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Discrepancies between paper and practice in policy implementation: Tajikistan's property rights and customary claims to land and water

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ABSTRACT

Property rights granted by land and water policies are not always identical with the claims – meaning perceived rights - people base their actions on. A high discrepancy between both resembles an ineffective policy implementation and bears the risk of unsustainable decision-making. Furthermore, perceived rights to land and its corresponding resource water can vary significantly. In this paper, we operationalize the property rights concepts and empirically assess, by specifying and quantifying, the difference between property rights and farmers' customary claims to both, land and water resources. With regard to land, actors tend to base their decisions on customary claims, and override property rights. In contrast, regarding water, we find that the full benefits of property rights granted by a policy reform are often not recognized. Whereas in the first case political control and monitoring mechanisms seems to fail, in the latter a lack of information sharing let the farmers not exploit their full investment potential.

1. Introduction

Across the globe, water has become a contested resource and the availability of and access to water play a key role in agricultural land-use options in many arid areas. To ensure efficient and sustainable land and water use, specific policies addressing governance systems and property rights need to be well defined at the national, sub-national and farm level (Binswanger-Mkhize et al. 2011). Accordingly, for irrigated agriculture, farmers need to obtain, possess and maintain two sets of rights: one relating to their farmland and one to irrigation water. However, resource use, decision-making and alienation rights differ in their characteristics and in their (transparent) implementation (Bruns et al. 2005; Dinar 2012). Especially transparent implementation is difficult in countries undergoing economic and political reforms, such as transition countries, where rights on paper change more frequently. Illustrating the fact that the rule of law has changed in many transition countries considerably since 1990 (Feige 1997), the enforcement of policies and laws is often fragile. As a result, Verdery (1997) stresses that fuzzy property exists, where property rights are now often "indistinct, ambiguous and partial" (p.105). However, institutional change constitutes a complex and evolving system.

In the literature, property rights of natural resources are discussed from many perspectives and over time, different concepts have evolved. For instance, the property rights approach, as discussed by Bromley (1992), focuses on the analysis of protected claims to an income stream resulting from the use of a certain resource. Thus, a "right" as defined by Bromley (1992) requires sanctioning of violations either by public or communal authorities. In this respect, property rights are narrow and legally defined and some authors coined the term 'de jure rights' (Alston et al. 2009). However, observed use of natural resources in various contexts often refers to informal claims which are usually not fixed in a written from. As an example, in many African countries, the land tenure and use practices often remain outside the existing legal system which reflects "the gap between legality and legitimacy as a major source of friction" (Deininger 2003, xxiii). Chimhowu and Woodhouse (2006) argue that land under customary tenure is sometimes even recognized as a legal category, although it is not state-registered property. In a situation, where legal property rights are absent, not recognized (e.g. due to civil war), or abandoned, customary claims can fill the vacuum (Korf and Fünfgeld 2006). Thus, there is a continuum of expressions of institutions governing the access to land and water from clearly defined and enforceable to non-enforceable use. Similarly, case studies have shown, that one has to recognize land and water tenure as a pluralistic system, where legal and customary rights overlap. This is for instance described as legal pluralism by Meinzen-Dick (2014). In order to be able to develop an initial operationalization in comparing these various sets, we focus on a) legally binding and formally defined property rights and b) customary claims, as two points along this continuum.

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Here, customary claims are defined as informal, not necessarily old in the sense of traditional customs, but generally recognized rules. In contrast to property rights, they are not legally binding and written. Both concepts are further discussed in the following section. Discrepancies between property rights and claims may emerge and they are omnipresent, but may be of different degrees. One of the main problems we identified in the context of policy implementation is that discrepancies between paper and practice emerge, which in the long-run can lead to less investment and less engagement in sustainable management of the respective resource (see also Theesfeld 2018). We argue that the more customary claims are in line with property rights, or vice versa, perceived security of tenure will increase and farmers will invest more in resource management. With this, we do not argue that necessarily a formalization of property rights is needed for more sustainable resource use and productivity increase. Rather we assume that a transparent and congruent situation would have to be envisaged for more tenure security. To give policy guidance for effective implementation, we need a better understanding on which set of rights farmers base their decisions on, which we pursue to investigate in this paper.

We aim to: 1) conceptualize and map property rights and customary claims from the perspective of various farm types, and; 2) analyze the land and water sectors jointly. In sum, this is an initial methodological attempt to make the "property rights approach", as advocated by Schlager and Ostrom (1992) and here broadly understood as encompassing formal and de-facto, more operational. Our main research question is how do farmers identify their customary claims to land and water and to what extent do these match (or mismatch) with the formally specified property rights? More specifically we address the following questions:

(a) Are customary claims (always) less pronounced when property rights are defined?
(b) Can we identify differences between the land and water sector against the background of a differing degree of political reform processes with respect to land and water over the transition?
(c) Are there differences among farm types and which group of farmers is more powerful in executing rights and has better access to one of the two resources?

To date, especially for transition countries, most studies have dealt with land and water property rights separately. Furthermore, a systematic analysis of land and water property rights and claims has not yet been applied to the case of Tajikistan. We think that Tajikistan is well suited for the study of disentangling property rights and the discrepancies involved in practices of land and water use. Since 1990, many structural and institutional problems in the land and water sectors have hindered a more efficient and sustainable agriculture (Rowe 2010; Sehring 2009; Abdullaev and Atabaeva 2012). The continuous policy and legal changes and the expected discrepancy with perceived customary claims – which even differ among various farm types as we will show further below – indicate a puzzling reference system for the use of land and water.

The remainder of the paper is structured as follows: Section 2 explains the theory of property rights in its contrast to the customary claims approach. Further, the operationalization of the two concepts is presented. In Section 3, we describe the land and water legal frameworks and their reform paths in Tajikistan. After presenting the methodology and introducing the data (Section 4) we analyze the rights on paper and the practices in Section 5. Section 6 discusses the discrepancies also contrasting both resources and pointing to differences in customary claims among farm types. Section 7 concludes and draws policy guidance.

2. Bundles of property rights and customary claims

Neoclassical property rights approaches argue that traditional land-tenure systems, where property rights are not clearly defined, are inefficient (Barrows and Roth, 1990), mainly due to higher transaction costs. De Soto (2000) promoted as well the position that ambiguous customary tenure systems lead to low rates of productivity. Barrows and Roth (1990) underline the contrary argument, that customary rights or claims are economically efficient when governments allow them. Further, Greiner (2017) points out that theoretical shifts concerning land tenure systems in sub-Sahara and post-socialist Eurasia from neoclassical economic top-down approaches to the theory of autonomously evolving property rights "towards more exclusive forms of tenure" were accompanied by the recognition of the inefficiency of the formalization of titles. Chimhowu and Woodhouse (2006) say that "customary rights is thus not a source of insecurity, but a positive feature that ensures continuing access for the poor." Irrespective of this partly normative debate about the superiority of one system over the other, the existence of such simple dichotomy can be questioned. Still, in the following we describe to some extent a dichotomous concept of property rights and customary claims allowing us to operationalize the bundle of rights approach that make up the prevailing tenure systems for land and water.

2.1. Discrepancies between property rights and customary claims

Empirical studies have shown that secure property rights and their enforcement are important for agricultural growth and the welfare of rural households who depend on natural resource use (Bruns et al. 2005; Deininger 2003; Besley 1995; Arnot et al. 2011). The key role of strong property rights, as Alston and Mueller (2008) emphasize, is to empower individuals and provide incentives for investing in a resource to maintain its value and to decrease vulnerability. However, there are different concepts of property rights being discussed and analyzed across and within different disciplines.

Bromley (1992; 2006) stresses that *property* is a benefit stream. The related *property right* is defined as "a claim to a benefit stream that some higher body – usually the state – will agree to protect through the assignment of duty to others" (p.2). A resource user holding property rights has duties and enjoys protection. Hodgson (2014) supports the definition of property rights from a legal perspective, too, where legal instruments of decision-making and enforcement are approved and granted by an authority. In the following conceptualization we follow this definition to describe property rights.

However, the term *right* is also commonly accepted and associated with the term de facto right (Schlager and Ostrom 1992), which is not a right from the legal perspective (Hodgson 2014)[1]. We agree with Hodgson (2014) that the term de facto right is thus somewhat misleading. However, people do also act, invest, and protect a resource due to informal but well-established and widely-accepted rules in use (Ellickson 1986; 1991) and these actions might or might not contravene the law. We propose the notion of *customary claims* to indicate that the regulations "outside" the law are not a right per se. We define customary claims as informal, not necessarily old in the sense of traditional customs, but generally recognized rules. We want to differentiate clearly between property rights, that are legally defined, and customary claims that are perceived as a reference system by the user. The latter can be congruent with the legally defined rules or not. Customary claims can even fill in a vacuum, where no rights have been regulated formally before. Both forms of access to land and water can co-exist and can be more or less congruent (Schlager and Ostrom 1992; Ellickson 1986, 1991; Alston et al. 2009).

[1] For Hodgson (2014) the term de facto right is misleading, and "it obscures the nature and role of real rights in legal and economic systems" (p. 4).