause for the original landowner. Second, the person whose land is expropriated must receive compensation for the taking.<sup>620</sup> This provision provides some protection to the original property owner because that person will receive some money to make up for the loss of land. A more comprehensive discussion of expropriation is available later in this book.

### **Application Exercise**

Let's apply everything we learned in Section 4 in this Application Exercise. Consider the two situations below. First, think of reasons why the extractive resource operation should take place. Then, think of reasons why it should not take place. These are the types of situations that officials at the Ministry of Mines and Petroleum encounter in their own jobs.

- (1) A natural gas deposit is located beneath a densely populated village in Jowzjan Province. A company envisions great commercial opportunities if it can secure the rights to explore for and exploit the natural gas. If exploitation occurs, the local village will have an energy source for the next twenty-five years. However, there is a 25% chance that removing the natural gas from the ground will cause an explosion. If the explosion occurs, it is estimated that five or seven people will be wounded. Should the natural gas exploitation take place?
- (2) A family of twelve in Herat lives on land that their ancestors have lived on for the last one hundred years. However, recent geological reports have revealed that the land contains deposits of copper that are valued at USD \$250 million. If the copper is extracted, it is likely to create five hundred jobs for people in the surrounding area. The family does not want to move off of its land. Should the Afghan Government use its authority under Article 65 of the Minerals Law to expropriate the land?

### **Application Exercise: Suggested Answers**

The two scenarios described above are difficult to resolve, and there might not be a "correct" answer. However, here are some potential responses.

- (1) We could argue that the natural gas should be exploited in Jowzjan because doing so will provide energy for the village for twenty-five years. This fact arguably outweighs any harm that might result from the exploitation of the natural gas. In addition, there is only a 25% chance of harm and a 75% chance of no harm. Alternatively, we could argue that the exploitation should not take place because no benefit will outweigh the risk of injuring people. Even if there is only a 25% risk of injury, that risk is not worth taking.

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<sup>619</sup> Ibid.

<sup>620</sup> Ibid.

(2) We could argue that the copper should be extracted because doing so will result in employment for five hundred people in the surrounding area. By contrast, the family that lives on the land has only twelve people. Because benefits for five hundred people outweigh losses for twelve people, the extraction should take place. Alternatively, we could argue that the sentimental value of the land to the family is so great that it cannot be quantified. This land has been in the family for generations, and it should remain that way forever.

## **5. EXTRACTIVE RESOURCE CONTRACTS**

In the previous Section, we discussed the areas that are restricted to extractive resource operations. However, even excluding all the areas that we discussed in Section 4, Afghanistan still has a lot of land available for extractive resource operations. It is not always necessary for the Cabinet or the local municipality to provide special approval for land to be available for extractive resource operations. As you will recall from Section 1, extractive resources are scattered located throughout the country, and there are many extractive resource opportunities available in Afghanistan.

But what exactly are parties allowed to do on the land that is available for extractive resource operations? Are parties that receive an extractive resource contract permitted to do anything that they want? Or are there restrictions on their activities, just as there are restrictions on the land that they can exploit?

Let's think back to the example of the lapis lazuli mine in Badakhshan. Imagine that the government will allow extractive resource operations to take place. Imagine that the prospective developer believes that the lapis lazuli that is visible from the surface represents only a portion of what is actually lying underground. The developer also has reason to believe that some gold may be located in the area. The company would first like to conduct a preliminary exploration of the deposit to learn just what is in the area. Assuming that preliminary exploration yields positive results, the developer would like to conduct a more in-depth exploration by drilling and excavating the area to determine the quality of the resources in the area. If the company is satisfied with the amount and quality of lapis lazuli located in the deposit, it would then like to extract the resource and sell it for a profit. Can a single extractive resource contract accomplish these goals? Or are separate licenses or authorizations required before the company can explore and exploit the resource? In formulating your thoughts, think back to Chapter 4, which discussed transfers of ownership.

The Hydrocarbons Law and the Minerals Law will help you to answer these questions. However, the contracts available for mineral and hydrocarbon operations are one area in which the Minerals Law and the Hydrocarbons Law differ. The simple fact is that different contracts are available depending upon whether a party wants to develop minerals or hydrocarbons. We will discuss the various contracts available for these two types of extractive resources throughout this Section. We will begin by discussing the various contracts available for minerals. Then, we will proceed to discuss the various contracts available for hydrocarbons.

### **5.1 Minerals Law Contracts**

The contracts available under the Minerals Law differ depending upon the specific type of activity that a party seeks to conduct as well as the size of the mining operation. As we discussed in our example about the lapis lazuli mine in Badakhshan, a party interested in a particular mineral deposit might want to first conduct basic or advanced exploration of the resource deposit before actually exploiting that resource. The Minerals Law recognizes these kinds of distinction, as well as others.

At a fundamental level, six types of contracts are available for mineral operations under Minerals Law, five of which are called “licenses”: (1) reconnaissance licenses, (2) exploration licenses and (3) exploitation licenses, (4) small-scale mining licenses, and (5) artisanal mining licenses.<sup>621</sup> But as you know, the Minerals Law also governs quarry and construction materials operations. This presents a sixth type of contract: the quarry and construction materials authorization.<sup>622</sup> The party that possesses one of these contracts is called the “holder” of the license.<sup>623</sup>

So what exactly are the distinctions among all of these contracts? That is what we will turn to now.

### **5.1.1 Reconnaissance License**

The first minerals contract that we will discuss is the reconnaissance license. According to Article 3(27) of the Minerals Law, reconnaissance “means preliminary exploration for minerals through aerial, geophysical surveys or geochemical survey, geological mapping; and minor sampling of surface soil and rocks, but excludes drilling and excavations.” In other words, reconnaissance is a very limited form of exploration where mineral deposits themselves are not really affected. Instead, the deposit is mostly left in its natural state.

If a party is interested in obtaining a reconnaissance license, it must submit an application to the Ministry of Mines and Petroleum.<sup>624</sup> That application must include certain information, such as the name of the group seeking to conduct reconnaissance, details about the proposed reconnaissance program, and a range of other information.<sup>625</sup> If the Ministry of Mines and Petroleum approves the application, a reconnaissance license is valid for two years.<sup>626</sup> It cannot be extended in length.<sup>627</sup>

A reconnaissance license is not available for an unlimited amount of land. As the Minerals Law confirms, the geographic area for which a reconnaissance license is valid cannot exceed 20,000 square kilometers.<sup>628</sup> This is a large area of land, but the size is consistent with the goal of a reconnaissance contract: basic mapping of the geological terrain.

### **5.1.2 Mineral Exploration License**

The second mineral contract available under the Minerals Law is the mineral exploration license. According to Article 3(14) of the Minerals Law, exploration “means any activity carried out to discover potentially economical and mineable mineral resources in order to demarcate the quality and quantity of the minerals contained within an area, and/or to evaluate the possibilities of their exploitation.” This license simply means that the license holder will be allowed to conduct more thorough exploration for mineral substances, such as iron, copper, lithium, or cobalt, than allowed for under the reconnaissance license. But the contract holder still will not have the right to exploit those materials for financial gain. If a party is interested in obtaining an exploration license, it must submit a bid through a public bidding process.<sup>629</sup> This bidding process means that multiple parties can submit applications to explore a particular mineral deposit, and the Afghan Government will select the best bid.<sup>630</sup> In selecting the best bid, the Ministry of Mines and Petroleum will first review all of the bids and make an initial proposal to the Commission, a governmental body that we will discuss later in the chapter.<sup>631</sup> If the Commission

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<sup>621</sup> Minerals Law, Article 13(1).

<sup>622</sup> Minerals Law, Articles 73-79.

<sup>623</sup> Minerals Law, Article 3(16).

<sup>624</sup> Minerals Law, Article 42.

<sup>625</sup> Ibid.

<sup>626</sup> Minerals Law, Article 43.

<sup>627</sup> Ibid.

<sup>628</sup> Minerals Law, Article 44.

<sup>629</sup> Minerals Law, Article 47.

<sup>630</sup> Ibid.

<sup>631</sup> Ibid.

endorses the proposal, then the Cabinet must provide its endorsement. If the Cabinet endorses the proposal, then the bidder has secured the license.<sup>632</sup>

If a party wins the bid, a mineral exploration license is valid for three years.<sup>633</sup> After those three years expire, the exploration license is renewable for two additional three-year terms as long as the license holder abides by all applicable laws and contractual terms.<sup>634</sup> Therefore, a party can technically maintain a mineral exploration license for nine years in total. The Ministry of Mines and Petroleum keeps track of the contracts that it has already registered on its website.<sup>635</sup>

An exploration license is not available for an unlimited amount of land. For this particular license, the maximum geographic area is 250 square kilometers.<sup>636</sup>

### 5.1.3 Mineral Exploitation License

The third license available under the Minerals Law is the exploitation license. As we just discussed, neither the reconnaissance license nor the exploration license permits the license holder to exploit the resources that it finds during the exploration phases. Rather, a separate contract must be obtained in order to exploit a particular mineral resource.

So what exactly does exploitation involve? According to Article 3(15) of the Minerals Law, exploitation “means operations and activities related to the technical and economic extraction of minerals and on-going exploration of minerals.” In other words, exploitation rights allow a party to physically remove a resource from the ground and to eventually sell that resource either as an unrefined or as a refined product.

As with exploration licenses, the exploitation license is obtained through a public bidding process.<sup>637</sup> Just as in the exploration license context, the Ministry of Mines and Petroleum, the Commission, and the Cabinet must each endorse the winning bid.<sup>638</sup> However, once awarded, exploitation licenses generally last much longer than exploration licenses. In fact, exploitation licenses generally last thirty years.<sup>639</sup> Once the exploitation license is acquired, the contract can be renewed until the resource is exhausted, assuming the license holder receives approval for such an extension from the Ministry of Mines and Petroleum.<sup>640</sup> The reason for these longer-term rights is that exploitation is a time-consuming process. Extractive resources may be buried deep underground, requiring a lot of equipment and financial resources to extract. There also may be economic reasons for leaving the resource in the ground for a period of time. For example, the price of the resource that is extracted might decline, and such a price reduction would leave less incentive to extract the resource all at once.

Unlike the exploration license, the exploitation license covers a much smaller amount of surface area. Whereas the exploration license pertains to a surface area of 250 square kilometers, the surface area of an exploitation license cannot exceed fifty square kilometers.<sup>641</sup>

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<sup>632</sup> Ibid.

<sup>633</sup> Minerals Law, Article 48.

<sup>634</sup> Ibid.

<sup>635</sup> Ministry of Mines and Petroleum, “Contracts,” accessed September 2, 2014, <http://mom.gov.af/en/page/1384>.

<sup>636</sup> Minerals Law, Article 49.

<sup>637</sup> Minerals Law, Article 55.

<sup>638</sup> Ibid.

<sup>639</sup> Minerals Law, Article 56.

<sup>640</sup> Ibid.

<sup>641</sup> Minerals Law, Article 57.

## The Exploration and Exploitation Licenses Under New Minerals Law

The old Minerals Law required separate bidding processes for exploration and exploitation licenses under all circumstances. Under the new Minerals Law, this arrangement is different. As Article 19 of the new law makes clear, “[t]he Ministry of Mines and Petroleum may, based on justifiable reasons, grant both Exploration License and Exploitation License in a single bidding upon endorsement of the Commission and approval of the Cabinet.”

Even if the Afghan Government does not grant both of these licenses to a single bidder, the exploration license holder still has “priority rights” to the exploitation license. As Article 54 of the new Minerals Law clarifies:

“Where the holder of Exploration License holder fails to win the bidding for the Exploitation License [of the area under its Exploration License], preferably, the holder shall have the right to be granted the [Exploitation] License at the same price as the winning bidder; otherwise, the winning bidder shall compensate all the expenses incurred by the Exploration License holder during the course of exploration, [provided] that these expenses shall have been reported to and certified by the Ministry of Mines and Petroleum. In this event, the winning bidder shall also pay an interest of (25) per cent for the cost/expenditures incurred by the Exploration License holder during the course of exploration.”

The Afghan Government has suggested that this change, along with others in the new Minerals Law, will encourage more investment in the mining sector by creating more certainty that investors can both explore and exploit mineral resources.<sup>642</sup> In fact, the multi-billion dollar deal that Indian and Canadian investors signed in 2011 to develop the Hajigak iron mine in Bamiyan Province, which we discussed in the Introduction, was agreed to on the condition that the National Assembly would ratify the revised Minerals Law.<sup>643</sup> Civil society organizations, however, have suggested that the new Minerals Law will serve to enrich foreign investors instead of Afghan citizens.<sup>644</sup>

What do you think the correct policy is? Should exploration and exploitation contracts be separated or combined?

<sup>642</sup> Ministry of Finance, “Wolesi Jirga Approves the New Minerals Law,” May 3, 2014, accessed September 3, 2014, <http://mof.gov.af/en/news/wolesi-jirga-approves-the-new-minerals-law>.

<sup>643</sup> Lynne O’Donnell, “Afghanistan: Mining Prospects,” *Mining Journal Online*, April 26, 2013, accessed November 12, 2013, [http://www.mining-journal.com/reports/afghanistan-mining-prospects?SQ\\_DESIGN\\_NAME=print\\_friendly](http://www.mining-journal.com/reports/afghanistan-mining-prospects?SQ_DESIGN_NAME=print_friendly).

<sup>644</sup> Global Witness, “Gaps in New Afghan Mining Law Pose a Threat to Stability,” August 19, 2014, accessed September 3, 2014, <http://www.globalwitness.org/library/gaps-new-afghan-mining-law-pose-threat-stability>.

#### **5.1.4 Small-Scale Mining License**

The fourth license available under the Minerals Law is the small-scale mining license. According to Article 3(9) of the Minerals Law, “‘small-scale mining’ is mining activities conducted for the purpose of extraction and exploitation of industrial minerals (such as clay, lime stone, salt, talc, gulfazysts, barite, fluorite, asbestos, graphic [graphite], kaolin, sulphur and carbonates) in an area not exceeding 1 square kilometer and sixty (60) meters in depth.” Based on this definition, small-scale mining can involve the same type of conduct that those with exploration and exploitation licenses might conduct, but the operation would not be nearly as large.

As with the exploration and exploitation licenses that we have discussed, small-scale mining licenses are awarded after a public bidding process.<sup>645</sup> However, unlike those two licenses, only the Ministry of Mines and Petroleum’s approval is required,<sup>646</sup> not that of the Commission or the Cabinet. Once the necessary approval is obtained, the small-scale mining license lasts ten years, but can be renewed indefinitely for terms of five years with approval from the Ministry of Mines and Petroleum.<sup>647</sup>

#### **5.1.5 Artisanal Mining License**

The fifth and final type of license authorized under the Minerals Law is the artisanal mining license. According to Article 3(9) of the Minerals Law, “artisanal mining” means the extraction of minerals that is conducted by limited (ordinary) mechanization and it is not to exceed thirty (30) meters in depth and an area of one (1) hectare; gold washing and extraction of precious, semi-precious and ornamental stones are also included in this definition.”

This type of mining is common in many parts of Afghanistan and has been conducted in the country for centuries.<sup>648</sup> The Minerals Law recognizes this fact and creates a different approval process for artisanal mining projects. Specifically, artisanal mining projects are not subject to public bidding.<sup>649</sup> The artisanal mining license can be obtained simply by submitting an application to the Ministry of Mines and Petroleum, which then must approve the application.<sup>650</sup> These licenses last five years, but they can be renewed indefinitely for terms of five years with approval from the Ministry of Mines and Petroleum.<sup>651</sup>

#### **5.1.6 Quarry and Construction Materials Authorization**

Quarry and construction materials contracts are the other types of contracts available under the Minerals Law. Unlike the five other contracts available under the Minerals Law, these contracts are referred to as “authorizations.” As you know, quarry and construction materials sites are “place[s] where mining activities are conducted for the purpose of extraction and exploitation of stones, crushed stones, dolomites, sand, gravel and other similar mineral substances that are categorized as construction materials in the relevant Regulations and are used in construction work.”<sup>652</sup> Therefore, these types of contracts are not meant for large-scale mining projects like the Aynak copper mine. They are meant to regulate materials that are used for more everyday purposes.

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<sup>645</sup> Minerals Law, Article 61.

<sup>646</sup> Minerals Law, Article 61(2).

<sup>647</sup> Minerals Law, Article 62.

<sup>648</sup> Alexandra Lavis, “Excavating a Future in Afghanistan,” *L.A. Times*, March 24, 2013, accessed February 1, 2014, <http://articles.latimes.com/2013/mar/24/world/la-fg-afghanistan-mines-20130324>.

<sup>649</sup> Minerals Law, Article 67.

<sup>650</sup> *Ibid.*

<sup>651</sup> Minerals Law, Article 68.

<sup>652</sup> Minerals Law, Article 3(25).

As with artisanal mining licenses, quarry and construction materials authorizations are awarded after filing an application with the Ministry of Mines and Petroleum, which must approve the application.<sup>653</sup> Once awarded, the authorization lasts five years and can be extended for terms of five additional years with the approval of the Ministry of Mines and Petroleum.<sup>654</sup>

Again mirroring the artisanal mining license, the quarry and construction materials authorization applies to the exact same-sized geographic area, which cannot exceed one hectare or be greater than thirty meters in depth.<sup>655</sup>

## **5.2 Hydrocarbons Contracts**

As we have discussed, the other component of Afghanistan's extractive resources are hydrocarbons. Hydrocarbons contracts are somewhat different compared to minerals contracts. Although all oil and gas contracts are awarded through a public bidding process, as are contracts under the Minerals Law,<sup>656</sup> there are more than just exploration and exploitation contracts available in the hydrocarbons sector. In fact, hydrocarbon contracts come in four varieties: (1) exploration and production sharing agreements, (2) service and production sharing agreements, (3) contracts for geological, geophysical, or geochemical services, and (4) contracts for pipeline operations. We will discuss each contract individually during the remainder of this Section.

### **5.2.1 Exploration and Production Sharing Agreements**

The first contract available for hydrocarbons is the exploration and production sharing agreement. According to Article 23 of the Hydrocarbons Law, “[u]nder an Exploration and Production Sharing Contract, the Contractor shall be granted the exclusive right to explore for Hydrocarbons and, in the event of a Commercial Discovery, to develop and produce Hydrocarbons.”

This contract essentially incorporates exploration and exploitation activities into a single contract, which is different from the approach under the Minerals Law. First, a contractor is allowed to explore for hydrocarbons in a particular area of land. If this exploration phase yields a discovery of hydrocarbons, the contractor may then exploit those hydrocarbons subject to certain conditions. As the name “production sharing agreement” suggests, the contractor will be required to share a portion of the discovered hydrocarbons with the Afghan Government. This is the most important condition that attaches to this contract. Another important condition in these contracts is that the right to export hydrocarbons is subject to the terms of the contract. Therefore, if a contractor envisions that it will want to export the hydrocarbons that it discovers, it should seek to negotiate that right when the contract is being drafted.<sup>657</sup>

This contract also lasts for only a certain amount of time. The exploration phase of this type of contract cannot exceed ten years.<sup>658</sup> If there is a commercial discovery, the production phase can last as long as twenty-five years.<sup>659</sup>

### **5.2.2 Service and Production Sharing Agreements**

The second type of hydrocarbons contract available under the Hydrocarbons Law is the service and production-sharing contract. According to Article 24 of the Hydrocarbons law, “[u]nder a Service and

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<sup>653</sup> Minerals Law, Article 73.

<sup>654</sup> Minerals Law, Article 75.

<sup>655</sup> Minerals Law, Article 76.

<sup>656</sup> Hydrocarbons Law, Article 28.

<sup>657</sup> Hydrocarbons Law, Article 23.

<sup>658</sup> Hydrocarbons Law, Article 34(1).

<sup>659</sup> Hydrocarbons Law, Article 34(3).



Production Sharing Contract, the contractor receive[s] the exclusive right to upgrade and rehabilitate hydrocarbon production facilities.”<sup>660</sup>

This contract means that a party can receive the rights to improve existing facilities that produce hydrocarbon products. If the contractor’s servicing work results in the production of hydrocarbon products, the contractor will have the legal rights to retain a specific portion of those hydrocarbons. The other portion of the hydrocarbons will belong to the Afghan Government. In this way, the production-sharing component of this contract is similar to that of an exploration and production-sharing agreement. The only difference here is that there is no exploration work conducted.

### **5.2.3. Contracts for Geological/Geophysical/Geochemical Services**

The third type of contract available for hydrocarbons pertains to geological, geophysical, or geochemical services. This contract, which is discussed in Article 58 of the Hydrocarbons Law, grants the contractor the right to conduct geological, geophysical, or geochemical services in an identified area. This authority means that the contractor helps to conduct survey work that assists the Afghan Government in helping to plan its oil exploration work.<sup>661</sup> In other words, a contractor here helps to identify the geographic areas where hydrocarbons are likely to reside. Therefore, although this is the third type of contract available under the Hydrocarbons Law, this activity would likely be conducted first before any other type of hydrocarbon operation.

Just as Article 9 of the Constitution of Afghanistan provides that all minerals and hydrocarbons are property of the Afghan Government, the data obtained through this type of contracts is also considered the property of the state.<sup>662</sup> Unlike many other mineral and hydrocarbon contracts, these types of contracts are generally short-term.<sup>663</sup>

### **5.2.4 Contract for Pipeline Operations**

The final type of hydrocarbon contract available under the Hydrocarbons Law is the pipeline operation contract. According to Article 26 of the Hydrocarbons Law, this contract “grants the contractor the right to construct pipelines and associated facilities (pumping stations, storage tanks, or valves) and to carry out the storage and transportation operation of Hydrocarbons.”<sup>664</sup>

This contract essentially allows the contractor to develop the infrastructure related to the transportation and storage of hydrocarbon products. The transfer and storage of hydrocarbons is the last component of the hydrocarbons development process after surveying, exploration, and exploitation takes place.

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<sup>660</sup> Hydrocarbons Law, Article 24.

<sup>661</sup> Hydrocarbons Law, Article 58.

<sup>662</sup> Ibid.

<sup>663</sup> Hydrocarbons Law, Article 25.

<sup>664</sup> Hydrocarbons Law, Article 26.

### Case Study: TAPI Pipeline

Since the mid-1990s, major oil corporations have sought to build a large natural gas pipeline that transports natural gas from Turkmenistan to markets in Afghanistan, Pakistan, and India.<sup>665</sup> This project has been known as the TAPI pipeline project and is named after the four countries that it would involve.

Although Afghanistan may not have as much oil and gas as some of its neighboring countries, such as Turkmenistan or Iran, it does have a geographic location between Central Asia and South Asia that makes it perfect for hydrocarbon transportation. The TAPI pipeline has not yet been built, although progress continues to be made, such as agreement concerning the amount of natural gas that each country will be entitled to.<sup>666</sup> If the project reaches fruition, the Hydrocarbons Law will be implicated. Specifically, the contract for pipeline operations will be the contract that the Afghan Government will have to award for this project to advance forward.

## 6. APPROVAL PROCESS FOR EXTRACTIVE RESOURCE CONTRACTS

As we just learned, the Minerals Law and the Hydrocarbons Law offer a variety of different contracts for prospective investors. Some contracts are available for small-scale exploration. Other contracts pertain to large-scale, industrial-sized exploitation. But what is the process for getting a contract approved? Are the regulatory proceedings identical regardless of the type of contract?

Think back to the example of the lapis lazuli mine in Badakhshan that we have talked about throughout this chapter. Imagine that the company that wants to invest in the lapis lazuli deposit is actually satisfied with the amount of lapis lazuli located in the deposit and that it does not want to explore for any more lapis lazuli. Instead, the company simply wants to exploit the lapis lazuli and sell it for a profit. How does the company know which approvals will be necessary to receive an exploitation contract? Will permission from the Ministry of Mines and Petroleum suffice?

The Minerals Law and the Hydrocarbons Law address these questions as well and aim to offer guidance for prospective resource developers. However, just as there are different types of contracts available for different mineral and hydrocarbon operations, different Afghan Government bodies are responsible for approving the various contracts that are available.

We have already discussed how the Ministry of Mines and Petroleum is the most important Afghan Government agency involved in the extractive resource sector. But it is not the only agency involved. At a broad level, three main governmental bodies are involved in approving extractive resource contracts: (1) the Ministry of Mines and Petroleum, (2) the Inter-Ministerial Commission, (3) the Cabinet. We will discuss the role of each of these agencies during the remainder of this Section.

### 6.1 Ministry of Mines and Petroleum

The Ministry of Mines and Petroleum is responsible for either approving extractive resource contracts or soliciting approval from another Afghan Government body for those contracts. The Ministry of Mines and Petroleum's responsibility in this area depends on two things. First, the Ministry of Mines and

<sup>665</sup> Alikuzai, *A Concise History of Afghanistan in 25 Volumes: Volume 1*, 580-81.

<sup>666</sup> "Operational Accord of TAPI Gas Pipeline Project Signed," *Daily Times*, July 19, 2014, accessed September 2, 2014, <http://www.dailytimes.com.pk/business/19-Jul-2014/operational-accord-of-tapi-gas-pipeline-project-signed>.

Petroleum's role will depend upon whether the deposit is a mineral or a hydrocarbon. If the deposit is a hydrocarbon, the Ministry of Mines and Petroleum does not have the authority itself to approve the contract. Rather, the Ministry of Mines and Petroleum is responsible for reaching a tentative agreement with a bidder, but it then must seek endorsement of the deal from the Inter-Ministerial Commission (Commission) and the Council of Ministers (or Cabinet), which we will discuss in Sections 6.2 and 6.3.<sup>667</sup>

The process for mineral resources is similar, but the Ministry of Mines and Petroleum does have the authority to itself approve certain contracts without seeking approval from the Commission or Cabinet. As we discussed briefly in the preceding Section, the Ministry of Mines and Petroleum has the authority to approve applications for (1) reconnaissance contracts, (2) small-scale mining contracts, (3) artisanal mining contracts, and (4) quarry and construction material authorizations. However, it must seek approval from the Commission and the Cabinet before awarding (1) exploration licenses and (2) exploitation licenses.

## **6.2 Inter-Ministerial Commission**

The Inter-Ministerial Commission, or Commission, is a committee that has an important function in approving mineral and hydrocarbon contracts. For both mineral and hydrocarbon issues, the Commission includes the following six members: (1) the Minister of Mines and Petroleum, (2) the Minister of Finance, (3) the Minister of Foreign Affairs, (4) the Minister of Economy, (5) the Minister of Commerce, and (6) the President of the National Environmental Protection Agency.<sup>668</sup> For mineral contracts, however, the Commission also includes the National Security Advisor.<sup>669</sup>

Under Article 5(5) of the Hydrocarbons Law, the Inter-Ministerial Commission must endorse each and every hydrocarbon contract.<sup>670</sup> However, as we will discuss in Section 6.3, the Inter-Ministerial Commission's approval does not mean that the hydrocarbon contract is fully approved. Rather, the Council of Ministers' approval is required as well before the contract is complete.

The Inter-Ministerial Commission's role for mineral contracts is not as broad as it is for hydrocarbon contracts. For mineral contracts, the Inter-Ministerial Commission approves exploration licenses and exploitation licenses.<sup>671</sup>

## **6.3 Council of Ministers**

Another government body that has an important function in approving extractive resource contracts is the Council of Ministers, or the Cabinet. The Cabinet includes all the Ministers that the President of Afghanistan appoints to the administration.<sup>672</sup> During President Hamid Karzai's second term from 2009 to 2014, twenty-eight ministers were appointed as Cabinet members.<sup>673</sup>

As we discussed previously, the Cabinet serves an important function in both mineral and hydrocarbon contracts. For hydrocarbon contracts, the approval of the Council of Ministers is required for all contracts, according to Article 5(22) of the Hydrocarbons Law.

The Cabinet's role in the mining sector is more limited than it is in the hydrocarbons sector, but it is still significant. As with the Commission, the Cabinet must also endorse exploration licenses and exploitation licenses.

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<sup>667</sup> Hydrocarbons Law, Article 5(22).

<sup>668</sup> Hydrocarbons Law, Article 4; Minerals Law, Article 9.

<sup>669</sup> Minerals Law, Article 9.

<sup>670</sup> Hydrocarbons Law, Article 5(5).

<sup>671</sup> Minerals Law, Article 7(1(2)).

<sup>672</sup> "The Cabinet," The Afghanistan Embassy, Oslo, accessed January 27, 2014, <http://www.afghanistanembassy.no/afghanistan/government/the-executive/cabinet>.

<sup>673</sup> Ibid.

## **Review of the Approval Process for Extractive Resource Contracts**

### Mineral Contracts

- (1) Reconnaissance License (Application): Ministry of Mines and Petroleum
- (2) Exploration License (Public Bidding): Ministry of Mines and Petroleum / Commission/ Cabinet
- (3) Exploitation License (Public Bidding): Ministry of Mines and Petroleum / Commission/ Cabinet
- (4) Small-Scale Mining License (Public Bidding): Ministry of Mines and Petroleum
- (5) Artisanal Mining License (Application): Ministry of Mines and Petroleum
- (6) Quarry and Construction Materials Authorization (Application): Ministry of Mines and Petroleum

### Hydrocarbon Contracts

- (1) The Inter-Ministerial Commission and Council of Ministers must jointly approve all hydrocarbon contracts.

## **7. LEGAL ENTITIES PERMITTED TO CONDUCT EXTRACTIVE RESOURCE OPERATIONS**

We have just discussed the various contracts that are available for those who wish to begin mineral and hydrocarbon operations and the approvals that are necessary to finalize these contracts. But who exactly is legally allowed to conclude these contracts with the Afghan Government? Is any Afghan citizen allowed to participate in extractive resource contracts? Are foreigners required to get special approval before they can participate in the extractive resource sector?

Let's revisit the lapis lazuli mine in Badakhshan. Let's imagine that the company that wants to develop the mine is headquartered in Canada. The company has never conducted any extractive resource operations in Afghanistan, but the company's president is a man whose parents are Afghan citizens. The company president has many relatives in Afghanistan, including distant cousins who live in the village in Badakhshan that is next to where the lapis lazuli deposit is located. Is the company eligible to participate in the extraction process? Is it forbidden from participating?

The Minerals Law and the Hydrocarbons Law discuss who may legally participate in extractive resource operations and who is legally prohibited from participating in these operations. We will discuss these restrictions throughout this Section.

### **7.1 Parties That Can Bid for Mineral and Hydrocarbon Contracts**

Both the Minerals Law and the Hydrocarbons Law discuss the legal entities that are allowed to contract with the Afghan Government. According to Article 31(1) of the Hydrocarbons Law and Article 14(1) the Minerals Law, four types of persons are presumed to be eligible to participate in extractive resource contracts:

- (1) Afghan citizens aged eighteen or older;

- (2) Foreign persons aged eighteen or older with the right to reside legally in Afghanistan;
- (3) Legal entities established under Afghan law; and
- (4) Foreign legal entities with the right to reside and invest in Afghanistan.<sup>674</sup>

### **Additional Factors: Afghan Partner**

Although not an explicit requirement in either the Minerals Law or the Hydrocarbons Law, both laws do suggest a preference that foreign persons bidding on extractive resource operations work with an Afghan partner. According to Article 98(4) of the Minerals Law, license holders are expected to give priority to Afghans in hiring employees if they have equal qualifications as any other person. Similarly, according to Article 28(4) of the Hydrocarbons Law, “[p]rovided that there is a tie between two bidders after evaluation of their bids, the Hydrocarbon Operation Contract shall be granted to the one with an Afghan partner.”<sup>675</sup>

This preference for an Afghan partner can be seen in Afghanistan’s first international oil contract, which was completed in 2012 to develop the Amu Darya Oil Block in Sar-e Pul and Faryab Provinces. This contract was awarded to a Chinese company, the China National Petroleum Corporation (CNPC). However, CNPC had teamed with an Afghan partner—the Watan Group.<sup>676</sup>

Why do you think the Afghan Government prefers to have an Afghan partner involved with a foreign company? Do you agree that it is a good policy choice to include Afghan partners?

## **7.2 Parties That Are Prevented from Bidding for Mineral and Hydrocarbon Contracts**

Just as some areas of land are prohibited for mineral and hydrocarbon operations, the Minerals Law and the Hydrocarbons Law also restrict certain individuals from obtaining extractive resources licenses. Under Article 31(2) of the Hydrocarbons Law and Article 16(2) of the Minerals Law, those individuals include at least the following, although the Minerals Law includes a more extensive list:

- (1) High-ranking State officials;
- (2) Members of the National Assembly;
- (3) Judges;
- (4) Prosecutors;
- (5) Officials from the Ministries of Mines and Petroleum, Ministry of Defense, Interior Ministry, Ministry Foreign Affairs, or the National Directorate of Security;
- (6) Persons with no legal capacity;
- (7) Bankrupt persons; and
- (8) Convicted felons.<sup>677</sup>

<sup>674</sup> Hydrocarbons Law, Article 31(1); Minerals Law, Article 4(1).

<sup>675</sup> Hydrocarbons Law, Article 28(4).

<sup>676</sup> “CNPC Gets Three Afghanistan Amu Darya Blocks,” *Oil & Gas Journal*, January 16, 2012, accessed November 12, 2013, <http://www.ogj.com/articles/2012/01/cnpc-gets-three-afghanistan-amu-darya-blocks.html>.

<sup>677</sup> Hydrocarbons Law, Article 31(2); Minerals Law, Article 16(2).

Can you think of why these people would be ineligible to participate in extractive resource operations? Many of the people on the list above are members of the Afghan Government. By prohibiting them from participating in extractive resource operations, the Minerals Law and the Hydrocarbons Law are attempting to eliminate any conflicts of interest that could undermine the legitimacy of the public bidding process. By preventing certain government officials from receiving extractive resource contracts, the Afghan Government sends a signal that bids will be evaluated on their merits and awarded to the party that submits the best proposal.

## **8. REGULATIONS THAT IMPACT EXTRACTIVE RESOURCE OPERATIONS**

We just discussed all the requirements necessary to finalize a mineral or hydrocarbon contract. But do a contractor's interactions with the Afghan Government stop once the contract has been issued? Or are contractors required to abide by regulations in their daily operations just as people abide by generally applicable laws in their daily lives?

Let's think back to the lapis lazuli mine in Badakhshan. Imagine that the Canadian company has secured a contract to exploit the lapis lazuli deposit. However, the company has realized that it did not hire enough workers for its operations, and it is exploring the possibility of hiring two workers from the local village. However, if the company hires these two workers, it would not be able to provide them with the safety equipment that it provides to all of its existing employees. Does the Minerals Law prevent the company from hiring the workers under this arrangement?

Both the Minerals Law and Hydrocarbons Law contemplate issues like these. In fact, as you will learn, extractive resource contractors must still comply with a long list of other laws and regulations in order to maintain their contracts. If the contractor fails to comply with generally applicable laws, the Ministry of Mines and Petroleum retains the authority to terminate the contract.<sup>678</sup> Therefore, it is important for entities involved in extractive resource operations to maintain compliance with all relevant laws.

In this Section, we will explore some of the laws that entities involved in extractive resource operations are required to abide by. Specifically, we will explore the (1) financial, (2) environmental, (3) labor and safety, and (4) anti-corruption laws that apply to contractors in the extractive resources sector.

### **8.1 Financial Laws**

Extractive resource operations are not without costs. Rather, they require significant amounts of money to be successful. Those who hold contracts in the extractive resources sector will pay not only for their own expenses in either exploring or exploiting extractive resources, they will also have to pay certain fees and taxes to the Afghan Government. Laws aside from the Minerals Law or Hydrocarbons Law govern these fees and taxes, such as the Income Tax Law of 2009, which has an entire chapter dedicated to extractive industry taxpayers.<sup>679</sup>

One of the costs associated with both mineral and hydrocarbon contracts are surface rental fees.<sup>680</sup> This fee is discussed in Article 65 of the Hydrocarbons Law and Article 82 of the Minerals Law. As we discussed in Section 3, surface rental fees are similar to the fees paid when someone leases another type of property. Because the Afghan Government owns the land containing extractive resources, private parties are permitted only to "rent" that land for the periods of time specified in their contracts. The rental

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<sup>678</sup> Hydrocarbons Law, Article 5(7); Minerals Law, Article 33.

<sup>679</sup> Income Tax Law, Chapter 12.

<sup>680</sup> Hydrocarbons Law, Article 65; Minerals Law, Article 82.

of that lend costs money, and contractors are required to pay their surface rental fees for the duration of their contracts.

Contractors that have rights to produce hydrocarbons or exploit minerals will also be required to pay royalty rates to the Afghan Government. These royalty rates are discussed in Article 95 of the Hydrocarbons Law and Article 83 of the Minerals Law.<sup>681</sup> As we discussed in Section 3, the Ministry of Mines and Petroleum is charged with setting the royalty rates for both mineral and hydrocarbon deposits. As we know, royalty rates are not flat charges like the surface rental fee. Rather, royalty rates are a fee based on the percentage of the net benefit accrued from an underlying asset.<sup>682</sup>

Let's return to our lapis lazuli deposit in Badakhshan. Let's say that the sales of that lapis lazuli are expected to produce USD \$3 million in net benefits. If the Afghan Government negotiates a 10% royalty rate with the contractor, the Afghan Government will be entitled to USD \$300,000. In other words, the royalty rate is the government's share of the net benefits from exploitation or production.

Licensees typically prefer lower royalty rates because that means they will be able to keep more money.<sup>683</sup> The Afghan Government would prefer higher royalty rates because that means the government would get more revenue. If the Afghan Government sets a royalty rate too high, however, a private company may be deterred from investing because they will not make as much money as they want.

### **Chinese Company Seeking to Renegotiate Royalty Fees for Aynak Copper Project**

Disagreements about royalty fees have recently become an issue for the Aynak copper mine project in Logar Province. The Metallurgical Corporation of China (MCC) in early 2014 sought to renegotiate royalty fees with the Afghan Government because the company believed those rates were not economically feasible.<sup>684</sup> According to the original terms of the 2007 agreement, MCC would pay the Afghan Government royalties at a rate of 19.5%.<sup>685</sup> In 2014, MCC was seeking to halve that royalty rate.<sup>686</sup>

## **8.2 Environmental Laws**

Extractive resource contractors must also abide by all relevant environmental regulations. As we have mentioned during this chapter, the extractive resources sector is among the industries most likely to pollute the air, water, soil, and other components of an ecosystem.<sup>687</sup> Therefore, it is especially important for those involved in extractive resource operations to abide by all relevant environmental laws. But the “environmental” impact of an extractive resources operation goes beyond pollution. Extractive resource

<sup>681</sup> Hydrocarbons Law, Article 95; Minerals Law, Article 83.

<sup>682</sup> U.S. Geological Survey, *2012 Minerals Yearbook: Afghanistan* (2013).

<sup>683</sup> Alan S. Gutterman, *The Law of Domestic and International Strategic Alliances* (Westport: Quorum, 1995), 203.

<sup>684</sup> Lynne O'Donnell, “China's MCC Turns Back on US\$3b Mes Aynak Afghanistan Mine Deal,” *South China Morning Post*, March 21, 2014, accessed September 3, 2014, <http://www.scmp.com/news/world/article/1453375/chinas-mcc-turns-back-us3b-mes-aynak-afghanistan-mine-deal>.

<sup>685</sup> *Ibid.*

<sup>686</sup> *Ibid.*

<sup>687</sup> David Phillips and Lois Hooze, “Responsible Resource Extraction in Afghanistan: The First Strategy,” *The Guardian*, accessed January 30, 2014, <http://www.theguardian.com/global-development-professionals-network/adam-smith-international-partner-zone/resource-extraction-in-afghanistan>; Hydrocarbons Law, Article 49(8).

operations can produce social consequences in an environment as well by affecting the daily lives of people in a community.<sup>688</sup>

As part of their requirement to abide by environmental laws, contractors are required to submit proposals to the Ministry of Mines and Petroleum's environmental department outlining the steps that they will take to mitigate pollution to the ecosystem and to mitigate the social impact of their activities.<sup>689</sup> These requirements are discussed in Article 52 of the Hydrocarbons Law and Article 89 of the Minerals Law. If the contractor's proposal is inadequate, then the contract will not be awarded. In addition, if the contractor violates any environmental law during the lifetime of their contract, we know that the Ministry of Mines and Petroleum has the authority to terminate the contract.<sup>690</sup>

### Case Study: Gulf of Mexico Oil Spill

The Minerals Law and the Hydrocarbons Law strongly emphasize environmental protections. When first reading the laws, it might not make sense why they put so much emphasis on environmental protections. But the importance of protecting the environment during extractive resource operations can be understood by looking at examples from other countries.

In the United States, for example, a massive oil spill in 2010 took place in the Gulf of Mexico, an area of the sea off of the southeast coast of the United States. The spill lasted for 87 days, claimed 11 lives, and caused billions of dollars in damage. It is considered the largest marine oil spill in the history of the petroleum industry.<sup>691</sup> As examples like this one reveal, successful extractive resource operations require attention to environmental concerns.

### 8.3 Labor and Safety Laws

Entities involved in mineral or hydrocarbon operations must also comply with generally applicable labor and safety laws.<sup>692</sup> If any labor laws are violated during the lifetime of a contract, the Ministry of Mines and Petroleum has the authority to terminate an extractive resource contract.<sup>693</sup> An example of an applicable labor law provision that affects extractive resource operations is the provision that regulates working hours for underground work, which is codified in Article 31(3) of the Labor Law. According to Article 31(3), employees who work in an underground setting can work for only 30 hours per week. Therefore, if an entity involved in mineral operations requires employees to work 50 hours per week, that entity would be in violation of the Labor Law, and the Ministry of Mines and Petroleum would have the authority to terminate that entity's contract.

<sup>688</sup> Hydrocarbons Law, Article 40(9); Minerals Law, Article 89.

<sup>689</sup> Hydrocarbons Law, Article 52; Minerals Law, Article 89.

<sup>690</sup> Minerals Law, Article 33.

<sup>691</sup> John M. Broder, "BP Shortcuts Led to Gulf Oil Spill, Report Says," *N.Y. Times*, September 14, 2011, accessed September 2, 2014, <http://www.nytimes.com/2011/09/15/science/earth/15spill.html>.

<sup>692</sup> Hydrocarbons Law, Article 43(9); Minerals Law, Article 33(1).

<sup>693</sup> *Ibid.*



Extractive resource contractors also have to abide by safety laws. Extractive resource operations involve exploring for minerals or hydrocarbons deep underground, using heavy machinery, and working on unstable terrain. Therefore, these operations are among the most dangerous in the world today. Under Article 39(9) of the Hydrocarbons Law and Article 59(1) of the Minerals Law, extractive resource contractors are expected to take precautions, which are reviewed by the Ministry of Mines and Petroleum, to ensure that their work does not risk the safety of their own workforce or the safety of the people in the surrounding area.

If you think back to the lapis lazuli mine in Badakhshan, the company's requirement to abide by safety laws would mean that it could not send its workers without the proper safety gear. Violations of these laws could mean that their contract could be terminated by the Ministry of Mines and Petroleum.

### **Case Study: Coal Mine Collapse in Samangan**

The dangers involved in extractive resource operations was exposed in September 2013 in a coalmine collapse in Samangan Province. In this collapse, twenty-three men died.<sup>694</sup> As this example reveals, the failure to take adequate safety precautions can ruin an otherwise lucrative and beneficial mining operation. Even with perfectly formulated contracts, favorable royalty rates, a sound business plan, successful extractive resource operations still require compliance with health and safety laws and regulations.

#### **8.4 Anti-Corruption Laws**

Entities involved in mineral or hydrocarbon operations also must abide by anti-corruption laws. As we already learned, Afghanistan's extractive resources are worth as much as USD \$1 trillion. Some of the contracts that Afghanistan has already signed with foreign investors are worth several billion U.S. dollars each. Because of the money involved, there are possibilities that some companies would be willing to bribe Afghan Government officials to obtain an extractive resource contract. However, they are forbidden from doing so under the law.

Specifically, Article 99 of the Minerals Law provides the following: "Where an applicant, a holder of license, authorization or contractor, or any other person on behalf of them directly or indirectly provides any money or any other in-kind payments intended to as a gratuity, gift or any other favor to any Afghan Government employee or any third party for the purpose of making that person grant any license, authorization, or contract [to the applicant or holder] or other relevant facilities, it shall be considered a criminal act and the perpetrator shall be prosecuted under administration corruption provision." Similarly, Article 69 of the Hydrocarbons Law provides that "[n]o contractor or any other person shall offer or provide directly or indirectly any funds or substance of material and spiritual value as compensation, gratuity, gift or fees, to any State officials of Afghanistan or any third party which is aimed at compelling such officials to award any contract, permit, license, and other related facilities."

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<sup>694</sup> Kevin Sieff, "In Afghanistan, Villagers and Government Battle Over Blame for Coal Mine Collapse," *Washington Post*, October 8, 2013, accessed January 21, 2014, [http://www.washingtonpost.com/world/in-afghanistan-villagers-and-government-battle-over-blame-for-coal-mine-collapse/2013/10/07/805c0564-2631-11e3-b3e9-d97fb087acd6\\_story.html](http://www.washingtonpost.com/world/in-afghanistan-villagers-and-government-battle-over-blame-for-coal-mine-collapse/2013/10/07/805c0564-2631-11e3-b3e9-d97fb087acd6_story.html).

### **Case Study: The Extractive Industries Transparency Initiative<sup>695</sup>**

To deter corruption in the extractive resources sector, the Afghan Government in 2009 signed onto an international program called the Extractive Industries Transparency Initiative (EITI). The new Minerals Law codifies Afghanistan's commitment to EITI in Article 100. EITI has been implemented in dozens of countries and aims to promote transparency in the payments made by private extractive resource companies to governments.<sup>696</sup> The reason to make those payments transparent is to make governments benefitting from extractive resource operations more accountable for the revenues that they receive.<sup>697</sup>

Do you agree that transparency should be a goal in the extractive resources sector in Afghanistan? Do you think that everything should be transparent even if it reduces the efficiency of extractive resource operations? Should there be a balance between mechanisms that promote transparency and mechanisms that ensure that quick action can be taken?

#### **8.5 Other Laws**

We can discuss only so many different laws and regulations in a single chapter, but it is important to understand that all areas of the law are implicated in the extractive resources sector. Insurance laws are involved. Investment laws are involved. Contract law is involved. And customs law is also involved. Up until now, you may have guessed that all of these areas of law are separated and that they do not interact. However, the extractive resource sector demonstrates that there are significant overlaps among the different bodies of law that you have studied up until this point. The more complicated a legal relationship is—for example, developing a multi-billion dollar mining contract—the more interactions there will be among different areas of the law.

### **9. DISPUTE RESOLUTION IN THE EXTRACTIVE RESOURCE SECTOR**

The final topic of discussion in this chapter is dispute resolution. Disputes are often something that parties do not contemplate when they finalize contracts. If parties are contracting with one another, then that means that they probably have a good relationship and trust one another. Disputes are not even considered a real possibility.

But let's return one more time to the example of the Canadian company that secured the rights to exploit the lapis lazuli mine in Badakhshan. Imagine that the company has been extracting the lapis lazuli for a year. Then, suddenly, the company begins to experience problems with a family in the local village. The family has asserted a claim that it is the rightful owner to the lapis lazuli deposit. The family says that their ancestors developed the lapis for generations and that they received formal rights to the lapis lazuli from the government in the 1970s. The family wants the Canadian company to leave immediately. What should the company do? Does it have to relinquish its investment immediately?

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<sup>695</sup> "Afghanistan." Extractive Industries Transparency Initiative.

<sup>696</sup> "Extractive Industries Transparency Initiative," Ministry of Mines, accessed January 30, 2014, <http://mom.gov.af/en/page/1383>.

<sup>697</sup> Ibid.

Both the Minerals Law and the Hydrocarbons Law discuss the processes for resolving such disputes, and we will discuss those processes throughout this Section. Although both the Minerals Law and Hydrocarbons Law discuss dispute resolution, their dispute resolution procedures are not exactly the same. Therefore, we will discuss dispute resolution in the minerals sector separate from our discussion of dispute resolution in the hydrocarbons sector.

### **9.1 Minerals Disputes**

The Minerals Law includes a very simple system for dispute resolution. Article 94 of the Minerals Law states that the default rule for resolving disputes is the parties' mutual agreement as to how they want to resolve the dispute. To make the matter simple, the parties can codify their mutual agreement by writing specific dispute resolution procedures into the original contract.

If the parties' contract does not clarify how disputes shall be settled, then the parties have two options from which to choose: (1) arbitration by someone who is an expert on the particular contract at issue or (2) a dispute resolution panel of between three and five impartial/independent experts. This expert or group of experts will then make a final decision about the dispute.

If the parties do not agree with the decision of the expert or experts, then the parties still have more options. In fact, they have thirty days to refer the dispute to a dispute resolution body from one of these four categories: (1) the Financial Dispute Resolution Commission as stipulated in the Da Afghanistan Bank, (2) the International Center for Specific Investment Disputes (ICSID), (3) an arbitration panel organized under the rules of the United Nations Commission on International Trade Law (UNCITRAL); or (4) an authorized Afghan court or any other court or arbitration authority to which the parties have agreed. If the parties do elect to refer the dispute to a dispute resolution body from one of these four categories, that decision will be final and binding.

### **9.2 Hydrocarbons Disputes**

Hydrocarbons disputes are resolved in a somewhat different manner. In fact, disputes that arise in the hydrocarbons sector are resolved based on the nationality of the contractor, as discussed in Article 70 of the Hydrocarbons Law.<sup>698</sup> One dispute resolution system applies to Afghan contractors, and another dispute resolution system applies to contractors that are foreign persons. If the contractor is an Afghan person or an Afghan legal entity, then any dispute between the Afghan Government and the contractor will be settled in the local courts of justice.<sup>699</sup>

The dispute resolution process is different if the contractor is a foreign person. If the contractor is a foreign person or legal entity, then the dispute is resolved according to the terms of the contract.<sup>700</sup> Therefore, it is important for foreign persons to carefully draft their extractive resource contracts to ensure that dispute resolution is properly addressed.

These procedures make sense when you consider the hierarchy of legal sources that governs agreement of parties. First, mandatory provisions of law will always bind parties to an agreement. Second, if there is no mandatory provision of law that applies to the situation, then the will of the parties usually governs. Third, if the will of the parties is not clear, then default rules of contract interpretation, which you learned about in your Obligations textbook, will be controlling.

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<sup>698</sup> Hydrocarbons Law, Article 70.

<sup>699</sup> Ibid.

<sup>700</sup> Ibid.

### **Application Exercise**

Let's apply everything we learned in Section 9 in this Application Exercise. Consider these two situations.

- (1) A contractor has a mineral exploitation license to exploit lithium deposits in Ghazni Province. The contractor invested total capital of USD \$12 million. The contractor has experienced a dispute with an adjacent property owner, and they cannot agree on where the boundary lies between their two properties. The contractor would like formal dispute resolution, but it is unsure whether it will have the money to do so. The contractor has only USD \$3,233 left in its bank account. Is that enough money?
- (2) A contractor for a hydrocarbon pipeline operation is based in Kandahar. The contractor did not receive payments for its services from the Afghan Government for the past three months. The Afghan Government claims that the contractor did not meet its obligations during those three months and that the contractor does not deserve payment. What will happen next?

### **Application Exercise: Suggested Answers**

- (1) No, USD \$3,233 is not enough money. The contractor requesting dispute resolution will have to post a financial bond to initiate formal dispute resolution. Because capital investment of USD \$12 million places the contractor's operation in the medium-sized mining contract category, the contractor will have to post USD \$4,000. It will have to find another way to finance the dispute resolution process.
- (2) Because the contractor is an Afghan legal entity, the dispute will be settled in the local courts of justice in Kandahar.

### **CONCLUSION**

We learned during the course of this chapter that the law that applies to minerals and hydrocarbons is complex. Therefore, whenever you are uncertain about the law that applies to minerals and hydrocarbons, it is best to consult the Minerals Law and the Hydrocarbons Law themselves. In addition, because there are frequent revisions to these laws, it is best to stay informed of all developments in the extractive resources sector. If neither of these two laws addresses your questions, then the regulations that the Ministry of Mines and Petroleum has enacted also provide a good source of information and should be consulted.

However, there are some principles in this area of property law that are simple. First, the Afghan Government retains all ownership over Afghanistan's mineral and hydrocarbon resources. This is a constitutional principle, and it cannot be repealed unless the constitution itself is amended. Second, Afghan law permits the Afghan Government to contract with private parties to explore for and exploit Afghanistan's mineral and hydrocarbon resources.

The Afghan Government's ability to contract with private parties is crucial if Afghanistan's extractive resource wealth is going to be realized. Afghanistan's extractive resources have the ability to generate economic growth in the country for years to come. However, because so much money is involved, it is essential that everyone involved in extractive resource operations abide by the law. Whether the resource is a small-scale lapis lazuli mine in Badakhshan or an industrial-sized copper mine in Logar, the rule of law is what allows extractive resources to power an economy.