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Fråga-svar

Afghanistan. Marktvister

Fråga

Hur ser det ut med arv av mark i Afghanistan, specifikt i provinsen Faryab?

Svar

Marktvister

Enligt refererade källor finns det flera sätt att lösa marktvister på. Antingen löser man tvisten på traditionellt sätt eller så för man ärendet till domstol. Förfalskning av dokument och korrupta domstolar är vanligt. Det traditionella sättet är att föra ärendet till den lokala Shura / Jirga, där de äldste i området grundar sitt beslut på vad de kan komma ihåg om vem som ägt marken långt tillbaks i tiden och ofta gynnas äldre män över yngre män och kvinnor. Oavsett om tvistens löses av domstol eller den lokala Shura / Jirga vinner vanligen den av parterna i tvisten som är rik eller inflytelserik målet.

Udlændingestyrelsen, *Afghanistan - Country of Origin Information for Use in the Asylum Determination Process Report from Danish Immigration Service's fact finding mission to Kabul, Afghanistan 25 February to 4 March 2012*, 2012-05-28:

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"LUA [Lawyers Union of Afghanistan] emphasized that in Afghanistan, and particularly in the rural areas, ownership and heritage of land is first and foremost based on tradition and memories of the local people. There are often no

records as land is not registered, and most people do not have a title deed to their land. For the same reason, it is difficult to solve land disputes by bringing the case to the court."

"Proving land ownership in Afghanistan is complex and multifaceted, and there are also cases of fake land documents being prepared. The research institute knew of at least one case where the fake documents were reputedly prepared by corrupt government officials..."

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"LUA explained that there are two ways of solving land disputes. The traditional way is bringing the case to the local shura/jirga. In this case, the elders in the area will base their decision on what can be remembered about the ownership of the land in the past. This way of conflict resolution is most prevalent in rural areas. The other way to solve land disputes is by bringing the case to the court. However, according to LUA, people prefer the traditional way of solving conflicts due to the corruption and disfunctionality of the formal court system. LUA explained that it will take minimum one year to solve the conflict through the court. Besides, people do not believe in the system and expect the case to be handled in favor of the influential party to the conflict who can bribe the judges. However, in urban areas, people do have title deeds to their land, and cases regarding land disputes are solved by using the formal court system."

"According to an independent research institute in Kabul, all land transactions fall under the purview of the Supreme Court. However, as there is no agreed national survey (cadastral system) in the country and as the transfer of ownership is not linked to any detailed survey document or centralized repository of land records, every single land transaction has the potential to become a disputed transaction.

The independent research institute in Kabul explained that due to corruption, there is no straight forward legal way to settle the land disputes as the court system is not working at all. At the end, the result will usually depend on the amount of bribe the individual will be able to pay the judges. Also in the Ministry of Land, title deeds and documents may be faked due to corruption."

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"An Afghan law practitioner stated that there are two main ways of solving a land dispute: the legal system where the parties can take their case to the court, or the traditional community based system through the shura/jirga. As the Afghan law practitioner explained, most of the land disputes are settled by the shura/jirga. The Afghan law practitioner referred to Afghanistan Human Development Report 2007¹⁸ in which it is documented that 80% of the cases in Afghanistan are resolved by the shura/jirga and only 20% of cases are brought for the court. He added that if one of the parties in a land dispute is a rich or influential person, he will most

probably win the case. This applies both to land courts as well as to the shura/jirga, as he will in any case bribe the judges"

Internal Displacement Monitoring Centre (IDMC), *Afghanistan: Armed conflict forces increasing numbers of Afghans to flee their homes. A profile of the internal displacement situation*, 2011-04-11:

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"The ownership of land and property is regulated by a complex mixture of statutory, religious and customary law.

The courts cannot be relied upon to resolve disputes fairly – the result of a lack of resources and training, and widespread corruption. Where authorities do issue fair decisions, enforcement is extremely limited and impunity widespread. Claimants often resort to violence in order to settle disputes, perpetuating cycles of displacement (FMR, December 2008). Customary mechanisms such as shuras and jirgas can be both useful and problematic in settling disputes. On the one hand, decisions are fast, inexpensive and usually settle disputes by compromise. On the other, they are heavily influenced by tribal traditions that favour older men over younger men and women."

Lagstiftning

Lagstiftningen kring innehav av fastigheter (mark och byggnader) är en komplex blandning av sedvane-, religiös-, civil- och konstituerande rätt.

Internal Displacement Monitoring Centre (IDMC), *Afghanistan. Armed conflict forces increasing numbers of Afghans to flee their homes. A profile of the internal displacement situation*, 2010-04-15:

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"... In case of private ownership of the land, the rights and needs of the land owner shall be taken into consideration. Land that is qualified as tribal land, over which tribes have a certain level of influence, shall be negotiated by the provincial government with the tribal leaders."

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"...The Government of Afghanistan has noted that establishing a national registry of land ownership could help to kick-start the economy by allowing this land to be used as collateral for entrepreneurial activity, encouraging investment from the private sector and broadening the Government's taxation base. 46 However, much of this land is currently being illegally occupied or controlled by powerful commanders. Some of these are also public officials, while others have been co-opted by the US forces into its struggle against the remnants of the Taliban. A culture of 'impunity' exists

amongst this new class of private land-owners who have come to regard themselves as being 'above the law'"

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"3.1. Land Law

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

3.1.1. Customary Law

In practice most rural property is acquired, sustained and transferred customarily, with family holding dominant.

Save Pashtunwali, a Pashtun code of conduct, there is no written customary law and each tribe and even community sustains and interprets the rules independently. What is customary becomes rule or law mainly only when a conflict arises. As everywhere, customary "law" is distinguished in Afghanistan by the fact that it is upheld only through social and community-based force and has enormous evolutionary potential; what was customary in 1900 may not have been customary in 1960 and what was customary in 1960 may not be customary today. In Afghanistan, custom is greatly influenced by Shari'a and the distinction between religious and customary law often difficult to identify.

3.1.2. Religious Law

Shari'a principles (Islamic law) are locally interpreted when it comes to property matters and widely referred to in both informal and formal dispute resolution. Informal dispute resolution operates at community and higher levels and broadly centres upon shura (non-Pashtun) or maraka (Pashtun). These are public committees formed for the purpose of dealing with a problem and generally comprising elders.⁷¹ Formal dispute resolution on rural land has traditionally proceeded through district primary courts (mahkama-iibtedaia) with appeal to provincial courts (mahkama-i-morafa'a) and thence to the high court (mahkama-i-tameez) but with a special land court now in place.

3.1.3. Civil Law

The written Civil Code supposedly embraces common or customary law and is deeply influenced by customary practice, itself deeply influenced by religious law. The written Civil Code was compiled in the early 1970s and given the status of statute (state law). Its religious basis is arguably strongest. In content it comprises more than 2,000 articles that draw tangibly upon mainly Hannafi (Sunni) jurisprudence and its "books of law," some of which are very old. The code includes substantial chapters on land inheritance, tenancy, leases, contracts, sales and mortgages. These subjects reflect the areas where tenure conflicts have traditionally existed and where rulings have accordingly had to be devised. Many of the instructions in the Civil Code are difficult to interpret. The compilation serves as the main sourcebook of courts of second instance (provincial level) and higher. Constitutionally, its provisions must apply before Shari'a law is referred to.

3.1.4. Statutory Law

The Civil Law is in turn subject to state law. Upwards of 70 rural land statutes exist. This is a complicated body of law, with many decrees simply reissued under a new administration or reflecting amendments without clear repeal of earlier versions. The status of Taliban decrees is especially uncertain and some are referred to by judges as obsolete although they are still legally in force where they comply with the principles established by the Bonn Agreement and the Constitutions of 1964 and now 2004. Each standing law is supposedly under review by the appropriate ministry, a process unevenly underway."

Faryab

Afghanistan Research and Evaluation Unit (AREU), *Land Relations in Faryab Province: Finding from a field study in 11 villages*, June 2004:

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"To save time, fieldwork was conducted only in three districts immediately adjacent to Maimana City: the districts of Shirin Tagab, Khwaja Musa and Khwaja Sabz Posh (hereafter KSP). Together these form a central belt in Faryab Province where intensively (usually irrigated) farmed land gives way to rain-fed agriculture and wide-ranging pasture. ... Livestock numbers are high.⁶"

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"...What was recorded hinted that it is mainly the better-off (like landowners) who benefit from out-migrating family members, as the very poor reported not having the means to go to large towns to seek work (let alone to Iran and Pakistan). Off-farm labour opportunities and benefits may in practice be similarly skewed.

Landlessness is clearly significant but difficult to pin down, and homelessness is a serious problem among the landless."

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"Determining which disputes to give most attention is also needed. In this regard, it is useful to conceive of land disputes recorded by this and others studies as falling into two classes: those that have arisen as a consequence of war and disorder (post-conflict disputes) and those that pre-date 1978 (pre-conflict disputes). While the former may reasonably respond to restitution action to the owners of 1978, the latter require a more complex approach. This is because conflict over land ownership has been shown to have origins that while old, remain very vibrant. Any programme which simply restores ownership of such properties to those who held way in 1978 will be not only unproductive but provocative (and likely unenforceable in the current climate of weak rule of law).

"Pastures are often the centre of conflict."

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"The debate over private vs. common property causes further tension around land ownership."

"Pastoral tenure norms are ill-defined and under challenge.

The precise tenurial nature of rights which have been granted over pasture land is unclear. The law (Pasture Law of 1970) is not known locally. This and related legislation are in any event ambivalent on several counts: first, in the meaning of public land, which directly affects pasture; second, in the right of tenure or rights which the state as administrator of public land may grant; and third, in the extent to which customary rights over pasture are respected."

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"As touched upon above, a main problem with designating pasture as government property (de jure or de facto) is that when government authority/political order breaks down as has been the case, those lands become virtual open access properties, available to those who have the means to grab them. This has certainly been the case in Afghanistan. Millions of hectares of property which the administration considers to be public land/government land are now under occupation, pasture included. For its part the Faryab government (Ministry of Agriculture and Animal Husbandry) complains that some 28,831 hectares of government pasture have been invaded and that the only action now needed is to have sufficient force to recover these lands.¹⁴⁵"

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"Land administration systems are too weak and confused to support clear norms."

Denna sammanställning av information/länkar är baserad på informationssökningar gjorda under en begränsad tid. Den är sammanställd utifrån noggrant utvalda och allmänt tillgängliga informationskällor. Alla använda källor refereras. All information som presenteras, med undantag av obestridda/uppenbara fakta, har dubbelkontrollerats om inget annat anges. Sammanställningen gör inte anspråk på att vara uttömmande och bör inte tillmätas exklusivt bevisvärde i samband med avgörandet av ett enskilt ärende. Informationen i sammanställningen återspeglar inte nödvändigtvis Migrationsverkets officiella ståndpunkt i en viss fråga och det finns ingen avsikt att genom sammanställningen göra politiska ställningstaganden. Refererade dokument bör läsas i sitt sammanhang.

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