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A CONTRIBUTION TO THE MAKING OF TOOLS: THE NOTION OF "COMMON PROPERTY RIGHTS"

An introduction to the Session no 1
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Dear Participants,

What is "Common Property Rights" and how to understand and mangage these rights? As Vincent Ostrom stated at the MAB-conference in Svolvær in 1993 the human way of understanding goes throught definitions and notions. Obviously discussion of different items under the umbrella of Common Property, do need a precise conseptual basis. To obtain the conference goal of

> "deeper understanding of how and why institutions of common ownership can mangage resouces in an equitable and sustainable way",[1]

the notions must be unanimously accepted and practiced. As legal- and social sciences do use the everyday languague and as the field of Common property study is interdisiplinary, lots of difficulties are caused by the fact that each authour do use the same expressions without having the same intentional meaning.

I would like to address some ideas concerning the efforts of conceptual approximation. Since the session 1 is discussing Legalizing as a problem and **the notion of legalizing** according to The Concice Oxford Dictionary does mean "to bring into harmony with the law", what is more appropriate than to use the legal notions as analytical instruments. It is a question of Commons being acknowleded by the legislator or court, as rights.

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[1] The International Association for the Study of Common Property. Fifth Common Property Conference. Reinventing the Commons (24-28 May 1995, Bodø, Norway) p. 4.

This is however not the easiest task as law systems are national arenas. There are probably no such as **one singel** harmonized set of **legal notions**. Each state do in principle excercice exclusive authonomy within its own territory. Conditions for the acknowledgement of "Common Property Right" is diverce. Do every state have some basic prinsiples in common, principles being common to MAN and MANKIND?

The Anglo-american, latin-european, nordic and german cultural and social systems are undoubtedly founded on the old **Roman Law legal institutions**. From this we may draw some basic distinctions, which could be helpful when analyzing Common Property as a system of Rights, which is our topic.

1. Legal subjects - legal objects

Let us take a look: The basic distinction is of course between **legal subjects** and **legal objects**. The first category is the legal persons, which is separated into the two groups **physical persons** (the homo sapiens, not i.a. the whales) and **legal persons** (foundations, companies, municipalities, states etc.). Those who be classified as legal subject might be the holder of legal objects. It is not vice versa. The latter category is all things not being legal subjects.

2. To or more legal persons interrelationsship

The legal rights do excist inter partes, solely. No interrelationsship, no legal system or legal rights. The legal subject do hold legal object in relations to other legal subjects. The legalizing of the Commons means having other persons to accept own occupation or utilization. It is sufficient if conflicting persons do acknowledge the utilizers right to access.

Without acceptance inter partes, it is neccesary to have the court or legislators decition. Otherwise the utilizer do have a pretention solely, not a legal right. If the legislator og court says yes you have a right. If the answer is no you have neither a right nor a pretention of having a right.

3. More about the legal objects

Objects (lat. Res) are things, material or immaterial things. Both categories could be hold by legal persons. According to Roman Law two main categories of objects excists: **Res commercicum** that is, ordinary goods having market value. **Res extra commercicum** is objects not having a market. They are inalienable. One solution of the tragedy of the commons is to turn every res extra commercicum into res commercicum. That is creating these interests av **Private Property Rights**. This is the carrying idea underlying tranferrable fisheries quotas. These scientists (see i.a. Hannesson, 1985) do solve the

tragedy by terminating the commons. No commons, no tragedy of the commons!

Turning this teory down, we have to go deaper into the Roman Law empire. Res extra commercicum do concist of two different kind of legal objects: **"Res nullius"**, being the name of wild animals, fish in the ocean, jewlery and unoccupied land.[2] This group of "res" is subject to occupation.

The latter category is the **"Res communes omnium"** - being objects excluded from the ownership of any human being, such as the earth, the ocean, light and air,[3] that is the **"res usus inexhausti"** (the inexhautible values).[4]

The legal and political situation under these two kind of regimes, are rather different. Obviously one may not treat res communes omnium the same way as res nullius. The lawyers in ancient Rome did not.[5]

The res nullius might be occupied. The occupier has become a **Justus possessor**. The res nullius has then turned into **jus in re aliena,** being subject to trade. The act of occupation does however not terminate basic "Common Property Rights" being utilized by the public. The public might still execute **Jus inoxia utilitaris;** the innocent right of using. Enjoying the jus inoxia utilitaris is legally as well as politically different from enjoying the open access fishery.

As indicated; there are big differences between "Common Property Rights" and "Common Property Rights". It is unlikely to beleive that such a lax conceptual use of the word would bring us the deeper understanding we are striving for.

4. Common - and Public Property Rights

So; what is what? Are we able to dig deeper into the conseptual landscape? Anglo-american legal theory are labelling "public rights" to the usage of open access

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[2] Se Henry Sumner Maine: Ancient Law: Its connection with the early history og society and its relation to modern ideas (1891) s. 245.

[3] Se Carl Goos: Forelæsninger over den almindelige Retslære (1889) s. 310.

[4] See Fredrik Chr.Bornemann: Foredrag over den almindelige Rets- og Statslære i Samlede Skrifter bd. 1. (1863) s. 105-106.

[5] C.f. Oscar Platou: Forelæsninger over udvalgte Emner af Privatrettens almindelige Del (1914) s. 30.

resources.[6] The notion of "Rights of Common" is the name of Private Property Rights. Fishery is such an example, the "common of piscatory" is an easement, which is not to be mixed together with "a free or a several fishery" being the notion of co-ownership. "Public rights of fishing" is the name of Salt Water fisheries as well as Tide River fisheries.[7] Presumably the "public rights of fishing" is based upon the Kings ownership to the seabed of rivers, bays and fiords.[8]

According to this legal language it is reason to believe that "the tragedy" being imposed on some legal rights does concern the Public- and not the Common Property Rights.[9]

5. The notion of a right. Proposal for some analytical instruments when analyzing "the Commons".

My intention is to give a brief explenation of the notion of a right. I agree to Jeremy Waldron[10] (p. 6) when he is stating that the first step to a rigorous understanding of the concept of a right is to notice the ambiguities in the use of phrases like "P has a right to X". First I go into some theories of right (paragraph a). Secondly I look at the different kinds or aspects of rights (paragraph b).

a) John Stuart Mill[11] ties the notion of a right to the possessors valid claim on society to protect his right (p. 71): No right without protection ("The Sanction Theory").

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[6] About the expression see e.g. Lawrence C. Becker: Property Rights. Philosophic Foundations (1977) and A.V. Lowe: "Reflections on the Waters: Changing Conceptions of Property Rights in the Law of the Sea" in International Journal of Estuarine and Costal Law 1986 s. 1 flg.

[7] Se Lord Hailsham of St. Marylebone (red.): Halsbury's Laws of England. Vol. 6 (1974) s. 215.

[8] L.c. In Norway see Peter Ørebech: Norsk havbruksrett (1988) s. 134 with further references.

[9] See e.g. H.Scott Gordon. "The Economic Theory of Common Property Resource". Journal of Political Economy 62 (1954), Garret Hardin: "The Tragedy of The Commons". Science 1968 (vol. 162) s. 1243 flg., Gordon R. Munroe. "Fisheries, Extended Jurisdiction and the Economics of Common Property Resources". Canadian Journal of Economics XV, no.3 (1982) and Mancor Olson: The logic of Collective Action (1982)

[10] Waldron, Jeremy. (1984) Theories of Rights, New York.

[11] Mill, John Stuart 1987: Utilitarianism (Prometheus Books, New York).

Jeremy Bentham[12] (p. 187 ff) is the spokesman for "The Beneficiary Theory" according to which, to have a right, is to be the **beneficiary** of another's duty or obligation whether it is sancionned or not. By the ideas of Bernhard Windscheid[13] (sec. 37) we are presented to "The Will Theory" (and the close related "The Choise Theory"- H.L.A. Hart's respected theory):[14] It singles out the right-bearer in virtue of the power that he has over the duty in question. When an individual has a duty to do someting, there is possibly some other individual who is in a position to control that duty in the sense that his say-so would be sufficient to discharge the first from the requirement. This degree of control makes the latter a right-bearer. Against this Neil MacCormick (1977 p. 192) is introducing "The Interest Theory": The rights are primarily to be conceived in terms of protection of interests of individuals against intrusion. At latest Carl Wellman[15](p. 95) has given his contribution through "The Dominion Model", which is close to the interest theories: A person has a right when the law gives him exclusive control over another persons duty so that the individual who has the right is a small scale sovereign to whom the duty is owed.

A theory alternative to those previously mentionned, is presentet by Alan R. White.[16] This I will call "The Immunity Theory": The rightholder is entitled by something which gives him a sort of ticket of justification and when doing what he is entitled to, he has got immunity from at least certain sorts of criticism.

b) As we have seen; the notion of right is debateable. The discussion will take different ways according to which angle is the focus. One could look at the rights and duties of one person (the unilateral aspect -), of two persons inter partes (bilaterally - The Hohfeldian perspective,[17] p. 42) or focussing on a third party constellation, the latter party then having a function of intervention, on either of the both sides (The Wellman perspective, 1985 p. 21). In this dissertation

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[12] Bentham, Jeremy 1970: An Introduction to the Principles of Morals and Legislation. (Burns & Hart, ed. London).

[13] Windscheid, Bernhard (1906): Lehrbuch des pandectenrechts.

[14] Hart, H.L.A. (1982) Essays on Bentham, Clarendon Press. Oxford.

[15] Wellman, Carl, 1985. A Theory of Rights. Persons Under Laws, Institutions, and Morals. Rowman & Allanheld.

[16] White, Alan R. 1982: Rights. Clarandon Press. Oxford.

[17] Hohfeld, W. N. (1964). Fundamental Legal Conceptions. Yale University Press, New Haven.

The notion of a right is a "chamelon-hued word" (Hohfeld, 1964 p. 53). The notion of a right is a complex legal position which has to be grouped into its simple and irreducible elements. What is these elements? Hohfeld identify a right with (a singel) **claim, privilege, power, or immunity** (the so called fundamental legal conception). These elements have the following jural correlatives: **Duty, no-claim, liability and disability** (Hohfeld, 1964 p. 36). According to Hohfeld "the right" is either a claim or a privilege etc. Wellman, 1982, Ch. I & 1984 are suggesting that "right" refers to a complex structure of some or all of these elements. A person holds a "genuine right" if and only if a complex set of norms applies to one in a way giving the person a dominion (1984 p. 213). White holds that right is not an ambigious term used to cover such notion as liberty, power etc. The notion of a right is as primitive as any of these other notions (claim, pover etc.) and cannot be reduced to or made equivalent to any one or any set of it. Nor can it be explained as being a complex or system of these (White, 1984 p. 173).

6. Legalizing the Commons

I have the strong impression that most Common Property Rights theorists do think of **Res nullius** when expressing concern about how to make sustainable harvesting. We are then talking about a totally free access regime, which normally is called **Public Property Rights.**

Obviously the legal situation differs a lot between the partipation regime under i.a. Res nullius and the Jus inoxia utilitatis. The first category is basic and in no conflict with Private Property Rights. The latter is founded on the edge of Private Property Rights, conflicting the utilization of a private owner. The **Res communes omnium** being in that aspect different from **Res nullius**, have no market value. Even being unestimable it suffers under no legal protection etc.

7. Which remedy?

Which remedy to be chosen is dependent upon which kind of open access utilisation being exercised. One popular answer to the "tragedy" is the neccessity of political control through governmental body.[18] This is more easy said than done. Getting stuck into the management labyrinth is a close possibility:

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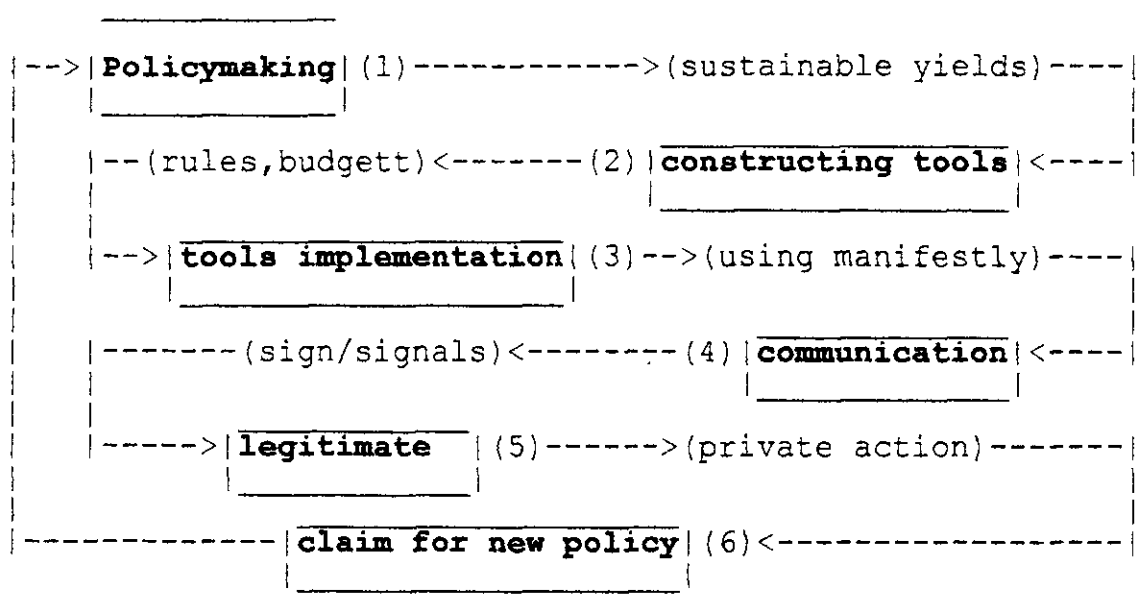
[18] Berge E. 1991: "Teori om eigedomsrett og bærekraftig utnytting av fellesressursar" i Stenseth, N.Chr., Trandem N. og Kristiansen G., Forvaltning av våre fellesressurser, Ad Notam.

Fig. 1: The management labyrinth (1): The phaces (conditions) which have to be fulfilled; otherwise failure. Phases 1-6.



However; is it necessarily so? Is the attainment of sustainble yields by means of distributive plurality decitions possible within the framework of free play of market **without** exclution of access by turning public- and common property rights into private property rights ?[19] How can sustainable management be an inevitable result from atomised marked decitions?[20] What is the conditions for fullfilling the goal of making such kind of selfgoverning conservation regimes work?

I think we have a lot to do, studying management systems all over the world, finding out conditions for the maintaining and establising of local sustainable societies.

Thank you for your attention.

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[19] Brox, O. 1988, Kan bygdenæringene bli lønnsomme? Gyldendal Norsk Forlag.

[20] By e.g. giving prize to the Public Property Rights, see Ørebech, P. 1991. Om allemannsrettigheter. Osmundsson, Oslo.