Revised version of a paper presented to the
IV. World Conference of IASCP, Manilla, 15-19 June 1993

SOME NOTES ON THE TERMINOLOGY OF NORWEGIAN PROPERTY RIGHTS LAW IN RELATION TO SOCIAL SCIENCE CONCEPTS ABOUT PROPERTY RIGHTS REGIMES.

by

Erling Berge and Hans Sevatdal,
Department of Land Use Planning,
The Agricultural University of Norway
P.O.Box 5029, 1432 Ås, Norway

Abstract
The paper finds that the concepts of property rights law seem to be independent of the social science concerns about divisibility of benefit and excludability from consumption. However, in the borderlands of property rights law, in human rights law and public rights to joint use of natural resources, some interesting constructs exist, like “bygde” -commons and some relations best described as quasi-ownership. These may be of interest to the design of new management systems. In social science recognition of a distinction between indivisibilities of the ecological production system and divisibility of benefit may help clarify the management problem. It will for example largely rule out the use of geographical boundaries as a means for shaping motivations if just distribution of benefit is a goal for the management system. In order to maintain access to resource systems for legal persons according to regional location or geographic proximity a distinction between ownership in common and joint ownership is recommended.

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 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.

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: how to define persons or groups of persons with legitimate access to the resource, and 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 and compare the legal concepts to those developed within social science.

Social science concepts

The labels most frequently used to denote jointly used natural resources 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[1] 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 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 less recognized is that both divisibility and excludability will depend on moral choice and social feasibility as well as physical characteristics and technical feasibility. The present discussion it will be restricted to divisible resources[2].

---

[1] Several concepts are used to denote essentially the same characteristic. Focusing on physical divisibility the concept subtractability has been used (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 characterized the system (Zamagni 1984). Economies of scale may depend on indivisibilities in the production system. In the present paper divisibility is used to cover all the situation where something may or may not be split into two ore more parts.

[2] The case where the benefit of the resource is indivisible either because of inherent characteristics or appropriation technology will not be commented on here. Social choice of indivisibility is closely tied to excludability in interesting ways. Choosing indivisibility and excludability means that all the benefit goes 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.

If a resource has the characteristic of being divisible into resource units (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.

Here it is assumed 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. Divisibility of benefits and indivisibility of the ecosystem will in a situation with concern for the distribution of benefits, create the management dilemma modeled by Hardin (1968) 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 usually 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. Also the fact that the institutional manifestations of both divisibility and excludability will depend on moral choice and social feasibility in addition to physical characteristics and technical feasibility might be given a clearer recognition.

To se if the concepts of excludability from, and divisibility of, the resource system are reflected in real societies, the legal implementation of ownership in Norwegian law will be investiagated.

Legal terminology in Norway

I. Ordinary ownership

The legal person according to Norwegian law, is either a real person, a recognized type of private corporation, or a recognized type of public body. Only a legal person can hold the rights and duties of ownership.

Norwegian law recognizes two main types of ownership-situations: single ownership and co-ownership.

The rights and duties of single ownership, according to the law, do not depend on what kind of legal person the owner is. Any difference in the way owners manage their resources are supposed to be caused by differences in the priorities of the owners, the property rights regime is the same.

Co-ownership is different from single ownership mainly by special provisions taking care of decision procedures among the owners. In general both single ownership and co-ownership by the three traditionally recognized types of legal persons are considered unproblematic (even though the problems in any particular situation may be formidable).

According to Lawson and Rudden (1982:82-84) 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 hisshare passes to his successors[1]. In Norway ownership in common is the “normal” situation.

TYPES OF OWNERS AND OWNERSHIP

Legally recognized types of owners
1. public body
2. private body
3. individual

Legally recognized types of ownership
1. single ownership — one legal person holds title
2. co-ownership — more than one legal person holds title
 * ownership in common

Quasi-owners of recognized types
4. estates — e.g. farms or fishing vessels

Quasi-ownership
3. quasi-co-ownership
 * joint ownership[2]

---

[1] 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.

[2]. 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.

II. Quasi-ownership

The law recognizes three types of owners and two ownership situations. However, with regard to access to and use of natural resources, a fourth type of owner and a third type of ownership situation can tenatatively be identified. The new type of owners will be called quasi-owners and the new type of ownership will be called quasi-ownership, in order to emphasis that they share important characteristics with legal persons and legally recognized ownership without being legally recognized as owners or 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. The so called “All Mens Right” (allemannsretten) to roam freely in the waste land is an example of a good in quasi-ownership. Besides inalienability, the quasi-ownership of some resource 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. Quasi-ownership is also different from ordinary ownership in that co-owership situations are defined as joint ownership.

The quasi-owner is best thought of as an estate in its capacity as a cadastral unit[1]. An estate is not a legal person, but the right to use some particular resource can be inalienably attached to an estate[2]. 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[3]. 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, not to any decendants of the estate[4]

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

[1] 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.

[2] In English law of property the right to remove something from another owners property is called profits (originally “profits-à-prendre”). There are two kinds of profits:
1) “profits appurtenant” where the right to the resource is inalienably attached to some holding the way described for quasi-ownership, 2) “profits in gross” where the right to the resource belongs to some legal person in ordinary ownership.

[3] 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.

[4] If two farm estates, both with rights to hunting in the common hunting area, 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.

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[1]. 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).

State commons and bygde commons.

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 waste lands, 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).

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. There are many local manifestations of the commons with state-commons and bygde-commons as the main forms.

"All mens rights"

A second version of the separation of use rights from the ownership of the ground is found in what is called "allemannsrett" (literally "all mens 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 hunting and fishing are restricted to citizens of the Norwegian state, and can be exercised in state commons. Public rights can be said to be held in quasi-ownership by individual persons in a way similar to the rights

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

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).

Reindeer herding

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 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”.

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, defines 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. The distributional considerations are presumed to be taken care of by the taxation system.

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 mens 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 person ownership rights, the leading principles for exclusion are

1) legal right of residence,
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.

Conclusion

The problem of securing sustained productivity of a larger resource system characterized by indivisibility in a situation where technology makes depletion of the productive stock feasible, does not seem to have been solved by any legal system 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?).

The practical answers to these questions are political. They depend on moral choice and social feasibility and have to be implemented as much through the acceptance of the people and the way the legal profession interprete their cases as through the public legislation.

But in designing regulations for resource systems recently having come under stress, it is instructive to consider how other types of resources are managed. For indivisible resource systems, the distinction between ownership in common and joint ownership is of particular interest. It is well known in English jurisprudence and, as argued here, it is found in the legal construction

of state-allmenning and bygde-allmenning as well as in the public rights of land use. This distinction might be of importanse in the construction of new resource regulations where one goal would be to preserve right of access for some group defined by residence in a region or proximity to the resource.

References:

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

Hardin, Garret 1968 “The Tragedy of the Commons”, Science, Vol.162, pp.1243-1248,

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

TYPES OF OWNERS AND OWNERSHIP

TYPES OF OWNERS

PUBLIC BODY

PRIVATE BODY

INDIVIDUAL PERSON

TYPES OF OWNERSHIP

SINGLE OWNERSHIP :
ONE LEGAL PERSON HOLDS TITLE

CO-OWNERSHIP:
MORE THAN ONE LEGAL PERSON HOLDS TITLE.

TYPES OF CO-OWNERSHIP:

*** OWNERSHIP IN COMMON**
RIGHTS ARE INHERITED BY SUCCESSORS

*** JOINT OWNERSHIP**
RIGHTS ARE INHERITED BY CO-OWNERS

EXAMPLES OF QUASI-OWNERS AND QUASI-OWNERSHIP

QUASI-OWNERS

PERSONS

FARMING UNITS

FISHING UNITS

QUASI-OWNERSHIP

ALL MENS RIGHTS

STATE COMMON AND BYGDE COMMON

REINDEER HERDING

EXCLUDABILITY
***FROM CONSUMPTION**

DIVISIBILITY
***OF BENEFIT**

***OF PRODUCTIVE ECOLOGY**

PHYSICAL CHARACTHERISTICS

TECHNICAL FEASIBILITY

MORAL CHOICE

SOCIAL FEASIBILITY

LEAGAL PRINCIPLES FOR GRANTING ACCESS

* LEAGAL RIGHT OF RESIDENCE

* GEOGRAPHIC BOUNDARIES

* GEOGRAPHIC PROXIMITY

PROBLEMS OF MANAGING INDIVISIBLE RESOURCE SYSTEMS

***LEGITIMATE INITIAL DISTRIBUTION OF ACCESS**

***CRITERIA FOR GETTING ACCESS LATER**

***SUPERVISION OF THOSE WITH ACCESS**

***LIMITATIONS ON CONSUMPTION AMONG THOSE WITH ACCESS**