I

Introduction

Institutions, to use Elinor Ostrom’s definition, are “the prescriptions that humans use to organize all forms of repetitive and structured interactions including those within families, neighborhoods, markets, firms, sports leagues, churches, private associations, and governments at all scales” (2005, 1). By the beginning of the twentieth century, social scientists by and large agreed that countries with institutions that encourage innovation and investment, inclusive political decision-making, and peaceful transitions of political authority are wealthier and less susceptible to domestic political unrest than other countries (Acemoglu and Robinson 2012; Bates 2008; Rodrik, Subramanian, and Trebbi 2004).

This consensus may be recent, but economists’ concern with institutions goes back centuries. Adam Smith’s The Wealth of Nations, published in 1776, recognized that social coordination requires an appropriate constitutional context: a structure of rules governing economic relations, along with arrangements for their enforcement (Brennan and Buchanan 1985). Smith understood that the creation of such a context depends in part on social norms and values that support economic exchange (Smith and Wilson 2019) and in part on the constraints on political decision makers (Weingast 2017b), and he introduced the then-radical idea that economic development resulted not from inherent characteristics of people but from the presence of institutions that allow humans to flourish (Easterly 2019; McCloskey 2019). Thus, even Smith, the classical economist perhaps most closely associated with the idea that the economy works best when left to its own devices – the view that came to be called laissez-faire economics – was in a sense an institutionalist.
Starting in the 1950s, economists such as James Buchanan contributed to the renaissance of institutional analysis by focusing attention on how the political rules of the game influence political and bureaucratic decision-making. Buchanan did not initiate the study of political institutions, but his vision of public choice – the application of economic reasoning to political actors, including public bureaucracies – gave them a starring role in explaining the origins of political liberties, fiscal restraint, and, ultimately, economic prosperity (Buchanan 1949, 1986; Buchanan and Tullock 1962).

Alongside public choice, institutional economics has advanced our understanding of the political, economic, and social foundations of economic well-being and political order. In North’s (1990) framework, institutions can be formal, such as a law or constitution, or informal, such as social norms, values, custom, or culture. North showed that institutions are important because they determine the benefits and costs of alternative actions and hence have the potential to shape the behavior of individuals and organizations. There is now broad agreement among institutionalists that norms, values, rules, and collective-decision-making procedures that encourage and even enable mobilization of resources on a grand scale are necessary for wealth creation and that the absence of those institutions explains why the economic fortunes of nations diverge (Alston et al. 2018; Kuran 2011; Mokyr 2017; North 2005).

Our focus in this book is on property rights to land. Property rights are the rules governing ownership of assets. We consider all types of property in this book – state ownership, common property, and private property – but private ownership lies at the center of our study. The reason is that private property is one of the themes that has united the political economy of John Locke, classical economists, and the institutional schools that had begun to mature by the twentieth century (Boettke and Candela 2017). Locke’s possessive individualism, articulated in his Second Treatise on Government, argued that private property was a source of prosperity and the foundation of civilization. F. A. Hayek, who, along with Ludwig von Mises, played an important role in developing the Austrian school of economics, viewed private property as necessary for the emergence of the Great Society – the community characterized by the division of labor and impersonal economic exchange among individuals who work together in markets to improve their collective fortune (Hayek 1948, 1973; Mises 1920). Institutionalists writing in the early twentieth century began to articulate their own approach to institutions, one rooted in an appreciation for the role of governments in creating a legal framework for
market exchange, including the construction of property rights (Hodgson 1996, 1998). John Commons’s *The Legal Foundations of Capitalism* (1924) argued that judges construct property rules based on case law and that those rules provide the economic foundation of market exchange. Indeed, while there is debate about the importance of private property rights, even institutionalists critical of Lockean possessive individualism acknowledge the importance of private ownership in a modern capitalist economy (Bromley 2019; Hodgson 2015a).

The reason to focus on the rules governing ownership of land, as opposed to other aspects of property, such as buildings or products of human ingenuity (intellectual property), is that getting right the property rights to land is perhaps one of the most important causes of prosperity. For example, Sokoloff and Engerman (2000) argue that differences in land property rights explain why the United States had become much richer than any country in South America by the nineteenth century even though in the seventeenth century the colonies in North America had similar GDP per capita to those in South America. The divergence can be explained by the fact that robust private property rights in land for smallholders (those with plots of land that were small yet appropriately sized from an economic perspective) emerged in the United States; in South America, the property rights to land were oligopolistic or owned by the state, each approach undermining the productivity of land.

The economic history of Western Europe further illustrates the link between wealth creation and property rights in land and also illustrates the link between those rights and the expansion of representative political institutions. North and Thomas (1973), in surveying the economic history of Western Europe, argue that the spontaneous emergence of private property rights to land contributed to economic growth and that when rulers weakened private property rights during periods of lower-than-expected government revenue—such as through expropriating land and imposing taxes on it—economic decline followed. From 1500 to 1700, politicians and courts in England recognized the spontaneously arising property rights as legal rights, in the process creating an institutional foundation for the Industrial Revolution, which commenced in the nineteenth century.

The economic stagnation of socialist economies provides further evidence of the relationship between property rights and prosperity. The Soviet Union, by criminalizing private property rights, dramatically reduced incentives for economic innovation and prevented economic calculation: without property, prices have little meaning, and
without prices, rational economic production decisions are impossible (Boettke 2001). The centralized political institutions after the Bolshevik Revolution exacerbated the problem of insecure property rights by creating fertile ground for strongmen such as Joseph Stalin to increase predation (Gregory 2004). More recently, the experience of several countries in South America illustrates what is to be gained by choosing private property rights. Alston (2016) contends that the creation of more effective private property rights to land and businesses explains the growth of Brazil’s economy over a three-decade period starting in the 1980s. The profound economic challenges confronting Venezuela, especially under socialist president Hugo Chávez (in office 2002–13), illustrate the economic costs of pervasive state ownership of assets. A robust literature finds that private property has many potentially beneficial consequences, from increasing public investment (Field 2005; Galiani and Schargrodsky 2010), to increasing the efficiency of land markets (Dower and Pyle 2019), to enabling people to live where they want to live by providing them with greater liquidity and easing financial constraints (Chernina, Dower, and Markevich 2014).

It should therefore come as no surprise that legal titling – the creation of private property rights through a formal judicial process – has long been a key component of international development assistance. Perhaps most famously, Hernando de Soto (2000, 2002) argues that legal recognition of ownership can explain why capitalism flourishes in some places but not others. The idea is if assets are not represented on legal documents, banks cannot easily identify the owners and hence cannot use those assets as collateral to increase lending and hence investment. De Soto was especially interested in the way the government deals with squatters, those individuals in possession of land and buildings but without legal rights. He found that legal recognition of squatters’ rights is critical to economic growth and development and creates incentives for people to forgo opportunities to join insurgencies and terrorist organizations (de Soto 2002, ix–x).

At first glance, it might seem that economic theory supports legal titling as a capitalist path to economic development and peaceful political coexistence. The core idea of the economic approach to human action is that people are rational and consider what they must give up in deciding on their course of action. It makes sense that people will be more likely to invest in their land and less likely to give it up to join an insurgency if legal titling increases the value of their land.
That is a big if. Legal titles turn out to have an ambiguous impact on investment (Bromley 2009; Kerekes and Williamson 2008; Migot-Adholla et al. 1994). One reason is that land relations and land markets in the developing world are often dominated by powerful groups that can steer the process of titling to favor their interests such that the formalization process may lead to inequities in landownership (Binswanger, Deininger, and Feder 1995; Deininger and Feder 2001). These distributional conflicts over land, which legal titling can sometimes exacerbate or even create, often lie at the heart of political conflict in the developing world (Albertus and Kaplan 2013; Boone 2013). Nor does it necessarily make sense to apply lessons from the experience of settlers on the American frontier in the nineteenth century to the current developing world. The reason is that the American government during that time had substantial capacity to implement land registration and its key decision makers faced overlapping political constraints that enabled them to commit credibly to private property rights – advantages that many developing countries do not have (Murtazashvili and Murtazashvili 2019a).

Jean-Philippe Platteau offers a more nuanced economic theory of legal titling than the simple one introduced earlier. According to Platteau (2000, 85–86), economic theories of property rights that presume that land scarcity eventually requires legal registration of landownership to provide maximum security of tenure overstate the significance of legal recognition and also underestimate informal land governance. Platteau further explains that one of the reasons why registration of ownership is not clearly linked to investment is that market access and credit, along with the scale of economic activity of farms, are just as important as documentation in encouraging investment. There is also an endogeneity problem: legal titling is costly, and hence it may be the case that the returns on investment made possible by informal security are driving the decision to obtain legal title, rather than the other way around (Brasselle, Gaspart, and Platteau 2002).

This book contends that to fully understand why legal titling fails to deliver on its promise, we require a new theory of the origins of property rights, one which focuses more squarely on the political challenges confronting efforts to establish legal rights to land. Our theory is at its core a comparative institutional analysis of formal organizations (such as a state) and informal organizations (such as a tribe, village, or gang). Each type of organization can establish private property rights to land under the right institutional circumstances. Specifically, we argue that any organization, whether formal or informal, seeking to establish property
rights to land requires a monopoly on authority, administrative and enforcement capacity, constraints on its key decision makers (especially its most powerful ones), and inclusive political and legal institutions, including de facto and de jure courts.

Our theory can explain whether a government establishes opportunities to own private property for large segments of society, a small segment of society (politically connected groups), or no one (if it is unable or unwilling to establish legal rights). Further, it offers insight into the success of self-governance. Some informal organizations fare well on each of the dimensions above, and in these cases we expect them to substitute for government as a source of private property rights. For example, a village governed by customary institutions may have a local monopoly on authority, capacity to specify and enforce property rights, its leaders may face constraints, on their behavior and inclusive decision-making institutions, including forums for adjudication. When self-governing organizations fall short on one or more criteria, they may become predatory (powerful members take property from others through force) or unable to define and enforce rights (such as when powerful outsiders challenge such organizations’ monopoly on authority). Finally, the failure of legal titling can be thought of as a special case of the government falling short on the criteria above, such as when it lacks the capacity to effectively define and enforce property rights or when its promises to respect the rights embodied in a legal title are not credible (in which case the legal title is just a piece of paper, rather than an institution that influences investment behavior).

INSTITUTIONAL ECONOMICS AND THE ISLAMIC WORLD

Our empirical focus is on Afghanistan, a predominantly Muslim country. Methodologically, our approach relies most heavily on insights from public choice and institutional economics, with the latter’s emphasis on the role of rules in shaping human behavior. One of the contributions of this book is to illustrate the applicability of institutional analysis outside its traditional applications in Western contexts and to offer an institutional analysis of a country in the Islamic world outside of the area that is usually focused on: the Middle East and North Africa (MENA).

We have several reasons for our focus on Afghanistan. Perhaps most importantly, it is a crucial case to evaluate the applicability of insights from new institutional economics, most of which are derived from intensive examination of the cases of Western Europe and the United States.
Our book shows that these analytical frameworks are not only useful but also essential to understand political and economic development in a fragile state. Another reason is that despite Afghanistan’s geopolitical significance, there is much misunderstanding regarding the country’s institutions. It is easy to think of Afghanistan as a country that modern institutions left behind. To an extent, this is true: there are very few functional legal institutions in the country. But it is a mistake to assume there are no private property rights in the country. Much of the rural land is owned privately or collectively by communities, but those property rights are constrained by customary institutions. Another reason to focus on Afghanistan is that it illustrates the persistence of customary governance, including of land property rights, even after two decades of state building. Perhaps most importantly, our work also speaks to questions of how Islamic societies develop. Kuran (2004) argues that the ideas that go by the moniker of Islamic economics do not explain economic growth or development in predominantly Muslim countries. He suggests that there are simply economies and markets, not an Islamic version of either.

Extending these insights, Kuran (2011) shows that Islamic religious institutions can explain why the Middle East, which was economically advanced compared to Europe around the year 1000, had fallen far behind by the eighteenth century. Beginning in the seventh century, Islamic institutions facilitated trade among Muslims, which was required by the Quran. Quranic commandments such as that one were a source of prosperity when interactions between Islamic and non-Islamic groups were uncommon. In addition, Mecca, the annual destination of pilgrimages, served as a hub for trade and cultural integration. Previous work emphasized that long-distance trading routes emerged in Europe prior to formal commercial law and were facilitated by merchant law (*lex mercatoria* or “law merchant”) – a polycentric, customary body of law governing relations among traders (Benson 1989; Milgrom, North, and Weingast 1990). Kuran points out that while Mecca was for centuries the most important hub for the exchange of goods, services, and ideas, other Islamic institutions prevented Muslim-owned businesses from achieving economies of scale and resulted in a fragmented private property system. Islamic law required that upon the death of one of the members who formed a partnership, the company or enterprise had to be dissolved and its assets distributed and that upon the death of a husband, all property had to be distributed equitably to potentially several wives of the founding partner. In Europe, in contrast, a firm was
a legal entity – a corporation – that could outlive its founders, and wealth could accumulate because upon death, the norm was to give the bulk of an inheritance to the oldest son. The corporation as a legal entity would not emerge in the Islamic world until the nineteenth century, giving Europeans a major institutional advantage for centuries. These rules in Europe may not have been as equitable, but they permitted massive accumulation of assets and the birth of the modern capitalist firm. Some religious institutions, such as zakat – which according to Islamic custom is a mildly progressive income and wealth tax – promised to constrain the development of the state, but the doctrines as laid out in religious texts were too vague to constrain rulers, who often used zakat like any other tax (Kuran 2020).

Can Islamic religious institutions also explain key features of Afghanistan’s political and economic development? In our view, Islamic institutions are less a binding constraint in Afghanistan than a source of legitimacy that predatory rulers appealed to and manipulated for personal gain, especially during efforts to construct a more formidable state during the nineteenth century. For example, one of Afghanistan’s most powerful kings, Abdur Rahman (who ruled from 1880 to 1901), a Sunni Muslim, declared Shia Muslims infidels in order to get around the Quranic prohibition of taking property from one Muslim and giving it to another during wartime. It was a clever but devastating tactic that allowed him to promise opportunities for plunder to attract soldiers to his army. The army certainly did plunder the vanquished and even sold many women and children into slavery.

It is also important to keep in mind that while Islamic institutions contribute to fragmented private property institutions in some contexts, private property is a respected and widespread economic institution in Afghan society. This is illustrated by the Afghan proverb that everything is owned in the country but the mountaintops. Another proverb is the common Afghan expression “zan, zar, zamin,” which states that men have the right to go to battle over violations of their women (zan), gold (zar), and land (zamin). Indeed, part of the reason why the government was unable to implement land redistribution after the communist revolution in 1978 was that social institutions supported private ownership of land. The rights are fee simple private property rights – alienable, clearly defined property rights held by individuals – yet unlike in most Western contexts, private property is typically recorded in customary deeds, which are informal documents countersigned in many instances by respected members of the community, rather than in legal titles. Islamic institutions
did not have much influence on the development of customary property rights, unlike in other Islamic countries.

More generally, customary institutions have a more fundamental role in defining political-authority relations than Islamic institutions do (Murtazashvili 2016). The fundamental source of constraints on arbitrary rule in Afghanistan has been a polycentric system of governance in which customary and tribal communities counterbalance governmental decision makers. These power-sharing arrangements are often pivotal in the emergence of the rule of law in fragile states because they strengthen civil society (Myerson 2014, 2015). In Afghanistan, these constraints are not found in Islamic religious institutions but instead are based in local customary practices that often refer to Islam but are largely not derived from religion.

Our analysis also illustrates the importance of distinguishing tribal from customary institutions. Pashtunwali, the tribal code putatively governing relations among Pashtuns, is an important source of economic and political governance, including provision of collective defense (Benson and Siddiqui 2014; Ginsburg 2011). Indeed, to the casual observer and even to many scholars of Afghanistan, Pashtuns and Pashtunwali are key to understanding Afghan politics. But when one of us (Jennifer) conducted fieldwork in over thirty villages in Afghanistan – which represented all of Afghanistan’s major ethnic groups – it became clear that customary processes and procedures were similar across Afghanistan’s ethnic groups. And disputes over land were not resolved by appeal to Pashtunwali or even Islamic law (though mullahs in some instances handled disputes over property among families). Rather, customary procedures and processes transcended groups and did not derive from either Pashtunwali or Islam. For example, the norm of collectively deliberating through a shura or jirga (literally “circle”; it refers to a customary council) and the use of customary deeds to signify ownership do not come from Quranic verses. And while Pashtunwali does include norms of consensual decision-making, shuras and jirgas are used by most communities in Afghanistan.

We do not deny the profound role of Islamic institutions and Pashtunwali in Afghanistan. Rather, our contribution is to show that customary private property rights are an important institution that does not suffer from the fragmentation documented in MENA countries. Our analysis highlights customary governance within an Islamic setting and reminds readers that customary and traditional institutions need not have their origins in religion even in a deeply religious society. In addition, looking beyond Pashtunwali – the code governing relations
among Pashtuns – is essential in a country that is only around 40 percent Pashtun. To understand property relations in Afghanistan, it is necessary to look beyond the traditions of any single ethnic group.

With these ideas in mind, we introduce our theory.

**Toward a (New) Theory of Property Rights**

Our theory of property rights is organized around three questions. First, we want to understand why the state sometimes establishes private property rights as a public good, why it sometimes does so selectively, and why anarchy sometimes prevails. The rule of law, which includes the definition and enforcement of property rights, is often conceptualized as a public good (Cowen 1992). The literature in the tradition of Demsetz (1967), Alchian and Demsetz (1973), Anderson and Hill (1975), and Barzel (1997), letting markets determine ownership of assets makes property rights meet the standard definition of a public good. Yet, as Haber, Razo, and Maurer (2003) argue, governments can provide property rights protection selectively, choosing whose assets to protect and who can own land. This possibility arises because political decision makers can provide property rights protection selectively to individuals and groups in exchange for their support.

American economic history is replete with examples of how property rights can be provided selectively even in an overall environment of credible and effective property rights for many in society. From the late eighteenth century until 1853 (the date of the last major land acquisition of the nineteenth century), the federal government acquired 1.2 billion acres of land. Rather than maintain state ownership perpetually, the government first established auctions to allocate land in 1785. However, the government had to first open new territories for settlement. Individuals who did not want to wait formed clubs, establishing what amounted to de facto governments to claim land until the government held auctions. At the auctions, they would collude, ensuring rapid transfer of land to private hands. They also occupied land in such large numbers prior to authorization that eventually the government skipped auctions, giving them land directly – so-called squatters’ rights.

So far, so good. Private property rights in land emerged, which, according to Sokoloff and Engerman’s (2000) story, contributed to economic prosperity. However, even as the government established private property rights for settlers, it systematically destroyed property rights on American Indian lands. When Europeans arrived, American
Indians had property rights and had goods to trade (Benson 2006). Anderson and McChesney (1994) explain that governments confronted with indigenous groups need to be incentivized to trade with them rather than raid them even though trade makes both sides better off. Anderson and McChesney show that the federal government preferred trading and making treaties with American Indian tribes before the Civil War (1861–65) but that afterward, trade and treaties were abandoned. The reason is that the federal government for the first time had a permanent standing army after the Civil War and hence its cost of subjugating American Indians declined dramatically compared to the earlier era, when local militias did much of the fighting. To be sure, there was much violence inflicted upon American Indians before the Civil War. For example, Andrew Jackson signed the Indian Removal Act in 1830. Its purpose was to move all American Indians from their homes in the South to west of the Mississippi. It resulted in the Trail of Tears: the forced deportation of sixty thousand American Indians from their homes in the Southwest, killing up to a quarter of them in the process. But Anderson and McChesney’s point is that there were around seven hundred treaties signed before the Civil War but fewer than ten afterward and ten times more battles after the Civil War than before it. By the conclusion of the Indian Wars in the western states and territories in the second half of the nineteenth century, all remaining American Indians were forced onto reservations. American Indian tribes received worse land, but more importantly, they were forced into a property system that prevented them from owning land, and for half a century, federal policy was explicitly designed to dispossess American Indians of their reservation land so that it could be opened up to settlers (Anderson and Lueck 1992; Dippel 2014).

Black Americans in the South were treated as property before the Civil War, which is an obvious example of selective definition and enforcement of property rights, and afterward many were excluded from legal protection of property. Even in parts of the country where black people could own property after the Civil War, there were disparities in enforcement and black farmers could only receive 40 acres of land from the government, while white farmers could easily acquire 160 acres in fee simple ownership (Miller 2011, 2020). Most women were barred from owning property until the twentieth century and were only able to secure the right to own property after prolonged collective action (Lemke 2016). Thus, even in the United States—a country often used to illustrate the political, economic, and even social virtue of private property—the government has
selectively defined and enforced property rights (Cai, Murtazashvili, and Murtazashvili 2020).

A theory of property rights should explain whose legal rights are protected in an overall context of selective enforcement of rights and why governments are unable or unwilling to enforce some people’s rights. It also ought to explain some governments’ inability or unwillingness to enforce any rights at all. In situations in which government cannot or refuses to define and enforce property rights, the result is anarchy. The defining feature of anarchy is that government decision makers are unable or unwilling to regulate political, economic, and social activities (Leeson 2006, 2014a). Yet nothing about anarchy ensures disorder. Self-governing arrangements often work well in the state’s shadow, though they sometimes break down or are predatory. Thus, the challenge for a theory seeking to understand security of ownership is to understand the comparative competencies of state and nonstate organizations.

To explain the characteristics of legal rights, we rely on economic theories of the state. There is a large economics literature on the state. We find it useful to follow North (1981) and Vahabi (2020) in separating this literature into that centered on the contract theory and that centered on the predatory theory. The contract theory sees the emergence of the state and of the rule of law as a result of a hypothetical bargain in which individuals give up some of their liberties to a “specialist in coercion” (as the state is often described), in exchange for its establishment of law, order, and property rights. Thomas Hobbes’s *Leviathan* (published in 1651) exemplifies the contract theory. For Hobbes, order is impossible without a sovereign. Hobbes was optimistic that the sovereign would provide the public goods of law and order and even respect property rights. Buchanan’s version of public choice also takes the contract-theory perspective, although it recognizes that it is the design of rules governing the use and acquisition of political power and not simply a Hobbesian monopoly on power that creates incentives for the sovereign to do what is in society’s interests (Buchanan 1975).

The contract theory offers insight into European state formation and its consequences. Feudalism, which emerged in France in the tenth century, was a political arrangement in which lords promised to protect individuals in exchange for their aid in collective defense. The source of collective defense in medieval Europe was the castle, which was for centuries an effective source of defense against raiders and invading armies. Two changes motivated people to accept a state: the invention of gunpowder weapons, which overwhelmed castles, and increasing wealth, which made
plunder more attractive (Batchelder and Freudenberger 1983; Hendrickson, Salter, and Albrecht 2018). The fact that wealthier societies are more attractive to predators suggests that economic growth is what drives the process of state formation (Geloso and Salter 2020). To prevent plunder, the state has to invest in collective defense, which suggests private property rights and regional or national defense go hand in hand (Hickson and Thompson 1991; Thompson 1974, 1979).

In Europe, the response to wealth creation was to invest specifically in armies to provide for collective defense. Of course, not all political communities have the income to do so. When a government does not have much ability to assemble an army, it may make more sense to destroy wealth to make plunder less attractive than to attempt to provide collective defense (Leeson 2014b). Along these lines, in Chapter 3, we provide evidence that Abdur Rahman prohibited the development of railroads because he believed doing so was an efficient way to improve the country’s security against foreign powers, especially the British, in a time when he faced tremendous challenges in raising a competent and sizable army.

In contrast to the contract theory, the predatory theory views political decision makers as interested mainly in acquiring revenue and control of land and people rather than in providing public goods (Levi 1988; Vahabi 2015). It questions the idea that state power expanded because rulers wanted to provide public goods (Vahabi 2016). It expects the interests of economic and political elites, rather than efficiency considerations, to steer the process of institutional change, and it expects that the process will be steered in a way that benefits those elites at the expense of others (Holcombe 2018).

James Scott’s explanation for the rise of the state fits the predatory view. According to Scott (2017), the earliest states emerged over thousands of years as hunter-gatherer societies adopted agriculture. Once these specialists in coercion emerged, they began to compete to acquire control over more resources, including labor. The state required labor to feed the population, but increases in population density resulted in the increased prevalence of disease. As disease decimated the population of these early states, rulers often compensated by capturing additional people. These states extracted what they could, though eventually people began to trade with barbarians and even predatory rulers began to accept the necessity of trade. The increase in trade, because it increased production and hence the state’s revenue base, allowed the state to expand its scope by improving its ability to provide goods and services for growing populations.
Our theory draws on both of these traditions. It takes from the predatory theory the appreciation for group conflict as the underlying feature of politics. Like all theories of the state, ours appreciates the role of a monopoly on coercion as an important reason why political decision makers have incentives to consider how expropriation of land might reduce their government revenue over the long run. Both of the above-mentioned theories recognize the importance of political constraints in the emergence of rights, and so we too carefully consider how such constraints interact with factors such as state capacity to explain the development of legal rights. Regarding state capacity, we distinguish the state’s monopoly on coercion from its administrative capacity. Mann (1988) contrasted the state’s “despotic” (coercive) power from its “infrastructural” (bureaucratic) power, as does Fukuyama (2013). This is an important distinction because states can have a monopoly on coercion but have weak administrative and enforcement capacity. In addition to these two elements of state capacity, both the capacity of courts and the inclusiveness of political and legal institutions – that is, the ability of individuals to participate in politics and to use the courts – are expected to influence property rights.

We expect that a government is more likely to be willing and able to establish private property rights for large segments of society when political decision makers have a monopoly on coercion, possess the administrative capacity (including functional courts) to define and enforce them, and confront constraints and when political and legal institutions are inclusive. The property regime is more likely to tilt toward selective enforcement when political decision makers have a monopoly on coercion and possess administrative capacity but political and legal institutions are exclusionary. We hypothesize that anarchy results when the state falls short of a monopoly on coercion or does not have much administrative and enforcement capacity.

Our second aim is to explain the success of self-governance. Much of the economic-development literature views the rise of centralized but limited states as an explanation for prosperity (Acemoglu and Robinson 2019; Bates 2017; North, Wallis, and Weingast 2009). Yet political decision makers (including bureaucrats) often face few constraints or are unable to impose order on citizens. When communities confront a weak or predatory state, self-governance is often a coping mechanism of theirs (Scott 2012). In fact, state failure may in some instances even improve the quality of governance, as Somalia’s experience illustrates. In 1991 General Siad Barre’s government collapsed. Foreign forces (including the UN)
intervened in the resulting civil war, but by 1995 the UN had withdrawn, leaving a situation of de facto statelessness. Somali customary law (xeer), which relied on clan elders to resolve disputes, provided a framework for governance. The xeer system was arguably a more responsive system of governance than the predatory Somali government that had collapsed. Economic development improved after the state collapsed because self-governance worked better (Leeson 2007; Powell, Ford, and Nowrasteh 2008).

The xeer system is an example of polycentric governance, or local power sharing. Boettke, Coyne, and Leeson (2011) explain that while polycentric governance has many benefits, local governments (like national ones) are also subject to capture, a phenomenon they call quasi-market failure. Customary and tribal governance is much like a local government — the difference between them is that the former are not recognized as government, but have similar features, such as a monopoly on coercion — they are also subject to capture. To avoid such capture, we argue, self-governing organizations must satisfy similar criteria to those introduced earlier: self-governing organizations require local monopolies, capacity, constraints on key decision makers, and inclusive collective-decision-making and adjudicative institutions. When they do, we expect informal governance of land property rights to substitute for the state. While previous studies do emphasize the role of constraints on the behavior of local leaders (Acemoglu, Reed, and Robinson 2014; Baldwin 2015), our framework offers a richer institutional account of the foundations for self-governance.

It is also necessary to consider how self-governance relates to the co-existing government. Elinor Ostrom (1990) emphasizes that self-governing organizations are nested within higher-level institutions. In fact, state recognition of community autonomy is one of Ostrom’s design principles for successful self-governance. In fragile states, governments may not have the requisite capacity or incentives to provide such autonomy. State building does not necessarily solve this problem. One issue is that the stronger state may still not have the incentives to respect the autonomy of communities.

Another challenge is that state building can lead to autonomy for groups that the state does not want to strengthen. Shortland (2019) explains how the success of self-governing criminal organizations depends on their ability to participate in otherwise-legitimate markets. A criminal organization is a business whose profitability depends in part on the extent that the state can provide some semblance of order (Shortland
and Varese 2016). Indeed, in Somalia, state building after the Somali civil war strengthened piracy organizations, which benefited from security like any other business (Percy and Shortland 2013; Shortland and Varese 2016; Shortland and Vothknecht 2011).

In the Afghan context, Shortland’s insight suggests that state building may improve the economic basis of support of criminal organizations such as the Taliban, which often rely on illicit drug trafficking to fund their activities. Thus, one challenge is to understand how state building can improve autonomy for customary self-governance organizations while risking creating new opportunities for criminal or insurgent organizations.

Our third aim is to explain why legal titling works in some contexts but not others. Our main argument is that the success of legal titling depends on the comparative competencies of the state and self-governance as sources of property rights, with the success of each determined by the factors mentioned earlier. From this perspective, legal titling requires comparing the imperfect alternatives of state and customary governance and (where relevant) criminal and insurgency organizations that in some instances seek to provide property rights protection. Since conflict-affected states typically have endemic government failure and robust self-governance, legal titling is unlikely to work well in such contexts.

EXPLAINING PROPERTY AND POLITICAL ORDER

We use our theory to explain the complicated relationships among land, the state, and war in Afghanistan. The Afghan state emerged in 1747 when a group of customary and tribal leaders used an opportunity created by the decline of the Iranian Safavid Empire to declare the ascendance of the Durrani Empire. These local power brokers selected Ahmad Shah as their first king (shah). He was a military leader and a member of the Pashtun tribal confederation’s Durrani tribe, which the nascent empire was named after. Map 1.1 shows the Durrani Empire, which at its most expansive included the northeast quadrant of modern-day Iran, most of Pakistan, and parts of India.

The method these local leaders used to select Ahmad Shah is called the Loya Jirga, a customary method of deciding matters of great importance to a community. Its name literally translates from Pashto as “grand council” or “grand circle.” The reason for the name is that people often meet in a circle in Loya Jirga deliberations. A jirga in non-Pashtun communities is also referred to as a shura (in Arabic, the word for “council” is
shura). It is a customary way to decide matters of importance to the public at all scales of governance: national, regional, and local. Readers will want to keep these deliberative councils in mind because of their central role in determining the boundaries of the Afghan state and also because they remain the most important locus of local self-governance and political decision-making.

Despite agreement on a ruler and the legitimacy conferred on him by use of a socially accepted decision-making procedure, political instability was the norm in the century after the founding of the Durrani Empire and would remain a challenge for the next two centuries. A recurrent issue was that the king’s relatives, who sat in positions of power in other parts of the country outside Kabul (where the king resided), often believed that they had a right to rule and launched revolts to make their case. The British were emboldened to start two wars with the Afghans partly because of
such prolonged infighting. The British could not hope to win at a reasonable cost, and so they gave up some of their authority after each conflict. Although Afghanistan was never formally colonized, the Soviets asserted influence over Afghanistan beginning in the 1950s before occupying the country in December 1979.\footnote{The Soviet-backed communist government came to power in a coup in April 1978, but the Soviets did not intervene militarily until December of the following year in response to widespread instability in the country.} After the Soviet withdrawal in 1989 and subsequent fall of the Afghan communist government in 1992, the country was plagued by a horrific civil war as different factions competed for control. The conflict subsided in 1996 when the Taliban came to power with heavy support from neighboring Pakistan. In 2001 the United States allied with the Northern Alliance, a coalition of military forces that came about in 1996 to fight the Taliban, to topple the Taliban and set up a democratic Islamic Republic led by Hamid Karzai. In 2014, Afghanistan experienced a peaceful transition of power from Karzai to Ashraf Ghani.

The Afghan rulers, even those who have made some progress in consolidating political power, have done little to establish private property rights. In fact, rulers have generally preferred forced relocation of people to creating private property rights and crushed opportunities for trade to consolidate their political power. Using insights from our theory (which we develop in Chapter 2), Chapters 3 and 4 explain why Afghan rulers have preferred plunder instead of creating private property rights. Chapter 3 compares property rights and trade in two periods: from 1747 until 1880 and from 1880 to 1901. From 1747 until 1880, the Afghan state was a de facto federation with limited central-government authority. The second period – 1880 to 1901 – is Abdur Rahman’s iron-fisted reign. Unlike previous monarchs, Abdur Rahman was able to consolidate political authority; in this regard, his regime constituted state centralization, which in the literature is often associated with a rise in property rights protection. Yet, we find that property rights and trade occurred under the de facto federation and declined with increasing state capacity. Our theory explains why private property rights and trade relations were more robust prior to the rise in state capacity: as Abdur Rahman made progress in increasing state capacity, he dismantled political constraints on his power. This, combined with political instability and few opportunities to participate in politics or courts, contributed to partial property rights protection for Durrani Pashtuns but tremendous property insecurity for other groups within the king’s grasp.
In the Afghan context, it is especially important to consider geopolitics alongside domestic politics and political economy. The reason is that foreign meddling frequently shifted the balance of authority from customary society to predatory rulers (Murtazashvili and Murtazashvili 2020a). For example, Abdur Rahman used the first two Anglo-Afghan wars (from 1839 to 1842 and 1878 to 1880) to justify his ban on railroads: he said that because they could be used to carry foreign troops, they must not be built in the country. The second war with the British also resulted in financial assistance given to Abdur Rahman, which he used to purchase weapons to increase his ability to bludgeon anyone who opposed him.

Chapter 4 continues the analysis from Abdur Rahman’s death in 1901 through the reign of the Taliban government. The rulers that made some progress in defining and enforcing private property rights did so because they accepted greater constraints on their authority, but for the most part, there were few robust institutions for collective action to limit predation or to press for more secure private property rights during the twentieth century. The result was that legal property rights never materialized.


After the 9/11 attacks, President George Bush authorized military force to topple the Taliban. The overthrow of the Taliban government was not especially challenging: a group of 100 Central Intelligence Agency officers, 350 US Special Forces soldiers, and 15,000 Afghans overthrew the Taliban, with only a dozen US fatalities (Jones 2008). The Americans, together with many international partners, eventually promoted liberal state building to replace the Taliban, focusing on a new constitution, elections for president and a national assembly, and massive investments in security, infrastructure, and human capital. Despite such investments, the first four elections after 2001 were marred by corruption and violence. By 2019, the government only controlled half the country’s districts and

---

2 The Third Anglo-Afghan War – also known as the War for Afghan Independence – occurred in 1919 as a result of British aggression.
only about 60 percent of the population (Special Inspector General for Afghanistan Reconstruction 2019).

Afghans typically view their courts as corrupt and inefficient. Subnational governments, which are often critical to effective delivery of public goods in other contexts, have hardly any administrative capacity and depend almost entirely on Kabul for the small amount of revenue they receive. The Taliban and the Islamic State franchise in the region, Islamic State-Khorasan, continue to fight the government. Afghanistan seems destined for endless war two decades into the state-building process.

Amidst this instability, it should be perhaps unsurprising that certain policy makers have pinned their hopes on legal titling as a way to escape conflict and violence. Ashraf Ghani, who was elected president in 2014 and elected to a second term in 2019, came to power in part on campaign promises that mirrored de Soto’s writings on legal titling. According to then candidate Ghani’s campaign manifesto, “One of the results of the legal flaws of the documents of these properties is that our cities can never take the shape of civic cities and citizens cannot tend to their rights and obligations as citizens. For this reason, we commit ourselves to a very transparent and methodical process of legalization of these properties” (Ghani 2014, 86–87).

It turns out that legal titling has not been used much, nor has it been especially effective in improving land-tenure security where it has been implemented, as we explain. Yet even as legal titling has disappointed, rights arising through self-governance have worked quite well, as the literature on the economics of anarchy anticipates. Chapter 5 articulates the key features of customary private property rights to land and contrasts them with the legal property rights regime, while in Chapter 6, we consider customary governance of commons. In each case, our survey shows that the de facto private and common property rights work well even though very few people have legal title or legal rights to use the commons. In fact, our nationally representative survey of Afghan households found that while only a fifth of rural Afghans have a legal title to their land, over nine out of every ten surveyed have customary deeds (people may have both a legal title and a customary deed). These customary deeds specify landownership and are often written down, but they are not legal documents and are not recognized by courts. They are documents Afghans use to settle arguments about property ownership in their communities. Even though courts do not typically recognize them as valid proof of ownership, customary forums for adjudication take them seriously, and such forums are where most Afghans go to settle disputes.
In Chapter 7, we consider legal titling explicitly. Our theory can explain why legal titling has not lived up to its promise where it has been attempted. What is perhaps most surprising is that the international development community in Afghanistan eschewed legal titling in favor of what we call community-based land adjudication and registration (Murtazashvili and Murtazashvili 2016a). These community-based initiatives seek to improve recording of ownership at the community level through a shura process. These initiatives have improved household land-tenure security even though they explicitly seek to keep the government out of community land registration. The implications for development policy are significant: land registration without reliance on the legal process is a promising, low-cost method to improve land-tenure security for those with de facto private and customary property rights to land.

Chapter 8 concludes the book by considering a fundamental question of political economy: Are property rights a cause or consequence of political order? Since legal property is a political construct, it is necessary to consider features of states to understand why governments define and enforce property rights in some contexts but not others. In this sense, political order might be considered a cause of property security. Consequently, land reform ought to follow successful attempts at establishing more functional states – not necessarily democratic ones, but those that have capacity and whose rulers face constraints and in which institutions are inclusive. It is also critical to avoid seeking panaceas and to embrace the diversity of customary and self-governing arrangements that people have often relied on where governments have been unreliable. We ought to take informal governance seriously not only because it often works, but also because an honest discussion about its role in state building is crucial to rebuilding the trust that is often destroyed alongside buildings and roads in states seeking to escape a history of violence and insurgency.

An Overview of the Fieldwork

To understand the Afghan context, one of us (Jennifer) conducted interviews and ethnographic fieldwork in Afghanistan over a two-year period between 2006 and 2008 and in 2011 and 2013. The fieldwork was supplemented by numerous follow-up visits, including a visit to Kabul in January–February 2020 shortly before the COVID-19 pandemic resulted in restrictions on international travel. The fieldwork was conducted in thirty-two villages across seventeen districts in six provinces of
Afghanistan and resulted in thousands of pages of transcripts. Semi-structured interviews were also conducted with officials in district and provincial capitals, national-government officials in Kabul, and representatives from the international-aid and diplomatic communities. Jennifer, who is proficient in several local languages, led a small group of Afghan researchers to field sites. In each community, the research design involved selecting a roughly equal number of men and women, including randomly selected households, religious leaders, and community leaders. We selected villages to reflect Afghanistan’s ethnic composition. The research team transcribed interviews in the field along with field observations. We also interviewed local experts on land relations.

Although the qualitative data are not representative of Afghanistan’s regions, we made every effort to ensure that they represented the country’s ethnic composition. Because of security concerns, it was not possible to conduct research in all areas of the country. For example, we initially selected Kandahar as a field site but then decided against it because of worsening security; so southern parts of the country are not represented. We conducted all fieldwork without any security accompaniment. Hence, there is some bias regarding village and district selection since we selected research sites that were not under insurgent control or heavily contested at the time of the field visits. Several years later, many of the villages where research for this book was conducted were heavily contested or firmly under insurgent control and cut off from research opportunities.

Since Afghanistan comprises thousands of diverse communities, we also designed and executed a nationally representative public opinion survey. The survey, which was in the field from October 2011 through early 2012, included questions about customary governance and property documentation. It includes 8,620 completed responses.

The appendix provides a full description of the fieldwork research, including provinces visited and the details of the survey.