

Private Property, State Sovereignty and Common-pool Resources:

**Model of global governance for
social-ecological resilience?**

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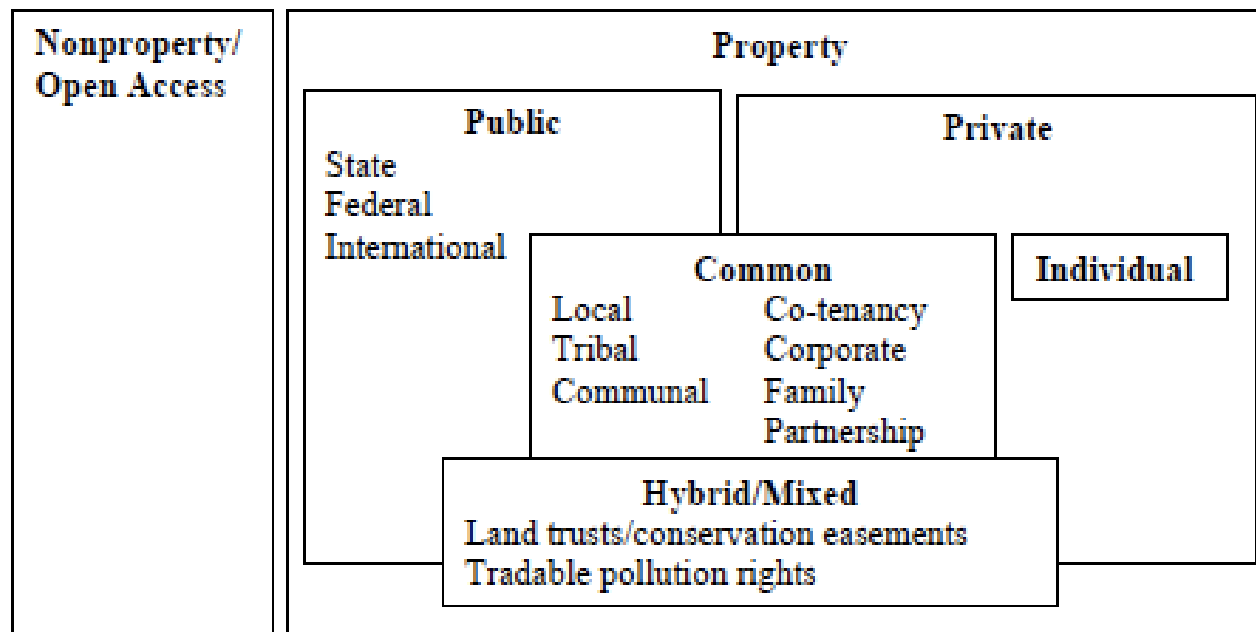
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Introduction

- Definitions:
 - Global governance approach
 - Social-ecological resilience
- State and international shared concerns regarding social-ecological resilience
 - Diminishing supplies of arable land & CPRs, such as water
 - Food sovereignty
 - Global economic crisis
 - 'Land grabs' for food & agro-fuel exports

Relations among Categories of Property Rights

Figure 1. Relations of Property Systems



Source: Cole (2002: 10)

Hoghfeld (1913) Analysis of 'jural relations'

Rights + Duties

Elements	Correlatives	Opposites
Right	Duty	No-right
Privilege	No-right	Duty
Power	Liability	Disability
Immunity	Disability	Liability

Private Property

- Rights to
 - Control of property (use, possess, manage, alienate, consume/destroy, exclude others)
 - Income and capital
- Duties:
 - not to cause harm/nuisance
 - Comply with land use regulations
- Key Features
 - Relatively simply defined
 - Standardized entitlements to facilitate harmonization
 - Recording/registration system
 - Effective monitoring system
 - Dispute settlement system to enforce
- To facilitate transferability (beneficial or not)

Legal Rules for Managing the Environment and its Resources

- State law governs property rights
- International Law - No direct rules of property but affects scope of States' sovereignty over domestic property interests:
 - All States bound by customary international law *and jus cogens* norms
 - States Parties to treaty regimes are bound by their terms
- Modern environmental property rights - 3 types:
 - Private Conservation Restrictions (conservation easements, debt-for-nature swaps)
 - 'Market Environmentalism': Transferable/tradable -'new' property rights (cap-and-trade, fishing quotas, sequestered carbon credits, water transfer rights, endangered species credits, biological diversity credits)
 - 'Fuzzy' Property Rights (environmental impact review, negotiated regulations) (Carol Rose, 2008)

State Sovereignty

- State Sovereignty Rules

- Sovereign Rights:

- Exclusive territorial sovereignty over land and over permanent population
 - ‘Permanent sovereignty over natural resources’
 - Coastal States (territorial sea, continental shelf, EEZ)
 - Minor rights: e.g., condominium, lease, servitudes

- Property-like Rights: possess, use/exploit, manage

- Duties:

- Non-intervention in other States’ territories
 - Comply with international legal obligations

- International Law Limits on State Property Law

- Certain minimum standards re property rights (Treaties define ‘investment’ to protect broad range of property rights, human right to property, cultural heritage items)
 - Direct/Indirect constraints (Investment treaty right to file claim against host State & arbitration, Indigenous right to be consulted, WTO sub-treaties on Goods, Food, IP, and Services, ‘no harm’)
 - ‘Internationalized’ domains beyond State territorial of property rights (EEZ seabed and subsoil, ‘common concern of humanity’, ‘common heritage of humanity’)
 - Procedural limits on States’ use of natural resources (‘due diligence’ to avoid harmful activities; principle of public participation)
 - *jus cogens* norms

Common-pool Resources

- CPR: natural or man-made resource system
 - Subtractability – Benefits consumed by one are subtracted from benefits available to others
 - Non-excludability – physical/legal difficulty of excluding others
- Examples: Large bodies of water, flowing rivers, canals, vast savannas, forests, pastures, aquifers, oil/gas reservoirs, fish stocks, migratory birds flocks, wild animal herds, the atmosphere and man-made resource systems irrigation canals
- 5 CPR property rights (access, withdraw, manage, exclude, alienate)
- ‘Self-organized’ Property Rights:
 - Design Principle 8: For resources that are parts of larger systems: Nested enterprises
 - How to create an adaptive multiple-layer, polycentric system?

Problems with Private Property Rules

1. Poorly suited for managing transboundary CPRs & do not always succeed in conserving natural resources
2. Common law rules are slow to adapt to changes
3. Western hegemonic, rights not duties, excludability & ownership v. management, and no theoretical agreement on:
 1. 'property rights'
 2. theoretical basis for property
 3. justifications for 'private' property
4. Adverse social & environmental consequences 'negative externalities'
 1. Concentration in hands of those who can pay vs most need or best use
 2. Allows or encourages 'insiders' to sell and move
 3. Encouraged outsiders to enter previously remote areas, aggregate properties and create monopolies
 4. Facilitate transfer of property from lower to higher value uses

Problems with State Sovereignty Rules

1. Protect transboundary CPRs requires States to cooperate
2. Provides disincentives to protect/conservé 'internationalized domains'
3. Have embedded neoliberal 'private property' ideas in State law
 - a. IFI 'conditionalities'- SAPs/comprehensive development frameworks
 - b. WB 1993 Water Management Policy – water as economic 'good' – creates markets for water rights & incentives for 'land grabs'
 - c. WTO TRIPS Agreement – intangible IPRs law
 - d. WTO GATS – State cannot ban export of 'goods'
4. Non-state actors create law binding States
 - a. SPS Agreement – *Codex Alimentarius* food industry members
 - b. TRIPS Agreement – US pharmaceutical industry executives

Global Governance to Promote Social-Ecological Resilience?

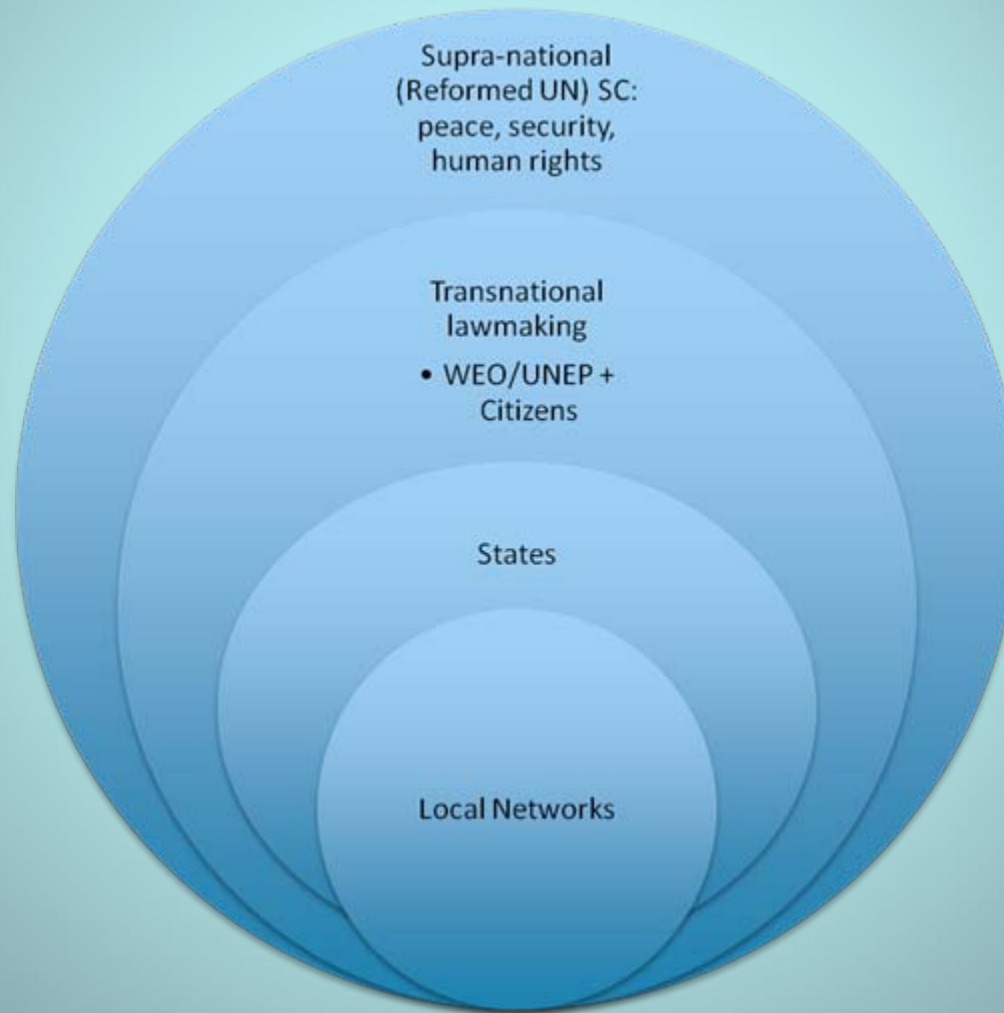
- Existing GEG Multilevel Arrangements
 - Aarhus Convention (procedural model)
 - UNEP
 - Mandate as main mechanism for policy review and coordination of environmental issues
 - Structure in place – functioning, multi-level decision-making at international, regional & domestic levels
 - Liberal opportunities for civil society participation
 - Activist leadership
 - Secretariat for some 43 MEAs ('autonomous institutional arrangements')
 - Proposals to strengthen or upgrade in process (a WEO?)

Global Environmental Governance

Multilevel, polycentric system of adaptive, nested enterprises

Different social and ecological scales

Diverse stakeholders



The End

Private Property

- Law of property:
 - social institution,
 - formal & informal restrictions on access & use of scarce resources
 - recognizes and permits decision-making by targeted person(s)/groups
- Origin & Development
 - Roman law (ambiguous)
 - International law – ‘natural right’ to appropriate ‘discovered’ lands as colonial ‘territory’ (Vitoria & Grotius)
 - State law
 - Grotius attributed comparable rights to individuals, laying ground for liberal rights theorists to develop for State level (Locke)
 - Generally natural resource rights attached to land
 - 1960s → environmental disasters → movements & counter movement
 - Rise of ‘private-individual’ property rights theories