CPR Digest Editorial Section

Some Notes on the Substance and Terminology of the Norwegian Law of Common Property

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Introduction

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 a 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.

If a community or a society wants to regulate the distribution of access to, and appropriation from, a natural resource, two fundamental problems are encountered: 1) how to define persons or groups of persons with legitimate access to the resource, and 2) to what degree additional rules affecting the distribution of the benefits from the resource are needed.

The present paper will discuss how Norwegian law has solved this problem. In order to develop better tools for managing common property we need a more precise language to describe and distinguish between the various possibilities for using and regulating the use of resources. In our description of the Norwegian law we will be as precise as possible. We will utilize established legal terminology to achieve this. When the (English) terminology is unknown or non-existent we shall have to go into more detailed formal explanations.

Legal terminology in Norway

Norwegian law recognizes two main types of ownership-situations: single ownership and ownership in common.[1] The actor who holds the rights and duties recognized by law is the legal actor. The legal actor is either a real person, a recognized type of private body, or a recognized type of public body. By and large the rights and duties of single ownership, according to the law, will not depend on what kind of legal actor the owner is. In some cases, however, the exceptions are important. Only real persons can have *odal* (allodial) rights to a farm. Some public regulations discriminate, and of course the tax system is different for real persons and private bodies. Thus, if one wants to investigate differences in how owners manage their resources, it is not enough to look at differences in the priorities of the owners; also the discrimination according to type of actor in the property rights regime needs to be incorporated in the study.

Ownership in common is different from single ownership mainly by special provisions taking care of decision procedures among the owners to protect the weaker party in any dispute. In general both single ownership and ownership in common by the three traditionally recognized types of legal actors are considered unproblematic (even though the problems in any particular situation may be formidable).

However, in our situation two further types of owner and ownership are of particular interest. The new type of owners will be called quasi-owners and the new type of ownership will be called quasi-ownership, in order to

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[1] 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.

emphasize that they share important characteristics with legal actors and legally recognized ownership without being legally recognized as owners or ownership.

TYPES OF OWNERS AND OWNERSHIP

Legally recognized types of owners
1. public bodies
2. private bodies
3. real persons

Quasi-owners
4. estates e.g. farms or fishing vessels

Legally recognized types of ownership
1. single ownership one legal actor holds title
2. ownership in common more than one legal actor holds title

Quasi-ownership
3. joint quasi-ownership

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

The quasi-owner can also be thought of as an estate in its capacity as a cadastral unit. An estate is not a legal actor, but the right to use some particular resource 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) by loss of citizenship or by exclusion from particular areas (or registers as the case may be), but not transferred independently of the estate. Selling the estate implies selling those particular rights as well. If the quasi-owner ceases to exist, the resource held in quasi-ownership will either also cease to exist or revert to the co-owners in case of joint quasi-ownership, or to any descendants of the estate in case of ownership in common.

This kind of relationship between a farm and some particular right has existed for a long time in Norway. It could be in the 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. Recently a similar situation has arisen in the relation between fishing vessels and fish quotas (the registry of fishing vessels then performs the same role as the cadastral register).

Quasi-ownership of the ground in some commons will imply ownership in common also for other resources in the area while quasi-ownership of usufruct implies joint ownership. If for example two farm estates, both with rights to hunting in the commons, are joined, the new estate will not have the hunting rights of both the former farm estates, only the hunting rights of one quasi-owner. Only if quasi-ownership of the ground in the commons is included among the assets of the farm, will the hunting rights increase with the share of the ground.

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 joint 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 by the farm estates in joint quasi-ownership *(bygde-allmenning).*[2]

The rights held by the persons or estates using the resources of the area designated as a commons, are held in joint quasi-ownership 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 since this is a new use of the waterfall. There are many local manifestations of the commons with state-commons and bygde-commons as the main forms.

In the same bygde-commons there may be some farms with both ownership rights to the ground itself as well as use rights to some particular resource, and some farms with only use rights to some particular resource in the commons without any right in the ground. In this case the farms with ownership rights to the ground in a state common.

A second version of the separation of use rights from the ownership of the ground is found in what is called *allemannsrett* (literally "all men's right") which perhaps could 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 hunting and fishing are public rights, but restricted to state commons. Public rights can be said to be held in quasi-ownership by individual persons in a way similar to the rights enjoyed by farm estates 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 or impossible to estimate).

A third type of restriction on the ability to enjoy a right and the area where it applies, is the right 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 actor 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".

Law and the question of access

The indivisibility of the resource and the divisibility of benefit in conjunction with societal goals of equity of distribution and sustainability of resource productivity, defines

[2] The Norwegian word *bygde* does not translate well into English. It means a sparsely settled local community somewhere on the scale between hamlet and town. It may include a few hamlets, even a village, but the connotation is of a sparse settlement. In this connection - bygde-commons - its meaning is more in the direction of opposition to the state. It means only that the ground of the commons is owned (in quasi-ownership) by a group of farms close by the commons, while the rights to use the commons can be described in the same way as those in the state commons. However, the group of farms must include more than 50% of the farms with rights in the commons. In the cases where the number of ground owning units were less than 50%, the rights of the commons has as a rule been extinguished and the assets distributed among the groundowners.

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.

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 usage 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 without granting some legal actor ownership rights, the leading principles for exclusion are

1) legal right of residence (some kind of "citizenship"),

2) geographic boundaries, and

3) 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. Thus the geographic boundaries of resource units will not be a parameter of choice for the lawmakers. This leaves residence and proximity as the established principles for limiting 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.

References:

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