Introduction to tenure and property

FRST 522

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Why should we pay attention to tenure?

- We need to understand tenure (or **property)** if we are going to understand who owns the world's forests, where and why, and who gets what forest products and why

What is ‘tenure’?

- **Tenure:** “is the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land” (FAO).

Meaning of ‘tenure’ globally

- **Land tenure** is an institution, i.e., rules invented by societies to regulate behavior. Rules of tenure define how property rights to land are to be allocated within societies. They define how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints (FAO).

Uses of the term ‘tenure’

- Property – property rights and responsibilities
  - ‘Forest tenure’ in British Columbia = a forest harvesting licence or forest harvesting concession (in most parts of the world)
- Academic contract

Three basic tenures: freehold, leasehold and common property

- An important factor in the emergence of capitalism in England (17th century) was the struggle by landholders to reduce the obligations under their land tenure.
- They were eventually able to force the monarchy to greatly simplify the system into two basic tenures: freehold and leasehold.

‘Strands’ of secure property rights

- a right to use and manage it;
- to derive income by letting others use it;
- to transfer it to another by gift or bequest;
- to capture the capital value of the land by sale;
- to claim immunity against expropriation of the property; and
- to operate without a term limiting the possession of these rights.

Freehold

- Freehold is a tenure under which land is held (relatively) free of obligations to the monarchy or State
- = private ownership of land.
- Fee simple (or fee simple absolute) are technical feudal terms, and are for all practical purposes synonymous with freehold and private ownership.

Freehold - 2

- Radical (root/underlying) title is held by the Crown / State
  - Private property owner pays rates and taxes to the State
  - State can acquire private property under the principle of ‘eminent domain’

Leasehold

- Leasehold is the tenure under which land is held by someone other than the owner for a specified period only, for rent.
- Leasehold is also ‘property’

Property is not synonymous with ‘ownership’

- A leasehold right is a property right
- A leasehold held by a private person is a private property right

Property

- A synonym for tenure.
- ‘Property’ was more used by lawyers and lay people, while ‘tenure’ and the related terms tended to be used by economists and other social scientists.
- Terms now generally interchangeable

- For the most part we are going to be talking about property in land.

- But we need to look across to how property under-ground, over the seas, or over intangibles has been asserted, maintained, and is evolving

Property when used to mean ‘tenure’ is NOT a thing

- <u>Give me your watch</u>

- We’d describe a watch as property.
- We’d not describe a watch as ‘John’s tenure’; but we would say, ‘John’s property’.

- It’s common to think of property as things. But that isn’t right either.
- An important take home message is that **Property is NOT a thing.**

Jeremy Bentham on Property - 1

- ‘Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it.
- There is no image, no painting, no visible trait, which can express the relation that constitutes property. It is not material, it is metaphysical; it is a mere conception of the mind’ (Principles of the Civil Code, 1802, 1830)

Jeremy Bentham on Property - 2

- ‘To have a thing in our hands, to keep it, to make it, to sell it, to work it up into something else; to use it – none of these physical circumstances, nor all united, convey the idea of property. A piece of stuff which is actually in the Indies may belong to me, while the dress I wear may not’ (Principles of the Civil Code, 1802, 1830)

- **So if** property **is not possession,** what is it?

Property (or tenure)

- Property or tenure is a **social relationship** between people in relation to the use and control of both **tangible** things (rocks, houses, super tankers)
- and **intangibles** such as good will in business and ideas as in copyrights and patents and forest carbon credits that are enforced by society.
- So the key elements here are
- Social relationship
- Use and control
- Enforced by society

- In North American society we tend to talk about owning property as if it were an all or nothing proposition. Here are some examples:

What images come to mind when you read or hear the following statement

- A woman’s home is her castle.

Familiar?

- It’s my property, I can do whatever I want with it.

- But property rights are actually very complex.

- Here are some ways to think about property that makes that clear.

Think about **property as consisting of a ‘bundle of rights’,** that is, many specific rights to do certain things with the land.

‘bundle of rights’ has a second meaning

- A piece of property, such as a parcel of land or a tree, may be the subject of rights belonging to several different persons or groups.
- The **property is said to be subject to a bundle of rights**.

- if you own a piece of land, what are some of the rights you might want regarding that piece of land?

‘Strands’ of secure property rights

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- to operate without a term limiting the possession of these rights.

Note: different rights can be held over the same piece of land

Rights and owners as ‘bundles’

- Different rights can be held by different people at the same time or different times

- ‘Craig McNamara sold the development rights to his farm’ (Purchase of Development Rights, PDR)
  - Conservation easements
- ‘the Bank has rights to my farm through the mortgage that is tied to that property’

Not all bundles have the same rights

What is a land tenure system?

- The land tenure system is all the types of tenure which are recognized by a national and/or local system of law, taken together as a system.

All these together comprise a land tenure system

- **For example, in a locality:**
  - Private freehold or residential plots and farmland;
  - Leases and mortgages of residential properties and farms;
  - Common property in grazing land; and
  - Municipal, provincial [local] or national government ownership of parks and roads

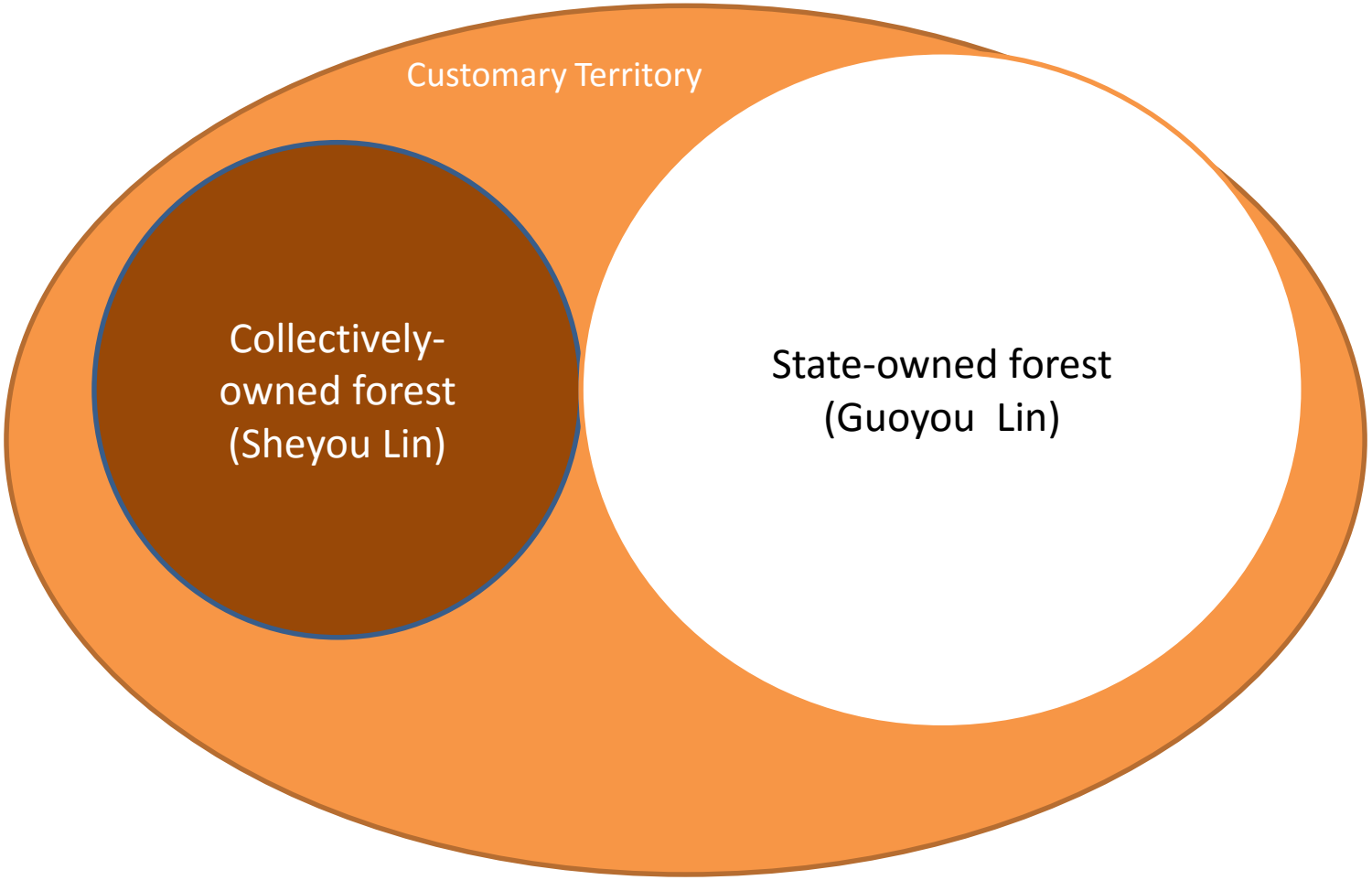
Different tenures meet different needs, often created by different land uses

That is the narrow, legal definition

- A land tenure system cannot be understood except in relationship to the economic, political, and social systems which produce it, and which in turn it influences.

- When we speak of the study of land tenure and land tenure systems, we are talking about both the study of tenure itself and the study of its relationship to these other systems

Forest ownership in Naidu



<u>The State can remove or encumber rights</u>

State regulations on zoning/land use

- **Can’t build a steel mill on your property in an area zoned residential**

‘Eminent domain’

- the Crown (now, the government) can take the land of the subject but it can only do so with the consent of the owner and payment of adequate compensation.

- The actual transaction would have to be sanctioned by statute [law] because the Crown could not 'take or grant but by record'.