

# The Capacity of Property Rights to Accommodate Socio-Ecological Resilience (tranboundary issues)

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# Overview

1. Introduction
  2. A 'Legal' Perspective on the Emergence and Operation of Property Rights
  3. International Law, Property and Resilience
  4. Reflections of Resilience and Adaptation
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# 1. Introduction: Some ideas

- Present paper builds on earlier work
    - (Of particular relevance to resilience/adaptation)
      1. The nature of things and of community values predispose things to certain forms of holding.
      2. Property is about the pursuit of values – individual and public interests. Law both facilitates and contains values that define property.
      3. Absence of clearly defined and clearly structured public interests - undermines balance between public/private.
      4. Law is a dynamic, adaptive process – but this does not necessarily mean that law can or should promote resilience and adaptation at all times and in all circumstances - plurality of values influence law.
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# 1. Introduction: Context - fisheries

- 3 broad regimes
    - EEZ and coastal waters - ‘exclusive coastal’ State authority
      - Limits by international law
    - Straddling and highly migratory species (transboundary resources)
      - Under LOSC and FSA – cooperation in conservation and management. Compatibility
    - High seas fisheries (located exclusively in areas beyond national jurisdiction)
      - Under LOSC – non-exclusive resource (inclusive, common resource)
      - General conservation and management, and cooperation
      - Often subject to ‘partial’ governance by RFMO – are property rights-based fisheries an option?
  - Ecological fit??? Dislocation of jurisdictional boundaries from natural system boundaries
  - Shared, transboundary or common resources : **Must be regulated by international law (in part)**
  - How does law/international law impact upon ‘property rights-based regimes, and upon their capacity to accommodate socio-ecological resilience?
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## 2. A 'Legal' Perspective on the Emergence and Operation of Property Rights

- What is property and how does it relate to resilience and adaptation?
    - Most natural resources are subject to some form and degree of property. Therefore property provides a nexus between the physical world and social systems.
  - 'An institution of private law regulating persons' relationships in respect of things' - Claim right + compliance
  - Property as excludability (legal, physical, moral) - nature of things and values shapes their 'propertyness'
  - Bundle of rights/interests. (Hohfeld - Honoré)
    - Use, management, transmission, non harmful use...
    - Variety of sticks in bundle depends upon the socially determined purpose of the holding
  - Justificatory theories for property - substantive values
    - Utility, liberty, labour/desert/propriety
    - *Resilience????*
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## 2. A 'Legal' Perspective on the Emergence and Operation of Property Rights

- Forms of property
    - Private property - individually controlled entitlement
    - State property - state private property
    - Common property
    - Stewardship?? Individual holding subject to overriding duties
    - Non-property
  - Different forms of property may provide more or less optimal support for resilience in different contexts.
  - Property systems include various forms of property as well as rules that determine questions of who, what and how
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## 2. A 'Legal' Perspective on the Emergence and Operation of Property Rights

- Private property
    - E.g. Tradable Environmental Allowances - ITQs
  - Qualities
    - Vests holder with an interest in protecting capital
      - Externalities and ecosystems?
    - Value linked to 'strength of right' - tends to consolidate
    - Holder determines use – less inclusive control
      - Unless strong external limits on property (yet reduces value of holding...)
    - Subject to strong market forces and efficiency driver (social adaptability)
    - 'Self-enforcement' – user engagement
    - Enduring and expanding form of holding - it works??
    - Property is actually a bundle of entitlements – therefore potentially flexible
      - Yet, characterised by exclusion – resistance to State control
    - Knowledge contingency - of markets and externalities
    - Requires centralised institutions to support the legal rights
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## 2. A 'Legal' Perspective on the Emergence and Operation of Property Rights

- Common Property
    - E.g. Community-based management regime : Maine lobster fishery
    - Access not exclusion, at least internally
    - Multiple stakeholders – greater knowledge options
    - Practice driven by internal rules and considerations
    - Entitlements and use rights generally depend upon adherence to community norms.
      - Reputation, reciprocity, community pressure, pull of collective values
    - Enforcement may rely upon
      - Reputation, reciprocity, community pressure, pull of collective values
    - Knowledge contingency
    - May operate outside formal State structures for property – although may also depend upon these to protect against interference from non-common owners
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## 2. A ‘Legal’ Perspective on the Emergence and Operation of Property Rights

Operative criteria	private property	common property
Scale	Larger	Smaller, unless nested
Resource complexity	Simple, single focus	Complex, interactive
Timescale	Enduring potential	Enduring potential
Practice encouraged	Security of investment, innovation	Adaptation, stability, risk sharing
Social Structure	Stranger relations	Close community/trust
Adaptation to shifts in natural environment	Less adaptive	More adaptive
Adaptation to shifts in social system	More adaptive	Less adaptive
System dependency	Strong reliance on legal system	Reliance on legal and ‘extra legal’ norms
Knowledge contingency	High	High

(Adapted from Rose 2002)

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## 2. A 'Legal' Perspective on the Emergence and Operation of Property Rights

- Institutional qualities demanded by all forms of property
    - If property is a legal right or entitlement, then the property requires a supporting legal system
    - Most property, private or common, is supported by a domestic legal order
      - Does not preclude property beyond sovereignty
    - If property is to operate beyond domestic legal orders, then how will this be done, and how will the values and structures of international law shape such property systems?
      - At the very least the qualities and values that influence international law produce rules that may then influence domestic law
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### 3. International Law, Property and Resilience

- If property regimes emerge ‘more directly’ under international law’ then we must consider:
    1. How international law may influence property in general in international fisheries
    2. How general attributes of international law influence resilience
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## 3. International Law, Property and Resilience

### 1. Influence of international fisheries law on property

- Fish = *ferae naturae*
  - Freedom of high seas = common property - non-excludability
  - Requires international cooperation for rules - ‘due regard’
  - Lack of centralised agency favours decentralised/’community rules and enforcement
  - International law resists support of property directly.
  - Yet large scale weak community – favours ‘neutral’ TEAs.
  
  - Fisheries law and resilience
    - Package deal under LOSC (inter-related norms – difficult to adapt?)
    - Science-based, with strong economic goals (Arts 61-2 LOSC) - knowledge contingency
      - Yet pre-sustainable development, ecosystem protection, or biodiversity
    - Benefit sharing - inclusive??
    - General goals – framework (scope for flexible interpretation)
    - Increasing use of soft law – FAO Code of Conduct (flexible toolkit - knowledge sharing)
    - Linked to other regimes CBD/RFMO and State level implementation – complex governance
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## 3. International Law, Property and Resilience

General attributes of International Law that impact upon resilience

– ‘Positive’ attributes

- Transboundary/inter-State issues (large scale issues)
  - Use of principles and general rules (flexible)
  - Framework treaties e.g. CBD, LOSC (flexible)
  - Systemic integration
  - Hard Law - Soft law - esp. guidelines/technical support (knowledge)
  - Less constrained by existing rules (flexible)
  - Defeasible quality of law (flexible)
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## 3. International Law, Property and Resilience

- Qualities of International Law that impact upon resilience
    - Negative attributes
      - Slow or difficult to adopt new standards of behaviour (unresponsive)
      - Absence of centralised government and strong institutions (ineffective)
      - Poorly developed community values and public interests
      - Lack of stability – certainty of commitments
      - Lack of normative hierarchy
      - Limited participation (state focused, although changing)
      - Disaggregated interests (weak user engagement)
      - Inequalities of agents
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## 4. Reflections on Resilience and Adaptation

- Engineering resilience and ecological resilience
    - Various meanings
  - Resilience of social systems does not make them good or bad (Ruhl)
    - Multiple values
    - Moral restrictions/incommensurability
  - If law promotes resilience, then this must involve weighing of values. (justice, utility, liberty, order,...)
  - Is resilience in a legal system normatively desirable? (flexibility v. certainty)
  - Does natural resilience entail legal resilience?
    - The nature of things shapes their regulation. If so, then accommodating ecological resilience may require fundamentally changed legal mechanisms.
    - Move away from 'regulation' to complex mixed regulation by diffuse agencies using 'toolkits'.
    - Multiple scales – panarchy – complexity.
    - Powerful institutions to facilitate resilience (balance interests, provide knowledge, stakeholder participation)
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## 4. Reflections on Resilience and Adaptation

- Factors relevant to law's ability to facilitate socio-ecological resilience (Ebbesson, 2010):
    - Flexibility
    - Openness - broad participation
    - Effective multi-level governance
    - Promotion of learning and adaptability
  - Tension between flexibility and certainty in legal systems
    - Paradox. Would the 'goal of protecting natural resilience demand fixed, normatively superior rules?
  - Complexity v simplicity in law.
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## Concluding Remarks.

- Ecological resilience represents an organising concept or principle (like sustainable development)
  - Resilience may provide a measure of the effectiveness of legal rules and institutions - as per Ebbesson
  - Law (and property) are tools to achieve resilient ecosystems. We need to understand the usefulness of these tools.
  - We cannot ignore well developed and strongly entrenched values in law, which may militate against resilience.
  - No one size fits all optimal solution
  - Importance of public constraints on property use, especially at crisis points.
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