On The Problem Of Terminology

by

Erling Berge and Hans Sevatdal,
Department of Land Use Planning,
The Agricultural University of Norway

This conference has focused on the problem of law and the management of renewable resource systems. Making law a central theme necessitates some understanding of Norwegian legal terminology in the field of property rights regimes.

Legal terminology

Norwegian law recognizes two main types of ownership-situations, single ownership and ownership in common[6]. The actor who holds the rights and duties of ownership is the legal person. The legal person is either a real person, a recognized type of private corporation, or a recognized type of public body. The rights and duties of single ownership, according to the law, do not depend on whether the owner is an individual or a private or public body of any kind. Any differences in how the owners manage their resources are supposed to be caused by differences in the priorities of the owners, the property rights regime is the same. Ownership in common is different from single ownership mainly by special provisions taking care of decision making procedures among the owners. In general both single ownership and ownership in common by the three traditionally recognized types of legal persons are considered unproblematic (even though the problems in any particular situation may be formidable).

[6]According to Lawson and Rudden (1982:82-84) the term "ownership in common" is the best approximation. English property law recognizes two types of co-ownership: joint ownership and ownership in common (for land the terms are joint tenancy and tenancy in common). The difference between them concerns what happens to the property on the death of one co-owner. Joint ownership implies that one joint owner's share accrues on his death to the other joint owners, while ownership in common implies that on the death of one co-owner his share passes to his successors. The joint ownership situation is ideal for the functioning of trusts and is said to apply to the management of property while ownership in common applies to the beneficial enjoyment of property.

TYPES OF OWNERS AND OWNERSHIP

Types of owners
public body
private body
individual

Types of ownership

single ownership	one legal person holds title
ownership in common	more than one legal person holds title

However, in our situation a fourth type of owner and a third type of ownership is of particular interest. The new type of owner will be called a quasi-owner and the new type of ownership will be called quasi-ownership, in order to emphasize that they are not legally recognized as such but that they share important characteristics with real owners, and real ownership.

One may say that the right to use some resource is "quasi-owned" if it is inalienably attached to legal persons in their capacities of being residents in an area or citizens of a state. Besides inalienability, the "quasi-ownership" of some resources is different from ordinary ownership in the protection afforded by society. It depends less on formal law and more on customary law and continuous use than ordinary property rights.

The quasi-owner is best thought of as an estate in its capacity as a cadastral unit[7]. An estate is not a legal person, but the right to use some particular resources can be inalienably attached to an estate. The ability of estates to hold resources in quasi-ownership is the basis for calling them quasi-owners. The right to resources held in quasi-ownership may be annulled (extinguished), but not transferred independently of the estate[8]. Selling the estate implies selling those particular rights as well. This kind of relationship between a farm and some particular right has existed for a long time in Norway. It could be in the

---

[7]A cadaster is a public register of all real property. It defines title to land, identifies the property unit, and defines the boundaries of the various units of land, and it establishes the value of them.

[8] Since individuals are not bought and sold, transfer of inalienable rights of persons is impossible. But they may be annulled by loss of citizenship or exclusion from particular areas.

form of holding a certain proportion of all "assets", the ground itself included, or it could be in the form of the right to use some particular resource. The latter situation implies that use rights are separated from ownership to the ground. Separation of the right to use particular resources from the title to the ground is very common and can be found in a variety of forms. Thus various kinds of use rights to resources like pasture, wood, hunting and fishing have been attached to farms in this way[9]. Recently a similar situation has arisen in the relation between fishing vessels and fish quotas (the registry of fishing vessels performs the same role as the cadastral register).

The quasi-ownership relation is the basis of the legal construction which is called "Allmenning" in Norwegian. Literally the word "allmenning" means "owned by all" and is used to denote an area which can be used freely by all. In this interpretation it has the same meaning as the commons, but in legal terminology the word has taken on a specific and precise meaning. Here it means an area, most typically forests, mountains or other outfields, in which the members of a local community or some group of farm estates hold, in quasi-ownership, most of the rights to most of the resources. The title to the ground is normally held by the state (State-allmenning), but in a few cases it is held in common by farming estates (Bygde-allmenning). The rights held by the persons or estates using the resources of the area designated as a commons, are held in joint quasi-ownership[10] and separated from the ownership of the ground. They are specific in the sense that after the rights holders have exercised to their satisfaction their traditionally established use rights, the remainder can be enjoyed only by the holder of the title to the ground. This is particularly important in relation to new uses of the ground. Thus the right to exploit waterfalls for the generation of hydroelectric energy goes with the ground. There are many local manifestations of the commons with state-commons and bygde-commons as the main forms.

A second version of the separation of use rights from the ownership of the ground is found in the so called "allemannsrett" (literally "all men's right") and could perhaps be translated as public rights. This right is restricted to real persons, is established by residence in the state and applies to all ground with some restrictions for cultivated land and built up areas. Right of way, camping, hiking or picking of wild berries are examples of this. Rights to some kinds of

---

[9] In Roman law an inalienable right to enjoy some asset was called usufruct.

[10] It is joint quasi-ownership in the meaning of joint ownership (see note 1). If one quasi-owner ceases to exist his rights go to the other quasi-owners and not to his successors. This implies e.g. that if a small-holding ceases to be a farm (becoming for example a vacation resort) its rights in the commons go to the other quasi-owners.

hunting and fishing are public rights, but restricted to state commons. Public rights can be said to be held in quasi-ownership in a way similar to the rights enjoyed in state-commons or bygde-commons. Public rights comprise, however, fewer types of enjoyments and they have weaker protection (probably since their economic value is low for any one individual or impossible to estimate).

A third type of restriction on the ability to enjoy a right and the area where it applies, is the rights of access to pasture and other necessary resources for the reindeer herders. The right to hold reindeers is restricted to Norwegian citizens of the Saami people and, since 1. July 1979, it also depends on either being active as a reindeer herder on that date or having proof that at least the father or mother or one grandparent of the person was an active reindeer herder. In principle their rights of access to the necessary resources are independent of ownership of the ground whether the ground is owned by the state, or by any other legal person singly or in common. Their rights apply only within the 10 reindeer herding districts defined by law in 1894 and depend on continuous use of it from "time immemorial".

Social science concepts

The various names for jointly used natural resources: communal property resources, common property resources, common pool resources, res nullius, etc., do not specify a type of ownership situation for the resource, only its use. They all convey a sense of access for everybody to a finite resource with all the problems this entails for equity of distribution and the sustainability of utilization.

The labels most frequently used do not distinguish clearly between two essential characteristics which both go into the definition of what type of use situation we are dealing with: divisibility of the resource,[11] on the one hand, and excludability of the users, on the other. The characteristics of divisibility and excludability are not either/or characteristics. Once we leave the pure cases of indivisible and non-excludable goods (pure public goods) there will be degrees of divisibility and excludability until we again approach a pure case of the perfectly divisible and excludable good i.e. "money". Divisibility of a resource

[11] Several concepts are used to denote essentially the same characteristic. The concept of subtractability has been used to focus on physical divisibility (Ostrom and Ostrom 1977). Focusing on the process of appropriation the concept of rivalry has been used to denote consequences of divisible benefits (Cornes and Sandler 1986). In studies of production systems divisibility is used to characterize the system (Zamagni 1984). Economies of scale may depend on indivisibilities in the production system. Here divisibility is used to cover all these situation where something may or may not be split into two or more parts.

and excludability from a resource are usually discussed in terms of technological possibilities in relation to physical characteristics of the resource. What seems to be recognized less often is that both divisibility and excludability will depend on moral choices and social feasibility as well as physical characteristics and technical feasibility[12].

If a resource has the characteristic of being divisible into resource units [13] (the benefit is divisible) which can be removed (appropriated) one by one by the resource appropriators and exclusion of individual appropriators is technically feasible, the question for the lawmakers and politicians of a society is whether to exclude, and if exclusion is wanted, how to exclude people from the group of legitimate appropriators. The principle of excludability and the degree, to which it may be applied, is a problem of political and moral choice with long lasting consequences both for a resource system and for the society.

In the present book we assume divisibility of benefit, but divisibility may also be a concept applied to other aspects of the resource. Renewable resources are part of an ecosystem. The ecosystem properly identified will be indivisible, and the rate of renewal, the productivity of the resource, will depend on the protection of this indivisibility. There the divisibility of benefits and the indivisibility of the ecosystem create the management dilemma modelled by Hardin as the "Tragedy of the Commons". The incentives in a strictly individualized process of appropriation will not include the protection of the productivity of the ecosystem. The various institutionalized systems of common property rights which have evolved, change the system of incentives in a direction where it is possible to safeguard the productivity of the ecosystem.

The same institutions which govern appropriation from indivisible resource systems may, however, also be used in the management of appropriation from divisible resource systems. Some of the differences of opinion in the ongoing debate about common property rights regimes may come from not clearly distinguishing between divisibility of benefit and divisibility of the resource system.

---

[12] Social choice of indivisibility is closely tied to excludability in interesting ways. Choosing indivisibility and excludability means that all the benefit go to a single appropriator. The inequality of distribution will be maximized. Concern for distributional consequences and choice of excludability will most certainly entail divisibility of benefit, hence the restriction to divisible resources for the present work.

[13] The case where the benefit of the resource is indivisible, either because of inherent characteristics or appropriation technology, will not be commented on here.

The legal terminology in the light of social science

The indivisibility of the resource and the divisibility of benefit in conjunction with societal goals of equity of distribution and sustainability of resource productivity, define the boundaries of the management problems we are concerned with. The degree and character of excludability is one of the parameters of choice in the solution of the management problem.

The legal terminology seems to be largely independent of this problem. In a normal situation with single ownership or ownership in common by legal persons, the criteria of exclusion are well defined, and a properly maintained cadastral system is supposed to take care of the definition of the resource units subject to ownership. Our concern here is the less clearly defined situations where both the characteristics of the resource may be unclear and the distribution of access to the resource may be an issue. The legal practice around public rights ("all men's rights") and joint utilization rights to various kinds of resources seem to be those of most interest.

From the goal of equity in distribution it follows that access restrictions should be as mild as possible. In those cases where legal practice does restrict access to some resource system the leading principles are the legal right of residence, geographic boundaries and geographic proximity. In a situation with indivisibility in the resource system, the boundaries of the management problem will be defined by the (minimal) boundaries of a productive resource system, and access problems must be related to this area. The geographic boundaries will not be a parameter of choice for the lawmakers. This leaves residence and proximity as the established principles for granting access rights. If maximum access to the resource system is desirable, both residence and proximity or some combination of them may serve without leaving it open to free access.

The problem of securing sustained productivity of a larger resource system characterized by indivisibility does not seem to have been solved by any legal system in a situation where technology makes depletion of the productive stock feasible, except by transferring ownership rights to one single agent, usually a public body. But the problems of contracts between principal and appropriation agents remain and are not fundamentally different from the problems facing a lawmaker wanting to maximize access within the constraint of some maximum sustainable yield.

For the lawmaker, the following problems suggest themselves (some of them will be the same for the single owner leasing use rights)
a. a legitimate initial distribution of access (for the single owner this may seem unproblematic, but the initial distribution may affect later policing costs)
b. what are the criteria of getting access at some later time (to what degree should the rights of access be alienable, inheritable and/ or handed out by the lawmakers) (for the single owner this will not differ from point a.)
c. how to register those with access and police their access
d. among those with access how does one limit the number of resource units appropriated (by quotas, by taxes, by self-enforced regulations or by some other means?)

References:

Cornes, Richard and Todd Sandler 1986 "The Theory of Externalities, Public Goods, and Club Goods.", Cambridge, Cambridge University Press,

Lawson, F.H. and Bernhard Rudden 1982 "The Law of Property" Second edition, Oxford, Clarendon Press.

Ostrom, Vincent and Elinor Ostrom 1977 "Public Goods and Public Choices" in E.S.Savas (ed.) "Alternatives for Delivering Public Services. Towards Improved Performance.", Boulder, Westview Press,

Zamagni, Stefano 1984 "Microeconomic Theory. An Introduction", Oxford, Basil Blackwell, 1987