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Abstract:

From multiple stakeholders to dominium plenum and back again: from Rights of Common to World Heritage Sites

The paper discusses the historical trajectory of commons by looking at the kind of legislation enacted in England from about 1200 to 1950 concluding there is a move from legislating for multiple stakeholders towards dominium plenum ownership and then since about 1850 again moving towards multiple stakeholders as the norm. Then some theoretical concepts that can assist in disentangling private and collective interests in land and land use are reviewed.

The matrix of resources and stake holders found in pre-modern Europe were during modernisation gradually replaced by a landscape tailored according to an idea taken from Roman law that all rights of management and use of resources located within the same area should be held by one person, the dominium plenum. However, economic development and new technology create new resources and new ways of using old resources. New goods and new externalities appear. Today we are discovering that the matrix of resources and stakeholders has reappeared.

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Introduction: What is the commons?

Most people may have heard about the commons. But I bet many - if not most - will believe it is the Parliament of the UK, the House of Commons. If we probe a bit maybe we get suggestions such as the village square, or a wilderness area. Most, even text books in property law, will maintain that commons in this sense is something that has disappeared or fast is disappearing from society. In one sense this is literally true: if we stop believing the commons exist, it has in reality disappeared. But in another sense it is as obviously untrue. There are today more commons in Europe than it was two hundred years ago.

Those who think of the commons as places were poor people could collect firewood and graze a few sheep and a few crofters might have the right to graze cattle and take timber for their farm buildings, may be forgiven for believing that this has or is fast disappearing. But there is a difference between this picture of the commons and the picture of the commons emerging from modern research into the social realities land users face and have to find solutions to. In contemporary society one may argue that all land where multiple stakeholders (usually including the general public as one) find a source or supply of utility are best conceptualised as a commons.

In traditional societies the reasons for keeping some resource as commons are numerous:

- If there is enough for all with access to the resource there is no reason to incur the costs of enforcing property rights.
- If access to a resource is essential for the survival of a family it would be seen as unjust to deny anyone access to a minimum level of the resources.
- If traditional societies see that there is safety in numbers, maximising the number of people imply resource access for every member of the community.
- If there are technical difficulties excluding particular persons form access to a resource, keeping it in common may be the only feasible way of managing it.

Thus, commons abound both in European history and in contemporary ‘traditional societies’.

The commons in European history was a method of reconciling a multiplicity of partly interdependent users and interests focusing on an area containing a multiplicity of partly interdependent resources. As a method of resolving conflicts about access and distribution in a situation of multiple interdependent users and resources the commons has worked extraordinarily well. Not because the commons is a natural phenomenon, but because people applied their ingenuity and capacity to finding ways to make it work. The commons is today best seen as a method for solving problems among land users rather than a solution in itself.

Contemporary commons and commons in history

One rather unexpected revelations for me as I learned about land tenure in Malawi, was the realisation that the customary land tenure of Malawi was in many ways very similar to the customary land tenure of medieval and early modern Europe, or perhaps I should say England and Scandinavia, since those are the lands where I have some knowledge of land tenure history.

According to Berman (1983) modern approaches to rule-of-law originated first in the Vatican state to be followed in the tenth to eleventh century by the Duchy of Normandy, The Norman Kingdom of Sicily and a bit later in England as the ruling dynasty of Normandy relocated there. England's long history of rule-of-law and good historical records provides us a wealth of information on medieval and early modern legislation on land tenure issues.

The Norman conquest of England in 1066 renewed and entrenched the feudal manorial system of landholding. From prehistoric times the landholding was centred on a more or less self-supporting village community. Their landholding was divided between the arable lands they were able to till and grow crops on, and the non-arable, the waste and woodlands where they found grazing, fodder and fuel[1]. The arable lands were in individual control during the growing season, but could be used for common grazing during the rest of the year (commonable lands). The resources of the non-arable lands were, probably, accessible for all the villagers as well as strangers that might have a need for something. But as population grew, the number of villages grew, and soon there appeared disputes about the details of use and access to the various resources.

This is in broad outline also the contemporary situation in Malawi. While the transfer of legislation from one country to another may do more harm than good, it may be instructive and provide ideas to study similar cases whether historical or contemporary.

In the present paper we shall give a brief outline of the development of land tenure legislation in England with a focus on the commons. Some speculations about the nature of this development and the reasons for the persistence of the commons will be presented. The removal of the commons was on the political agenda in England until 1876, and their demise and disappearance has been a common enough assumption all throughout the twentieth century. But 1876 also marks a turning point. The commons did not return in name. But much of the legal technology currently used to reconcile the multiplicity of interdependent interests in the diversity of interdependent resources originated in the commons.

In the development of property rights in Western Europe I will propose three broad phases:

1. Medieval land tenure before 1350
    a. Transition to the next period 1350-1650
2. Early modern land tenure 1650-1850
    a. Transition to the next period 1850-1930
3. Contemporary land tenure from 1930

[1] As far as I can understand English language does not have a good word to distinguish between these two classes of land. In Scandinavian languages words similar to the Norwegian "innmark" (arable and meadow lands held in severalty) and "utmark" (untilled arable, wastes, woods and pastures held partly in severalty and partly in common or jointly) captures the distinction in usage and includes the connotation of differences in property rights. We shall here use arable to mean all land that currently is cultivated, fallow or allocated for future cultivation, and non-arable to denote the rest including pastures, forests, mountains, rivers, and small water bodies.

From pre-modern to contemporary property rights in land[2]

Traditionally "commons" were seen as "uncultivated lands" or the "Lord's waste", but it was also town parks or village greens for the citizen's common usage.

In the medieval village most of the arable would be privately owned or controlled, while the non-arable often was publicly or collectively owned or controlled. However, moving from the village green to the midway point to the next village one would often find a graduated shift from clear and strong individual control of plots to open access. There would be grey areas where rights were contested and in the process of being redefined. One might for example find a perimeter band of non-arable land around the arable that was more individually than collectively controlled. But it was also the case that much of the arable was not completely individually controlled. Outside the growing season it could be used for pasture. The English open field system of agriculture is well studied. Usually it entailed both regular reallocation of fields and coordinated action in working on the land such as ploughing and harvesting.

In the feudal system of landholding all lands would vest in the lord of the manor and for those lands disputes about land use and use rights could be heard in the manorial court. In the non-arable lands the villagers would hold use rights protected by customary law. They could use the non-arable according to custom, but what was left (if anything) belonged to the lord of the manor. The lord's dissatisfaction with what was left appears to be the origin on the first statutes on the commons of 1236. Here the lord's right to enclose the part of the commons that the commoners did not need was confirmed ("right of approvement"). This was extended in the Commons Act of 1285. But the lord was obliged to leave sufficient pasture for the commoners use. If the commoners disagreed with the lord they could use a writ of assize of novel disseisin to try to recover their rights of common.

By the time of these first acts on the commons it was firmly established that the lord of the manor is the owner of the ground (or soil) of the non-arable. The commoners owned rights to specific resources such as pasture, fuel, building material, and fishing. The concern in the parliament was to make it possible for the lord to retain the residual of the specific resources. It was also firmly established that the commoners' rights in the non-arable had as good title as the lords. The link between ground ownership and the remainder of the rights of common was not stated explicitly but appears to be taken for granted. This link becomes important as it later is generalised to apply to all kinds of new resources or new ways of using existing resources or anything left over in an executed contract. The ground owner will in the future become the owner of the remainder, the unspecified residue after all specific resource quantities (including time limited leases) have been accounted for.

Between the 13th and the 19th century the enclosure movement grew. Major acts detailing how enclosure should be done were passed in 1773, 1801, 1833 and 1836. Their major concern was agricultural production[3]. However, most of the actual enclosures were particular projects paid for by private interests mandated by private and local "inclosure" acts. In the hundred years before 1836, some 4000 such inclosure acts were passed. The 1836 act was intended to do away with the delays and expenses of this procedure. It also expressly prohibited enclosure of the non-

[2] Important sources for these observations are Pugh 1953, Halsbury's Statutes of England , Third Edition 1968, Neeson 1993, and Rackham 1989.
[3] The long title of the "Inclosure Act 1773" was "An Act for better Cultivation, Improvement, and Regulation of the Common Arable Fields, Wastes, and Commons of Pastures in this Kingdom".

arable lands (the waste). After 1845 nearly all important enclosures were mandated by the Inclosure Act 1845. The 1845 Act marks a shift in focus of the enclosures. Now the main interest is land consolidation in the arable lands, not privatisation of the non-arable lands[4]. And after 1868 there are no more acts on Inclosure. In 1876 the title of the new act was changed to the "Commons Act 1876".

Box 1 The History of Hatfield Forest

The complicated divisions of property rights is illustrated by Rackham(1989) in his investigation of the history of Hatfield Forest. Around 1550 the king gave all his interests in Hatfield Forest to Lord Rich. Part of the Forest was already owned by the Barrington family. In 1592 the Rich family sold their interests in it to the Morleys of Great Hallingbury. In Rackhams words:

> «The Forest had been the Crown's, and the manor someone else's, for much of the Middle Ages, and this had led to disputes; but the new separation was different. Lord Morley had bought not only the Forestal rights (by now reduced to little more than the rights to keep deer) but also the soil of the whole Forest and the trees in the western two thirds. Barrington already had the trees (but not the soil) of the north eastern third and the right to pasture animals throughout the Forest; he now bought the manorial jurisdiction over the whole Forest, including the right to hold courts and to fine offenders (including Lord Morley) against the by-laws. As lord of the manor he now had to deal, not with distant and complaisant Royal Forest authorities, but with a resident owner of the Forest eager to enforce his claims. There was plenty of room for the two lords to dispute which rights each had acquired, and for high-handed commoners to play off one lord against the other.» (p.97)

The separation of ground from the rest of the resources was clearly important. The one with title to the ground was the landowner. For a non-historian it is startling to observe that one could buy «the manorial jurisdiction over the whole Forest». But reading Bloch's (1940) account of the fragmentation of social power (military, political and economic) during the feudal ages one should not be surprised. Instead we here see one source of the local and regional variation of property rights: the local or manorial judicial powers to define and enforce rights and duties in relation to local resources.

The start of the enclosures in the 13th century may have been driven by the rather practical considerations of the lord. How could he assure that he got a maximum out of his waste with a minimum of manpower? It gained momentum by the introduction of large scale commercial sheep farming in the 14th century. During the centuries the process got its ideological interpretation. The privatisation of the commons, the enclosure of lands belonging to one individual became the explanation for economic progress. The hero of England's agricultural revolution was without doubt the "improving landlord". The ideas about the important and beneficial consequences of private individual land ownership were probably fuelled by the discoveries and reinterpretations of Roman law. The dominium plenum, theory of ownership became the politically correct view of the liberal political movement. And by the time of Adam Smith's the Wealth of Nations in 1776 this view apparently had taken on a life of its own with consequences for how property rights

[4] The long title of the "Inclosure Act 1845" was "An Act to facilitate the Inclosure and Improvement of Commons and Lands held in common, the Exchange of Lands, and the Division of intermixed Lands; to provide Remedies for defective or incomplete Executions, and for the Non-execution, of the Powers of general and local Inclosure Acts; and to provide for the revival of such Powers in certain Cases."

came to be seen in later centuries. The knowledge of and the techniques to handle the complicated interrelationships of people, resources and land stayed within the legal system. But outside in the emerging new discipline of economics the dominium plenum doctrine took root. Other systems of ownership faded out of view.

By the time of the Commons Act 1876, one hundred years after The Wealth of Nations, the force of the enclosure drive was spent. New concerns were on the rise and had by now become prominent. In the Inclosure Act 1845 the urban concerns with access for the public to common lands appear for the first time as a minor interest. In 1866 the first Metropolitan Commons Act was passed. In 1863 we get a "Town Gardens Protection Act", in 1872 a "Parks Regulation Act", in 1906 and Act on Open Spaces, in 1938 an Act on the "Green Belt" of London, and in 1949 the Act on "National Parks and Access to the Countryside". The interests of the urban populations had become a major concern. Regulations to promote the preservation and management of the remaining commons were just a minor part of this.

Historical studies from the 18th and 19th centuries show a widening gap between the ideological beliefs about the many individual and social benefits of enclosed private property and the facts on the ground. The purported gains from entrepreneurial innovation and rational agricultural activity were not as great as claimed and the performance of the purported conservative low productive activity of the commoners were not obviously inferior.

The privatisation and individualisation of the landscape had by the end of the 19th century basically come to a halt. The complexity of medieval land tenure had in one sense been drastically reduced. In the Law of Property Act 1925 the number of tenure types could be reduced to two: freehold or leasehold. But enough of the old commons remained to preserve the knowledge of how to use resources in a system of interdependent interests and activities.

This knowledge was not directly recognized as relevant for the new urban interest in access to the rural landscape, but the legal technology developed to disentangle the many and varied interests in the medieval agricultural system was ready at hand. After the National Trust for Places of Historical Interest or Natural Beauty, incorporated in 1894, ran into trouble this knowledge could be put to good use. Their problems arose because they did not have any powers to regulate the use of the properties they had acquired for the benefit of the general public. In a 1907 Act the National Trust was reorganised and given the necessary powers to fulfil its stated purpose. This act was extended several times until 1953. Today the National Trust is one of England's largest land owners. The public (the commoners as it might have been called in earlier times) have well regulated access and can enjoy the amenities.

The activities of the National Trust are based on property rights to the lands and buildings they want the public to have access to. But this is hardly sufficient. Also privately owned lands outside the metropolitan areas were of interest to the general public. In 1949 the Act on "National Parks and Access to the Countryside" took steps towards securing access to waste lands whether held as commons or in severalty.

We see on the one hand that new interests in the uses of the land appear and get legal confirmation. The "improving landlord" managing his land in dominium plenum has to deal with the interests of the urban public. On the other hand we see that the ideological hegemony of the private individual landowner managing his lands in dominium plenum becomes entrenched in the new academic discipline of economics. The virtual disappearance of property rights from

sociology after the first world is symptomatic. Property rights were seen as fixed and immutable. Only in the 1970s and 80s in the emerging field of institutional economics, economic sociology and political economy do property rights reappear as a variable of interest for the planning of welfare and economic development.

Medieval land tenure is characterised by the distribution of use rights and procedures for decision making in connection with uses and conflicts about use rights, rents and taxes. The decline of the traditional commons started with the introduction of large scale sheep farming on the manors of England and ended as seen above some time between 1845 and 1876. By the time of Lock, Hobbes, Grotius, and Pufendorf the beneficial consequences of entrepreneur landlords owning the ground and everything that was attached to it, flowed over it, or lay beneath its surface had become self-evident, to be taken for granted. The dominium plenum became the hegemonic definition of property rights.

By the 1870s most of the traditional commons were gone, only commons of grazing remained here and there. The act from 1876 switched from being concerned about easing enclosure to being concerned about maintaining and regulating the use of the few remaining commons.

The reduction of or disappearance of the medieval commons should not be lamented per se. What I think is less fortunate is that by forgetting about the old commons we forgot about the reasons for developing this amazing legal technology in the first place. The many enclosures may have simplified the landscape and disentangled the interdependence of interests and resources. But the simple landscape of dominium plenum did not last. Even before the turning point around 1850 large groups of people with stakes in the landscape appeared on the political scene and demanded their share of the goods. The enclosures had not managed to disentangle forever the multiplicity of partly interdependent users and partly interdependent resources. By the 1920s a new course in land use regulations pointed to the contemporary system of tenure.

Since the 1920se the drivers of change have been the advent of new concerns rooted in the interests of urban populations for access to nature and the protection of biodiversity, and the public health concerns about pollution and environmental degradation.

The commons have reappeared but with new names. Today they are the lands of the National Trust, and the National Parks. They are seen in the parks in the cities and the green belts around them. They are admired as world heritage sites.

Property rights have to be renegotiated continuously as society and culture change. In doing so the level of specification of rights tends to grow. The greater specification allows problems to be solved. The solutions to old problems fade into the taken for granted and new problems take centre stage. The dominium plenum solution to internalising the externalities could not accommodate the more complex world of modern democracies.

Theoretical perspectives on systems of property rights

In the culture of western democracies there is a tendency to think of property rights in absolute terms. Ideas about property rights are based on experiences with our everyday personal belongings (Snare 1972). Transferring such beliefs into public discourse gives the view that only dominium plenum is real property rights. Only if one decision maker holds all that is attached to the ground, flows over the ground or lies below the ground, and is awarded all the rights and

liberties of enjoyment and devolution will there be real property rights. Thus only a few societies enjoy real property rights and only a few rights are seen as property rights.

An alternative view is based on the assumption that all societies have rights we should recognize as property rights. In any society there are the rights that enjoy the maximum protection the society can afford (Godelier 1984). These rights typically comprise the resources necessary for life and survival of a family. Such rights should be called property rights.

The belief that property rights are fixed and immutable is part of their magic. It makes us feel secure in something and gives us freedom to act. In a historical perspective, though, property rights change with political and cultural processes. In order to understand their development we needs concept from outside of law.

If property rights are the rights defining the legitimate appropriation of a stream of goods, we are led to ask:

- Who are the actors entitled to appropriate?
- What are the goods the actors appropriate?
- How do the actors go about appropriating?
- What are the actors allowed to do with the goods appropriated?

A first approximation to the question of "who", is the distinction between individuals, collectives, and the state. This distinction is behind the classification of property rights into private, common, and state property rights regimes which further have been associated with private goods, common pool goods and public goods.

Studies of property rights often emphasise their embeddedness in a political system and emergence from a political process (Brouwer 1995a, Sened 1997, Hann 1998). Thus the definition of property rights as being of the private, commons or state type is an interesting fact in itself, and should be expected to vary among societies. It is usually taken for granted that private property rights include all the claim-rights, privileges, powers and immunities[5] recognized by (mature) legal systems (Honoreé 1961). However, the discussion of private property rights is usually focusing on the right of exclusion which is presumed closely tied to the right of alienation either in bequeathing or in trade. Without the right of alienation and exclusion the bundle of rights seem to be theoretically uninteresting for the (private) property rights paradigm[6]. However, a right, even if it is inalienable and only partly or conditionally excludable,

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[5] Hohfeld's (1917, 1917) conception of legal relations applied to the relation between owner and non-owner in relation to an object also contains the negation of this relation as seen from the owner's position:

	RELATION OWNER	NON-OWNER	ITS NEGATION
Use aspects	claim-rights	duties	no-rights
	Privilege	no rights	duties
Exchange aspects	Powers	liabilities	no-powers
	Immunity	no-powers	liabilities.

Commons (1924) takes the discussion further. He clarifies the meaning of the categories outside the strict legal context as well as the distinction between the directly interested parties (owner/ non-owner) and the «uninterested» third party (such as the «public interest») to which Hohfelds «jural opposite» (negation) relationship applies if interpreted in the meaning of a limit on the owner/ non-owner relation.

[6] The focus on alienation can probably be explained by the «Coase Theorem» (Coase 1960) stating that in a neo-classical economy «free» trade in assets will always lead to an optimal resource utilisation. Hence, assignment of

may give rise to a valuable stream of goods, some of which may be alienable. And in between the alienable and inalienable there are all the possible variations of the conditionally alienable. These rights can be as private as any completely alienable and excludable good[7]. The problem is not alienation or not, but monitoring and enforcement of whatever rights there are.

In discussing state property rights it is focused on their public character. They are by some seen as being held in trust for the people and should be managed by the wise and well intentioned state bureaucrats for the greatest good of the greatest number of people. By others it is focused on the inherent difficulties in designing rules to do this even in the best of circumstances, and the many examples of states with corrupt servants making state property into something best described as open access or even the bureaucrat's own private property should warn us against assuming a priori a benevolent state.

In between the discussion of private and public property, the common property rights are by some seen as the ideal combination of private and state aspects of property, and by others as getting the worst of both. It is well within the probable that all arguments about the virtues and shortcomings of common property may be true in some specific context and with some specific combination of rights and duties as defined by some specific political system. It is impossible that all arguments can be true in general.

Bundles of rights

Rights seldom come one by one. Usually they are defined generally and will be thought of as bundles in the sense that the general description of them will allow for some kind of specification into «elementary» rights. The rules of specification, however, may vary. This leads to a conception of different bundles of rights.

The rights and duties of an owner of some particular resource are defined in several ways:

- customary behaviour towards the resource as defined by the local culture
- legislation defining the rights and duties of a holder of the particular resource
- public legislation on environmental protection and resource management
- ideas of equity in dealing with competing interests in the resource

Rights are often defined in an inclusive hierarchy where each category implies the rights in lower level categories (Schlager and Ostrom 1992):

1. Alienation
2. Exclusion
3. Management
4. Subtraction
5. Access

Rights of alienation imply rights of management and exclusion. Rights of management imply rights of exclusion, access and subtraction, and rights of exclusion imply rights of management,

property rights does not matter for efficient outcomes, while any restriction on trade will be detrimental to it. However, Coase, unlike most of his readers, recognized the limitations of this theorem. The assumptions require that all actors are rational and possess complete information about all other actor's preferences and strategies, and that transaction costs are zero. Recognizing this, the conclusion is that politics, institutions and distribution of rights *do* matter. The detrimental impact of restrictions on alienation is far from obvious.

[7] McKean (1998) points to the problems flowing from our use of «private» both for a type of good, a type of actor, and a bundle of property rights. We lack a precise technical language for the discussion of property rights and institutions. Buck (1998:2-5) demonstrates how technical terms in law and political science can convey different meanings.

subtraction and access. Theoretically the five rights can be combined into five packages containing more and more extensive rights. They are often seen to correspond to some particular role in the social system managing a resource (Table 1). The definition of «owner» in table 1 corresponds to the view holding that only right of alienation and exclusion will constitute «real» private property. Is this in fact the preferred way for legal systems to define owners? To what extent does the law prohibit, allow or proscribe some way of breaking up this hierarchy?

The bundles of rights defined by table 1 can be said to represent an action or production oriented specification of rights. It emphasises what an appropriator may legitimately do with whatever is owned.

Table 1
Bundles of rights associated with positions in the resource management system.

	Owner	Proprietor	Claimant	Authorised user	Unauthorised user
Alienation	X_1				
Exclusion	X_2	X_2			
Management	X_3	X_3	X_3		
Subtraction	X_4	X_4	X_4	X_4	
Access	X_5	X_5	X_5	X_5	X_5

Source: Schlager & Ostrom 1992

This is in many ways a cross-cultural standard of property rights. Its general applicability may be observed in customary law societies in Sub-Saharan Africa by substituting alienation with devolution. In societies with abundant virgin land like most of Sub-Saharan Africa well into the 20th century, there is no incentive for developing a market in land. Still, people in these societies are as interested in devolving land on chosen successors as anywhere. And the right of devolution will imply rights of exclusion, management, subtraction and access. For most purposes it seems reasonable to talk of owners also in cases where alienation is restricted to devolution to customary successors.

In the Roman law tradition this production oriented concept of ownership came to be applied to the ideal typical situation where all valuable resources within some geographical boundaries are held by the same actor. Then it was dominium plenum.

But this is not the only approach to specification of rights relevant for resource management. If we take the standard ownership position as given, one may further think of (at least) two other ways of specification of rights to resources. One is the specification of rights developed in the trust institution[8]. If the hierarchical specification in table 1 is called action oriented, the trust specification can be called utility oriented in the sense that its origin was the problem of securing the long term utility of some resource for a specified group of persons.

Trust ownership

Macfarlane (1998:112), citing Stein and Shand 1974, sees the English common law tradition of treating bundles of rights rather than the total dominion of the thing (as in the Roman law

[8] Another has elsewhere been called "viability bundles" and is in essence the medieval or pre-modern pattern of combining resources to estates, see Berge 2002.

tradition) as being more open to the developments of new rights necessary for capitalist development. The most sophisticated expression of this may be the trust institution. The trust institution developed in English jurisprudence out of the medieval customary law as amended by case law and common law[9]. The trust institution allows separation of legal, managerial and beneficial ownership rights in a way different from what is stipulated in table 1. In a trust the owner according to law and equity has a package of rights put together differently from the hierarchical system of table 1 (see table 2). For land trusts the owner, called trustee, will usually only have the power to alienate the land and enough of the other rights to exercise the right of alienation in conformity with the trust put in him or her. The beneficiary of the trust will retain the rest of the rights and duties. But rights of management may be delegated to some professional while the beneficiary has access and withdrawal rights to the net utility of the property: the net stream of income and other goods it generates. Then the rest of the rights of exclusion, management, subtraction and access are shared according to what needs the manager has and to the benefit of «cestui-que-trust»[10]. The approach to defining the central role of the beneficiary may be called consumer oriented. The other bundles of rights in the system are put together as complements to the rights of the beneficiary.

	Trustee	Cestui que trust (beneficial use)	Manager (managerial use)	Ordinary owner (Table 1)
Alienation	X_1			X_1
Exclusion	ΔX_{21}	ΔX_{22}	ΔX_{23}	$\Sigma\Delta X_{2j}=X_2$
Management	ΔX_{31}	ΔX_{32}	ΔX_{33}	$\Sigma\Delta X_{3j}=X_3$
Subtraction	ΔX_{41}	ΔX_{42}	ΔX_{43}	$\Sigma\Delta X_{4j}=X_4$
Access	ΔX_{51}	ΔX_{52}	ΔX_{53}	$\Sigma\Delta X_{5j}=X_5$

Table 2 Complementary bundles of rights as defined by the trust institution.

The flexibility of this system and its ability to address new concerns also in resource management is evident in the development of public trusts such as «The National Trust for Places of Historical Interest and National Beauty». In Canada the trust institution is used as baseline for developing new forms of forest management in something they call an «eco-forestry land stewardship trust model» (Banighen 1997). By the 1990ies land trusts or environmental trusts had become a standard technique to create and manage environmental easements. It is a private law rather than public law alternative to environmental regulations. In states where the diversity of resources, environmental conditions, and interests makes it difficult to promulgate comprehensive public regulations, this may be a more productive way of organising the commons.

Besides the trust institution two other features of English law are important to understand for the modern regulation of the non-arable lands: the courts of equity, without which the trust institution could not have been developed, and the strong tradition for developing customary law into common law. Neeson's (1993) account of how the manorial courts were used to regulate and enforce usage of property rights gives a fascinating testimony to the versatility of the customary law tradition. It created variety and tailored usage to local conditions. Berman (1983:325) observes that in the medieval society «.., lawmaking itself was regarded as a process

[9] Its origin is traced to the effort by the more wealthy to evade the statute of uses from 1536 (Simpson 1986: 199)
[10] For technical terms it is referred to Black's Law Dictionary

of deliberation and discovery. Laws were considered to be either true or false, either just or unjust, and therefore the making and administering of them were not sharply distinguished from their application in case of dispute.» The common law approach to legislation is a continuation of this tradition.

The Dominium Plenum model of landholding

Legal development inspired by Roman law's dominium plenum in its Justinian interpretation seems to end up with a landholding system where ownership of the ground automatically implies ownership of all resources attached to the ground unless otherwise specified in contracts between the owner and some tenant. And the ownership position is assumed to have all the rights and duties as specified in the full hierarchical management bundle of rights. The unity of landholding and resources and the full power of actions associated with it give a simple and powerful action model for the independent and self-sufficient individual and citizen. This action model is also taken for granted in the definition of ownership and property in most public discussions. The dominium plenum model is the hegemonic ideology of property rights.

Students of modern society often note a trend they call individualisation. Individual land ownership is part of this. Around the world there is in general a strong tendency to organise ownership of land according to the dominium plenum model. In developing countries, one after another they try to implement land reform programmes comprising enclosure of commons and individualisation of titles. One after another they fail. The outcome does not work as expected. The continued use of the dominium plenum model of land holding both nourishes and is strengthened by the cultural and academic strength of it. But the failures of the application of the model suggests something vital is missing. The conclusion here is that knowledge and understanding of earlier systems of land holding are the vital missing links in the design of land reform programmes.

To some extent one may say that historical developments progresses from the common law paradigm to the private property paradigm to contemporary society with its public regulations paradigm. But in saying this we must keep in mind that the approaches do not displace each other. The old ones do not disappear, but adapts to and informs the evolution of new paradigms.

Great efforts were and still are expended on enclosure processes to take apart the bundle of older rights and put together a new one where ownership of the ground goes together with ownership of all that is attached to or flows over the ground. In this historical process it is rather striking that just as the tide turned on the enclosure movement in England one may observe a kind of resurgence of commons in many European countries. In 1857 the last enactments on «Forest» enclosure occurred in England. The same year Norway enacted new types of commons as well as reaffirmed the old commons. A few years later Sweden and Finland were creating new forest commons. In 1976 Portugal made an effort to recreate the old village commons called baldios (Brouwer 1995a and b).

Even if England did not try to recreate any of their old commons, they could, with the legal techniques developed, create something new, the public trust, owning and managing land, not exactly in common or jointly, but at least for the benefit of the new urban commoners. England also has moved beyond this total «unity» of rights by applying the trust institution to the management of land according to new concerns about cultural landscapes and the sustainability of ecosystems.

It has been focused on the «trust» model of landholding. This model has proved very versatile in its adaptations from, on the one hand, the capitalist concerns about organising resource ownership and distributing rents, to, on the other hand, collective action based on public concerns about cultural heritage or protection of nature. But the model is difficult to apply outside the historical context where it was developed. Other countries need other solutions. The usual approach is public regulation for the preservation and enhancement of environmental services and goods.

Dominium plenum and public regulations of the environment

The old commons of North-Western Europe, whether conceived of as lands or rights, are remnants of the pre-medieval land use system where significant use rights were held jointly by the local population and managed by their customs. Access to and use of the commons were significant additions to the outcome of severally held lands, often yielding goods it would be difficult or unprofitable to provide on individually held lands. The landscapes that grew out of this system by way of privatisation, particular usages, and diversification of control are today highly valued and considered both precarious and in need of protection. Today one can see the old commons as highly sophisticated forms of property rights with a social and political dynamic very different from what we might call ordinary individual private property.

Previously it was taken for granted that many special interest groups had to co-exist within the same landscape. In the dominium plenum approach this was seen as problematic and one interest group, the ground owner, gained ascendancy. But new interest groups kept being formed.

If we take for granted that every interest group wants its special interests safeguarded, we see that those that grew out of the old commons and their resources, the owners of the ground, found protection in property rights. The urban interests concerned with the new resources have had to turn to the state to get regulations protecting their interests. The remarkable thing is that they often have gotten, at least partly such special regulations without much consideration of the possible interactions and interdependencies there might be among the various resources of the regulated area.

In Europe a situation with multiple stakeholders within a common area have since medieval times and until the dominium plenum tradition of property rights became dominant been handled as if the person or group of persons with the highest interest in a particular resource had been awarded property rights to it, and access to legal remedies to sort out the points of conflict with other groups. The fact that different resources within an area had different owners, sometimes with conflicting interests, required a common organisation. The feudal system gave the territorial aspect an advantage that translated into ownership of the ground in the early modern state. The advantage of the ownership of the ground was extended to its ultimate end in the privatisation of the commons, the enclosure. Unifying the property rights to the resources within fixed boundaries internalised many conflicts leaving only the externalities suffered by neighbours and the questions of justice in relations to those excluded from the land.

But the simple situation (the “fee simple”) was of course too good to last. New problems appeared as new, environmental goods and services were ‘discovered’. Instead of the multiplicity of property rights relations of the old commons, a separate sphere of environmental regulations was created, either ignoring old property rights or consciously overruling them. Today the fight is about the relative standing of the different regulations. Which bureaucracy is best able to promote its interests?

The societal dynamic threatening the environmental qualities are often associated with the powers inherent in the dominium plenum property regime that grew out of the customary law regime. As urban society has matured and learned more about the goods and services provided by natural ecosystems in their various stages, a new concern about their management has emerged[11]. The goods and services provided by nature and valued by urban society are in some ways very different from the goods and services valued by rural society and the owners of the old style commons. But in other ways they are similar. And most of them are closely interdependent on each other.

This interdependence of traditional resources (water, forest) and the ecosystem services is of general interest. Recreation and biodiversity will for example depend heavily on how traditional resources are utilized. The interdependence of many of the goods and services of different types is in one sense obvious. But it is seldom included in the design of regulation regimes.

For environmental goods and services the efforts or expenditures required to maintain the level of service will in most cases appear as incomes foregone by not exploiting goods like forest or water. These costs are not evenly distributed. Depending on the distribution of property rights to the traditional resources, the level of conflict around the institution of new public regulations will vary. For example, in a private recreation area the organisation must either include landowners and other stakeholders or in other ways accommodate their interests to align incentives for maintenance and enjoyment. The resort owner alone will seldom be sufficient. One would expect that environmental goods and services should be the task of local public actors with powers to tax its constituency.

Conclusion

A modern society requires that there are ways of specifying resources and dividing rights among several and different owner interests. There also has to be ways of sharing and co-managing resources and benefits within groups of differing sizes and interests. The most versatile tools for achieving this is found in the Common Law system developed in England[12]. Its current versatility is in many ways the outcome of the struggle between a customary system of rights holding similar to the Norwegian and the effort to implement the dominium plenum position in the modernisation of the British state during the 18th century[13].

In contemporary modernisation projects an understanding of how these tools of land holding are constructed and what their cultural foundations are, will be essential. However, legal techniques can never be transferred from one culture to another without being adapted to the local values and conceptions of property. There is a close link between property rights in action and cultural values and ways of thinking (Douglas 1986, Godelier 1984).

The simple conclusion about the future of common property must be that there always will be one form or another of common property. But as cultural values and ways of thinking evolve, so the property rights system will evolve. To recognize the commons of the future we need to understand their foundation in general problems of collective action and ideas about equity.

[11] Devlin and Grafton (1998) recognize two paradigms in the studies of how to mitigate the environmental problems: the private property rights paradigm and the public regulation paradigm. Yandle (1998) adds a third: the common law approach. All approaches are in use.
[12] Its history is fascinating (see e.g. Thompson 1975, Simpson 1986, Neeson 1993).
[13] On the question of landholding and modernisation of the state see Scott 1998

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