



# Can community-based land adjudication and registration improve household land tenure security? Evidence from Afghanistan



Iliia Murtazashvili<sup>a,\*</sup>, Jennifer Murtazashvili<sup>b</sup>

<sup>a</sup> Graduate School of Public and International Affairs, University of Pittsburgh, 3810 Wesley W. Posvar Hall, Pittsburgh, PA 15260, USA

<sup>b</sup> Graduate School of Public and International Affairs, University of Pittsburgh, USA

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## ABSTRACT

Unlike in many developing contexts, land title regularization and registration projects in Afghanistan have for the most part eschewed judicial adjudication and recording of title for those landholders with customary tenures or otherwise without legally recognized rights to land. Rather, the pilot land titling and registration projects in the country have been community-based, the defining feature of which is recording of community consensus regarding who in the community holds what rights to what land, buildings, water, trees, and commons, with some recognition by a governmental entity such as a municipal or government agency, but not as a result of judicial adjudication and registration processes. We call these initiatives Community-Based Land Adjudication and Registration, or CBLAR. We show that CBLAR is more appropriate than legal titling in the Afghan context but that the success of these initiatives in improving household land tenure security depends on the quality of customary governance and on investment in public goods such as roads, schools, lending institutions, administrative capacity of local governments, and forums to resolve disputes that overwhelm communities. More generally, CBLAR promises to improve household land tenure security in post-conflict settings when it is implemented in the appropriate context and with the appropriate support from the state and international donors.

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## 1. Introduction

Our research considers the question of whether community-based efforts to identify legitimate users of land in Afghanistan have improved household land tenure security. Unlike in many developing contexts, the pilot land title regularization and registration projects in Afghanistan have for the most part eschewed judicial adjudication and recording of title for those landholders with customary tenures or otherwise without legally recognized rights to land. Rather, the pilot land titling and registration projects in the country have been community-based, the defining feature of which is recording of community consensus regarding who in the community holds what rights to what land, buildings, water, trees, and commons, with some recognition by a governmental entity such as a municipal or government agency, but not as a result of judicial adjudication and registration processes. We call these initiatives based upon community-based registration of rights Community-Based Land Adjudication and Registration, or CBLAR.

In contrast with land registration, which refers to official, legally prescribed recording of rights to land or *tasfiya*, a legally defined procedure for official adjudication and legal registration of rights to land (MEC, 2014, pp. 21–22), CBLAR produces community-based registration of rights. For example, the UN-Habitat Municipal Governance Support Program (MGSP) eschews legal titling in favor of recording property ownership and issuing a *safayi* certificate, which in the Afghan context is a property tax document. *Safayi* is not a proof of property ownership but rather a community-based recording of ownership that the municipality can then use to collect taxes that increases the ability of the municipality to provide public goods (UN-Habitat, 2015a).

Land reform in Afghanistan is motivated by the belief that property insecurity in rural and urban contexts contributes to economic vulnerability, conflict, and underinvestment in public infrastructure (Alden Wily, 2013; Foley, 2009; Malkasian, 2013; MEC, 2014; Stanfield et al., 2013). CBLAR has been implemented to improve tenure security in three distinct contexts since 2003 through a series of pilot projects. The first context includes several informal urban settlements in need of infrastructure upgrading. The second context includes various rural communities for which settled communities and nomadic peoples claim rights to communal pastures. The third context includes efforts to resolve conflict in communities

\* Corresponding author.

E-mail addresses: [imurtaz@pitt.edu](mailto:imurtaz@pitt.edu) (I. Murtazashvili), [jmurtaz@pitt.edu](mailto:jmurtaz@pitt.edu) (J. Murtazashvili).

that have experienced land conflicts deriving from inheritances, boundary issues, and tribal jurisdictions. Although the Afghan government has a formal process for registration of land ownership (tasfiya) in the Land Management Law (which was issued by a presidential decree in 2008 and has been amended many times since), it is ad hoc and currently cannot be launched on even a regional scale. Our empirical focus is therefore on these CBLAR pilot projects.

Our analysis of each context shows that CBLAR is more appropriate than legal titling as a method to identify legitimate users of land in a community. CBLAR acknowledges limits in the ability of the central government and municipalities to formalize property rights through tasfiya or a judicial process, recognizes that formal adjudication often provides the state with opportunities for land grabbing, and reduces the costs of identification of legitimate users of land by working through informal governance organizations that are often viewed as more legitimate and administratively competent than courts and government agencies. However, our research also finds that the experience with CBLAR in Afghanistan is most likely to be successful when such projects are implemented in the context of competent, reliable, and legitimate systems of customary governance, and its impact on reducing vulnerability improved by embedding such projects in a broader context of investment in public goods such as roads, schools, access to credit, and capacity of local governments to resolve land disputes.

This paper is organized as follows. Section 2 provides a conceptual framework that clarifies under what conditions both legal titling and CBLAR are expected to improve household land tenure security. Section 3 uses evidence from fieldwork in over thirty rural villages and from a nationally representative survey to contrast the formal and customary systems of governance in Afghanistan. Section 4 considers the three contexts in which CBLAR has been implemented in Afghanistan since 2003. Section 5 concludes.

## 2. Legal titling, CBLAR, and household tenure security

The International Federation of Surveyors (FIG) defines land registration as the official recording of legally recognized interests in land. From a legal perspective, FIG distinguishes between two types of land registration: deed registration and registration of title. For deed registration, documents filed in the registry are evidence of ownership. Deed registration can generally be implemented more quickly and with less expense than title registration. For registration of title, the register itself serves as the primary evidence of ownership. Title registration is more complex because it includes examination of documents and cadastral plans, yet it promises greater tenure security and more reliable information. In addition, users do not have to search old deeds to determine ownership because the title register standardizes and streamlines such information (The International Federation of Surveyors, 2015).

Legal titling may be part of land registration projects in contexts where the rights of landholders are not recorded in a deeds or title registry. Such adjudication seeks to bring landholding into the registry through a legal process, with the results of such adjudication recorded in the official land registry. This type of registration system, which is sometimes referred to as first registration, surveys and records ownership prior to issuing certificates as proof of ownership. First registration can bring customary, religious, and other landholding norms into a single national system of ownership controlled by the state, as well as doubling as a list of taxpayers (Alden Wily, 2003a). Registration in this manner promises to improve security of land tenure, access to credit, and productivity of land (Arruñada and Garupa, 2005).

One of the main economic justifications for legal titling in the developing world is the finding that countries with a very long history of private property rights tend to be wealthier (Acemoglu

et al., 2002; North, 1981; North and Thomas, 1973; Sokoloff and Engerman, 2000). Some are optimistic that poor countries can improve prospects for economic development by replicating the process of the emergence of private property institutions that occurred in Western Europe and North America. For example, (De Soto's, 2000) defense of legal titling in the developing world is based on the presumption that legal recognition of the land claims made by squatters on government-owned frontier land in the nineteenth century in the United States spurred the growth of capitalism in the country and that developing countries can mimic that process.<sup>1</sup> In the policy realm, legal titling is a longstanding component of Western-led efforts to improve development prospects (Easterly, 2006; Rodrik, 2008).

Despite its popularity, many studies question whether legal titling actually improves household land tenure security. Legal titling can undermine household land tenure security for women because they are often excluded from judicial adjudication of property rights (Agarwal, 1994; Tripp, 2004). Legal titling also tends to generate land grievances because formalization of land ownership is inherently redistributive (Boone, 2013). In addition, although some studies find that legal titling increases investment in land or public infrastructure (Field, 2005; Galiani and Schargrodsky, 2010), others find that people are no more likely to perceive that their land tenure is secure after the state assigns them a legal title (Benjaminson et al., 2009; Brasselle et al., 2002; Bromley, 2009; Sjaastad and Bromley, 2000, 1997).

The underlying reason why legal titling may not improve household land tenure security is because property rights are political constructs that depend for their effectiveness on the willingness and capacity of the government to grant and enforce them (Bromley, 2006; Sened, 1997). The political nature of a property right requires consideration of the broader context of governance within which property rights are specified and enforced (Deininger and Feder, 2009). Several dimensions of governance are likely to influence whether legal titling will improve household land tenure security.

First, state capacity influences whether legal titling improves household land tenure. State capacity refers to the ability of the government to implement and enforce public policies (Fukuyama, 2013). In order for legal titling to improve household land tenure security, the state must have sufficient capacity to register land ownership (Arruñada, 2014, 2012), enforce ownership (Fitzpatrick, 2006), and resolve conflicts over land (Blattman et al., 2014; Murtazashvili and Murtazashvili, 2016a,b).

Second, the extent of constraints on political decision-makers influences the consequences of legal titling. Political constraints determine the credibility of the state's promise to respect private property rights (Haber et al., 2003; North and Weingast, 1989; Riker and Weimer, 1993). Legal titling is unlikely to improve household land tenure security unless political institutions constrain politicians to respect the property rights that are embodied in legal titles. This feature of governance is especially important in weak states because politicians in such contexts are often unable to commit credibly to their promises of institutional reform (Coyne and Boettke, 2009; Flores and Nooruddin, 2012).

<sup>1</sup> There are a number of institutional factors besides legal recognition of squatters' presumptive rights to ownership that explain why the United States is a very wealthy country, including a favorable constitutional structure (Mittal et al., 2011), a rational and orderly system to record land ownership in frontier regions (Libecap et al., 2010), and the fact that the federal government planned to transfer its vast stock of public land to settlers through land auctions (Murtazashvili, 2013). The notion that legal titling unlocked capitalism in the United States neglects the broader constitutional, legal, and ideological context within which the government recognized the land claims made by squatters.

Third, legal titling is more likely to improve household land tenure security when the projects are coordinated with efforts by the state or donors to provide the following types of public goods. Road-building projects promise to improve household land tenure security by reducing the costs of using the services of police and courts. Building schools can increase household land tenure security because people with higher levels of education are more likely to take advantage of opportunities to formalize their land-holding (Lesorogol, 2005). Development projects that establish or strengthen lending institutions can improve household land tenure security by providing greater opportunities to landholders to invest in infrastructure, such as a fence to protect their land from trespass. Community-driven development projects, which typically seek to establish or reinforce local governance institutions (Jochem et al., 2016; King and Samii, 2014), can improve household land tenure security by increasing the capacity of local governments to administer land records. Finally, development projects that establish forums to resolve disputes within and across communities can improve household land tenure security by increasing participants' ability to resolve land-related conflict (Blattman et al., 2014).

CBLAR is an alternative to legal titling in that such projects work with self-governing community organizations to clarify who owns land in a community, while acknowledging that the state is unlikely to be able to successfully implement legal titling projects. However, our working hypothesis is that the extent to which CBLAR improves household land tenure security also depends on the quality of governance and public goods provision. First, we expect the consequences of CBLAR to depend on the quality of customary governance where such projects are implemented. Although informal systems of land governance may generate land tenure security when the state is weak (Sjaastad and Bromley, 1997; Toulmin, 2009), the quality of informal governance varies substantially across contexts (Acemoglu et al., 2014; Agrawal and Gibson, 1999). CBLAR is more likely to improve household land tenure security when such projects are implemented in a context in which informal systems of governance are both administratively competent and provide members of the community with ample opportunities to participate in land governance.

Second, we expect that CBLAR is more likely to improve household land tenure security when such projects are coordinated with public goods provision. Although CBLAR limits the role of the state in the process of recording land ownership and identification legitimate users of land, self-governing communities in some situations may not be able to provide public goods, in particular when those public goods transcend community boundaries (Ostrom, 2005, 1990). In addition, many communities in post-conflict settings are in need of infrastructure upgrading. Thus, we expect that CBLAR is more likely to improve household land tenure security when such projects are complemented by investments to upgrade roads, build schools, strengthen lending institutions, and improve local governance capacity.

### 3. Land governance in Afghanistan

Afghanistan is a legally pluralistic society with multiple, overlapping systems of land governance (Coburn, 2013; Coburn and Dempsey, 2010). The formal system of land governance divides authority between several government agencies and courts. The government also maintains repositories of legal ownership documents, although the country has never had a comprehensive cadastral survey and very few Afghans have legal titles.

King Zahir Shah sought to implement land registration in order to facilitate tax collection in the 1960s. In 1962, USAID established the Cadastre Institute in Kandahar, which provided technical assistance in support of the cadastral survey (Peikar, 2014). The government also established sixteen regional Cadastral Survey

directorates from 1964 to 1986 within the Afghanistan Geodesy and Cartography Head Office and established the AMLAK land office within the Ministry of Finance in 1965 to administer state-owned lands and to document ownership for the purpose of taxation. However, this effort did not produce a nationwide land registry or issuance of formal documents to surveyed land parcels. By 1968, the mass survey and titling plan had been downgraded to a simple inventory of legal owners and location of their lands, with no issuance of deeds to private owners, which were the initial intentions of the reforms (Alden Wily, 2013; Peikar, 2014). Rather, an owner's entry on the survey is only a statement of probable ownership of land rather than official confirmation of ownership (Stanfield et al., 2013). Moreover, only approximately a third of agricultural land was surveyed, and many of the survey records have since been destroyed as a result of conflict (Batson, 2013; Peikar, 2014; Safar and Stanfield, 2007; USAID/LTERA, 2007). Another challenge is that AMLAK used its own surveys, rather than cadastral surveys, for taxation purposes, and courts rarely use cadastral surveys in preparing legal deeds (Safar and Stanfield, 2007).

Beginning in August 2009, the government initiated a process to streamline land governance by moving the responsibility for land administration from the Ministry of Finance to the Ministry of Agriculture, Irrigation, and Livestock (MAIL) and by giving the authorities that had been exercised by the AMLAK land office to a new government organization, the Afghanistan Independent Land Authority or ARAZI (Peikar, 2014; Stanfield et al., 2010). The responsibilities of ARAZI include managing state-owned land, registration of land through the *tasfiya* process, implementation of cadastral surveys, leasing government-owned land, and resolution of land disputes. ARAZI contrasts with previous systems of land administration in use of best practices from international land reform efforts, the political independence of ARAZI, political support for land reform from the Afghan government, and efforts to coordinate cadastral surveys with the *tasfiya* team, as well as in a desire for transparency. ARAZI, with the assistance of USAID, has also coordinated a comprehensive review of the Land Management Law of 2008 (Peikar, 2014).

Despite these efforts to streamline the administrative process, many government agencies continue to share authority over land relations. In rural areas, the key organizations are the Ministry of Finance and MAIL, while in urban areas, organizations such as the Ministry of Urban Development (MoUD), local courts, and mayors play an important role. Moreover, although many urban areas have municipal plans and zoning codes governing land relations, these zoning codes are often out of date (Alden Wily, 2013).

Courts at the district and provincial levels, whose judges are appointed by and accountable to the Supreme Court of Afghanistan in Kabul, are the only source of legal authority to adjudicate land disputes (Barfield et al., 2011). These sources also oversee the *Makhzan*, which are provincial-level public records offices responsible for maintaining legal documents such as birth certificates and legal titles (Batson, 2013). However, the judiciary is poorly staffed and trained, and courts are among the most corrupt institutions in the country (Barfield et al., 2011; Suhrke, 2011).

One of the consequences of the institutional weaknesses of the formal system of land governance is that few Afghans have legal titles to the land they occupy. We included a number of land-related questions in a recent USAID-supported survey of governance in the country.<sup>2</sup> Respondents were asked whether they have a "legal title" (which the survey defined as a government-issued ownership

<sup>2</sup> The survey, which was completed in late 2011, was implemented by Democracy International and includes 8620 responses from a representative sample of Afghan households. The rural subsample consists of 6450 observations from settlements classified as "villages."

document) or a “customary deed” to the land they own. Customary deeds are ownership documents that are acknowledged as legitimate within a community but without legal recognition by the government. According to the survey, 85% of rural Afghans said that they owned land, but only 19% of landowners said that they had a legal title.<sup>3</sup> However, 94% of landowners had customary deeds to their land.<sup>4</sup> These findings suggest that customary deeds signify land ownership for most Afghans even though legal titles are the only ownership documents recognized as valid by the government. Another consequence of the shortcomings of the formal system of land governance is that individuals rarely use the courts to resolve land conflicts (Alden Wily, 2013; Deschamps and Roe, 2009; Murtazashvili and Murtazashvili, 2016a,b).

For many Afghans, the customary system of land governance is a more suitable alternative than the formal property system. Customary authority in most villages is divided between deliberative councils (*shuras*, *jirgas*, or simply “elders”), village representatives (*maliks*, *arbabs*, *namayenda*, *wakils*, or other titles), and religious arbiters (*mullahs*, *mawlawi*, or other religious leaders). Because the names vary, we refer to deliberative councils, religious arbiters, and village representatives generically as *shuras*, *mullahs*, and *maliks*, respectively, to avoid confusion.

The description of customary governance that follows is based primarily on fieldwork, supported by the Afghanistan Research and Evaluation Unit, by one of the authors.<sup>5</sup> One of the purposes of the fieldwork was to understand the extent to which customary systems of governance identified by anthropologists such as Roy (1990) during research conducted in the 1970s and 1980s persisted after several decades of conflict. Such persistence in post-2001 Afghanistan is important because it provides insight into the appropriateness of CBLAR in the Afghan context. A thorough understanding of customary governance is also necessary to understand why CBLAR improves household land tenure security. For example, our finding that customary councils are inclusive and customary representatives are selected by members of the community explains why CBLAR initiatives are successful in but also clarifies why these successes are unlikely to extend to contexts in which customary governance is less participatory or where representatives are less accountable.

A *shura* is the fundamental forum for collective decision-making in rural Afghanistan because its authority derives from popular consent. These councils typically meet on an ad hoc basis. Membership is not typically fixed and is open to participation by any men in the village, although it is not typically necessary for all men in a village to participate in collective decisions. Rather, a meeting of a *shura* usually comprises a group of respected “elders.” In the Afghan context, one’s status as an elder does not refer to attainment of a particular age but to one’s reputation for fairness within the community. Informants often referred to individuals in their early thirties as elders because of their reputation for fairness and diligence in addressing collective concerns. Major disputes are typically resolved through a *shura*, while minor ones can be resolved by a *malik* or *mullah*.

A *malik* is the face of a community to outsiders and an important local administrator. Informants explained that the community selects a *malik* except in instances where the position is passed down from a family member because the family has a reputation for public-mindedness. Regardless of how a *malik* comes to this position, villagers can remove a *malik* by convening a *shura*.<sup>6</sup> Although *maliks* are sometimes depicted as unaccountable or as large landowners (Abdullayev et al., 2009; Beath et al., 2013), fieldwork found that they were largely accountable to members of their community and that they were usually not large landholders.

Nearly every Afghan village has a *mullah*, who is a self-trained, community-based religious leader. *Mullahs* represent the lowest level of religious organization in Afghanistan but are also a relatively independent component of customary governance. They deal with issues arising within families, such as inheritance. *Mullahs* often participate in deliberative processes in community *shuras*.

Customary governance has been disrupted by communist rulers who viewed it as an obstacle to modernization, by mass migration during decades of conflict, and by efforts by the Taliban to displace customary with religious authority (Murtazashvili, 2016). Despite these upheavals, rural informants indicated that customary governance not only reconstituted itself but in many ways had become more inclusive than in the past. Our survey also found that customary governance remains an important feature of the institutional landscape in rural Afghanistan: most rural Afghans have access to a customary representative (over 99%), to a customary council (87%), and to a religious leader (77%). The survey also found that rural Afghans are more confident in their *malik* than in either their district governor or police.<sup>7</sup>

*Shuras*, *maliks*, and *mullahs* each play important roles in land governance. Individuals are more likely to turn to a *shura* to resolve land conflicts than to formal authorities (Deschamps and Roe, 2009). *Maliks* often maintain customary deeds to land and participate in local forums to resolve land disputes (Stanfield et al., 2010). *Mullahs* play an important role in resolving land conflicts within families, in particular in disputes over inheritance of land (Stanfield et al., 2013).

The process of customary adjudication of ownership is initiated when one of the parties petitions an elder or requests to convene a *shura*. Once evidence in a case is presented, *shuras* make a decision. In some cases, community *shuras* are unable to resolve disputes. Inability to resolve disputes is more common when disputes involve parties from different villages or when an outside party comes in and takes land. When disputes go unresolved, parties can appeal to higher levels of authority, such as a district governor, although higher-level officials typically encourage the parties to resolve disputes locally through customary channels (Murtazashvili and Murtazashvili, 2016a, 2015; Stanfield et al., 2013).

<sup>3</sup> The descriptive statistics presented in this section are from the rural subsample (n = 6450 observations). We use the rural subsample because the fieldwork was conducted in villages and because this section focuses on describing customary governance in Afghan villages.

<sup>4</sup> Afghans may have a customary deed, legal title, both, or no documents signifying ownership. When landowners have no documents, ownership is signified by collective acknowledgement by members of the community.

<sup>5</sup> The fieldwork consisted of between 8 and 15 interviews in each of 32 villages in 17 districts across six provinces. Informants included randomly selected citizens of various occupations and ethnicities, community-identified customary representatives, elders, *mullahs*, as well as an equal sample of men and women.

<sup>6</sup> Prior to the civil war in Afghanistan that commenced in 1978, *maliks* were in some instances appointed by the government. However, *maliks* today are selected by their community. Although *maliks* often have a stamp from the district governor that signifies their authority to deal with the government, they are selected by their community, not the government. The practice of issuing these stamps is entirely informal, as *maliks* have no legal status in the government (Murtazashvili, 2016, 2014).

<sup>7</sup> In the rural subsample, we found that over 90% of respondents had “a lot of confidence” or “some confidence” in their *malik* compared to 79% and 55% for the district governor and police, respectively.

## 4. Land reform in Afghanistan

### 4.1. Urban settlements in need of upgrading

Many rural dwellers migrated to urban centers to escape violence during the anti-Soviet insurgency in Afghanistan. After 2001, Afghanistan's capital remained a preferable option for many people seeking to escape from the Taliban or to improve their economic opportunities (USAID, 2009a). The insufficiency of Kabul's master plan, which has not been updated since 1978, became even more obvious after 2001, when a swell of new residents led to an surge in housing built in violation of the master plan (Gebremedhin, 2005).

Prior to implementation of land reform, a World Bank-sponsored survey found that 70% of people in Kabul did not have legal title to their land. Rather, most had customary deeds, which in urban contexts refer to witness-recorded documents prepared locally and routinely approved by a *wakil-e gozar*, or neighborhood leader (World Bank, 2005).<sup>8</sup> A white paper issued by MoUD stated the principles behind land reform: (1) recognition of ownership for those in possession of land; (2) resolution of land disputes through community-based processes; (3) determination of the veracity of customary and formal documents through customary channels; (4) community-based recording of possession when no documentation is available; and (5) formalization of land ownership provided it is requested by the community. MoUD hoped that implementation of a cost-effective, transparent, accessible, and simple registration system would improve household land tenure security (Ministry of Urban Development, 2006).

#### 4.1.1. LTERA project (2004–2009)

The USAID-supported Land Titling and Economic Restructuring in Afghanistan (LTERA) project sought to implement MoUD's design principles for land reform. LTERA sought to clarify land rights by recording who owns what land through a community-based process and by improving the capacity of the Provincial Appeals Courts of Afghanistan to store legal documents, to verify ownership, and to resolve land disputes. To facilitate completion of these goals, the project developed a community-based adjudication process for tenure disputes in settlements where the majority of landholders in informal settlements did not have legal title to their land (USAID, 2009a; USAID/LTERA, 2007).

According to a USAID-sponsored evaluation of a settlement site in Kabul, CBLAR led to an improvement in household land tenure security (29 of 30 residents interviewed said they felt more secure), more construction, an increase in the number of businesses, and higher land values. Although only thirty households were interviewed, the project was extended to the rest of Kabul and two additional districts, with activities including establishing 56 shuras, mapping and clarifying property rights for 54,000 households, and resolving 1400 land disputes within informal settlements through community-based dispute-resolution committees (USAID, 2009a,b).

In contrast to projects seeking "regularization of rights through a formal legal process," LTERA illustrated how "de facto recognition of rights can also have a positive impact on the livelihoods of Afghan citizens" (USAID, 2009a, p. 26). The defining administrative feature of LTERA was CBLAR:

Courts alone have proven ineffective in solving issues related to allegedly grabbed land, partly because they consider residents on grabbed land as offenders and not victims. Mediation by community elders among all parties involved with a focus on creating

mutually satisfying solutions through dialogue has been an effective conflict resolution method (USAID, 2009a, p. 24).

In a pilot site in Kunduz, donors acknowledged the presence of a shura as one of the keys to successful CBLAR effort:

Unlike other USAID/LTERA tenure formalization areas, the settlement of Rustaquabad had an existing shura in place and strong community leadership. The shura approached the municipality of Kunduz and the Ministry of Urban Development in 2007—before the USAID/LTERA program started—with a view to formalize tenure rights. . . This community leadership has been a key factor in facilitating the formalization process (USAID, 2009a, p. 26).

Land reform was also implemented through a shura in Taloqan, the capital of Takhar province in the northeastern part of the country:

The formal judiciary is commonly seen as intimidating, slow and expensive, and decisions made by judges are perceived by most people as unfair or unenforceable. In Taloqan, the shuras met the expectations of the citizens in terms of affordability, equity, and enforceability of decisions. Since most land disputes were internal to the community—disputes among neighbors or among family members—decisions made by community elders were more likely to be accepted than judicial decisions (USAID, 2009a, p. 30).

The project also coordinated CBLAR with investment in public goods in several pilot sites. Self-governing communities in Afghanistan that are able to resolve land conflicts through a shura process often face major challenges in providing public goods with large up-front costs, such as a road or a school (Murtazashvili, 2016). USAID highlighted a road-paving project in Deh Qabel, a district in Kabul, to illustrate how investment in public goods complements land registration. One reason the road was built was to support CBLAR. According to interviews conducted as part of the project's assessment, people near the road-paving project said that they felt more secure in their possession of land.

USAID also claimed that the presence of Community Development Councils (CDCs) contributed to the success of land registration. CDCs were established with the support of the World Bank in thousands of Afghan communities. Each community with a CDC received a block grant of approximately \$60,000 in funds to improve local governance. Because the presence of CDCs was a criterion used to select pilot sites for implementation of LTERA, it is challenging to disentangle the impact of these development projects from CBLAR on household land tenure security. Despite using CDCs as one of the criteria for site selection, they may not have had much impact on household land tenure security because people rarely turn to them to resolve land conflicts in communities that also have a shura (Murtazashvili and Murtazashvili, 2016a,b).

LTERA illustrates the promise of CBLAR as an alternative to legal titling in fragile states but also suggests that its success reflects the quality of customary governance at the sites where the projects are implemented, the willingness of the state or donors to invest in public goods that communities cannot provide, and state support in improving local infrastructure through block grants from CDCs. An audit mandated by USAID recognized as much in observing that to the extent the project improved household land tenure security, it was because it drew on customary leaders' wealth of community knowledge (USAID Office of the Inspector General, 2009). Nevertheless, while the project's success also depended on complementary investment in public goods, such as roads in particular, road building was only a major component of the LTERA project in a few settlements. The auditors recommended an assessment of the feasibility of coordinating with other donors to improve infrastructure in informal settlements because CBLAR is less likely to improve land tenure security when poor infrastructure prohibits optimal use of land in informal settlements.

<sup>8</sup> A *wakil-e gozar* is the urban equivalent of a *malik*, i.e., a neighborhood (*gozar*) leader (*wakil*). In rural areas, *maliks* routinely countersign customary deeds.

#### 4.1.2. LARA project (2011–2014)

The successor to LTERA, the Land Reform in Afghanistan (LARA) project, also sought to improve household land tenure security through CBLAR.<sup>9</sup> Building roads was the major infrastructure upgrading activity. Unlike LTERA, LARA invested in infrastructure upgrades in each pilot site. LARA was less ambitious than LTERA in that it was only implemented in two informal settlements in Jalalabad, a city in Nangarhar Province in eastern Afghanistan. The project had a budget of \$41.8 million over three years.

LARA was based on the presumption that overlapping and conflicting legal systems resulted in poor land management, hindered private sector investment, diminished economic growth, and fostered instability. LARA's goals included establishing a land management framework to encourage private investment and growth, to support resolution and mitigation of land-based conflict, and to improve the legitimacy of the Afghan government. Activities included technical assistance to government agencies that address land issues, reform of land markets, and improving household land tenure security by upgrading informal settlements and formalizing land occupants' rights (USAID, 2013a).

The project identified who in the community possesses what lands through a CBLAR process in each of the informal settlements in Jalalabad. The surveying of the land took two months. Roads were also built in the settlements. One of the project's most important activities was recording customary deeds. However, there was no legal recording of ownership, including any plans to legally register ownership (USAID, 2013a).

LARA included infrastructure upgrading as a more explicit component than LTERA. LARA's legal team also worked with the Minister of Justice to improve the design of the draft Land Management Law. The costs of implementation were likely reduced by working with the assistance and consent of local customary councils.

USAID interpreted community-based recording customary deeds as evidence of the success of the project in improving household land tenure security. In addition, women who participated in a focus group found that road building projects improved access to police and that they had greater information regarding their ability to claim land through inheritance (USAID, 2013a, p. 16). Presumably, improved access to police and greater knowledge of legal rights to property improved household land tenure security for women in these settlements, although there was not a more systematic impact evaluation conducted as part of the project evaluation. Similarly to LTERA, the success of LARA in realizing its goals reflected the capacity and legitimacy of customary councils along with investment to improve urban infrastructure.

It is important to recognize that USAID has not systematically evaluated the hypothesis that CBLAR improves household land tenure security. Rather, the evidence presented in the donor reports is suggestive rather than conclusive. The discussion serves to motivate both donors and the community of scholars interested in land reform in the Afghan context to more rigorously evaluate the hypothesis that CBLAR improves household land tenure security.

#### 4.1.3. UN-Habitat MGSP (2015–present)

UN-Habitat's MGSP partnered with the Ministry of Urban Development, the Independent Directorate for Local Governance, Kabul Municipality, and ARAZI to upgrade informal housing in municipalities through CBLAR. Since land titling and cadastral surveys are complex and expensive, property was registered by issuing *safayi* certificates without attempting to formalize ownership. With

community support, MGSP registered 85,000 properties at an average cost of 8 USD per property (UN-Habitat, 2015a).

UN-Habitat worked through community-based governance structures to implement land reform. The project acknowledges the role of customary leaders, *wakil-e gozar*, as part of the municipal governance structure even though they do not have a formal position in the government. In addition, the recently created, mixed-gender Gozar Assemblies, each of which comprise several CDCs, were partners in the implementation process (UN-Habitat, 2015b).

This project shows that CBLAR is a low-cost, feasible alternative to legal titling and that de jure land registration is not necessary to document ownership for the purposes collecting taxes. Yet there remains the challenge of discerning the impact of such projects. To date, the project, which began in 2015 and is scheduled for completion in three years, has not been evaluated for its impact on household land tenure security. However, the remarkably low cost of registering land ownership suggests that even a small improvement in household tenure security would be sufficient to justify from the project in terms of net benefits.

#### 4.2. Reform of land tenure on pasture

Pasture is the second context where CBLAR has been implemented. Nomadic pastoralists and settled communities depend for their livelihoods on access to pasture. There are approximately 240,000 nomadic households in Afghanistan, with over half of these households (approximately 1.2 million people) continuing to migrate or seeking to migrate within Afghanistan. The majority of Afghan nomads are Pashtuns, who are often called Kuchis.<sup>10</sup> Winter pasture is typically located in the south and east of Afghanistan and is considered the traditional home of many Pashtun Kuchis. Kuchis typically migrate with their animals on various routes during the summer, sometimes changing these routes in search of new economic opportunities (Alden Wily, 2009a, 2003b; De Weijer, 2007).

Conflict over pasture is common in many communities in rural Afghanistan. The majority of conflicts involve commanders. Kuchis often have to pay commanders fees for access to land that can be as much as 50% of the value of their herd during times of drought, and they lose approximately 20% of their herd each year to commanders or criminals (Desta, 2009). Conflict is more common in the summer months, when there is greater competition for land, and in eastern parts of the country. Kuchi migration patterns have been altered not only by conflict but also by droughts in the region. Aside from undermining productivity, conflicts between nomadic and settled communities may also contribute to political instability. According to an informant from a village in Bamiyan Province, "Kuchis [Afghan nomads] claim that they have a lot of land in this area. If hundreds of Kuchis come to this area, they will destroy the agriculture of our district. ...The second problem is that if the Kuchis return, then terrorists will accompany them—like Al Qaeda and the Taliban." Concerns such as this were expressed by several villagers and district officials interviewed in Bamiyan Province, one of the regions that has seen several high-profile conflicts between nomadic and settled communities.

The underlying source of conflict is an institutionally incoherent property regime governing pasture. Although all pasture in the country is formally state-owned, ownership is asserted by individual households, villages, or village clusters, and in some cases, by a tribal group. The last category is typically nomads. Legally, pasture is divided into "public pasture" and "communal pasture." Public pasture is available for use by anyone, with the proviso that it

<sup>9</sup> For a description of the LARA project, see: <http://www.usaidlandtenure.net/project/land-reform-afghanistan>.

<sup>10</sup> Kuchi is a term derived from the Persian verb *kuchidan* (lit. "to migrate").

<sup>11</sup> Interview, district governor, Panjab District, Bamiyan Province.

cannot legally be converted to agricultural use. However, nomads have long had priority use rights to summer pasture, a practice that dates back to the reign of Abdur Rahman, who allowed nomads access to summer pastures during his violent state-building campaign from 1880 to 1901 (Barfield, 2010). These priority use rights may have been stable in the past, but civil war and violence has led nomads to seek out new economic opportunities, which sometimes results in new conflicts. The weakening of the Taliban has also in some regions led to retaliation against Pashtun Kuchis who are now among the most vulnerable people in many regions (Alden Wily, 2009a).

Despite these challenges, rural communities are often able to resolve land conflicts through customary channels, in particular through shura processes (Alden Wily, 2009a,b; Stanfield et al., 2013). Communities often devise rules that specify which members of a community may use land, what constitutes appropriate agricultural use of the pasture, and under what conditions grazing is allowed, appoint “land guards” to monitor use of the pasture and enforce its rules, and convene deliberative councils to resolve conflicts (Alden Wily, 2009a). The projects that have been implemented to date have for the most part acknowledged the significance and effectiveness of these informal systems of land governance. However, these CBLAR initiatives also recognize that the donor community can play an important role in governance of pasture by training public officials and in providing support to customary councils in their efforts to resolve land conflicts.

#### 4.2.1. FAO SALEH project (2003–2008)

The FAO Sustainable Agricultural Livelihoods in Eastern Hazarajat (SALEH) project commenced in 2003 and was implemented in four districts in Bamiyan Province.<sup>12</sup> The project was based on a participatory approach that included efforts to establish local institutions to sustain interventions to improve rural livelihoods. SALEH provided agricultural assistance to communities and established 54 pasture management committees. The project initially sought to establish agricultural associations, as pasture issues were often resolved within communities through customary councils. However, the project added activities seeking to clarify community-based procedures to adjudicate land conflicts over pasture as a result of recommendations from land tenure experts who recognized that such conflicts may arise in the future and that a prospective approach to improving institutional capacity to resolve such conflicts was a worthwhile investment (FAO Afghanistan, 2006).

The government played a very limited role in the SALEH project during the process of clarification of rights to pasture land. The project focused on helping rural communities clarify rights to local pastures without much in the way of state support. The reason for limiting the state’s role was the perception that the government does not have the capacity to manage pasture through a centralized process. Rather, the presumption guiding SALEH was that community regulation and management of pasture is appropriate because members of the communities are closer in proximity to the pasture, customary owners have a clear interest in appropriate pasture management, they have in most cases been dealing with the pasture for centuries, and the state often establishes institutions that undermine community ownership of pasture (Alden Wily, 2008a).

The draft National Land Policy of 2007, which was proposed during the period when SALEH was implemented, established a category for “community land” that would recognize customary rights to manage pasture consistent with local institutions. The draft Pasture Law specified simple steps to recognize owner-managers,

which is referred to as “custodianship.” The process of establishing custodianship consists of the following steps: (1) the community shows local conflicts have been resolved; (2) the community is acknowledged as the owner-manager of the pasture; (3) pasture boundaries are described in detail; and (4) the community provides a plan to conserve pasture and enforce its rules. This process of recording land ownership promised to clarify collective land ownership rights even though the state played a very limited role in the process (Alden Wily, 2012).

SALEH illustrates how projects can work with the government to acknowledge a role for community-based procedures to resolve conflict over pasture. This project also coordinated efforts with other development projects, including women’s empowerment projects that hoped to improve access to education for women. Although the proposed Pasture Law has provisions to recognize communal ownership, the government as of this writing has yet to approve it. Substantial uncertainty regarding the status of communal and customary tenures remains as a result of these political delays.

#### 4.2.2. RLAP (2006–2007)

The Rural Land Administration Project (RLAP) was implemented in four pilot sites in three provinces (Takhar, Herat, and Kunduz). RLAP attempted to reduce conflict over pasture by implementation of CBLAR. The project was based on the theory that community-based land administration by local people rather than by a district office of a central land registry linked to government land administration can improve household land tenure security (Stanfield et al., 2013). This project identified legitimate users by documenting land rights in consultation with maliks, shuras, and mullahs knowledgeable regarding traditional patterns of use of pasture, along with representatives from nomadic groups using those same pastures during different times of the year. The hypothesis guiding the project was that people would enjoy greater land tenure security, and be more likely to use and take care of pasture, if they produced and controlled access to their own land records.

The registration process began by asking village leaders if they wanted to identify legitimate holdings of private agricultural land. The project then applied the same process to identify legitimate users of pasture. The records of this process were kept with the village council, with copies filed with the provincial land administration agencies, including Amlak. Village leaders committed to keeping records and updating agreements as conditions changed and were willing to do much of the work of registration themselves, including for private land. The government’s role was to record the findings of the CBLAR process, to collect information regarding competing claims from various outsiders, and to provide support in efforts to enforce private and communal property rights. Members of the community continued to have some discretion in devising the rules governing the process to identify legitimate users of land and adjudication of disputes. In communities without a shura, the district or provincial governor could require a collective meeting among those using a pasture (Stanfield et al., 2010).

RLAP and SALEH illustrate the feasibility of implementing a CBLAR procedure. Each project interpreted the successful implementation of CBLAR as evidence of the project’s success in improving household land tenure security. Deschamps and Roe (2009, p. 31), in comparing these projects, suggest that by emphasizing “rights of use” rather than “ownership” of pasture, these projects were able to avoid the thorny issue of establishing ownership of pasture. However, SALEH placed greater emphasis on ownership than RLAP. Since communities assisted by SALEH did not experience inter-communal disputes over possession, the project assisted community efforts to secure legal acknowledgment of their collective ownership of assets, although rights would not include rights to sell land and would be dependent upon

<sup>12</sup> See <http://coin.fao.org/cms/world/afghanistan/en/Projects/SustainableAgriculturalLivelihoodsInHazarajat.html>.

sustainable management and use of those assets (Alden Wily, 2013, p. 62). To the extent these projects seem to have contributed to a reduction in inter-communal conflicts over pasture, they can be taken as evidence in support of CBLAR as a way to improve household land tenure security.

#### 4.2.3. PEACE project (2006–2012)

The Afghanistan Pastoral Engagement, Adaptation, and Capacity Enhancement (PEACE) project documented land conflicts involving nomads and trained government staff in community-based procedures to resolve disputes.<sup>13</sup> Unlike the SALEH and RLAP projects, the major component of the PEACE project was training government officials working for commissions established to address issues involving nomadic pastoralism. These commissions, including the Independent General Directorate of Kuchi (IGDK) in 2006, were created in response to conflict over pasture (Foschini, 2013).

The PEACE project sought to improve household tenure security by establishing dispute resolution processes that brought local groups together. In addition, the project provided training on dispute resolution to IGDK representatives in 31 provinces in the hope that the representatives would then implement community-based dispute resolution procedures (Jacobs, 2012). The project completion report describes the goals and accomplishments of the project, including resolution of 3450 conflicts along five major migration routes through the “Kuchi Shura Program,” which established “peace shuras” at the local level to facilitate resolution of conflict. The activities also included facilitating IGDK “shuras” in over 30 provinces (USAID, 2013b).

The project, which trained over 500 village and Kuchi leaders, developed a strategy to resolve conflicts through a deliberative councils alongside capacity building in conflict resolution techniques. Coordination with the government and local NGO partners was essential to identifying specific needs and suitable participants. The PEACE project was successful because communities chose conflicts they wanted solved, participants had a voice in finding solutions, and many agreements were registered with the district or provincial governor’s office (Jacobs, 2012).

### 4.3. Resolution of rural land conflicts

The third context of land reform is communities that have experienced land conflicts deriving from inheritances, access rights to water and pasture, boundary issues, and conflict among ethnic and tribal jurisdictions (Deschamps and Roe, 2009; Norwegian Refugee Council, 2006). The CBLAR projects which have been implemented in this context have generally sought to improve the ability of communities to resolve land conflicts. They also acknowledge the importance of customary mechanisms in resolving conflict and sought to strengthen them. These projects have also explored registration through a formal legal process, albeit with very little success to date.

#### 4.3.1. AREU/NRC land conflict project (2006–2009)

The objective of the Afghanistan Land Conflict (LC) project, which was implemented by the Afghanistan Research and Evaluation Unit (AREU) and Norwegian Refugee Council (NRC) with funding from MAIL and the World Bank, was to reduce land-related insecurity and vulnerability by strengthening the government’s capacity to resolve land conflict in a way that is fair, effective, and legitimate. The project acknowledged three different mechanisms to resolve land conflict: the court system, community-based mechanisms (CBMs), and political advocacy. According to an AREU

report on the project, rural landholders rely on CBMs at the expense of government-administered mechanisms because land titles are required for many land transactions and dispute resolution proceedings administered by the government. The result is that land management is mostly ad hoc, with disputants trying to navigate a complicated web of community-based and government systems that are often circumvented by influential people or the officials in charge (Deschamps and Roe, 2009).

The LC project acknowledged that customary adjudication is perceived as cheaper, faster, and more accessible than the court system. Customary law also places more emphasis on restorative justice, its rules are perceived as legitimate, and customary institutions are less susceptible to bribery and corruption than courts (Foley, 2011). In contrast to the projects discussed earlier, the LC project explicitly considered strengthening the linkages between courts and CBMs. While CBMs are often more efficient, less expensive, and more legitimate than courts, and in some cases, decisions are more enforceable, courts are increasingly popular in peri-urban and urban areas where the Afghan government has more reach. Therefore, the LC project explored the potential of coordinating the efforts of CBMs and courts, including the possibility of registering the decisions of a shura to give them legal status in some cases. In other situations, disputes would be referred by the government for resolution. In addition, for particularly complicated cases, both CBMs and courts may be unavailable, in which case political avenues may be employed on an ad hoc basis (Deschamps and Roe, 2009).

The LC project viewed the absence of legal title as a source of conflict and was therefore more optimistic regarding land registration as a way to improve household land tenure security than the projects discussed earlier. At the same time, the LC project retains the essential features of CBLAR since it acknowledged the importance of customary channels of dispute resolution and eschewed first registration except in areas where the state is stronger, such as urban and peri-urban areas.

#### 4.3.2. USIP land conflict and land dispute resolution project (2014 to present)

Efforts to clarify ownership through a centralized process in Afghanistan are rare. However, there have been discussions during efforts to reform land laws regarding the process of *tasfiya*, which refers to identification of land ownership and recording of the results in legally binding records. This process could be used for first registration on a national level and could in principle be conducted at the community level so that communities would take a primary role in first registration of ownership (Alden Wily, 2013).

The United States Institute of Peace (USIP) began the Land Conflict and Land Dispute Resolution project in 2014 with support from the United States Department of State. This project, which was also supported by ARAZI, explicitly offered landholders an opportunity to register their land ownership with the government in pilot sites in Kunduz and Khost. A more thorough review of this project is not possible in this paper. However, it is important to note that almost none of the respondents desired clarification of ownership through a formal titling process. The reasons include the complexity of the process, as legal titling requires working with at least five agencies (ARAZI, court, cadaster, local government, and Ministry of Finance), as well as multiple fees (Alden Wily, 2013). The USIP formalization and clarification project also encountered major challenges, including political indifference, corruption, and incompetence (Gaston and Dang, 2015). This project illustrates that landholders may not be interested in formalization of ownership through a legal process because they do not trust that increasing the state’s role in land relations will improve their land tenure security. They also risk losing their lands if the state does not recognize their claims as “legal.”

<sup>13</sup> For a description of the Afghanistan PEACE project, see: <http://cnrit.tamu.edu/peace/index.html>.



## 5. Conclusion

CBLAR promises to improve development prospects in contexts where customary tenures are not legally recognized or where their legal status is unclear (Alden Wily, 2011, 2008b). Evidence from Afghanistan shows that CBLAR can be implemented across a wide variety of contexts. It also shows that the success of CBLAR requires long-standing, accountable, and legitimate systems of customary land governance. CBLAR is works in the Afghan context precisely because customary governance remains a reliable and proven option in many urban and rural communities. Efforts to implement CBLAR in a context where customary governance is unreliable or ineffective are unlikely to improve household land tenure security. Such projects are also more likely to improve household land tenure security when they are embedded in broader institutional reforms and accompanied by investment in the types of public goods that provide greater opportunities to participate in markets and to use services provided by the government, such as police and courts. To date, only a few of the pilot CBLAR projects explicitly coordinate their activities with these sorts of complementary investments. In addition, the projects that have included road-building components tend to emphasize CBLAR while downplaying the importance of roads. Our findings suggest that the donor to community can do more to acknowledge that the consequences of CBLAR depend on coordinating such projects with investments in public goods that increase opportunities for people to participate in markets, to access government services, and strengthen local forums to resolve land disputes.

These findings from Afghanistan are cause for optimism. They show that the criticisms of legal titling have led to widespread use of CBLAR. Yet the current political context of Afghanistan tempers our optimism. The Land Grabbing Law has yet to become law and revisions to the Land Management Law have been frustrated by political delay and indifference (MEC, 2014). A more pressing problem is that Afghan leadership remains committed to legal titling. President Ashraf Ghani's political manifesto of 2014 take the position that first registration is necessary to improve land relations:

...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 these properties. ...In addition, our other commitment is for a registration program to take place comprehensively and nation-wide so that all the documents and certificates are made accessible to our countrymen via electronic storage. The old methods of keeping documents in storage rooms, tax offices and so forth will be fully transformed into a very clear program of property registration through electronic storage of information and will be prepared in written form and published at a specific time for transparent decision-making in all court and commission settlements (Ghani, 2014, pp. 86–87).

Our research acknowledges the challenges posed by property insecurity for economic development and political order but also that first registration along the lines suggested by President Ghani would do little to improve household land tenure security. Establishing the administrative capacity of the state is necessary before such first registration would have a reasonable chance for success (Murtazashvili and Murtazashvili, Forthcoming). Rather, CBLAR warrants serious consideration as an alternative to legal titling in the current Afghan context.

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