Promoting Legal Recognition of Community-Based Property Rights, Including the Commons: Some Theoretical Considerations

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Threats to community-based property rights, including the commons, particularly for local people in the majority world (a term I prefer over "developing countries" because most human beings live there), are serious, severe, and getting worse day-by-day. The primary problem arises out of the fact that many, if not most, nation-states in the majority world ignore community-based property rights and instead claim ownership of vast areas of natural resources, including areas inhabited by indigenous and other local peoples.

The extent of these sweeping claims of state ownership is truly staggering. In many countries, the nation-state claims ownership to well over half of the land base. In Indonesia, for example, an estimated 90 percent of the Outer Islands are legally classified by the national government as state owned forest land. These areas are not all forested. (Be wary of equating legal categorizations with actual ground level conditions.) They are, however, home to perhaps more than seventy million people, including over thirty million indigenous. All of these Indonesian citizens are legally deemed to be squatters on public land, regardless of their length of occupancy.

Many rural peoples in Indonesia and throughout the majority world are guardians and stewards of natural resources, including biodiversity reservoirs and carbon sinks, and possess important local knowledge for managing these resources sustainably. Of course, local conditions and cultures vary and not all local people, including indigenous people, respect and protect their natural environments. But all of them are human beings, and on that basis alone should have a fundamental right to participate in decisions that directly impact on their lives and livelihoods. Unfortunately, rural peoples in the majority world in terms of international and national laws are largely ignored and many still continue to be forcibly dispossessed from the ancestral homes.

In my work with public interest lawyers from various countries in Asia, the Pacific and Africa, we are striving to amplify the voices of rural people in law and policy making processes on national and international levels. We try to undermine the political economy of ignorance which makes it easy to overlook the presence of rural people and their community-based property rights.

One strategy for doing this involves rethinking prevailing theories of property rights. Most property rights theorists and students rely on a four-part typology: private (which is a misnomer because it really means individual), commons, state, and open access (which refers to a situation where no defined property rights exist). This typology has proven to be very useful in distinguishing common property from open access, and has played an important part in

challenging the impacts of Garret Hardin's influential article which is about the "tragedy of open access" and not any "tragedy of the commons."

I believe that continued and largely uncritical reliance on this four-part typology is hampering the development of practical and effective legal and policy tools for helping local people gain recognition of their community-based property rights, including their common property. The prevailing typology simply doesn't work well in law and policy making nor in project design processes. It overlooks the spatially and temporally dynamic nature of community-based property rights systems. It also promotes the disaggregation of individual rights from the community-based systems in which they exist and are legitimated. The World Bank and most other financial lending institutions, as well as most nation states, promote individuation and disaggregation in the belief that individual property rights are superior to group-based rights as they can be bought and sold, i.e. marketed, much more easily.

Another problem with the prevailing four-part typology is that it implies that there is a distinct and separable commons within community-based property rights regimes. In my work I have found that it is almost impossible to isolate "the commons" within a community-based property rights system. It should be obvious by now that there are usually many different, and often overlapping, types of commons within a community-based property rights system.

I prefer to think of property rights using two conceptual, and interrelated spectra: The first spectra has public on one end and private on the other. Public means it's owned by the state and private means its not owned by the state. The degrees of private and public ownership, however, vary with some private rights being heavily encumbered by state conditionalities such as easements and zoning restrictions, and some public rights being largely unregulated. Private titles, therefore, are not necessarily the strongest type of property right. It depends, as Margaret McKean suggested in her talk, on what's in the bundle. To know what a specific property right entails, whether its a private title or a public lease, requires that you identify what's in its bundle.

The other spectra has individual on one end and group on the other. The group end basically refers to community-based property rights regimes, most of which typically include individual rights as well as common properties. Individual property rights do not only emanate from nation-states. Rice terraces in Southeast Asia provide a good example of this. I've never known of a rice terrace in the middle of a public forest zone in Asia that wasn't individually owned, usually in accordance with a local community-based property rights regime.

The fundamental characteristic of a community-based property rights is that their primary legitimacy is drawn from the community in which they exist, and not from the nation state in which they are located. So when I refer to group rights I am primarily speaking of a local group that provides the authoritative basis for the property rights, and not so much on the specific characteristics of the property rights within the community-based regime.

Cross-referencing the two spectra allows for the identification of four types of possible property rights.

1. **Private-individual**. A private, individual property right is the lodestone of capitalist (Western) property rights and concepts. It includes a Torrens title or a fee simple absolute. A private, individual property right is widely believed to be the best possible type of property right. One reason is that individual private owners tend to have the greatest freedom to use resources as they see fit.

2. **Public-individual**. This type of property typically refers to a lease to an individual (or a corporation which in some nations is deemed to be the legal equivalent of an individual) of legal rights over land that is ostensibly government owned. Timber concessions are a classic example. Over the past decade in Asia, as the plight of rural peoples has garnered more attention, several countries such as Thailand and the Philippines have also developed programs for conditionally leasing public-individual rights to small-scale forest farmers, usually for a fairly short period of time ranging from two to twenty-five years.

3**. Public-group**. This category refers to legal arrangements where a government conditionally leases or otherwise delegates property rights, usually for a specific period of time, to a local community or user group. With the growing emphasis on such concepts as community forestry and community-based natural resource management the range of new types of public-group rights is increasing and would include the CAMPFIRE program in Zimbabwe (which is still limited to wildlife) as well as the Joint Forest Management program in India.

4. **Private-group**. The best (although the most rare and difficult to acquire) option for protecting community-based property rights, including the commons, especially for original long-term occupants of a specific area, would be to acquire legal recognition of private-group rights, a concept that should encompass individual and common property rights within the perimeter of a community-based property regime.

Private rights are less easily canceled, and less easily controlled by the government, which is a major reason why private individual rights are so popular and legally well entrenched. They also provide more leverage when negotiating with governments and wily outsiders, a benefit many poor rural communities surely could use. Private rights, however, whether individual or group-based are not absolute. No property rights are or presumably ever were completely free from some degree of governmental regulation in the public interest (although some promoters of the "takings movement" in the USA would have us think otherwise). Indeed, I have long argued that rural zoning laws, akin to urban zoning, should be considered to regulate and control unsustainable and/or inappropriate land use in areas that are covered by private rights.

One last point: there is a huge difference in my work, especially for indigenous peoples, between the legal recognition of their community-based property rights and the state granting them property rights. Community based property rights already exist among indigenous peoples, and something is seriously wrong when they are obliged to request their respective national governments to grant them property rights. Indigenous peoples, and many other rural resource users, already have property rights and are seeking state recognition of their rights, not state grants of new rights.

People naturally begin developing attachments to the natural resources in the areas where they live. The more time and labor that is invested in developing a resource, the more the investors tend to think that they have rights to the natural resources they are using. This is not a new insight. Roman law recognized that the first user of a resource had a right to it by virtue of first use; the longer the use, the stronger the right. Indeed, for all the terrible things that have befallen native Americans in the USA over the centuries, the US government seldom referred to them as squatters. Instead, federal courts have long upheld the notion of aboriginal title, a concept dating back to the Roman Empire.

Indigenous peoples and other long-term occupants of so-called public lands clamor for legal recognition of their community-based property rights, including their common properties. The alternative would be to concede that their ancestral domains are public and to ask their respective governments for a grant of property rights. In my experience, that latter option is unfair and difficult to pursue successfully. It is also much more likely to undermine community-based property rights, including the commons.