

OWNERSHIP AND PROPERTY RIGHTS ISSUES IN WATERSHED RESOURCE MANAGEMENT

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INTRODUCTION

In any human society, institutions whether formal or informal, establish the standards which guide or govern both individual and group behavior, and in the process define the rights or entitlements that people possess in relation to other people as well as to the material and the abstract things in their midst. Those relationships concerning things are referred to generally as "property rights."

By its generic nature, this phrase embraces a wide range of examples including rights to acquire, possess, use, transfer and dispose of different classifications of land (i.e., private, public, common/communal or open access), crops, water and other material resources. Particularly in today's modern world, it also covers rights to abstract possessions or intellectual properties like scientific inventions, industrial or fashion designs, and indigenous knowledge systems.

When applied to upper watershed areas involving forest resources, property rights are those rights held by individuals, groups and/or societies with regard to "forest land and all the resources found therein." In the literature, the resources most often cited because of their greater economic value are trees, water and minerals. It is only lately with the emerging consciousness of the need to conserve biological diversity that the intrinsic value of animal and other plant resources is also being recognized. Property rights concerning these

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various natural resources are more specifically termed lately as "natural resource rights."

Property rights define who can take advantage of these rights; they create opportunities and incentives for the holder (Gibbs, 1986). In reference to watershed management, these rights govern the control and use of watershed resources, principally land, trees and water. In order to guide the effective use of such resources, they must be well-defined, enforceable, and transferable (Bromley, cited in Gibbs, 1986).

Well-defined property rights enable individuals to understand fully and in advance, the implications of their actions. The probable low enforcement of property rights for a certain resource may lead to disrespect or abuse of those rights and may create disincentives to invest in that resource. Transferable property rights allow mobility of resources, particularly their movement from lower to higher valued uses. But prohibiting resource transfer to more valued uses may lead to inefficient resource management when either the prohibition is circumvented because the uses are too valuable to be passed up, or when the uses are themselves ignored.

Thus, understanding property rights regimes operating in regard to watershed resources is imperative for effecting and sustaining good watershed management for these point out the motivations that underlie people's behavior toward the resources. It is apparent in the literature that rights to land and trees located in forests are better studied and more understood than those governing water.

Property rights regimes identify various ways by which resource rights come into people's possession, and ownership is one such way. Ownership defines the nature of the status of the holder with regard to a particular resource. It is a unidirectional relationship between the holder and the resource, one that allows the holder maximum control over that resource.

Ownership of particular resources like land and trees may result from legislated or customary tenure which are institutional arrangements that spell out in the form of rights how people may access and make productive use of these resources. However, some tenure specialists like Bruce (1989) view "ownership" to be a rather more specific example of "tenure" in the same way as "usufruct" (customary use right), "leasehold" and "stewardship" (guardianship) are. Like tenure, ownership is better understood as a "bundle of rights" (Lynch, 1993). Under this bundling concept, the ownership status vests in the holder various rights that define access, control, utilization,

management and disposition of a particular resource. Categories of ownership are largely determined by categories of property, for instance, private or public ownership for private or public properties.

Conflicting ownership claims that lead to insecure land tenure and resource use rights are among the major institutional factors that hinder successful natural resource management in the country's forestlands or upper watershed areas.

This paper shall attempt to show how the existing dualistic system of reckoning property rights, especially resource ownership rights, raises certain issues in relation to the management of forest or watershed resources, and what their implications are for policy research.

DUALISM IN RESOURCE OWNERSHIP

Around 70% of the Philippines' total land area of 30 million hectares are considered watersheds and a greater part of the watersheds are comprised of forestlands. Classified and unclassified forestlands comprise about 53% of this total land area or 15.88 million hectares. Since forests constitute a vital component of watersheds, sustainable forest use cannot but be highly beneficial to watershed management. As it is today, the forests including watersheds have many uses and users—i.e., multiple publics with individual stakes in the forest, or stakeholders (Rebugio, 1996). But in as far as ownership of forest and watershed areas are concerned, there exists a dual system delineating two principal claimants to the same resource base: the state and the indigenous peoples.

This duality appears to be the result of major historical antecedents associated with: (1) the waves of conquest and colonization which upheld the sovereignty of the state and the supremacy of its rights over those of the country's original inhabitants who are now called indigenous peoples; and (2) the dominating social forces of progress, modernization and development during the past half century which kept the indigenous peoples out of the mainstream but which exacerbated encroachment on their ancestral domains. The two opposing resource ownership claims have existed in juxtaposition with minimal conflict for scores of years until the present times, when population pressure has steadily eroded the resource base, thus making resource control an imperative oftentimes for the survival of either the state or of indigenous societies.

Other authors, notably lawyers, have written extensively or partly about this dualistic ownership system in relation to the land tenure situation and ancestral domain claims of indigenous peoples. For instance, A. Gatmaytan (1992), who has analyzed this dualism extensively, considers it "opposing perspectives on the same land or resource base...two different world views of a single physical world." Gasgonia (1992) refers to it as "two schools of thought...: those that invoke the Regalian Doctrine and those that invoke Native Title." Similarly, D. Gatmaytan (1992) and De Guzman (1993) have also invariably referred to it as a divergence between the national law or legal system and the indigenous or customary law and concepts.

Formal statist system

On the one hand of the dual system lies the formal, national legal system, which embodies what Falk (1988) terms the "statist framework of rights." It provides the foundation for the state's claim of sole ownership and full jurisdiction over all lands of the so-called public domain as well as all the natural resources found in the country. This claim traces its origin to the Regalian Doctrine of the Spanish period, which presumed that all lands and resources belonged to the Crown or the state, excepting those it had granted or titled to private parties. It also finds reinforcement in the most recent 1987 Philippine Constitution, in existing legislation (like the Public Land Act, the Forestry Code, the Water Code, the Mining Act and the National Integrated Protected Areas System or NIPAS Act, among other legislations), in judicial pronouncements and in administrative policies and issuances governing the country's natural resources (Gatmaytan, 1992; La Viña, 1996).

The 1987 Constitution is quite clear in stating that the state owns "all lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources" (Art XII, Sec. 2). This implies that even for lands covered by titles, ownership and control of the natural resources found within the titled land are still retained by the state (A. Gatmaytan, 1992:17-18). Thus, a landowner may use the water found in his property for domestic purposes without securing a permit, but government can require him to register such use or regulate such use whenever necessary (Art. 6 of the Water Code). It also explains why local communities or indigenous groups awarded a stewardship contract or a certificate of ancestral domain claim must

secure permits to cut trees or harvest rattan even if these were grown by them or why they are not entitled to extract the mineral resources found beneath the surface of their titled property.

The legal system has classified lands of the public domain into four types—agricultural, forestal (forest/timber), mineral and national parks. It has also pronounced these public lands, except for agricultural lands, as inalienable along with other natural resources. In the case of forestal lands, or those lands with at least 18% slope which can range from having dense forest cover to being actually treeless, these may not be declared alienable and disposable and hence may not be titled. There is no way under present legislation, therefore, for communities or inhabitants to acquire ownership and titles to occupied areas within forestal lands unless these lands are reclassified into alienable and disposable public lands (De Guzman, 1993:7). But so far, only agricultural lands of the public domain can be so reclassified.

As provided for by law, the state reserves the right to exercise full control and supervision over the exploration, development and utilization of all natural resources. It may directly undertake such activities through its various agencies, or enter into co-production, joint venture, or production sharing agreements with private citizens or with predominantly Filipino groups for a period of 25 years, renewable for another 25 years.

The Department of Environment and Natural Resources (DENR) is the primary government agency tasked by the state to protect, conserve, manage, regenerate and develop the country's forestlands and watersheds. Areas, which have been proclaimed Watershed Forest Reserves, now numbering 120 with a total of around 1.38 million hectares and located in 15 regions of the country, are directly being managed by DENR (Table 1). These watershed reservations are designated as initial components of the National Integrated Protected Areas System.

But through certain Executive Orders and Letter of Instruction, the state has turned over jurisdiction of 12 watersheds, watershed forest reserves, or geothermal reservations (whole or parts thereof) totaling 684,948.10 hectares from DENR to three other government institutions. These institutions are the National Irrigation Administration (NIA; by virtue of LOI 1002), the Philippine National Oil Company (PNOC; E.O. 223), and the National Power Corporation (NPC; E.O. 224). The sizes of the watershed areas under their respective protection, management and development are indicated in Table 1.

Table 1. Selected data on size of forestland/watershed areas under management of stakeholder and of designated open access areas

Type of Data	Area Covered (in has)
Managed forestlands/watersheds under certain stakeholders*	7,082,308.39
National Government Agencies/Institutions:	2,062,034.09
• DENR – 120 Watershed Forest Reserves	1,377,085.99
• Others: NIA, PNO, NPC - 12 watershed areas	684,948.10
Corporate-Based Forestry Industries:	2,101,842.30
• Timber License Agreements	1,405,998.00
• Pasture Lease Agreements	215,710.00
• Industrial Forest Management Agreements	480,134.30
Local Government Units	
• Communal Forests	(unavailable)
Local Communities & Individuals/Peoples' Organizations (under the CBFM Program)	2,918,432.00
Open Access Areas	7,552,349.00
• Expired, canceled, suspended TLAs	7,189,810.00
• Canceled PLAs	36,244.00
• Canceled IFMAs	326,295.00
Total forestlands/waters**	14,634,657.39

Sources: 1997 DENR Fact Sheet on Watershed and 1997 DENR Strategic Action Plan for CBFM.

* Not exhaustive, with probable overlapping figures.

** Does not include areas covered by regular reforestation projects and mangroves.

The state, acting through DENR and its predecessors, has also granted rights to access forest resources by way of licenses, leases, permits or production-sharing, joint-venture and co-production agreements to persons, natural and juridical, who are not forest inhabitants or local residents (A. Gatmaytan, 1992:18). In the forestry sector, it has issued Timber License Agreements (TLAs), Pasture Lease Agreements (PLAs) and Industrial Forest Management Agreements

(IFMAs) to what Angeles (1995) calls the "corporate-based forestry industries". These are issued for the occupancy, exploration, development and management of certain areas in forestlands and the utilization therein of certain natural resources, including timber.

According to DENR, some 2.1 million hectares located in eight regions of the country are presently still under existing TLAs, PLAs and IFMAs. Expired, cancelled and/or suspended TLAs, PLAs and IFMAs have contributed to the increasing size of open access forestlands which invite illegal logging, poaching, and irresponsible slash-and-burn farming, thereby hastening forest or watershed degradation. According to DENR statistics, the open access areas now total about 7.5 million hectares, which is slightly more than the total size of the managed forestlands of around 7.0 M has (Table 1).

Moreover, in seeking to involve forest peoples and communities as partners in the sustainable management of forest resources, the DENR has embarked on a number of people-oriented forestry programs which have been recently integrated into what is now known as the community-based forest management or CBFM program (1997 DENR Strategic Action Plan for CBFM). Included in this new umbrella program are the Integrated Social Forestry Program, which has been devolved to local government units, the Community Forestry Program, the Forest Land Management Program, and the Ancestral Domain Management Program.

These different programs grant tenurial security under the stewardship concept to forest occupants, both individual families and entire communities, through various instruments that ensure access and use rights to forestal lands for 25 years, renewable for another 25 years. Based on current figures obtained from DENR, there are presently 2.9 million hectares of forestlands under the CBFM program.

DENR has also involved the local government units in forest management and protection by devolving communal forests to these units. However, no aggregate data is immediately available to indicate just how large an area the devolved communal forests represent.

Informal customary system

On the other hand of the dualism is the informal, customary system on which traditional societies, in particular indigenous peoples, base their claim of ownership and use rights over their traditional territories or what is now known as ancestral domains. The claim is supported by custom law that is believed to be in existence longer than the Spanish Regalian Doctrine and therefore vesting in the indigenous groups a prior

vested ownership right. This is the idea behind its reference to, or equation with "native title" (De Guzman, 1993; Gasgonia, 1992). Viewed as an indigenous right, the ancestral domain claim also presently finds international acceptance in the Rights of People principle under the larger framework of human rights; this principle presents a contrast to the Statist Conception of Rights (Falk, 1988).

Studies of indigenous Filipino concepts and practices related to land use have revealed that ownership of the ancestral domain belongs not to the individual but to the community. The domain is a community or group holding that includes not only the places where individual families farm and live in, but also where they hunt for animals and fish, where they obtain curative plants and other cultural requirements, as well as where they bathe, frolic, hold their rituals, and bury their dead.

De Guzman (1993) has shown that because land is equated with life and survival as a people, the loss of it by indigenous Filipinos is tantamount to their extinction. Land refers to the larger domain or territory, and the domain is a community heritage bestowed by a Supreme Being. Therefore the indigenous Filipino has a birthright to the resources within the domain and at the same time a sacred duty to preserve them for future generations. The domain is divided according to specific uses. There are common access areas where any member of the group can enjoy the land and its resources. There are also areas designated for swidden farming and residence, which may be considered as personal property by individuals, families or clans by virtue of usufruct or proprietary use rights. Although tenure is established and maintained by actual and continued land use (in between fallows), usufruct rights may be abandoned so another party may claim use of the land for himself. However, the one who planted the crops on the land gets to keep the fruits even after the land has changed hands. The right to use the land does not mean the right to own it. Lands within the domain are generally inalienable and cannot be disposed of outside the community that owns them. Land transfer and sale must take place only between community members.

Over the years, the indigenous peoples have suffered from land dispossession. What has remained of their traditional territories is now found in public forests, thus creating insecure land tenure statuses for these original forest dwellers. Lack of tenurial security over ancestral domains is often taken to mean by them as lack of ownership and control over these traditional territories (A. Gatmaytan, 1992).

At present, the state is trying to come to terms with the indigenous customary property rights regime by recognizing ancestral domain/land rights and by establishing the ancestral domain/land program which both the indigenous peoples and the advocates of their rights deem inadequate. Legal debates on the formal legal system and its treatment of the ancestral domain issue center on the following points: (1) that the ancestral domain claim is a claim to private land by indigenous peoples which the state does not and cannot acknowledge within the current legal system; (2) that while the Constitution provides for the recognition of ancestral lands/domains, the existing laws which appear not to interpret this intent remain unchanged, and worse, there is still no law passed that implements the constitutional mandate; (3) that until such a law can be enacted, the ancestral domains will remain an open and easy target for encroachment of all types via government projects, and government agencies and other stakeholders shall persist in controlling the resources found therein; (4) that some convergence can be found on the concepts that recognize property regimes in the two systems enough to permit the titling of ancestral domains as communal property; and (5) that the tenurial instruments—i.e., Certificates of Ancestral Land Claims (CALCs) and Certificates of Ancestral Domain Claims (CADCs)—reflect the aspirations of indigenous peoples and may thus provide a temporary solution to the ancestral domain problem.

To briefly sum up and compare the two systems on a number of salient points, see Table 2.

SOME ISSUES AND DIRECTIONS FOR POLICY RESEARCH

- 1. Managing conflicts among the various contending stakeholders in the watershed.** Evidently, the different forest land use and resource management schemes initiated by the state have succeeded in creating multiple publics with their own respective stakes in the forest or watershed. The presence of several stakeholders in an area has oftentimes resulted in the problem of overlapping or conflicting vested rights to a common resource base. It is not uncommon today to find in a watershed area, for example, at least two stakeholder groups each with vested rights granted at different periods in time. The conflict is usually between parties occupying superordinate and subordinate contending parties; while they stand on the sidelines on the matter of dispute, they are very influential in its eventual resolution.

Table 2. Salient features of the dualistic system of forest resource ownership in the Philippines

Formal Legal System	Informal Customary System
<p>The state owns all lands classified as public domain and all natural resources in the country</p>	<p>The group/tribe owns all lands within the traditional territory/ ancestral domain and all the resources found therein</p>
<p>Ownership is founded on the Regalian Doctrine and on subsequent legislation and administrative policies</p>	<p>Ownership is by virtue of prior and immemorial possession of the ancestral domain</p>
<p>Public lands came into the hands of the state through conquest and colonization, hence there is no intimate bonding between owner and land</p>	<p>Ancestral domain came into communal ownership through a common heritage bestowed by a Supreme Being, hence emotional and spiritual ties bind the owner to the land</p>
<p>Except for agricultural lands, no one else can own the other public lands (forestal, mineral & national parks) and all natural resources found therein, and resources in titled property still belong to the state</p>	<p>The domain is inalienable from the group, with all members owning the designated common access areas, but residential and farm parcels are treated as private property through proprietary use rights</p>
<p>Public land and/or resources may be accessed, used, managed and developed by local and/or foreign entities through licenses, permits, leases, and agreements for co-production, joint-venture and production sharing granted by the state</p>	<p>Common access areas and their resources may be enjoyed by any group member as it is considered a birthright; private home and farm lots and the crops one has grown may be transferred within the family or group only</p>
<p>The state employs the assistance of local individuals, communities and corporate entities in sustainably managing, using and protecting certain public lands and resources (viz. forests/watersheds) under the stewardship agreement covering 25 years and renewable for another 25 years</p>	<p>It is an inherited duty of every member of the group to protect, conserve, manage and sustainably use the communal lands and resources of the group</p>

2. **Pushing for IEC, organizational strengthening and livelihood support for DENR's Ancestral Domain Management Program.** Between the statist and the customary systems lies the unresolved issue of who really exercises prior ownership—is it the state or the IPs? Many see the absence of a legislation on ancestral domain recognition as a crucial factor to its resolution so the push for the enactment of such a legislation must continue and escalate. Many also expect the issue not to be immediately resolved because this shall require a complete turnaround on the part of the state. At the moment, however, the ADMP is the best possible concession that the indigenous peoples can get from government and so policy and program support for ancestral domain must be enhanced. There are numerous needs in this area, foremost of which are in the information, education and communication or IEC, organizational strengthening and livelihood aspects.

Data from the field indicate that in most cases, if not all, DENR support for the ADMP tends to cease after the awarding of the CALCs or CADCs, often leaving the status of indigenous groups relatively unchanged. This is such a pity considering that in many instances, the support for IEC, organizational strengthening and livelihood improvement is available at DENR if not with other government and nongovernment organizations. In this regard, it is necessary initially to determine the kinds of assistance desired and required by the CADC awardees, how to match their needs with the existing resources available, what mechanisms are best to ensure that the assistance gets to those who needs it most and for whom it is intended, and how to develop and further strengthen the awardee's organizational capabilities to deal with their external support.

3. **Linking the interests of forest communities with those of forest industries.** Community-based forest management need not be a threat to forest industries and the latter need not be anti-CBFM as different stakeholders have their own significant roles to play in sustainably managing the forest. How can government and business corporations be motivated to engage in a mutually-beneficial and equitable partnership with forest communities, and vice versa, to produce the forest products they need but at the same time conserving and renewing forest resources? What initiatives or incentives is each sector willing and able to bring into such a partnership? It is worth analyzing closely what arrangements

are currently working between the forest communities and private corporations to manage, protect and conserve forest and watershed resources.

4. **Updating knowledge and understanding of the socio-psychological and cultural changes undergone by indigenous peoples.** With the growing international acceptance of rights of peoples, in particular, indigenous rights within the traditional framework, there is need to deepen and expand our understanding of how indigenous concepts of property, ownership, resource use and management have become altered over time by various extraneous factors caused for example by intermarriage, education, migration or even the introduction of government programs. Land and resource transfer to non-indigenous populations or to another indigenous group is, for example, frequently effected by inter-ethnic marriages. The knowledge we hold about indigenous lifeways may no longer be compatible or may even clash with the realities of change that indigenous peoples constantly face today. Programs have been known to fail because such knowledge sadly needs updating.
5. **Understanding the situation of forestal lands converted into open access areas.** As the TLAs, PLAs and IFMAs expire or are suspended or cancelled, the number and extent of open access areas are expected to increase. The DENR anticipates these areas to be "hotspots" in the future and hopes to address the problem by implementing CBFMP there. But how this is exactly going to happen is not quite clear yet and the specific policies have yet to be evolved. In the meantime, there is need to learn what are the conditions prevailing in the country's 7.5 million hectares of open access areas, such as who have now staked claims in these areas, what are the land use mixes present, or how fast is environmental degradation occurring there.

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