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New commons established by pooling, facilitated by the Land Consolidation Court. Norwegian experiences and examples

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Abstract: *New commons might come into being by pooling of resources. Such pooling often needs some sort of professional external assistance, as well as appropriate institutional framework. In Norway the Land Consolidation Courts - originally established for reallocation and individualization of land and rights - have developed into a multipurpose instrument, also for facilitating common use of formerly individualized resources. Examples are extraction of certain mineral deposits, development of small-scale hydroelectric power, recreational fishing and hunting, land development etc. The issue is discussed in a context of legal framework - both in public and private law - negotiation, decision-making and enforcement.*

Key words: Commons, negotiations, institutions, the Land Consolidation Court
JEL codes: Q15, P48

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[1] Paper presented at a Workshop at Universidad Publica de Navarra (Navarre Public University), Pamplona-Iruña (Spain), November 5-7, 2009.

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Foreword

Hans Sevatdal wrote the present paper for the workshop "The contribution of the commons. The effect of collective use and management of natural resources on environment and society in European history." held in Pamplona-Iruña (Spain), hosted by José-Miguel Lana Berasain's project "Enigma of commons (HUM2006-01277)" at Universidad Pública de Navarra (Navarre Public University) on November 5-7, 2009.

Going through the unpublished papers of Hans Sevatdal, after his sudden death on 12 September 2015, we saw that this paper introduced an important discussion. Alas, other tasks had kept Sevatdal busy. He was unable to develop it for publication. We have taken on to do some editorial work on the paper to present it to a wider audience through the Working Papers from our Centre for Land Tenure Studies.

We also want to thank Hans Sevatdal's wife, Birgitta Fagerstrøm, for her permission to publish the article and use the front-page photo with Hans Sevatdal hunting in Lifjell, Telemark.

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New commons established by pooling, facilitated by the Land Consolidation Court - Norwegian experiences and examples.

By
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1. Introduction; property right, public regulations and land use

The issues discussed in this paper are basically about the relationship between rights in land on the one hand, and the actual use of land resources on the other. More precisely, I want to focus on the emergence of a phenomenon I call "new commons", coming about by some sort of "pooling" mechanism. This approach will by necessity involve presentation of the institutional framework, the dynamics and actual state of affairs concerning the property units, rights and owners, the role of public regulation, and the role of the land consolidation court.The latter is a specialized facilitator for the right holders, to enhance rearrangements of rights and physical structures in land, and related issues like joint facilities and clarification of rights and property boundaries.

Rights to control land resources come in two rather different forms: property rights on the one hand, and rights (and obligations) accruing from public regulations on the other (Eggertsson 1993). In social sciences and economics one often refer to both types of rights as "property", but in a legal sense we have to distinguish as clearly as possible between them. This distinction is also very important in a practical sense. We will refer to them as belonging to two different groups of institutions; those groups we will call the property right regime on one hand, and the public regulation (of land use etc.) regime on the other.

Public regulations come into being by decisions in administrative and political bodies. Both groups of rights and obligations may come into being by legislation.

Public regulations comprise laws and decisions made by various public authorities, and they restrict, promote and enhance opportunities, and in general create the framework within which land use might take place, and within which owners and other actors based on property rights may act.

There are interdependencies between those two regimes in a multitude of ways, and I am not going to investigate all of them. My focus is on the interaction between those two regimes in shaping interdependencies and interactions between owners, concerning use of land resources. The message is that actions in the public regulation regime enhance, facilitates and even necessitate some sort of "commons".

Property rights and public regulation are both institutions, but let me introduce another concept closely related to those. That is the actual state of affairs concerning properties, owners, and rights, in for example a specific area. In Norwegian, there is a useful term for this concept: "eigedomsforhold". The corresponding concept to this term comprises three different aspects of the existing situation, namely characteristics (features) of 1) the property units, 2) the rights holders (owners etc.) and 3) the nature of the rights themselves.

One tentative translation into English might be "tenure situation"; another try might be something like "property conditions", in for example an area. None of those translations is quite satisfactory. However, the main issue is to establish a sort of basic "model", or maybe a structured way of thinking, about the mutual causal interdependence between the use of land resources, and the way in which these resources are held, by whom and in what units. For that purpose the translations have to suffice.

In much the same way as the institution of property rights has a corresponding "real world" manifestation in the "property conditions", the institution of public regulation has its corresponding manifestation in "regulation conditions". This concept is referring to features of the rights/obligations, the holders of rights/obligations and the units (entities) of land over which these public regulations apply.

Combined, the institution of property rights and the institution of public regulations constitute the "rules of the game" for the use of land resources. One of the main issues in this paper is to explore and demonstrate how these rules, in interplay with the existing property and regulation conditions, and the economic and technological opportunities and requirements, create new forms of interdependence between actors/owners, and thus necessitates / facilitates some sorts of "commons".

2. Fragmentation, commons, and freedom of contract

In Norway there are various forms of common property, as discussed below, but we also have fragmentation of ownership to land. This fragmentation might take different forms. One is the "traditional" physical fragmentation of the property units, i.e. the farms, into a number of parcels and plots. The means to remedy this "problem" is of course land consolidation, meaning consolidating the land to each farm or property unit into for example one block of land. Such consolidations have been going on for a long time, executed by the Land Consolidation Courts, and this type of fragmentation is no longer an important problem, even if it is by no means totally abolished.

However, successive subdivisions throughout the centuries have created another type of fragmentation. The land and land resources are fragmented into a large number of smallholdings. This type of fragmentation is increasingly posing problems for efficient, economic use of land resources. Not because such subdivisions are still going on, they are not, but because the resulting tenure conditions no longer suffice for land use requirements. The results of subdivision practices, once a rational response to actual needs, today pose severe problems for efficient land use.

One may put it like this: The phenomenon of many and scattered parcels to each holding is not a serious problem anymore, but the many holdings and the many owners are. This is by no means a specific Norwegian phenomenon; it is well documented, for example in Galicia in Spain and other places in Europe, in the so called "Farland" project, see Jagt et al. (2007) and Ónega-López, Puppim de Oliveira, and Crecente-Maseda (2010). Traditional land consolidation measures are normally targeting the first type of fragmentation, by consolidating the many parcels to each holding. The second type of fragmentation can (normally) not be mended by *traditional* land consolidation measures, that sort of rearrangement requires transference of rights (transactions) of other types, the most obvious being buying and selling, renting and leasing, but also various forms of *pooling of rights and property.*

The concept of "commons" might cover a wide variety of meanings and realities in terms of arrangements of property rights. So is also the case in Norway. The usual translation of the term "commons" into Norwegian is "allmenning", which literally means "all men's land". But the terminology is misleading; the Norwegian commons are by no means open for everybody in the sense of "open access", they are owned by somebody, and the rights to them and in them are held somehow by somebody – in common and/or jointly by a group of some sort.

We have two important and distinct types of such "allmenninger"; State Commons and Parish Commons, the terms "State" and "Parish" referring to the actual ownership to the land itself. In the first case the ownership (and title) rests with the state, in the second with farms in the local community. In both cases however, the user rights, or most of the user rights, belong to the members, or member farms in the respective local communities, in Norwegian termed "bygd".

In addition to those two types there is a third and very important type that might be termed "farm commons" in English, signifying that ownership and user rights as well, are held exclusively by a cluster of farms in the local community. It is important to stress "farms in the local community",

not the local community as such. In these cases, which are very numerous, one might say that the shares of the commons are included in the farms as such, and cannot be (easily) separated from the ownership to the farm (Grimstad and Sevatdal 2007). The term in Norwegian is "jordsameige", actually meaning "joint ownership of land". The point however, is that the "jointness" operates through the ownership of the farm. It is different from ordinary joint ownership in this respect.

Beside these three distinct types, there are a multitude of forms and arrangements of "commonness" concerning land, and rights in land, some old and established through historical processes, others might have come into being quite recently by clear-cut legal transactions, i.e. normal legal contracts. Some of these might be best understood, termed, and discussed within the framework of the concept of "commons", or even better: in terms of "commonness".

The multitude of different forms and varieties of commons might - reasonably well - be understood as responses, in time and space, (i.e. in its proper context) to the actual needs and opportunities for the use of land and its resources, and of course; within the institutional framework. In Norway, one element in the institutional framework seems to have been rather consistent through time and space: that is the principle of freedom of contract (Sevatdal 2008). This is by no means the same as anarchy; there have "always" been legislation concerning tenure arrangements and transactions between parties holding rights in land. But these rules and regulations most often have an important amendment, either explicitly stated, or implicitly understood. In legal terminology, this amendment in the legislation often runs like this: *"The rules in this law apply if the parties themselves do not agree otherwise"*. And in these matters the parties quite often *do* agree otherwise; according to needs, opportunities, local traditions, individual priorities and so on.

This basic principle; freedom of contract has another, and quite powerful, aspect also; the notion that *the clauses in a contract should be fulfilled.* Both culturally and in terms of formal legislation, this aspect is very potent, and has been so for many centuries. A third element concerns *the forms of contract;* there is in principle also *freedom of form,* which means that an oral contract is just as binding between the patties as a written one. Thus there is no formal requirement that contracts concerning transactions in land rights should be in written form; they are binding amongst the parties all the same. But of course, most contracts today *are* in writing, and they have to be, if they are to be registered in the land records. But entering the documentation of a transaction into the legal register is not compulsory.

3. The structure of farm units and property conditions - resent development

During the last generation, 30 - 40 years or so, important structural changes have taken place in rural Norway, as in most industrial and postindustrial countries. At the core of these changes are the reductions in the number of active farms and farmers. From the late 1950's till today, their number is reduced by at least 70%, from approximately a little less than 200.000 then, to a little less than 50.000 today. At the same time the actual volume of produce, as well as the acreage under cultivation, are very much the same.

Now, two peculiarities concerning property conditions in Norway are important. Firstly that "farms" traditionally comprise not only cultivated land, but property-wise also include land and resources in the so called "outfields"; i.e. forests, pastures, bogs, mountains, lakes and rivers and so on.

Secondly, the fact that a farm is not used as an active farming unit/entity any more, does not mean that the land and resources are sold to, and thus amalgamated into another farming unit. It is

overwhelmingly the case that the best and most conveniently located cultivated land is rented out to other - still active - farms, while other resources are not. Thus the former farm unit, with all its resources, is somehow turned - or maybe we should say recreated - as what essentially is a "property unit", not a management unit. Otherwise one may say that the former agricultural management entity is decomposed into its various elements: buildings for residential or recreational use, cultivated land (still) for agriculture, and so on for forest, pasture, fishing rights, hunting rights etc. Some of the elements might not be put to any use at all - that will depend on the demand (market) for the resource in question and other factors as well.

What about the owner during these processes - what happens to him? In one perspective nothing happens, in another perspective quite a lot. In the first perspective the traditional transfer of ownership to the next generation within close family goes on as usual. For many a good reason the property unit is normally not sold to outsiders, in a kind of "free" market. In Norway such a thing as a free market for farmland hardly exist. Traditional family based rights (odal rights etc.), as well as public regulation of transfers of such land, and also other factors, all contribute to that. By and large, there are formal institutional constraints, as well as economic and cultural factors at work, that combined to give few incentives for market transactions. So, the heirs normally succeed their parents as owners.

These owners are normally not farmers any more, at least not occupation-wise, and may not be "farmers" culturally either, and they may not even be permanent residents in the local community. In this way it is justifiable to say that quite a lot happens to the owners and the ownership through these processes; possible estrangement of owners from farming culture and local society - with the consequences that might have. Selling of farmland and outfields to neighboring farmers would have created another structure, but today approx. 40 % of the agricultural land is rented, and practically all active farmers rent land in addition to what they own themselves. I other respects there are changes going on also, gradually estranging farming from ownership to traditional farms. In sum, this seems to change traditional farming, which was almost exclusively based on ownership of farm units, to being more and more dependent on contract arrangements. It might be symptomatic that the Central Bureau of Statistics of Norway, quite recently, in fact this year, exchanged the term "farm" for "agricultural enterprise", as the basic entity in their statistical terminology.

4. Land administration - public regulation

The process briefly outlined above, is one part of the story for understanding the development of new commons, pooling, contractual arrangement and so on. Another part of this story is public regulation - we may call it land policy or "land administration". The third part is the underlying trends and developments in economy and technology, and the last one is the interaction between all of them.

A general overview of the land administration system in Norway is given in Sevatdal (2008). The interesting point for us however, is not the system in itself, but the fact that public authorities are getting more and more involved in directing, influencing and in general governing the overall use of land and land resources in Norway. That goes for all kinds of land; urban, semi-urban and agricultural, as well as outfields of any sort; forests, mountains, lakes and rivers, and coastal waters as well. The background for this is a variety of considerations and motivations: environmental, economic, esthetic, cultural etc. Again this is not a specialty for Norway; it's pretty much an international trend. A huge body of legislation and policies, as well as corresponding bureaucracies, is developed for these ends, on local, regional and national levels.

One important aspect of this bundle of activities is how the results are manifesting themselves in the landscape. We may visualize the resulting structure as one or several overlays of rights and duties (in short; regulations), on top of the property conditions, forming a pattern pretty different from property units, parcels, property rights and owners. In general, the target areas of public regulations

are units different from property rights units; it might be a cultural landscape, a whole river coarse with its tributaries (a watershed), a forest area, and so on. Other regulations might not be targeting specific physical land units as such, but be directed towards specific activities, projects, and resources.

The basic issue is that because the resulting structures of public regulations differ from the structures of properties, parcels, and rights, especially in landscapes, which are fragmented property-wise, they tend to create and/or facilitate interdependencies in land use amongst property units, owners, and users.

Some of these resulting interdependency situations may very well deserve the name of "new commons". Regulation of big game sport hunting, resulting in a "hunting commons", is a good example, even if it is by no means new, it is a type of commons well established several decades ago. The right to hunt is - basically - the sole right of the owner of the land, if not transferred to somebody else. He might use it or not use it, rent it out or lend it to others and so on. But the actual exercising of hunting, in addition, requires permission from the proper public authorities. They will give this permission for a suitable area from their overall wildlife management perspective, not for individual property units. Given the small scale and fragmented property structure in the forests, this will normally result in the creation of a "hunting commons". From the owners perspectives there is no hunting value on the individual property, unless the owners co-operate. It is a typical situation of pooling of resources, with all its implications concerning negotiations, holdout problems, institutional frameworks, transaction costs and so on. Just as plain and simple, and as complicated, as that.

However, this is not the end of story. There is an important amendment to be made concerning the institutional framework: What can those owners in favor of hunting do, if someone, even the majority of owners, are negative to organizing a hunting commons, and they thus do not succeed in negotiating a solution? The system provides for enforcement mechanisms towards the "unwilling", regardless of them being in minority or majority, in favor of *"desirable"* land use. And in this case hunting is definitely regarded as desirable - so far. There are several approaches to the application of enforcement mechanisms, the most important, and the one to be discussed below, is by mediation and - if necessary - compulsory decision by the Land Consolidation Court. The very existence of this possibility will - of course - influence the negotiations amongst the parties.

The case of big game hunting, especially for moose and elks in the forests, and even wild reindeer in the high mountains, might serve as the basic model. Today we can see applications of some elements in this model for handling other types of resources. Finally, it's worth noticing that it is the *resource in question* that is pooled. In this case the big game hunting is pooled, not other resources like forest, pasture, development rights and so on, and by no means the property units as such.

However, the underlying driving forces for pooling are economic, social and technologic developments. These developments create new options, change traditional uses and so on, in many ways. We can take the example of big game hunting a little bit further. The model outlined above function very well as long as all, or the great majority, of the owners are interested in hunting. What we see today is that there are increased opportunities for commercialization of big game hunting, the market is there, the demands and the prizes are increasing. This creates a growing tension amongst those of the owners who want to sell their hunting opportunities at market prizes and those who prefer the traditional local hunter/owners practices.

5. The functioning of the Land Consolidation Courts

In a world of perfectly specified rights, no transaction costs, no budget restriction for the actors etc. - in other words in a Coasian world (Coase 1960) - there is no need for anything like a Land

Consolidation Court. The parties themselves will eventually negotiate solutions for the most efficient use of the resources. However, we do not live in such a world, there are constraints resulting in transaction costs, there are budget restrictions, the rights might not be very clearly specified and so on. This is not to say that the parties do not succeed in negotiating solutions, they often do. For some types of land resources, like for instance cultivated land, negotiating *renting contracts* seems to succeed quite easy, with small transaction costs.

The Land Consolidation Courts in Norway came into being in 1859, and have changed and evolved during the 150 years since then. Originally, the main function was to consolidate fragmented holdings in agriculture and forestry, and dissolve and/or rearrange use of farm commons. Often this included issues of clarification of property rights, so if need be, these courts also had the power to mediate and pass judgements in disputes over boundaries and other issues concerning property rights.

On the subsequent evolution of legislation, tasks, procedures, organization etc. of the Land Consolidation Courts, as well as their function today, there is an extensive literature in Norwegian. Two brief accounts in English are Sevatdal and Bjerva (2007) and Fernández (2008)[1].

The primary activities today is much the same: clarification of property rights, rearrangements of the physical property units, establishment of joint facilities like roads and other infrastructure, rearrangements of land use in farm commons, and other cases of interdependency amongst property units and holders concerning efficient and desirable land use. The latter is most important for the problems discussed here, as cases for establishment of "new" commons more frequently are brought before this court. It is also worth mentioning that land consolidation is no longer restricted to rural areas, land consolidation in some form or other might, at least in principle, be applied everywhere (Sky 2008, Ramsjord and Røsnes 2013)[2].

Beside those primary activities, there are others as well, which we may call "tools" or secondary activities. Some of those are clearly tools; others might be of interest in themselves. A list of such activities involve the following issues: Mediation and negotiations, legal/technical assistance in transactions and property formation, valuation of land and resources, cadastral and land registration work etc. To some extent it is justifiable to say that these courts have become arenas for professional mediation (Rognes and Sky 1998) and for legal/technical assistance to the right-holders, to solve a wide variety of problems related to property rights and land use.

The Land Consolidation Courts are organized as courts, but with technical expertise also. They are independent of the land administration and other administrative and political bodies. Hence, their activity as far as decision-making power goes is restricted to property right issues amongst right holders, i.e. legal relationships between owners. They have no regulation/administrative powers - those powers rest exclusively with the land administration and political authorities. The fact that they deal with issues very different from the ordinary courts, most typically rearrangements of property conditions, should not obscure this.

6. New commons – examples

6.1. Management of salmon rivers

Big game hunting is already introduced as a well-established type of "commons", initiated by the actions of land administration, but organized by the right-holders themselves, with or without external assistance.

Another example is fresh water sport fishing - especially for salmon and trout. Many of the Norwegian rivers have a good stock of salmon and trout, which is the base for highly valued sport fishing. Fishing licenses, marketed by the landowners, might have high market value in themselves, but are also the basis for other economic activity.

[1] Fernández's thesis is also available in Spanish. Note added by the editors, February 2016
[2] References here added by the editors, February 2016

For a long time the proper authorities have taken active part in the management of this resource in various ways. The resource as such is subject to ownership; the basic principle is that fishing rights goes with the ownership of lands, i.e. the owners of the adjacent land owns the fishing rights. Some few years ago the legislators imposed a new management regime on the owners, they became obliged to draw up a comprehensive management plan for the whole river course as one entity. Sensibly, as the salmon population and the river constitute but one system biologically speaking.

In this sense, a river has always been one functional biological entity, and consequently there has been interdependency amongst the owners. Legislation governing the relationships among owners to a river system is age-old, at least from mediaeval times. The new approach is the formalization of a commons in a legal sense, superimposed by the public administration. Moreover, the enforcement mechanism is the same as for big game hunting: no binding management plan, no fishing.

Now, a major salmon river in Norway might have many hundreds right holders. How then, should such a plan come into being, with its legal issues, organizational problems, handling of economic and valuation issues and so on. Not a small task. The answer is of course land consolidation. Currently[3] there are several such cases for the land consolidation courts. The legislators feel it prudent to impose such regulations, on the explicit consideration that the planning problems can be solved by this mechanism.

6.2 Small scale hydroelectric power plants

Development of hydroelectric power plants in small rivers, even creeks, is another example to much the same effect. Most major river systems in Norway are already either developed or protected from development for environmental reasons, but hundreds of small rivers are neither protected nor developed. With the current demand for so-called "clean energy", increasing prices and new technology, development of small hydroelectric plants are most profitable for the developers - and for the owners. Such development is by and large not based on building of dams and reservoirs for regulation of the water-flow, one utilizes the energy in the amount of water as it is at any time, by diverting it into small pipelines.

Still, the development project normally has to comprise the river in its entirety along the gradient, and then again, the problem with the many owners pop up. Consent from the authorities is also required, and that will be given for the river, not for parts thereof. Again, the answer is pooling of the resource, in this case the hydroelectric energy in the water. If the parties do not reach a solution by negotiation, land consolidation is the answer. In the last years hundreds of such cases have been performed, and certain principles for handling of two major problems has been developed. These are the problem of organizing, and the problem of distribution of costs and risks.

The core of the issue is that of establishing an economic enterprise. Such an enterprise cannot be established by coercion, neither by the land consolidation court, nor by others, for example a majority of owners. It has to be voluntary participation, maybe even enthusiastic participation, for many a good reason. One can mention the risks involved, and the problem of including participants in the project, that by the very nature of things have adapted a negative attitude right from the beginning. And also from common sense of justice, it is not fair to compel owners into such a risk taking position by compulsory means.

On the other hand, it is not fair and proper either, that some of the parties should be able to block economic development for the other owners of the resource in question. This is the age-old dilemma in

[3] That is in 2009, note by the editors February 2016.

land consolidation, and the classical solution is to dissolve the interdependence by individualization, by subdivision of a commons, and consolidation of scattered strips and parcels. These options are not there any longer in our cases.

The solution is to establish an organization, which include all the owners and properties, by pooling. Membership in this is compulsory, in which the shares are assessed by the land consolidation court. The members have a sort of obligation to make their share in the resource available, against a "fair" compensation, for utilization by those owners who are willing and able to take part in the economic enterprise. Those owners can organize the enterprise more or less as they see fit, and take the commercial risks involved. In principle, the solution comprise two organizations: the commons amongst the owners, and the firm (enterprise) for the managers. The former is organized by the land consolidation court, the latter is not, but the transactions between them are part of the compulsory solution, established by the court.

As one can imagine, there are a lot of formal legal aspects, economic considerations and assessments, as well as normative aspects involved in solutions along these lines. One of the rather basic principles in land consolidation has to be observed: that none of the parties, or rather, none of the participating properties, should suffer net losses. It is not a requirement that everybody should have an equal share in the profits, but rather the negative: *nobody should lose.* If there will be a profit to share or not, might be predictable, but not decidable!

In practice, the solutions by and large seem to be *negotiated,* and based upon *consensus.* The land consolidation courts seem to be functioning largely as a professional arena for negotiations and the staff as mediators and providing legal/technical assistance.

6.3 Extraction of sand, gravel, stone and minerals

Extraction of this kind normally takes place at the surface, and the landowner owns the resources. The environmental impact might be quite substantial, not only from the quarries themselves, but also from the infrastructure in the form of roads, drainage and so on. Hence consent from the proper public authorities is required, especially so because of the necessary infrastructure that has to be built, and from landscape considerations. Applications to the authorities and subsequent permissions, would often - given the property conditions - involve several property units and several owners. Consequently, some sort of cooperation amongst them has to be established right from the initial stage. This cooperation could take different forms, but some sort of pooling is a rather obvious solution.

A group of my graduate students have during the fall 2009 studied a small, but quite interesting case of slate extraction in stone quarries. The slate resources were located in a most typical Norwegian forested outfield area property-wise: many property units and parcels, and several owners. The slate resource has been studied and inventoried in detail, by a professional team of geologists, who found that the recourses in both quality and quantity were suitable for economic exploitation. However, the resources were located rather scattered, over an extensive area. Hence, there was fragmentation, both resource-wise and property-wise.

The development process was enhanced by a kind of "semipublic" company established and funded by an association of local (municipal) governments, with the aim of supporting development of local economic activities. The incentives of the local governments to involve themselves were to promote economic activity, within the framework of proper and acceptable physical planning considerations, and consequently to facilitate cooperation amongst the owners. The latter was initiated by the use of economic incentives: funding for starting the project was made available on generous terms for the interested landowners, *on the condition that some of them handed in a formal requisition for land consolidation to establish the necessary cooperation.*

The land consolidation scheme has just been concluded (fall 2009) and the production started - on an experimental scale though. The whole enterprise is on a small scale. Fully developed it is planned to employ 10 persons full time. In this case, the land consolidation court has functioned as an arena for negotiations and mediations. It also performed an important function in evaluating each share in the resource and by drawing up the legal documents and make the formal decisions. The "final" document has the form of a binding court decision, even if the reality is the result of a *negotiated agreement.* That is in fact often the case in the land consolidation procedures. There are several legal/technical/economic benefits for the parties to have their agreements formalized this way.

The model for the solution in this case is by and large the same we have seen above: establishment of an organization (a commons?) of owners with compulsory membership, and an estimated and fixed share for each member. Then there is a kind of "renting" arrangement between this body and the actual economic enterprise. This enterprise is largely organized as the members see fit, and normally comprises a smaller group of the active and interested owners.

6.4 Pasture

Pasture in the outfields is an age-old and most traditional type of land use. Often there is a traditional "pasture commons", even if the ownership to the lands itself is otherwise individualized (Sevatdal 2006). These situations are of no concern for us here. They follow well established mechanisms for management and also for solving conflicts.

However, another type of "new" problems have recently occurred in the wake of the dramatic decrease in number of farms and farmers discussed above, and the estrangement of ownership and owners from animal husbandry and from farming in general. The problem is that in many places the formal *rights* to pasture goes with the ownership to the land itself. Thus, the pasture rights are fragmented in much the same way as the land itself, i.e. in a most inconvenient way for economic forms of pasture practice, especially for sheep. This form of practice is dominated by letting the animals roam freely over a large area, with little or no regards for property boundaries. The practice was based, not on formal legal rights, but on a kind of *mutual consent,* as all, or at least most of the owners were in more or less the same situation. When the animal husbandry farmers are becoming a small minority of owners, as is happening today, the majority being largely estranged from farming and even from the local community, problems have occurred. Some of these owners might, for a wide variety of reasons, not be willing to accept the inconveniences of having grazing animals on their property. Part of the problem is that the profitability in economic terms of this kind of husbandry is low, thus fencing along the boundaries, herding and paying a rent sufficiently for the landowners, is out of the question.

Could these problems be solved by pooling mechanisms, with or without assistance by the land consolidation court? There have been some cases, but part of the problem is that the institutional (legal) framework is somehow outdated, in the sense that it does not facilitate negotiated solutions very well.

The logic in the situation should however call for rational negotiated solutions; in the Norwegian outfields there is an abundance of pasture, it is an ecologically sound and sustainable form of harvesting, and - apart from actual land development – the inconveniences for other types of land use is generally low. The outdated legislation might partly be explained by the low standing of traditional sheep grazing in the consciousness of an urbanized political establishment, in competition with current policies with it's emphasis on protection of predators. It may be politically correct today, but maybe not tomorrow, to favor the big predators (bear, wolf, wolverine and lynx), not sheep, and definitely not sheep-farmers!

6.5 Others

There are other forms of land use problems as well, which might find a solution along similar lines as those discussed above. For example, solutions to property problems in urban and semi-urban land development by means of pooling, assisted by land consolidation procedures, are much debated. Legislation to this effect has just been established, but so far only sporadically practiced. Other candidates for pooling, with or without land consolidation, might be timber production and extraction of water from ground water resources. There are certainly also others.

7. Summing up

Finalizing my reflections could conveniently start with Coase and his so called "theorem", Coase (1960), neatly summed up by Ekbäck and Kalbro (2009, 85). Provided there are neither transaction costs nor budget restrictions, then *"...when the rights in a certain resource are clearly defined, privatized and transferable, the parties will, of their own accord, conclude agreements concerning the economically efficient solution, regardless of who is the rights-holder to begin with."*

In the real world, there *are* transaction costs and budget restrictions. The interesting issues are of course the "largeness" and "smallness" of these costs, and how the transaction costs can be reduced to an acceptable level for the parties. One often tends to think of "transactions" as exclusively buying/selling and renting of land, but pooling of resources is also definitely a kind of Coasian transaction. As we have seen through the examples above, pooling in many cases is not a question of pooling of *parcels* or even *property units,* it is about specific units of specific resources being amalgamated, and thus made available for use by somebody somehow. The amalgamation might be done for a defined or undefined period. One interesting question is to what extant the right to this specific resource is specified, or specifiable and (easily) transferable. In practical terms, this is a question of land registration and, quite often, if it is specific enough to be entered into a legally binding contract, that will suffice for enforcement and especially for collateral purposes. One should not forget that the purpose of pooling often is to pave the way for establishment of a commercial enterprise.

What can be said of the role of the Land Consolidation Court? Some few aspects seem obvious; some might need studies that are more detailed. Two aspects seem obvious: First the clarification of rights, in a Coasian sense to specify the rights. Secondly to be an arena for negotiations and mediations. To some extant this also involves finding solutions, in a material and factual sense, to the actual problems. In practical terms, this often means to bring the negotiations from a win - lose situation to a win - win situation. Formal decision-making in face of a real *conflict concerning the material solutions* might not be the normal outcome. However, the *impact* of this *possibility* might be substantial for enhancing negotiations.

Even if the role of the Land Consolidation Court is important, it can be no doubt that getting around the barrier for efficient and/or desirable land use, posed by inefficient property condition, by pooling mechanisms, largely has to be based on negotiated solutions. This observation rises the problem of how to establish consistent institutional frameworks, favorable to solutions along these lines. For the time being there seems to be little consciousness and ability among the legislature at national level, for the importance of consistency in this matter.

Finally, it has to be said that it might be arguable to name all the arrangements of a pooling process for a "commons". Some of the cases presented above, like a salmon commons, hunting commons and pasture commons coincide reasonably well with established terminology, but "slate commons" and "development commons" do not.

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programme

Saturday, 7 November. 9,30 - 13,00

Session 4. Facing external shocks: communities and the survival of the commons

- **Fernando Esteve Mora & Javier Hernando Ortego** (Universidad Autónoma de Madrid, Spain): "Managing the commons, urban demand and sustainability: The evolution of the forest resources in the Sierra de Guadarrama (Spain), 16th-18th centuries"
- **Paolo Tedeschi** (University of Milan-Bicocca, Italy): "Notes on Common Lands in the Eastern Lombardy in the 19th Centuries"
- **Niels Grüne** (University of Bielefeld, Germany): "Struggle for Stability: the Transformation of the Commons in Rural South-West Germany (18th-19th Centuries)"
- **Francisco J. Beltrán Tapia** (Universidad de Zaragoza, Spain): "Diversity of Economic Landscapes and Common Land Persistence in 19th Century Spain."

Chair: Erling Berge · Discussant: Tine de Moor

Conclusions of the meeting:
Nadine Vivier (Université du Maine, Francia)
José-Miguel Lana (Public University of Navarra)

organizers

Jose-Miguel Lana (Public University of Navarra),
Iñaki Iriarte-Goñi (University of Zaragoza),
Antonio Ortega (University of Granada),
Antonio M. Linares (University of Extremadura),
Tine de Moor (Utrecht University),
Erling Berge (Norwegian University of Science and Technology)

registration

Those interested in attending the workshop should fill in and send the inscription form to the following e-mail address: josem.lana@unavarra.es:

Name:

E-mail address:

Center:

City:

Phone:

Registration fee: 20 €
Fees should be deposited in the following account number:

Caja Rural de Navarra:
IBAN – ES16 3008 0001 1807.0019.0523
SWIFT Code: BCOEESMM008

It is important to write the payment reference 2597 and the name of the payer.

Payment gives the right to the attendance certificate.

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The contribution of the commons

The effect of collective use and management of natural resources on environment and society in European history

Pamplona-Iruñea (Spain)
5-6-7 November 2009

Meeting room
Department of Economy,
"Los Madroños/Gurbitzak"
building, UPNA-NUP

Appendix
Program for the workshop

Despite intense privatization efforts in Europe and the Americas since 1750, collective ownership use of natural resources is still omnipresent. The customs that have survived may not be merely dismissed as marginal relics of times gone by in run-down areas. The drive and vitality of communal customs in some regions and their compatibility with economic growth reveals a complex process of historical change. Their prolonged lifespan and the huge variety of communal modes defined by user type, access rules, limitations and prohibitions, etc, also invite researchers to appraise the efficiency of communal systems in adapting to different social and ecological environments. Despite the fact that these modes of cooperation have been able to offer their users advantages in terms of scale, sustainability and overall use of land, they are not exempt from social conflict nor do they guarantee a sustainable use of resources.

This meeting aims at assessing the effect of commons on the surrounding environment and society. Despite the reputation common property regimes have earned as being an inefficient way to manage natural resources both in economic and social terms, there are ample examples of communities of commoners that have shown their ability to adapt to changing contexts, and have been a driving force behind a balanced environmental and social development. Such issues have been well-studied in other social sciences, and can offer a source of inspiration for historical research.

programme

Thursday, 5 November. 15,00 - 19,00

Welcome
José-Miguel Lana and Josemari Aizpurua (Public University of Navarra)

Session 1. Natural resources and its collective uses: water and forests

- **José Rivera** (University of New Mexico, USA) **& Luis-Pablo Martínez** (Generalitat Valenciana): "Acequia culture: historic irrigated landscapes of New Mexico"
- **Samuel Garrido** (Universitat Jaume I, Spain): "Water and irrigation communities in eastern Spain (19th and 20th centuries)"
- **Lenka Slavíková, Tatiana Kluvánková-Oravská, Sonja Trifunovova, Vítezslav Malý** (IEEP, University of Economics in Prague, Prognostic Institute, Slovak Academy of Science): "Public, communal or private forests – an experimental evidence of human behavior from Czech and Slovak Republic"
- **Liviu Mantescu** (Max Planck Institute for the Study of Societies, Germany): "Community-based institutions for managing forest commons facing Natura 2000 regulations"

Chair: Josemari Aizpurua · Discussant: Erling Berge

Friday, 6 November. 9,30 - 13,00

Session 2. Community and the management of environment

- **Angus J L Winchester** (Lancaster University, United Kingdom): "Property rights, 'good neighbourhood' and sustainability: the management of common land in England and Wales, 1235-c. 1800"
- **Esther Pascua Echegaray** (Independent Schollar): "Bringing the Environment back in: Communities and Sustainability in Medieval and Early Modern Aragon"
- **Margherita Pieraccini** (University of Newcastle, United Kingdom): "The quest for sustainability in the legal pluralist context of the English common land"
- **Roberta Cevasco - Vittorio Tigrino** (Universitá del Piemonte Orientale "A. Avogadro", Italy): Feudal jurisdiction, common properties and management: an inquiring between historical micronalysis and field sources (Ligurian Apennines, XVII-XXI).

Chair: Nadine Vivier · Discussant: Antonio Ortega

Friday, 6 November. 15,00 - 19,00

Session 3. Beyond physical resources: culture, cohesion and the new commons

- **Jesús Izquierdo Martín** (Universidad Autónoma de Madrid, Spain): Epic and Tragedy of the Commons. Language, identity and colective property in pre-modern Castile
- **Daniel Schläppi** (Universität Bern, Switzerland): "Corporate Property, Collective Resources and the Political Culture of the Old Eidgenossenschaft (Switzerland in the 17th and 18th Century)"
- **Hans Sevatdal** (The Norwegian University of Life Sciences, Norway): "New commons established by pooling, facilitated by The Land Consolidation Courts - Norwegian experiences and examples."
- **Antonio Ortega Santos** (Universidad de Granada, Spain): "New Commons". About Social Strategies and Social Decision Making for the management of woodlands in Mediterranean Ecosystem, XXth century".

Chair: Tine de Moor · Discussant: Iñaki Iriarte-Goñi