

Community-Based Property Rights: A Concept Note

Property rights are an important factor in natural resource management. Indeed, sustainable development is unlikely to ever be attained in many locales if the property rights of indigenous and other local communities remain unrecognized by national and international laws. Terms and concepts concerning property rights, however, have deeply imbedded and often different meanings for different people. As efforts to understand the relationships between different domains of work and scholarship increase, new insights concerning challenges posed by language are emerging. The emphasis given by "poststructuralists" to language and interpretation is having an enormous impact upon thinking and scholarship in the liberal arts and social sciences, including theories and concepts related to property rights. Different concepts of property lend support to and are consequently reproduced by particular political-economic or cultural orientations. As such, it is important to develop and disseminate new ways of discussing property and property rights that better reflect and promote the concerns and best interests of indigenous and other local communities.

CIEL's Law and Communities Program first publicly invoked the term "community-based property rights" and the acronym "CBPRs" in 2000. Among other things, the CBPR concept is purposefully designed to be useful in advocating on behalf of local communities and their rights to manage and control natural resources. It is the product of a program objective to develop and promote applied legal concepts that are more pro-community and more equitable than widely used terms such as common property and "community-based natural resource management," which is also known by the acronym CBNRM. The concept of CBPRs provides an intentional and strategic conceptual contrast to CBNRM, common property, and other terms such as co-management and joint management.

Legal recognition of CBPRs by governments should be understood to be an aspirational and optimal goal for many local communities that are or will be negotiating natural resource management agreements with governments. Although full legal recognition of CBPRs as private rights may not be the final outcome of a particular negotiation with states that claim ownership and control over vast areas, it is important that long-marginalized local communities and advocates on their behalf know of and pursue an optimal ideal outcome. This is fundamental to any credible and fair negotiation process involving rural peoples and their property rights.

DEFINING CBPRs

Property rights are not necessarily contingent on state grants or formal documentation. Like human rights, which derive their authority from and are recognized by international law as well as by anthropological and natural law concepts, the existence of CBPRs is not necessarily dependent on governments or any assumption of state creation, grant or recognition. Rather, CBPRs encompass ubiquitous and very real local-level dynamics in which many rural people establish, maintain and enforce community-based management rights and obligations regarding natural resource use and development. Typically, longer-established communities, and especially indigenous ones, have more developed understandings of and reliance on their CBPRs, many of which have been formed in response to local environmental conditions.

Community-based property rights by *definition* emanate from and are enforced by communities. The *distinguishing feature* of CBPRs is that they derive their authority from the community in which they operate, not from the state where they are located. Formal legal recognition or grant of CBPRs by the state, however, is generally desirable and can help to ensure that

CBPRs are respected and used in pursuit of the public interest.

References to community-based natural resource management and property rights should be used only with regard to initiatives that are primarily controlled and authorized from within a community. Externally initiated activities with varying degrees of community participation should not be referred to as community-based, at least not until the community exercises primary authority in making decisions. Unfortunately, the term "community-based" is loosely used and applied too often to initiatives with only the limited involvement and support of local communities.

In contrast to widely used and largely uniform Western concepts, CBPRs within a given local community typically encompass a complex, and often overlapping, bundle of rights that are understood and respected by a self-defined group of local people. As with common property, CBPRs are not equivalent or even similar to "open access" regimes that by definition are subject to no management rules and are therefore non-exclusionary.

CBPRs often include, but are not limited to, common property. They can also encompass various kinds of individual rights and kinship rights, such as inherited rights to agricultural fields and fallows, gardens, planted or tended trees or rattan clusters, and the like. CBPRs likewise can include rights to land, wildlife, water, forest products, fish, marine products, intellectual property, and so forth. CBPRs may vary in time and place to include rights to seasonally available resources such as fruit, game, fish, water, or grazing areas. They often specify under what circumstances and to what extent certain resources are available to individuals and communities to inhabit, to harvest, to hunt and gather on, and to inherit.

Throughout much of the Global South, CBPRs exist in many places and are often distinguishable from Western property rights concepts. Western concepts are based largely on state-created and protected private individual rights, or on socialist concepts that theoretically vest the state with ownership of all land and other natural resources to supposedly best promote the public interest.

Some critics have argued that it would be best to prevent any confusion with Western concepts by simply not using the term property rights. They fear that applying the term "property rights" to indigenous rights, even if prefaced by the term community-based, could weaken and undermine traditional local control of natural resources. Their concern is largely based on the widespread and increasing commodification of property rights throughout the world.

Unlike individual property rights, however, legally recognized CBPRs would not be as prone to commodification, because they are group-held, and decisions to sell any rights must involve the group. In addition, use of the term property rights makes clear to the state and other external forces, in language they understand and rely on, exactly what a particular local community claims and aspires to have recognized. Besides fostering clarity and limiting misunderstandings, use of common language can help limit opportunities for collusion and manipulation by outsiders. An analogous situation involves participatory community mapping. The concept of maps is not indigenous to most areas in the Global South covered by indigenous CBPRs, but an increasing number of indigenous communities are mapping their ancestral territories. These maps, even when not recognized by government, can sometimes be used as valuable tools for resisting encroachment.

DECENTRALIZATION AND COMMUNITY-BASED PROPERTY RIGHTS

The concept of CBPRs described in this issue brief is comprehensive and flexible. It is also markedly distinct from decentralization initiatives currently underway in many nations. Decentralization can help foster and support legal recognition of CBPRs and various types of CBNRM initiatives, but decentralization to local gov-

ernment units does not necessarily lead to such outcomes. In some countries, decentralization/devolution can even preclude them, and purposely so, as local government officials assume and maintain legal control of valuable resources to cover local government costs.

Throughout the Global South there are literally thousands of local traditional leaders and their constituencies outside of formal local government units. These traditional villages, local communities, and CBPRs are typically heterogeneous and dynamic, and many exist and function outside of official government structures.

One useful conceptual tool for clarifying these facts is to distinguish between the *grant of legal rights* by the state and the *legal recognition of CBPRs*. Legal rights do not emanate solely from nation-states. There are various theories of law and jurisprudence that acknowledge as much. When national governments own land and other natural resources, they can decentralize authority to local government units or local officials, which then grant management/property rights to communities located within their jurisdiction. But when community-based property rights already cover an area, the state may (and often should) be obliged to recognize these rights, especially when the area is an ancestral domain/indigenous territory that pre-exists the state and its natural resource classifications.

LEGAL RECOGNITION OF COMMUNITY-BASED PROPERTY RIGHTS

Government recognition of CBPRs, especially indigenous ones, is often desirable and necessary. But it need not always entail formal codification or the issuance of any specific documents. More important is the government's fulfillment of its responsibility to help resource-dependent communities defend and benefit from sustainably managed natural resources, whether public or private. In many instances, the best way for governments to promote environmental justice, including local incentives for conservation and sustainable management, would be to recognize existing community-based property rights wherever supported by locally appropriate forms of evidence such as farm fallows, orchards, gravesites, and so forth.

As an initial step, this can be accomplished by creating a legal presumption of local community ownership wherever such evidence exists.

There are many other reasons for legally recognizing CBPRs. First and foremost, in many countries the constitution can be interpreted as already protecting the CBPRs of indigenous peoples (i.e., original long-term occupants). Legally recognizing these rights would be a positive and crucial step toward ensuring that the constitution is invoked to protect and promote the well-being of all citizens. In many countries where conflict is epidemic, the legal recognition of community-based rights would also contribute to goodwill between local communities and governments.

Legal recognition of CBPRs provides state assurance that local people will be better able to profit from investments of their time and labor. It would provide indigenous and other local communities with state-sanctioned authority to prevent migration into their territories, which often overlaps with protected areas and other fragile ecosystems rich in biodiversity. It would likewise help local communities better protect and maintain natural resources by bolstering the enforcement of local management regulations.

Property rights, of course, by themselves do not provide adequate incentives and conditions for sustainable development; they are a necessary but insufficient condition. They need to be complemented with technical and other forms of assistance to develop and strengthen local organizational capacities and to support sustainable management and conservation, along with appropriate credit programs that provide economic alternatives to the sale or overextraction of resources. They also require the existence of strong procedural rights to be truly meaningful. It is only when this combination of rights and benefits is guaranteed and protected that sustainable development will become a living reality for the people at the grassroots.

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