

The origins of private property rights: states or customary organizations?

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Abstract. Political theories of property rights are less optimistic than self-governance perspectives regarding the ability of non-state organizations to supply private property institutions. Despite offering different answers to the question of where property rights come from, these diverse perspectives share a concern with organizational capacity, constraints, and legitimacy as explanations why organizations are able to supply private property rights. We use these shared concerns as a point of departure to investigate formal and informal private property rights in rural Afghanistan. We find that informal private property rights are more effective than formal private property rights because customary organizations fare better than the state on the dimensions of capacity, constraints, and legitimacy. More generally, these ‘political’ features of formal and informal organizations explain why self-governance works, as well as provide insight into the challenges confronting efforts in fragile states to establish formal private property institutions.

1. Introduction

One of the fundamental questions of institutional economics is where private property rights come from. A long tradition of the literature in both the ‘old’ and ‘new’ institutional economics views the state as the main source of private property rights. Commons (1924), in one of the early works that came to define the old institutional economics, located the origins of private property rights in legal decisions of judges. Along similar lines, Bromley (2006) suggests that the concept of a private property ‘right’ only makes sense when individuals can call on a state to enforce it. There is also a sizable new institutional economics literature that conceptualizes of the state as the fundamental source of private property rights (North and Weingast, 1989; Olson, 1993; Riker and Sened, 1991; Riker and Weimer, 1993). These political theories of property rights expect that informal private property rights will be inferior to state-backed private property rights (Hodgson, 2009).¹

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¹ In this essay, we use ‘political theories of property rights’ to refer to the old and new institutional literature prioritizing the state as the fundamental source of property rights and ‘self-governance perspectives’ to characterize the literature contemplating the informal origins of property rights.

The state-centric focus of political theories of property rights contrasts with the literature on self-governance. According to self-governance perspectives, institutions may arise outside the state, in particular under conditions of state weakness (Leeson, 2007b, 2014; Leeson and Coyne, 2012).² These spontaneously arising institutions may even be efficient in the sense that they are wealth-maximizing (Ellickson, 1991; Leeson, 2006, 2011b). Rather than prioritize the state as a source of property institutions, studies of self-governance suggest that informal private property institutions may compete with, or even substitute for, formal private property institutions.³

In addition to asking where property rights come from, these literatures are also concerned with a second fundamental question: why are organizations able to supply private property rights?⁴ Despite many points of contrast regarding the origin of economic institutions, political and self-governance perspectives appeal to similar factors to explain why organizations are able to supply private property rights. For example, political theories explain the origins of rule of law in terms of constraints on formal power-holders, such as those emanating from a constitution (Weingast, 1997). Within the self-governance literature, constraints on informal power-holders are expected to influence the efficiency of informal institutions (Acemoglu et al., 2014; Leeson, 2007a). The role of constraints is a shared concern between these diverse perspectives even though the organizational source of property rights – the state or informal organizations – differs.

This essay shows that these shared concerns are not limited to constraints. Rather, these perspectives are tied together by a concern with several features of organizations, including administrative capacity, adjudicative capacity, cost of conflict resolution, constraints, and legitimacy, each of which influence the ability of those organizations to supply private property rights. Our working hypothesis is that an organization that attains success on these five dimensions is

² Since we are concerned with private property institutions, our discussion of self-governance focuses on the economics literature on the origin of informal private property rights, rather than Ostrom's (1990, 2005) studies of self-governance of the commons. Yet as one of Ostrom's many contributions includes clarifying the importance of fieldwork to understand governance (Boettke et al., 2013), our debt to Ostrom's work is in our use of intensive fieldwork to understand the evolution of institutions. Despite a great deal of progress in understanding institutions, there remain many important insights to be gleaned by combining quantitative and fieldwork-based studies of the evolution of institutions (Buchanan et al., 2014).

³ 'Institutions' refer to rules that influence expectations and beliefs of individuals (North, 1990; Ostrom, 1990). In this essay, we define 'formal property institutions' as ownership rules specified and enforced by the state and 'informal property institutions' as ownership rules specified and enforced through non-state organizations. Our definition corresponds most closely Barzel's (1989, 2002) typology of 'legal property rights' (property rights enforced by the state) and 'economic property rights' (rights to enjoy property).

⁴ By 'organizations', we mean collective decision-making procedures within which rules derive their significance. 'Formal organizations' refer to organizations that constitute or derive their authority from the state, while 'informal organizations' derive authority from non-state sources, such as custom or tradition.

more likely to supply private property rights, regardless of whether it is a formal organization, such as a state, or an informal one, such as a customary system of village governance.

These dimensions provide a more nuanced answer to the question of why an organization is able to supply property rights than existing political theories, which tend to describe politics generically in terms of ‘political parameters’ (Libecap, 1989), ‘political interests’ (Sened, 1997), or ‘discount rates’ (Bates, 2008; Olson, 1993). A broad perspective on governance also complements recent studies of informal governance that focus somewhat narrowly on constraints on informal actors, such as whether chiefs are constrained (Acemoglu et al., 2014; Baldwin, 2013), by considering how organizational capacity and legitimacy influence the origins of property rights.

We use this conceptual framework to explain variation in the quality of formal and informal private property rights in rural Afghanistan. Based on original fieldwork evidence from 32 villages in rural Afghanistan and an original, nationally representative survey, we present two key empirical findings. First, customary organizations are generally successful in providing basic private property institutions. Second, the success of customary organizations in comparison to the state on the dimensions of capacity, constraints, and legitimacy explains why customary organizations are better able than the state to supply private property rights.

This essay contributes to the property rights literature in several ways. First, while the case of Afghanistan is an important example of self-governance, it also shows that the success of self-governance depends on context; in particular the extent customary modes of governance attain success on the dimensions of capacity, constraints, and legitimacy. Second, this study joins several recent attempts to better understand the origins and change of private property institutions through rigorous data collection and analysis (Bubb, 2013; Hajj, 2014; Seidler, 2014). Third, while a large literature considers the evolution of institutions of co-ownership of property in the developing world (Ostrom, 1990, 2005), we focus on informal private property institutions. Finally, although several studies point out that Afghanistan remains legally pluralistic (Barfield, 2008; Barfield *et al.*, 2011; Coburn, 2013; Suhrke, 2011), ours is the first analysis that is explicitly grounded in the approach of institutional economics.

This essay is organized as follows. [Section 2](#) sets forth the conceptual framework that we use to interpret economic institutions in Afghanistan. [Section 3](#) discusses the methods of data collection. [Section 4](#) describes key features of formal and informal land governance in Afghanistan. [Section 5](#) compares the quality of informal and formal property rights using both fieldwork and survey evidence. [Section 6](#) uses variation in organizational capacity, constraints, and legitimacy of the state and customary organizations to explain differences in quality of formal and informal private property rights. [Section 7](#) concludes.

2. A framework to explain the origins of private property rights

The dimensions of a private property right

Property rights are the rules that govern ownership in society (Barzel, 1989). Private property rights vary on the dimensions of clarity of allocation, alienability, security from trespass, and credibility of persistence (Riker and Weimer, 1995). This section describes each dimension and explains the importance of comparing formal and informal private property rights on each of them.

Clarity of allocation refers to the extent property rights are assigned to objects of value. One of the main indicators of clarity of allocation is the extent land is documented (Arruñada, 2012). Another indicator of clarity of allocation is the extent of disputes over land. Ongoing, unresolved disputes suggest that ownership rights are not clearly allocated (Murtazashvili, 2013).

Alienability refers to the ability of individuals to use (including to trade) private property rights. The economic importance of alienability is to facilitate attainment of economies of scale. The economic significance of alienability is that land rights are unlikely to be allocated efficiently unless individuals can transfer ownership rights (McChesney, 1990; Miller, 2011).

Security from trespass refers to the ability of an owner to prevent unauthorized entry. The ability to secure land from outsiders is perhaps the fundamental feature of a property system because of the relationship between property security and investment incentives (North, 1990; North and Thomas, 1973). A private property system is unlikely to encourage investment unless landholders are able to secure their possessions from trespass.

Credibility of persistence refers to the extent individuals expect their rights to exist in the future (Riker and Weimer, 1995). Since third parties specify and enforce property rights, credibility of persistence concerns the future behavior of these third parties, asking whether these third parties are likely to expropriate property.⁵

Typically, these dimensions are used to assess formal private property rights. However, informal private property rights must be held to the same high standards as formal private property institutions to measure their effectiveness. For example, while customary deeds may be associated with land-tenure security, it is also economically relevant whether those customary deeds are alienable and whether people who possess these customary property rights expect them to exist in the future. Table 1 summarizes how formal and informal property rights vary on each of these dimensions.

⁵ Such credibility problems are especially important in states experiencing post-conflict reconstruction (Coyne and Boettke, 2009).

Table 1 Dimensions of formal and informal private property rights

	Formal private property rights	Informal private property rights
Clarity of allocation	Extent legal titles allocate ownership.	Extent informal private property rights (e.g., customary deeds) allocate ownership.
	Extent disputes are resolved through formal channels.	Extent disputes are resolved through informal channels.
Alienability	Extent laws constrain formal land transactions and land use.	Extent social norms constrain land transactions and land use.
Security from trespass	Enforceability of formal private property rights.	Enforceability of informal private property rights.
Credibility of persistence	Expectations that the state will respect formal private property rights.	Expectations that informal representatives will respect informal private property rights.

Source: Authors.

Explaining the origins of private property rights

Political theories of property rights offer an explanation where property rights come from and why they emerge. One of the defining features of political theories of property rights is a presumption that property rights come from is the state. To answer the ‘why’ question, these theories appeal to changes in political interests, political institutions, and political capacity. Political actors require self-interested reasons to specify and enforce a system of ownership because property rights are ultimately a political choice (Riker and Sened, 1991; Sened, 1997). Political institutions that constrain politicians, influence the expectation that rulers will respect private property rights (Haber *et al.*, 2003; North and Weingast, 1989). Finally, property rights are unlikely to emerge unless the state is sufficiently strong to subjugate conflict over ownership (North, 1981; Olson, 1993).

Rather than view the state as a source of institutions, the literature on self-governance sees institutions as arising through spontaneous processes under anarchic conditions. Anarchy refers to the absence of state control of economic, political, or social processes while spontaneous order refers to emergence of institutions under conditions of anarchy (Leeson, 2014). The self-governance perspective suggests private property institutions may arise from organizations other than the state (Leeson, 2011a; Murtazashvili, 2013).

Despite differences in their optimism regarding the ability of non-state organizations to supply economic institutions, these literatures share several concerns. One is a focus on organizations. Although a tradition within the self-governance literature considers economic institutions that arise without any overarching organizational structures (Hadfield and Weingast, 2012; Sugden, 1989), the self-governance literature more generally views informal institutions as deriving their significance within informal organizations (Williamson, 2000). Another commonality in these literatures is a focus on constraints. For example,

approaches to informal organizations also emphasize the role of constraints in explaining the emergence of high-quality economic institutions (Acemoglu et al., 2014; Agrawal and Gibson, 1999; Leeson, 2007a).

More generally, we suggest five dimensions that constitute a shared framework to explain why property rights emerge. These dimensions are not exhaustive. Rather, the list that follows strikes a balance between the large numbers of variables typical in studies of common-property regimes (e.g., Cole *et al.*, 2014) and parsimonious political perspectives that describe the origins of property rights institutions in terms of ‘political parameters’. Additionally, while the dimensions below may be useful in understanding the organizational origins of successful systems of co-ownership of property, we use them to explain the supply of private property institutions.

The first dimension is administrative capacity, which refers to the ability of a public organization to ‘tax, coerce, shape the incentives facing private actors, and make effective bureaucratic decisions during the course of implementation’ (Geddes, 1996: 14). Such capacity is increasingly recognized as a defining feature of governance (Fukuyama, 2013). In the context of property rights, administrative capacity is important because it is unlikely that property rights will be clearly allocated unless an organization has the requisite capacity to provide a basic framework to survey land and record ownership (Arruñada, 2012; Bromley and Anderson, 2012; Toulmin, 2009).

Organizations also vary in adjudicative capacity. The literature on legal institutions, which considers how these institutions influence economic growth (Djankov et al., 2003), also has important implications for property rights. While disputes are bound to arise over property rights, adjudicative capacity influences the extent individuals are able to resolve disputes over land. In some situations, informal organizations may provide a legal forum rivaling the state (Leeson and Coyne, 2012). Dispute resolution is important because it is an indicator of clarity of allocation of property rights.

The third organizational dimension is the cost of resolving land disputes. The higher the costs of resolving land disputes, the less likely people will turn to an organization to record land claims or to adjudicate disputes. In some situations, the costs of dispute resolution may even lead people to resolve disputes over land through informal means (Ellickson, 1991).

Fourth, constraints influence property rights because they determine incentives of power holders to engage in predatory behavior. Constraints, which consist of accountability mechanisms that ensure organizations and the officials who run them answer to citizens, help to ensure politicians act in the best interest of citizens (Przeworski et al., 1999). Both formal and informal organizations vary in the presence of constraints.

Finally, political legitimacy, which refers to ‘whether a given rulership is believed to be based on good title by most men subject to it’ (Friedrich, 1963: 234), is hypothesized to explain the organizational supply of property rights.

Political legitimacy is an important measure of formal state strength (Migdal, 2001) but can also be generated from non-state sources (Weber, 1978). Property rights are more likely to be effective in encouraging economic growth when the process for allocating the rights is perceived as legitimate (Hoff and Stiglitz, 2005).

3. The evidence

This essay relies on three sources of evidence. The first is fieldwork in rural Afghanistan collected by one of the authors under the auspices of a Kabul-based research organization, the Afghanistan Research and Evaluation Unit (AREU). It consists of original interview and focus groups from 32 villages collected across 17 districts in 6 of the 34 provinces of Afghanistan. The data were collected during several trips to Afghanistan from 2005 to 2012, totaling over 16 months of field research.

The author and a team of male and female Afghan researchers interviewed community-identified village leaders (typically customary leaders), local government officials, religious officials, and randomly selected villagers, including an equal sample of both men and women, in three languages: Pashto, Dari, and Uzbek.⁶ The author also conducted interviews with international donors, diplomats, and government officials at several ministries at the national and sub-national levels that supplemented village-level interviews. Provinces, districts, and villages were selected to ensure representation of Afghanistan's ethnic groups and regions.⁷

The only districts visited were ones considered safe for travel without security personnel. This meant research in Kandahar in the south was not possible at that time. The research team ultimately visited all villages slated for fieldwork with the exception of Guzara District in Herat Province, where the district governor refused access to villages in his district because of several local, ongoing conflicts.⁸ The fact that the districts selected were safe certainly suggests bias in the data. However, 'safe' is a very relative term in Afghanistan. Several years later, at least half of the districts visited are no longer secure for travel by foreigners.⁹ Despite the struggles of daily life in much of rural Afghanistan, no informant refused to

⁶ In Turkmen-speaking communities, interviews were conducted in Dari.

⁷ Provinces visited include Balkh (two districts), Bamiyan (four districts), Herat (three districts), Kunduz (two districts), Kabul (three districts), and Nangarhar (two districts).

⁸ The conflict did not involve the Taliban insurgency, but a festering conflict between rival *qawms*. In Afghanistan, *qawm* refers to one's solidarity group and may include ethnic group, tribe, clan, or village (Roy, 1990). Although precisely identifying the effects of *qawm* on behavior is quite challenging (Jochem et al., 2015), the fieldwork provided many anecdotal accounts of how *qawm*-based social identity appeared to influence conflict.

⁹ Tragically, the district governor who warned not to visit his villages was himself shot dead, along with his young son, just a few months after meeting him.

be interviewed. We believe this response rate was due to the care with which the research was introduced to informants, as well as effort to gain permission from government officials to access communities.

In addition, the empirical analysis is based on a nationally representative public opinion survey that the authors helped to design. Democracy International, an American non-governmental organization, implemented the survey in October–November 2011 with support from the United States Agency for International Development (USAID). The survey, which gathered responses from 8,620 respondents, is representative of all of Afghanistan's regions and ethnic groups and includes an equal number of men and women. In addition, we make use of the *Asia Foundation Survey of the Afghan People*, another nationally representative public opinion survey (also collected in 2011 and also supported by USAID), to gain further insight into dispute resolution.

4. Land governance in rural Afghanistan

Afghanistan first emerged as a state in 1747, when a council of customary leaders accepted Ahmad Shah Durrani as its first king. Subsequent monarchs accelerated the consolidation of the state, especially Abdur Rahman, whose reign from 1880 to 1901 earned him the reputation as the 'Iron Amir' for the brutal tactics he used to subjugate customary and tribal authority. Prior to his reign, the Afghan state was more like a loose confederation of tribal groups than a modern state.

The trend towards centralizing authority continued throughout the century and into the post-2001 period, as centralization is also a key organizing principle of the 2004 Constitution.¹⁰ Although the Constitution created governing bodies at multiple levels – national, provincial, district, municipal (for cities), and village – provincial and district governors are appointed by officials in Kabul with little local input and are frequently from different areas than where they govern (Murtazashvili, 2014). Primary court judges at the district and provincial levels are appointed by and accountable to the Supreme Court of Afghanistan in Kabul (Barfield *et al.*, 2011; Coburn, 2013). In addition, as of 2015, village and district elections promised in the 2004 Constitution had not been held.

The formal property regime in Afghanistan is similarly centralized. After Abdur Rahman declared state ownership of all land as part of a strategy to consolidate political authority, successive monarchs began a slow process of decentralizing land ownership. However, the communist governments that were in power from 1978 to 1992 reversed this by imposing radical land reforms consisting of land redistribution, reestablishment of state ownership, and strict limits on landholding size (Edwards, 2002). The Taliban, appreciating the hostility toward communist-era land reforms, recognized customary deeds and

¹⁰ Article 147 of the 2004 Constitution explicitly mentions 'centralism' as the organizing principle of the government.

addressed land grievances generated by land redistribution. Yet on balance, land governance under the Taliban remained highly centralized.¹¹

Since the fall of the Taliban government in 2001, primary courts at the district level and the Amlak, a government office responsible for registering and taxing private property, share responsibility for land governance.¹² Surprisingly, many informants appeared to be familiar with their local Amlak representative even if they had little knowledge of the formal government in other respects. Unfortunately, many of the formal land deeds did not survive the conflict intact (Batson, 2013). State primary courts remain the only state-recognized authority to resolve land disputes. The Afghan National Police at the provincial and district level, overseen by the Ministry of Interior, are in charge of enforcement.

Although there is no formal government that extends to the village level, there is a robust system of customary governance at the village level in rural Afghanistan. Customary governance divides authority between village-based deliberative councils (*shuras*, *jirgas*, or simply ‘elders’), religious arbiters (*mullahs*, *mawlawi*, *khalifa*, or other religious authorities), and village representatives (*maliks*, *arbabs*, *namayenda*, *wakils*, *qaryadars*, or other titles). Fieldwork in dozens of villages of varying ethnic composition around the country found remarkable similarity in the functions of these organizations despite variation in titles and so we refer to these bodies generically as *shuras*, *mullahs*, and *maliks*.¹³

Shuras are village councils that meet to resolve conflicts when they arise. Participation in these bodies is voluntary and open to any male. In general, elders with a reputation for fairness preside over meetings. While these councils may apply different norms to resolve disputes, such councils are ubiquitous. For example, a council in a Pashtun village may apply norms of *Pashtunwali*, the Pashtun tribal code, while a *shura* in a Tajik village would more likely apply Islamic or customary law. However, the process of dispute resolution – petitioning a customary council, with deliberations presided over by elders – is quite similar across groups.

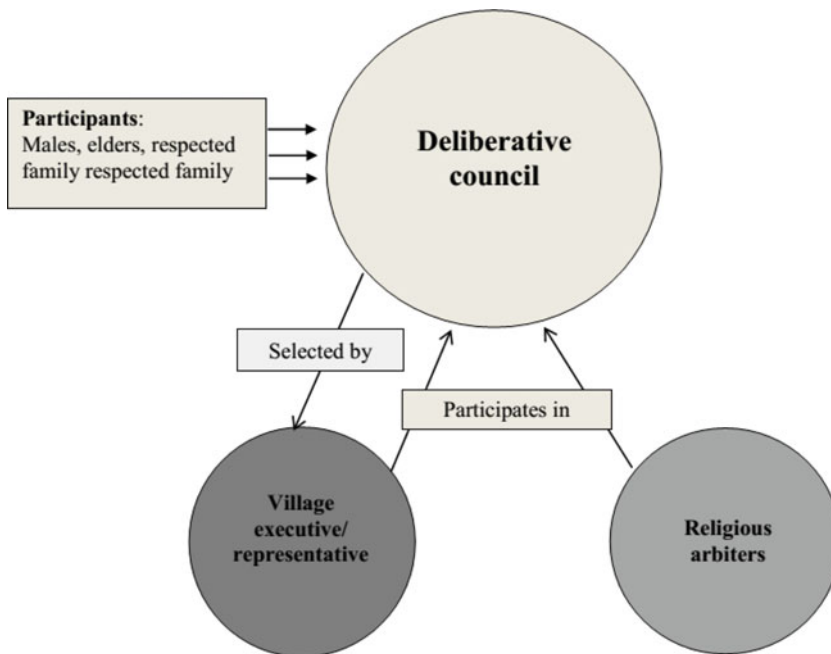
Mullahs are community-based religious leaders. Community members typically turn to *mullahs* to resolve inheritance issues, an area of jurisprudence governed by Islamic law (Stanfield *et al.*, 2013). Nearly all communities have at least one *mullah* but larger or religiously diverse villages may have more.

¹¹ Land Law of 2000.

¹² The Amlak was renamed *Arazi* in 2009 and jurisdiction moved to the Ministry of Agriculture, Irrigation, and Livestock. We use the term *Amlak* because it is the term most Afghans continue to use for the office and it was the term used during fieldwork.

¹³ A primary reason for conducting fieldwork across multiple provinces and multiple districts within each province was to understand whether features of customary governance generalize across Afghanistan’s regions and ethnic groups.

Figure 1. (Colour online) The structure of customary village governance.
Source: Authors.



One of the main functions of a malik is to represent community interests to outsiders, including formal state officials.¹⁴ They also play a role maintaining customary land titles and resolving land disputes (Stanfield *et al.*, 2010). Although the title of ‘malik’ is often translated as a ‘chief’ or ‘headman’, informants in most communities revealed they selected the malik or that the position was inherited because the family has a reputation for fairness. In the latter case, the community usually had some ability to remove a malik. Figure 1 depicts the interrelationship between these bodies.

Anthropologists have long recognized the evolutionary nature of customary governance in Afghanistan (Anderson, 1978; Tapper, 1983). Although decades of conflict put pressure on the system of customary governance, informants explained that violence transformed rather than destroyed customary governance. The Democracy International survey also found that almost all villagers in rural parts of the country reported access to village representative such as a malik (over 99%), a customary deliberative council (87%), and a religious leader such as a mullah (77%).¹⁵

¹⁴ Informants often described their malik as a ‘bridge between the people and the government’.

¹⁵ These percentages are for the rural subpopulation of the survey.

Through expert interviews and village observations, a typical pattern of procedures to resolve land conflicts emerged.¹⁶ A claimant will approach a respected member of the community who then calls upon the defendant for inquiry. For simple disputes, a malik or mullah would resolve the issue, but for complicated issues, the elders would typically convene a shura. After gathering evidence, a shura meets and makes a decision based on physical evidence, including customary deeds, as well as witness testimony. Customary deeds can be written or unwritten. For unwritten deeds, property rights reside in collective acknowledgement that a family or individual ‘owns’ land that they inhabit or cultivate. In some communities, maliks or mullahs maintain customary deeds, or a respected family may hold them.

After a shura makes a decision, the elders write the decision on a piece of paper, which the claimant, defendant, and usually three other witnesses sign (sometimes fingerprints are used in lieu of signatures because many villagers are illiterate). In some cases, the community is unable to resolve the dispute on its own and claimants turn to the government. Although courts enjoy formal authority to resolve land disputes, villagers often petition their district governor (*woluswal*) to help resolve the dispute when they are unable to resolve them locally. During fieldwork, it was typically common for higher levels of authority to encourage claimants to resolve disputes at more local levels. For example, it was not uncommon to hear of a customary council returning disputes to families or *qawm* for resolution, while informants often explained that their *woluswal* (if they elected to approach him) would often send the disputing villagers back to their community to resolve their conflict through customary channels within their community. Figure 2 depicts the customary process of land adjudication.

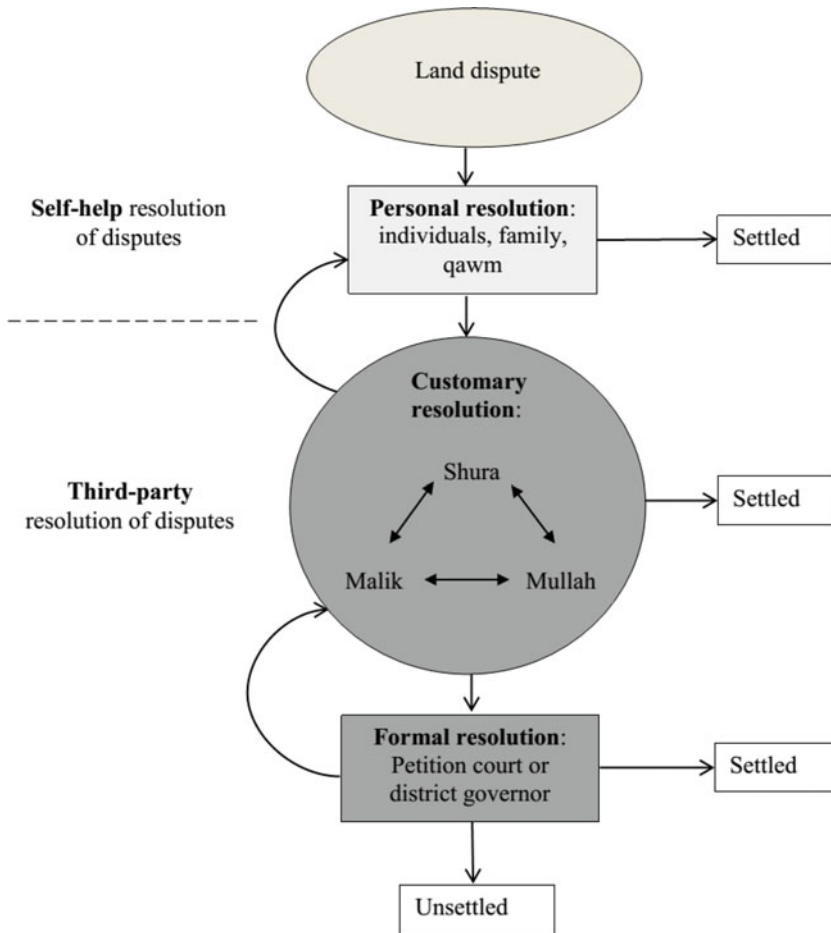
Informants in most villages emphasized the primacy of customary organizations in resolving conflicts over land. In Pashtun Zarghun, a district in Herat Province, a male farmer explained that their *arbab* (‘*arbab*’ one of the various titles used to describe a village representative) is ‘responsible for selling land, signing land ownership documents, and also resolving disputes over land in the village when they arise’.¹⁷ A female from another village in the same district described how her *arbab* resolved a dispute over an inheritance:

I have made some claims against my brothers regarding inheritance rights... There was a lot of land remaining when my father passed away. Three or four times I have told my brothers that they should give me my share of the land. We discussed this issue with the *arbab* who then talked with my

¹⁶ One of our informants was a member of the 1965 cadastral survey team and is still active in efforts to reform land governance in the country today. We owe him a special debt for clarifying our understanding customary land governance.

¹⁷ Interview, male informant, Pashtun Zarghun District, Herat Province.

Figure 2. (Colour online) The customary process of land adjudication.
Source: Authors.



brothers. After his conversations with them, the arbab was able to resolve the issue and I received my share of the land.¹⁸

These findings do not deny the importance of the state in resolving conflicts. Informants in roughly half of the villages visited mentioned that in their village, members of their community routinely petition their district governor to resolve a land dispute. Yet even in these villages, customary governance remained the first venue for dispute resolution. In addition, informants rarely mentioned that they or their fellow villagers turned to state courts. In fact, district governors routinely used the threat of adjudication by state courts to encourage villagers to

¹⁸ Interview, female informant, Pashtun Zarghun District, Herat Province.

resolve disputes through customary channels because even government officials perceive courts as corrupt.

5. The quality of formal and informal property rights in Afghanistan

This section compares the effectiveness of legal titles and customary deeds on each dimension of a property right. Rather than analyze the quality of private property rights disaggregated by the different levels at which we conducted fieldwork (i.e., village, district, and province), we report broad conclusions regarding formal and informal property regimes in rural Afghanistan while noting important exceptions to these findings. Our justification for this approach is that there was a great deal of similarity in the findings across the village visited and so finer-grained disaggregation would not yield a great deal of additional information.

Of course, there may be differences in village, districts, or provinces despite our finding of similarity.¹⁹ Customary property rights and customary governance may be more likely to break down in the most insecure parts of the country. In this regard, our fieldwork may overstate the quality of customary property rights since such areas were off limits to fieldwork. On the other hand, data from two nationally representative surveys alleviates concern with selection bias in the qualitative data, as they also find that customary governance remains accountable and accessible throughout the country, including in areas where the Taliban have influence.

Clarity of allocation

According to the Democracy International survey, 85% of respondents in rural areas report owning some land. However, most hold customary deeds rather than legal titles: 94% of rural landholders have a customary land title, while only 19% have a state-backed legal title (some hold both). As customary titles effectively allocate property rights over land, while the legal system does a poor job in specifying ownership, we take this as evidence that the customary property regime attains more success than the legal system in terms of clarity of allocation.

Data on dispute resolution provides an additional evidence of the relative effectiveness of the customary property regime in comparison to the state in terms of clarity of allocation. Individuals were more likely to resolve disputes when they appealed to the customary organizations compared to when they appealed to the state: of those who approached a shura, 59% had their cases resolved (the numbers were 64% for those who petitioned maliks and 70% for mullahs). On the other hand, 51% of those who approached district authorities and 52% who approached other government agencies saw their disputes resolved

¹⁹ Murtazashvili (2015) considers the sources of variation across villages in customary provision of public goods.

(Asia Foundation, 2011: 143). Eighty three percent of respondents reported that when they took their disputes to a customary body they were somewhat or very satisfied with the dispute resolution mechanism (Asia Foundation, 2011: 148). Disputes were also more likely to be solved in a timely manner when they are dealt with through customary channels, as 72% of respondents said that shuras/jirgas resolve cases timely and promptly, while only 47% said the same of state courts (Asia Foundation, 2011: 152).

Alienability

The formal property regime also fares poorly compared to the customary property regime in terms of alienability. Communist-era reforms imposed constraints on alienability as a means to prevent ‘powerful’ members of society from acquiring large amounts of land. Although the Taliban government removed some of these constraints on alienability, such as increasing the amount of land one could own, the formal property regime in place since 2004 has little experience facilitating transactions of formal property deeds.²⁰

In contrast, through fieldwork, discussions with Afghan land-tenure experts, as well as a review of secondary literature, we did not find that customary property regimes restrict alienability of privately held land, today or in the past. Rather, as long as the parties consent and community members preside over transactions, individuals were free to exchange customary deeds to land.

Security from trespass

The available evidence suggests that the formal property regime does not provide secure property rights. Legal titles are more common in urban areas, and those are the areas where land grabbing is a persistent problem (Alden Wily, 2013). Moreover, journalistic accounts suggest that the state is a willing participant in land grabs of both informal and titled land (e.g., Foschini, 2013).

In contrast, informants during fieldwork rarely mentioned property insecurity as a problem in their community. As the vast majority of individuals in these communities held customary deeds, and very few held legal titles, we interpret this evidence as suggesting that the customary property regime is associated with relative security from trespass. Although our evidence does not directly compare legal titles with customary deeds in terms of security from trespass, ownership insecurity does not appear to be among the most prominent challenges facing rural communities.

The main exceptions to this conclusion were in areas where nomadic pastoralists came into conflict with settled communities. Nomads, who are typically Pashtun, often have decades-old legal titles.²¹ In Bamiyan Province,

²⁰ The Taliban land reforms are specified in the Land Management Law of 2000.

²¹ Historically, these legal titles were issued by the Afghan government (which has usually consisted of Durrani Pashtun leaders) to enlist support of nomads, themselves predominantly Pashtun, in the

nomadic return weighed heavily on the minds of several informants because of conflict in a neighboring province between nomads and settled communities. However, informants who raised these concerns did not experience conflict with nomads themselves; they spoke of conflicts that they had heard about in the nearby province. In this region, property rights were secure from trespass even though none of the informants had legal title despite fear of nomadic return weighing heavily on the minds of several informants.

Credibility of persistence

Even when people have legal titles issued by the state, it is unlikely that individuals would believe the state's implicit promise to respect private property rights. The comments of a government security commander in Guzara District, Herat Province in western Afghanistan, capture the government's credibility problem:

'Ob az balu khet ast' ['the water which flows from above is dirty']. For example, the president signed a decree about how government land should be dealt with. This decree said that no one should occupy land owned by the government. But some land owned by the government has been taken over by those people who are in the highest [government] positions. Perhaps these people who have taken over land have some relationships with political parties or other politicians. So these agreements mean nothing. It is just something written on paper. It has no legal force.²²

In contrast, interviews and observations generally indicated that customary representatives rarely interfered with customary property rights. This general finding is not without caveats, as informants in one of the villages recounted that powerful local commanders had usurped customary positions. In this village, informants lacked confidence in their 'representative'. However, distrust of village leaders was the exception rather than the rule in rural communities. Rather, informants typically had few fears that customary power holders would interfere with their customary property rights. [Table 2](#) summarizes the quality of formal and informal property rights on each of these dimensions.

6. Explaining the outcomes

Administrative capacity

We begin to answer the question of why customary private property rights are more effective than formal private property rights by considering the administrative capacity of the Afghan state in comparison to customary village governance. As one expects in a fragile state, the government of Afghanistan does

state's efforts to mollify opposition to extension of the authority of the central government. One of the consequences of these campaigns is incoherence of the legal property regime.

²² Interview, District Security Commander, Guzara District, Herat Province.

Table 2 Comparison of formal and informal property regimes in rural Afghanistan

Dimension	Formal property regime	Customary property regime
Clarity of allocation	Few have legal title and disputes often go unresolved through formal channels.	Most rural dwellers have customary deeds and are able to resolve conflicts through customary channels.
Alienability	Formal rules have historically limited alienability, although recent legislation seeks to increase alienability of legal titles.	Historically and in the present day, there are few discernible constraints on alienability of customary deeds.
Security from trespass	Legal titles do not appear to convey a sense of security.	Customary deeds correspond to a sense of security in rural areas.
Credibility of persistence	The state largely unconstrained and often complicit in land grabbing.	Customary representatives face constraints and rarely expropriate land.

not have much revenue or a highly specialized, merit-based bureaucracy (Suhrke, 2011). Administrative weakness is a primary reason (along with a poor security situation) why the government has been unable to conduct a land cadaster or record ownership for nearly four decades. Despite efforts to strengthen the capacity of land titling offices since 2001, government land offices remain poorly staffed (Alden Wily, 2013).

A more surprising finding than state weakness in terms of administrative capacity is the competence of self-governing organizations on this same dimension. Informants in most villages expressed confidence in customary governance to provide basic public goods, including documentation of land ownership.²³ Customary organizations do not have sophisticated technology such as a means to digitalize customary deeds, and in many cases, these customary rights are unwritten. However, we found customary modes of governance quite able to demarcate ownership.

Adjudicative capacity

The Afghan state also has weak adjudicative capacity. Primary district courts are hampered by a dearth of qualified judges (Coburn, 2013). One of the indicators of weak adjudicative capacity is that when most informants spoke of going to the 'government' to resolve a dispute, they typically meant going to the district governor. This is a sign of weakness with courts because district governors have no legal jurisdiction to resolve such disputes (Murtazashvili, 2014).

The main reason why informants did not rely on the state was the adjudicative capacity enjoyed by the system of customary governance in comparison to the

²³ The exception is the village, discussed earlier, that experienced the return of a commander who made it difficult for customary bodies to deliberate on matters of collective importance.

state.²⁴ To illustrate, a district administrator from Paghman District in Kabul Province – a district very close to the capital city – said people usually solve problems through their own shuras ‘because the shuras are more active and they solve the people’s problems quickly and easily’.²⁵ Because of this capacity to resolve conflict, district governors advised informants to avoid dealing with state courts, preferring instead customary alternatives.²⁶

Costs of dispute resolution

Formal dispute resolution is also costly. To illustrate, an informant from Behsud District in Nangarhar Province, in eastern Afghanistan, recounted a conflict over ownership between Pashtun Kuchi nomads who had returned recently to her village:²⁷

We thought the Kuchi [Afghan nomads] people made fake deeds and tried to take our land. We had this land for a long time and had it before the Taraki period.²⁸ They are claiming that they own the land from Taraki’s time until now . . . The issue reached the provincial government but the Kuchi people have money and they bribed [provincial-level government officials].

Bribes such as these are a cost of dispute resolution that deterred informants from settling conflicts through formal channels. An informant in Pashtun Zarghun District, Herat Province, who had a land dispute within the formal court system for six years without any clear path for resolution, offered a blunt assessment of formal officials: ‘They don’t make decisions. They just take money from both sides’.²⁹

In contrast, few informants reported high costs of accessing customary channels of dispute resolution. In a focus group discussion, young men in Nahri Shahi District, Balkh Province, contemplated the challenges to the legal system:

Interviewer: Do you have a jirga now?

Informant A: Yes, we have one. . . . [The jirga meets] when we have problems and tries to solve them.

²⁴ Our fieldwork found that villagers are better able to provide smaller-scale public goods, such as dispute resolution, than larger-scale public goods, such as building a school or a road.

²⁵ Interview, Head of District Administration, Paghman District, Kabul Province.

²⁶ Murtazashvili (2014) considers the relationship between village representatives and district governors, finding that cooperation between district governors and informal representatives is quite common but far from inevitable.

²⁷ Interview, female informant, Behsoud District, Nangarhar Province.

²⁸ Noor Taraki was one of the first leaders of Afghanistan communist party that seized control of the country in April 1978.

²⁹ Interview, male informant, Pashtun Zarghun District, Herat Province. Informants in each village visited, as well as in each district, commonly mentioned substantial costs of working through formal channels to resolve disputes, and many mentioned corruptions specifically.

Informant B: Also, people are happy that they don't have to go to the district governor. They try to solve problems in the village because the court will take a lot of their money.

Informant C: I want to say that the corruption that we have in our judiciary is the kind of corruption that Afghanistan has never faced before. All the judges just take money and people hate them for it.³⁰

In hundreds of interviews in rural Afghanistan, informants rarely mentioned turning to courts to resolve land conflicts. One of the few examples where individuals mentioned using formal courts involved two wealthy landowning families in Panjab District, Bamiyan Province.³¹ One of the feuding neighbors ended up taking the claim to court in the provincial capital.³² As both families in this case were relatively wealthy, they could afford the ten-hour drive to the provincial capital through difficult and mountainous terrain that proved an insurmountable source of transaction costs to most members of their community.

Political constraints

The government of Afghanistan does not provide elected decision-makers with substantial authority. As a result, these officials are largely unaccountable to citizens. The same is true of judicial officials. Judges of primary district courts are technically responsible to adjudicate land disputes but are appointed by and beholden solely to their superiors in the Supreme Court. Appointments are rarely made on the basis of merit, but instead serve to extend the influence of officials in Kabul (ICG, 2010). Lack of internal constraints is one of the reasons why citizens view the judiciary as one of the most corrupt government organizations (Barfield *et al.*, 2011).

The fieldwork found that maliks, in contrast, are largely accountable to the people. In several villages, informants mentioned that, in the past, they had removed from maliks their position because of perceptions of corruption. In a focus group discussion with maliks in Karokh District, Kabul Province, the maliks explained, 'If the arbab does not work on behalf of the people, the people will send him back and take away his power'.³³ According to another informant in the same focus group, 'Everything is in the hands of people themselves, they can select an arbab and fire him from his post'.³⁴

Informants also explained that their shura encouraged participation. These findings appear to generalize, as the Democracy International survey shows that nearly 72% find their shura 'very accessible' or 'somewhat accessible' (see

³⁰ Focus group discussion, Nahri Shahi District, Balkh Province.

³¹ In Afghanistan, large landowners are called *zamindar*.

³² Focus group discussion, Bamiyan Center.

³³ Focus group discussion among maliks, Karokh District, Herat Province.

³⁴ Focus group discussion among maliks, Karokh District, Herat Province.

Table 3 Access to customary village councils (shuras/jirga/elders)

Categories	How accessible do you find your traditional council (shura/jirga/elders)?									
	Total	male	female	Villages	Urban	Pashtun	Tajik	Uzbek	Turkmen	Hazara
Very accessible	34%	38%	30%	35%	33%	33%	35%	33%	52%	31%
Somewhat accessible	37%	37%	37%	39%	30%	35%	39%	45%	28%	36%
Not very accessible	13%	11%	15%	13%	14%	14%	13%	14%	14%	11%
Not accessible at all	0%	0%	1%	0%	1%	0%	0%	0%	0%	1%
Do not have this body in community	15%	14%	16%	13%	22%	16%	13%	8%	7%	20%
Obs.: 8,620										

Source: Democracy International survey.

Table 4 Confidence in maliks, district governor, and police in rural Afghanistan

	Confidence in village representative	Confidence in district governor	Confidence in police
A lot of confidence	40%	30%	15%
Some confidence	50%	39%	30%
No confidence	10%	31%	55%
Obs.: 8,620			

Source: Democracy International survey.

Table 3). Less than one percent of Afghans find their customary councils ‘not accessible at all’.

There is also a competitive balance of authority in most villages. According to our survey, more than 85% of rural Afghans have access to both a malik and shura. The presence of multiple, overlapping forums to resolve conflict serves to protect individual private property rights.

Legitimacy

Customary organizations also have high levels of political legitimacy. As Table 4 shows, 90% of respondents indicated that they have ‘a lot’ or ‘some’ confidence in their malik, compared to around 70% and 45% for the district governor and police, respectively. Although some of the recent literature on customary governance in Afghanistan depicts customary leaders as corrupt, feudal-type lords (e.g., Beath *et al.*, 2013), the fieldwork and survey evidence shows that maliks are legitimate and generally accountable to members of their community. That is, customary governance enjoys substantial legitimacy.

7. Conclusion

Studies of self-governance anticipate our central finding that there are property rights in rural Afghanistan despite a barely functional formal government. Yet the reasons why self-governing arrangements are effective reflect long-standing insights from both political and self-governance theories of property rights. Whether self-governing organizations are a more reliable source of economic institutions than the state depends on the extent formal and informal organizations attain success on the ‘political’ dimensions of capacity, constraints, and legitimacy.

Our focus in this essay has been on the positive question of why an organization is able to supply private property rights. A normative, or policy, question is whether to invest in legal titling. In light of the finding that informal property rights are quite effective, one option, popularized by de Soto (2000), is formalizing the hitherto-informal property rights. In fact, Ashraf Ghani, upon becoming Afghanistan’s second democratically-elected president in 2014, announced legal titling as essential to improving livelihoods and security in Afghanistan (Hodge, 2014).

The case for legal titling rests upon the presumption that informal property rights, which may be effective, are nevertheless inferior to formal property rights. While the evidence suggests that the presence of informal property rights might smooth the transition to legal titles, as the formal property regime could build upon the informal regime, it also points to another option: leaving land governance to communities. Self-governance appears to work quite well, and it is far from clear that the state would be able to commit credibly to respect private property rights that are embodied in legal titles issued by the state. Although we did not address the normative question of whether legal titling is efficient in this essay, this analysis should at least suggest why it is important not to rush to legal titling given the current weakness of the Afghan state and the relative competence of customary organizations to supply private property rights.³⁵

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³⁵ In a companion paper, we explicitly consider the question of whether legal titling is efficient in Afghanistan (Murtazashvili and Murtazashvili, 2014).

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