

RIGHTS AND EXCLUSION IN TENURE: IMPLICATIONS
TO TENURE POLICIES IN THE PHILIPPINES¹

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ABSTRACT

The concept of tenure security as a function of rights is examined from the point of view of claimants' capacity to exclude others from a claim as a behavioral aspect of enforcing rights. Two cases in the Philippines and one in Mexico are presented to support the views that in different resource access regimes: (1) exclusion and rights are differentiable explanations of tenure security, (2) in certain intensities of competition over claims, tenure security is effected more by exclusion than by rights, and (3) policies to strengthen tenure security among farmers in the Philippines should focus less on defining rights than on improving their capacity to exclude other claims on their lands and crops.

INTRODUCTION

A number of recent studies on land and crop tenure security tend to emphasize rights as basis for tenure claims. Feder and Feeny (1991) examines the extent to which property rights affect resource allocation (mainly land) by way of security of claims. Rights give rise to security and, in turn, security (1) provides the incentives to holders of rights to use land efficiently, or (2) allow holders of rights to obtain credit to raise the level of

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capital they could use to support present production. In both instances, rights give rise to more intensive use of land so that land can be made available to a larger population of users. ^{Feeby}

et al. (1990) reviews Hardin's model of user-resource interaction in open access regimes and examines how users develop limitations to access and use rights thus evolving institutional mechanisms for averting the "tragedy" predicted by Hardin. Fortmann and Bruce (1988) reviews the extent and manner by which claims to lands and trees are recognized by users and suggests that tenure rights occur as "bundles" of different rights to acquire, use, exclude others from, or transfer, portions of a resource. Furbotin and Pejovich (1975) explains how tenure rights influence the utility function of users of resources through contractual arrangements that permit the exchange of property rights. The Proceedings of the Conference on Common Property Resource Management (1986) presents several discussions reflecting present preoccupation with how rights define (and limit) property claims. Among these are Hunt's discussions of canal irrigation in Egypt and the manner in which rights to irrigation water are distributed across government and community organizations, and Runge's analysis of common property in the context of use rights as defining elements of resource access regimes.

This paper compares rights and exclusion as normative and behavioral determinants of tenure security. Its aim is to assess the extent to which rights or exclusion explain security. Three case studies are presented as basis of the analysis.

CASE 1: THE CHICO DAM PROJECT

Narrative. In 1962, it was proposed in the Philippines that a series of dams be built on the Chico river in northern Luzon. The river's headwaters come from the Mt. Data area in southwest Mountain Province and runs on a generally southwest to northeast direction into the provinces of Kalinga-Apayao and Cagayan. The river weaves across traditional territories of two northern Luzon ethnic groups: Bontoc and Kalinga.

When initially designed in 1962, the dams were then deemed too expensive to be feasible. Thus, their construction was not pushed through. That is until 1973 when oil prices went up due to OPEC action. This time, the government estimated that the project would help make the country energy independent and save it US\$39 million a year in payments for oil. In the government's view, the total benefits of the dams would be sufficiently high so that even if their construction will entail social and political costs due to displacing a few thousand Bontoc and Kalinga from areas that will be inundated by the dams, net returns to investments will be substantial.

In February 1974, with Martial Law authority, President Ferdinand Marcos ordered the National Power Corporation (NPC) to begin work on what was to be officially known as the Chico River Basin Hydro-Electric Project. Phase I was to be the building of Chico II, a dam located in a Bontoc area. Bontoc resistance was

immediate and high. Notwithstanding military escorts, camp sites of NPC survey teams were torn down. Surveyors were confronted by naked women to harass them while they work. Harrassments led to belligerence so that in less than six months after beginning their work, the survey teams were forced to make their surveys from the air as Bontoc villages were deemed unsafe for them.

The rapid build-up and largely unexpected intensity of Bontoc resistance to Chico II made NPC decide to temporarily abandon the site and instead begin with Chico IV, a dam to be located in a Kalinga area. The NPC estimated that since the Kalinga were more loosely organized than the Bontoc, perhaps they would be more tractable to NPC intentions, or, should it come to it, easier for the government to coerce or to coopt.

The Kalinga also resisted the project. The Kalinga are a peaceful people who till the land, although without titles, in rice terraces called "payaos". They raise other crops (beans, sweet potatoes, banana, sugar cane and coffee) in small household plots called "uma". The Kalinga has been on the land since before anyone among them could remember. They resisted the dams because they could not allow their land to be inundated. In their way of understanding nature, their land, where they have buried their ancestors for centuries, are living embodiments of their soul as a people. Destroying their land, or forever sinking it under water, was deemed by the Kalinga to be tantamount to totally eliminating their heritage.

At first, the Kalinga tried to negotiate. Through a sacred intervillage pact called "bodong", they organized into a single collectivity. They sent five delegations to Manila to appeal to President Marcos but at no time was a delegation received by the President. The NPC was adamant: lands found in Kalinga territory were to be expropriated for a higher good, i.e., the State's desire to ensure energy for the larger society beyond Kalinga communities.

The Kalinga found themselves with no choice but to resist or to physically exclude the NPC's and government's presence in their territory. By the end of 1974, the Kalinga began hostile acts against NPC survey teams much like the Bontoc before them. They found in one of their elders a leader duly legitimized in a "bodong" to lead their resistance. This was Macliing Dulag. He had the backing of elders of other villages who were likewise active in articulating the Kalinga resistance to the dam project. Against them was the NPC with full backing of the 44th Infantry Battalion of the Philippine Army.

Intimidations by the military was persistent and peaked from January to April 1980 after efforts of another government agency, the Presidential Assistant on National Minorities (or PANAMIN) failed to coopt Mr. Dulag and his group of elders. The PANAMIN offered Mr. Dulag and other leaders with salaried positions in the then newly created Kalinga Special Development Region (KSDR) but Mr. Dulag and the other elders with him refused the offers.

By the end of 1979, the military got active. Children were shot at to scare them (e.g., in Bugnay shortly after a community dialogue in Binga on February 3). A village, also in Bugnay, was sprayed with gunfire on February 13. Hostilities intensified. An Army unit was ambushed on February 27, believed by many to have been staged by the New People's Army (NPA) who at this time also became active in the area to support the Kalinga. However, the Army blamed Mr. Dulag for the ambush. The Army retaliated by raiding Bugnay that same day. Mr. Dulag appealed to military authorities in Manila to pull-out the 44th IB. The unit was taken out of Bugnay on March 19 but came back to raid Bugnay again on April 14. Finally, Mr. Dulag was killed in a raid on Bugnay on April 24.

The struggle of the Kalinga certainly did not go unnoticed by outside groups. Church, civic and educational organizations, the press and militant labor and students, sided with the Kalinga leadership. The Kalinga struggle became a good cause for the then expanding resistance to Marcos. International groups likewise supported the Kalinga. The Public Broadcasting System (PBS) made a stirring documentary of Kalinga opposition to the dams in 1981.

Escalating public outcry from within and outside the country especially after the death of Mr. Dulag finally brought the dam project to a halt. The World Bank who first offered financial assistance for the project, indicated reluctance to push through with its loan. Presently, the project is shelved. Implementation is officially indefinitely postponed. Whether or not the dams will be

ultimately built by the government is something that is not certain at this time. The bottom line so far as this paper is concerned is that there was this time when the government wanted to build the dams on ancestral Bontoc and Kalinga domains and yet the dams were not built because the Bontoc and the Kalinga resisted their construction.

Lessons. The Chico case presents a situation in which competing claimants to a land - the Chico river zone - have mutually recognized, albeit incongruent, perspectives of rights to the land. The government acted on the basis of regalian doctrines and the NPC, a state agency, assumed full statutory rights to harness the Chico for public welfare. The Bontoc and Kalinga did not dispute these rights. They merely wanted that these rights not be exercised in Chico where their lands might be affected. Meanwhile, the Bontoc and Kalinga invoked ancestral dominion as basis for their right to keep their land in a manner that they see fit. This right was likewise recognized by the government (although only tacitly) as evidenced by the fact that: (1) the government sought to first negotiate with the two groups before attempting to coerce them into accepting the government's intentions, and (2) at no time did the government officially brand the Bontoc or Kalinga as "squatters" or "illegal occupants" of "public lands" to which the rugged northern Luzon mountains can be easily classified into based on existing laws declaring areas with at least 18% slope as inalienable public lands. Yet, not respecting perspectives from which rights were viewed by claimants, the case suggests that a

claimant lost out to another because of the effectiveness of its being able to exclude the other from enforcing a competing claim. It appears in this case that rights and exclusion are differentiable events in enforcing claims. De facto tenure (i.e., actual control over an asset) is created not so much by rights as it is by a claimant's capacity to exclude other claims on a resource.

The Chico case also suggests that although tenure may be in fact created by exclusion, exclusion can only be sustained if it were ultimately legitimized by rights. The NPA contributed to the struggle in Chico but it did not gain as much as the Bontoc and Kalinga the sympathy of the larger public (the Philippine public and publics outside the country) which created the key pressure on the government and the World Bank to abandon the dams. The larger public sided with the Bontoc and Kalinga in efforts to enforce their claims and this provided the legitimacy of their attempt to exclude the government from their land.

CASE 2: INSURGENCY AND TENURE IN NORTHERN MINDANAO

Narrative. This case refers to the effects on land and crop tenure of the changing and alternating control by the insurgent NPA and the Philippine Army of seven villages in northeastern Zamboanga del Norte in the island of Mindanao in the Philippines. The villages are Sikitan, Bag-ong Silang, Rosevilla, Teresita, Santa

Fe, Dilawa and New Land, all "barangays" (village-level political units) of Piñan and Mutya municipalities of Zamboanga del Norte. The villages lie in the western foothills of Mt. Malindang, a mountain range running south to north along the western boundary of the province of Misamis Occidental. The area in which the villages are located is remote and is accessible from the city of Dipolog some 30 linear kilometers northeast, by two gravel roads, one through Piñan and Mutya and one through the national highway from Dipolog to Zamboanga City. Part of the way to the villages is by trail accessible only by walking. The distance to be walked is shorter through the national highway to Zamboanga than through Pifian or Mutya.

The seven villages encompass a total area of about 20 km². The original inhabitants in the area were Subanon until displaced by migrant Cebuanos from northern Mindanao lowlands. Cebuano migration began soon after World War II and by 1970 only seven Subanon families lived in Sikitan, Rosevilla and Teresita.

The combined population of the seven villages today is about 1,500 individuals. Primary livelihoods are farming and limited livestock raising (mainly swine and poultry). Coconut and corn are dominant cash crops and sweet potato and cassava are primary subsistence crops. Hunting, mainly wild boars, birds, monkey, snakes and frogs, are important subsistence activities as well.

The seven villages are within the Northern Mindanao Area

Command of the NPA. In part because of their remoteness and more for their proximity to Mt. Malindang as well as poverty of their residents, the villages became a patrol area for the NPAs when they stepped up operations in northern Mindanao at the end of 1979. By 1980, NPA presence in the seven villages became regular and frequent. Eleven landowners fled, totally abandoning their farms. At least four large absentee landlords began losing access to their crops when, because of uncertainty on how the NPA may treat them, they entirely desisted from visiting their farms to harvest their crops. In their absence, tenants as well as other residents in the villages and NPA cadres, harvested their crops or tilled their lands without rents. Where rents were set aside by tenants expecting their landlords to someday return, the amount was determined by the tenant with hardly no chance by the landlord to verify actual harvests on which rents were based.

In part because of political pressure by large landowners particularly those owning coconut lands, military operations by the Philippine Army was started in the area at the end of 1980. Skirmishes followed and in 1986 to 1987, the seven villages were included in what was dubbed by local residents and the military alike as "no man's land". In 1988, a Philippine Army camp was established in Sikitan at which time seven landowners in the villages came back. The camp was abandoned in 1989 and in June to August 1990 the NPA returned to the area. The seven landowners again fled and came back in September 1990 after the Philippine Army established permanent bases in Sikitan, Teresita and Dilawa.

Presently, five landowners have not yet moved back to their villages because of continuing fear that the Philippine Army might again leave and the NPA will come back.

Lessons. Unlike the Chico case where competing claims to mainly open access resources are made based on differing sense of rights to the land, this case is more about opportunities for exercising claims to largely private assets, based on the extent to which the claim is created and enforced by a legitimacy-giving socio-political unit. The government and NPA provided legitimacy to claims (albeit incompatible) and the extent to which claimants may ensure their claim on the basis of either government or NPA legitimacy, depended upon the extent to which the government or NPA is able to exclude the other from the area in which the claim is made. Three lessons are suggested in this case:

1. Rights or claims created by, or made under the authority of, a socio-political unit, seem useful to ensuring tenure claims to the extent that the rights or claims are: (a) recognized to be legitimate by the socio-political unit, (b) the unit is able to enforce its authority in the area in which the claim is made, and (c) the claimant is able to use the rights assigned to him or her by the unit, as means for obtaining the coercive capabilities of the unit. In the case of titled landowners in the seven villages, their rights to their land and crops were useful to their being able to exercise de facto control over their assets to the extent that they were able to use the rights to obtain from government

enough military assistance to exclude NPA-legitimized users of their lands or crops. The statutory rights of the landowners provided in titles issued by the government -acted as the conduit through which state police capabilities were made available to them to exclude competing users of their assets. When government police forces were removed from the site and the NPA moved in, statutory landowners actually lost tenure to their land and crops and their assets were made available to those who, the NPA, as the other socio-political unit that at other times controlled the area, recognize as rightful users of the assets.

2. In the sense that either landowners or NPA-legitimized users of lands and crops were able to exercise tenure to assets because either the government or NPA were able to provide them with sufficient coercive tools to exclude those legitimized by the other, it appears that, as in Chico, claimants' rights may be differentiated from their capacity to exclude as explanation of tenure security. Rights may precede or follow exclusion³ but exclusion remains a separate determinant of tenure security. Rights augment tenure security by way of being the instrument through which claimants obtain (from a larger socio-political unit that recognizes the legitimacy of their rights) exclusionary tools with

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Rights precede exclusion in the case of landowners who have had titles to their land before the NPA came and who came back to retrieve their control of their land after the Philippine Army has taken back from the NPA control of the villages. Rights follow exclusion in the case of residents and non-resident NPA cadres who, with NPA permission, were in fact using lands and harvesting crops of landowners who fled, while the NPA controlled the villages.

which to establish and ensure tenure.

3. Rights without exclusion do not ipso facto create tenure. Titles otherwise recognized in the seven villages, were no good at the time their holders were excluded from the area by the NPA. Meanwhile, among tenants who continued to use lands and harvested crops at their discretion when the NPA controlled the area and their landlords were gone, tenure to at least the portion of land or crops they were availing of with liberty may be considered to have been created by exclusion with little or no rights to the assets. The extent that they exercised discretion on rents at the time their landlords were gone, represented the portion of the land and crops to which exclusion gave tenants tenure to assets without rights to them. Thus, tenure security may be created by exclusion sans rights but not always by rights sans exclusion.

CASE III: VIVA ZAPATA!

Narrative. In this case, I rely mainly on Huizer's accounts of Emiliano Zapata's activities and movement in Mexico in 1890 to 1920 (Stavenhagen ed. 1970:375-406). References and quotes are from Huizer's accounts unless stated otherwise.

Zapata was born in 1877 to a peasant family in San Miguel Anenecuilco in the state of Morelos, Mexico. He led a peasant movement that was spurred by peasants losing lands to landowning hacendados. The movement eventually became a full pledged revolt to

appropriate hacendado landholdings back to peasants. At the time of Zapata, Mexico was embroiled in intense competition for land drawn along class boundaries. The competition and conflict it produced is typified by what occurred in Zapata's birthplace during his boyhood. Hacendados were grabbing lands from peasants in Anenecuilco so that in 1887 "even the streets and yards of parts of the village were taken." Peasant houses or crops were destroyed by soldiers hired by hacendados, to force peasants out of their farms, surrender their farms to the hacendados, and then work in the sugar plantations which the hacendados established on the land. Some plots may have been bought by the hacendados but most were simply forcibly taken away from the peasants.

Village councils were set up by the peasants to negotiate for keeping their farms. Activities of the councils included making direct pleas to President Porfirio Diaz in Mexico City. The pleas were not heard by Diaz and the landgrabbing continued unabated. Zapata was active in the council in Anenecuilco and because of his "outspoken and rebellious attitude", he was jailed in 1897. He escaped, briefly served in the army, then because of his skills with horses, was taken out of the army by a hacendado who took him to train the hacendado's horses.

Zapata became president of his village defense council on September 12, 1909 "after the older member of the council has decided that young men had to enter into the heavy struggle to get back the village lands." More visits to Mexico City were made and

a lawyer was enlisted by the council to help villagers with their claims. No results were obtained. Later, when more lands in Anenecuilco and other villages in Morelos were taken, another approach in the form of letters of complaint to the Governor of Morelos was tried. The Governor merely forwarded the letters to the hacendados against whom the complaint was filed, with no comments. Hacendados continued arrogating lands and even refused to rent to villagers the lands which have been taken from them.

Ultimately, Zapata gained prestige among the peasants in surrounding villages of Villa de Ayala and Moyotepecso so that eventually the residents in these villages joined the Anenecuilco village defense council headed by Zapata.

More belligerent resistance to hacendado expansions were started in Anenecuilco, Ayala and Moyotepecso including tearing down fences built by the hacendados in arrogated lands. At this time, a revolt was starting in Northern Mexico led by Francisco Madero which made local authorities in Morelos careful not to provoke the peasants in Anenecuilco, Ayala and Moyotepec. As peasants continued to dismantle fences, the authorities did not stop them. Huizer notes:

When the local mayor (jefe politico) came with ten men to see what was going on, he found more that a hundred people, verified that there were no arms and left. The fear created by the first activities of initial revolt, initiated at that time by Francisco Madero in the north of Mexico, seemed to have prevented the local authorities from taking action against Zapata.

Zapata joined the revolt of Madero. Along with two other leaders, he formed guerilla groups and later became head of all groups (as a "heneral") after the other two leaders were killed by government troops. After a month, Zapata's group grew to a thousand armed peasants.

Madero became President of Mexico on May 26, 1911 after Diaz left on exile. Trusting Madero to institute a land reform program for which he gained the peasants' support, Zapata allowed his army to be disarmed. Federal troops occupied Morelos. But led by an old Diaz general named Victoriano Huerta, the troops started claiming back lands for hacendados in Morelos. Zapata rearmed his army. He declared:

Let all the world know we shall not lay down our arms until ejidos of our villages are restored to us, until we are given back the lands which the hacendados stole from us during the dictatorship of Porfirio Diaz, when justice was subjected to his caprice (Huizer 1970 c.f. Simpson 1937:51).

Huizer describes the ensuing actions of Zapata:

In each town which was conquered by the peasant troops all the records of land ownership were purposely destroyed and practically all the lands of the state of Morelos - fifty three haciendas, farms and ranches - were given to the peasants... The armed peasants defended the lands which they had occupied when federal forces came to throw them off."

In between serving in the Zapata army, peasants "cultivated the land they had obtained". In instances wherein Zapata's own troops failed to protect lands from federal troops, lands were "taken back" to be restituted to the hacendados.

Lessons. The Zapata story is certainly more complex than is briefly described here. The point to be made is that in this case both peasants and hacendados recognized the same socio-political unit, the state, as the provider of legitimacy to land ownership. Both peasants and hacendados were seeking legitimacy from the same state for their claims. Even destroying records of hacendado holdings is an act on the part of Zapata of affirming that it is the state that is the repository of legitimacy of land ownership; destroying the state's records of holdings will rob hacendados of basis for claiming legitimacy from the state.

This case indicates intense competition for land. In this condition, tenure to lands were established not so much by the rights competing claimants were able to obtain from the state, but by sheer force that they were able to muster to exclude the other from the land. This suggests that under intense threat from the other: (1) de facto tenure to land by peasants or hacendados was as good only as they - through collective action in the case of the peasants or by using state police powers in the case of the hacendados - were able to keep the other away from the land, and (2) loss of capacity to exclude meant loss of tenure to the land.

Here also, as in the Chico and Mindanao cases, exclusion is indicated to be differentiable from rights as an explanation of tenure security. Likewise in this case, capacity to exclude is indicated to come in either of two forms: (1) physical (i.e., exclusion from space), or (2) economic (i.e., resisting the price

for which competing claimants may offer for an asset). Occupation of Morelos by either Zapata or federal forces determined extents to which peasants or hacendados were able to avail of appropriate coercive instruments to exclude the other as competing claimants to their lands. Meanwhile, hacendados did succeed in removing peasants from farms by buying the farm from the peasant. Although in dire need of their farms to sustain themselves and therefore possibly unhappy to part with their farms, peasants were unable to resist the economic enticement of purchase. It is certainly not farfetched to imagine that the same peasants who sold their farms may have been among Zapata's army who fought to regain their lands.

CONCLUSION

The three cases suggest that across different resource access regimes:

1. The capability to exclude others' claims to a resource may be differentiable from rights as explanation for tenure security;
2. Tenure may be ensured by exclusion sans rights but not always, nor necessarily, by rights sans exclusion, and
3. To the extent that (1) and (2) are correct, the manner by and degree to which rights contribute to exclusion to ensure tenure depend largely on the intensity of the competition for a resource. Where competition is intense, tenure security seems more determined by exclusion than rights; where competition is low, security rely more on rights than on exclusion.

The relevance of rights to tenure security appears to center on rights being able to (1) legitimize exclusionary behavior, and

(2) help claimants of rights obtain exclusionary instruments from a larger community that recognizes or instituted the rights. In this sense, tenure security is a function more of behavior than norm and the relevance of norm is to ascribe acceptability of and support for the behavior.

If these conclusions are correct, it might be inferred that tenure policies seeking to strengthen claims to lands and crops need to focus more on improving claimants' capacities to exclude others from their assets than on defining the rights assigned to the claimant. This means that policies should provide either: (1) incentives for claimants to avail of state instruments that add on to their capabilities to physically and economically exclude competing claimants of their assets (e.g., credit and police), or (2) ensure that claimants are not able to easily transfer assets, especially land, to persons or instrumentalities other than the state. In this instance, the state may serve as intermediating market instrument when competition for limited assets gets acute.

To the extent that the preceding analyses are relevant to the conditions in the Philippines today, it might be recommended that the government seriously examine the set of attendant policy instruments to support programs on improving tenure security for small users of agricultural, fishery and forestry resources in the country. Among these programs are the Comprehensive Agrarian Reform Program, Integrated Social Forestry, and Territorial Use Rights on Fisheries. If the analysis in this paper is correct, the programs

would need to be supported by instruments that, in different intensities of competition for land or other assets, will appropriately strengthen the exclusionary capabilities of beneficiaries. Failure to strengthen exclusionary capabilities of beneficiaries is likely to lead to failures in the programs.