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Design Principles of Norwegian Commons

ERLING BERGE
Department of Sociology & Political Science,
Norwegian University of Science and Technology;
IASCP Council Member

LEGAL TRADITIONS

IF YOU LOOK AT THE HISTORY OF LAND LAW IN England you find that "right of common" is defined as the right to remove something of material value from the land of another owner. Those who possess such rights of common are called "commoners." I think this definition should alert us to an important dimension of the commons: the distinction between ownership of the land and ownership of the material resources attached to the land. The Roman law institution of dominium *(directum et utile)* conferred upon the owner of the land absolute powers (or as close as practically possible) over the land and all things of value attached to it. So even if the Romans did not see land as different from other kinds of property, the old maxim *"nulle terre sans seineur"* can surely be traced to Roman times.

The pre-medieval and medieval societies of Scandinavia as well as Great Britain were more concerned about the materials of value they could harvest from the land and the personal relations among those with interests in the products of the land than about the ground as such. In feudal society the maxim "no man without a lord" was just as self-evident as "no land without a lord." Most of the land was commons, its usufruct was shared between the landlord and his commoners. But tilled land within this commons was, in some basic sense, private property.

As Roman law spread across Europe, the doctrine of dominium came in conflict with established local traditions of common land ownership and usufruct rights to its various resources. Roman law was also in conflict with other aspects of feudal society and the ideas of tenure relations dominant there. It is not a great secret that the development of market

economies was closely connected with the gradual victory of the dominium principle. But in the mutual adaptation of Roman and local ideas of law, new legal conceptions were developed to reconcile some of the older concerns. The dominium doctrine never became as total as it is presumed to have existed in Roman society.

Now let us go to the Norwegian commons and look at various instances of the commons. In Norway, the dialectic between Roman law and the development of the law of commons has been somewhat different from England's experience. The rights of common have survived in a much clearer way. Today Norwegian commons come in three "flavors" which I call state commons, bygd commons and private commons. *Bygd is* a Norwegian word which doesn't translate well to English. Its original meaning is something like "local community." Because the areas burdened with rights of common were tied to the local community, the *bygd* (seen as a local community) became tied to a certain area as their commons. During the past 1000 years, this has turned around. Today the *bygds* are defined in terms of their rights of common. The *bygd is* defined as consisting of those farm enterprises which have rights of common in the areas called commons.

The defining difference between state commons, *bygd* commons, and private commons is the difference in land ownership. In a state common, the state is the land owner; in the *bygd* and the private commons, some of the commoners own land. What distinguishes *bygd and* private commons from a co-ownership is that not all the commoners are land owners. The difference between a *bygd* and a private commons is that in the *bygd commons* more than 50 percent of the commoners are land owners and in private commons less than 50 percent of the commoners are land owners. Private commons are almost extinct. In a government act in 1863, it was stipulated that the land of private commons should be consolidated. They were to be divided into sections of private property for the land owners, and the rest became *bygd* commons. This division has been done in most areas, but some are presumed to still exist. Only one fairly big private commons is known to exist. Here a timber company is the land owner while all the farms of the local community are commoners with grazing rights. The company has no interest in the pasture. Currently a fourth type of commons is under construction. In a recent government report, a new kind of commons was proposed for the county of Finnmark. It is a complicated legal construction designed to accommodate reindeer herders, farmers, and local non-farmers. Briefly, it can be described as a hybrid between the state commons and the *bygd* commons.

The importance of land ownership and its separation from rights of common is that the land rights include residual rights. All rights which are not considered as rights of common are residual. In Norway, for example, rights to hydroelectric power is one of these residual rights. The resource didn't exist a 100 years ago; we didn't know about the value of waterfalls until a new technology appeared. Thus, this new right fell to the land owner.

DESIGN PRINCIPLES

The separation of land and residual rights from the rights to specified resources is the first and main principle of differentiation among various types of commons. A second principle used in the definition of various types of commons is the specification and definition of the resource units from which various political entities are allowed to withdraw resources. By saying "entities," I emphasize that the beneficiary need not be a person. For some types of resources, the unit holding the right of common is the farm or the reindeer-herding unit seen as a legal entity. It is, for example, the farm which holds rights of pasture and only the number of cattle the farm is able to feed through the winter are allowed to pasture. One implication of this is that rights of pasture cannot be traded separately from the farm.

Resource types seem to be differentiated primarily after the ecological dynamic of their regeneration (forests are different from wild game). This dynamic has implications for how to allocate rights of enjoyment and control of technology used in their appropriation. Second, they are differentiated according to economic value. This has implications for who gets allocated the right of enjoyment. The units exercising rights are selected from amongst the actors in the economy. They are persons or production units in the primary industries (farm, reindeer-herding unit, fishing vessel). Stockholding companies or other kinds of economic actors have been barred from these types of rights. This conceptualization of the rights-holding units in the commons reveals a great deal about the political objectives of the society.

The third principle of differentiation amongst commons is the manner of sharing power between the state and the commoner. Its origins go back at least to the eleventh century. At that time the king of Norway was elected by the commoners and he was given certain powers to go with his office, primarily activities related to war. But he was also given some rights of coordination among the users of the commons. The first one,

I think, was the right to give settlers permission to settle in the commons. From the eleventh century on, the king's powers, gradually generalized to state power, have grown in leaps and bounds, but have also had significant setbacks. Sometimes the government has taken away powers from the commoners; at other times, commoners have reasserted their rights or acquired new rights through prescription, a mode of acquiring title to inherited resources other than land.

Today the relations between the state and various types of commoners are formalized both through new acts and development of administrative proceedures. The difference between governance of state commons and *bygd commons* is substantial. The state has no particular powers for decision-making in the *bygd* commons but substantial power in the state commons. The state company STATSKOG manages the state commons for the interests of both the land owner and the remaining timber. In other words, STATSKOG will primarily harvest whatever timber is left after the commoners have taken what the needs of their farms dictate (it is the farm unit which holds rights to timber, not the farmer), but STATSKOG keeps track of the commoners and the extent to which they use their rights. STATSKOG collects rent for the leasing of building lots for cabins and so on.

In state commons the management and coordination of the interests of the commoners have been delegated to the local municipalities in their mountain boards. The mountain board, elected by the municipal council, will give detailed rules for pasturing and building of houses needed for utilizing the pasture, and they also give detailed rules for hunting and fishing by the commoners.

GOALS

In the design of the institutions governing the commons, there is a particular concern about the distribution of benefits, about equity. There is also a concern about the economic perfomance of the commons and about restricting the usage, or more generally about the sustainability of the resource. Judging from the first known written law from the twelfth century, the lawmaker's only concern was equity and its procedural implications. Later on, from about the eighteenth century, concern about limiting the removal of timber was written into the law. In the twentieth century, a concern about the sustainability of wild game populations has been introduced. The concern about economic performance dates from the nineteenth century.

PROBLEMS OF MANAGEMENT

It is not easy to reconcile the various goals, but one technique mentioned above, used for some of the rights of common, is tying the rights to units such as farms or reindeer-herding units. Other rights are tied to persons in various ways. The rights to timber are, for example, tied to the farm, while the rights of hunting are tied to the farmer and the persons in his household. Defining a farm as the unit able to exercise rights in the commons suggests a concern with the viability of the farm as an economic enterprise as well as a practical mechanism (at least for farms) for restricting the usage of the commons. Seeing a farm or a reindeer-herding unit as capable of holding some rights of common relates to the stipulation of inalienability of the rights of common. This idea is strengthened by the stipulation that rights cannot be enjoyed beyond what the "farm" or "herd" needs. A farmer cannot take more timber than he can use in building or repairing the houses on his farm. This limitation was originally introduced in 1687. At that time, the goal of the king was to keep more of the timber for himself. There is no indication that the intention was to use the rule as a conservation measure. But in the 1730s or 1740s, the rule came to be seen by managers of the "king's commons" as very useful in their effort to re-create good forests (and hence improve the economic result for the king). The evolving conflict of interest between the king and the commoners had by the end of the eighteenth century basically been resolved by granting the king ownership of land and residual rights, just as the State has today. The expression "king's commons" is older and perhaps related the the maxim "No land without a lord."

A second basic mechanism of recognizing diverse goals in the design is different rights of common according to geographical location. When persons are defined as the units holding rights, the rights-holders are often limited by geographical boundaries. These may be the boundaries of the houshold running the farm, the area of the *bygd* where the farm is located, the local municipality where rights are to be exercised, or the territory of Norway. A few rights are given to any people who are able to visit the commons (i.e., who have rights to stay in Norway long enough to visit the commons). The ways rights are limited represent a compromise between considerations of equity and probability of overuse. More recent ideas about resource management have not been integrated with the legislation on the commons, but have been laid down as resource-specific rules applying to all lands, whether commons or private lands.

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One reason for such a system of cross-cutting management rules might be variations in the size of the area needed to manage a resource effectively. Variations in rules for various types of game illustrate this. The increasing number of large game in the present century may be seen as a result of this approach even if it is not the only causal factor. The goals and various design principles and mechanisms used to achieve the goals create a complex web of regimes. I will mention a few just to give you an idea of the results. First, there are particular rules for the use of housing timbers, fuelwood, pasture, housing in the commons, fishing, and hunting of small game, beavers, lynx, and big game. These rules are further differentiated by resource-specific management regimes. Several levels of decision-making and various ways of sharing power are part of the gradient. For example, each rabbit or grouse does not have high economic value, and finding the last ones is difficult. Thus hunting them to extinction is at least costly. In principle hunting could be free for all just as fishing. But too many hunters will pose a hazard for both the hunters and the surroundings. Limiting hunting rights to the people living in the *bygd* is one solution. Fishermen, on the other hand, do not represent any particular danger to the surrounding community of fishermen. Fishing can be allowed for all living in Norway. Big game have high economic value and hunting to extinction is not particularly difficult. Here restrictions need to be more severe. Even limiting the rights to the household of the cadastral unit is not enough. Problems of coordination of big game hunting require special legislation and monitoring.

STUDIES OF EUROPEAN COMMONS ARE NEEDED

In England existing rights of common are only rights of pasture for a few farms and considered to be a remnant from the past. In Scotland and Switzerland they are a bit more elaborate. In Norway and Sweden they are still extensive, and in Norway probably getting even more elaborate. It is not obvious why commons have survived better on the northern (and alpine) fringe of Europe than elsewhere, and their consequences in terms of equity of resource access and economic performance compared to alternative forms of property is unclear. Studies of the design principles implemented in contemporary European commons and their degree of success in reaching societal goals might be illuminating for efforts to adapt commons in other parts of the world to the various demands of a modern society.