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PRESENTATION SUMMARY

From multiple stakeholders to dominium plenum and back again

Since the beginning of 2005 I have lived in Malawi. One rather unexpected revelation for me as I learned about land tenure in Malawi, was the realisation that the customary land tenure of Malawi was in many ways very similar to the customary land tenure of medieval and early modern Europe. Or, perhaps I should say England and Scandinavia, since those are the countries where I have some knowledge of land tenure history.

In Europe the landholding was centred on a more or less self-supporting village community. Their landholding was divided between the arable lands they were able to till and grow crops on, and the non-arable, the waste and woodlands where they found grazing, fodder and fuel¹. The arable lands were in individual control during the growing season, but could be used for common grazing during the rest of the year (commonable lands). The resources of the non-arable lands were, probably, accessible for all the villagers as well as strangers that might have a need for something. But as population grew, the number of villages grew, and soon there appeared disputes about the details of use and access to the various resources.

This is in broad outline also the contemporary situation in Malawi. The similarities between Africa and Europe in this area may give some ideas about more general principles in the development of land tenure. This will have to be developed elsewhere. My paper here gives a brief outline of the development of land tenure legislation in England with a focus on the commons.

I find the history of land tenure and the reasons for the persistence of the commons a fascinating topic. Most people may have heard about the commons. But I bet many - if not most - will believe it is the Parliament of the UK, the House of Commons. If we probe a bit maybe we get suggestions such as the village square, or a wilderness area. Most, even text books in property law, will maintain that commons in this sense is something that has disappeared or fast is disappearing from society.

Now, those that think of the commons as places where poor people could collect firewood and graze a few sheep and a few crofters might have the right to graze cattle and take timber for their farm buildings, may be forgiven for believing that this has or is fast disappearing. But there is a difference between this picture of the commons and the picture of the commons emerging from modern research into the social realities land users face and have to find solutions to.

In traditional societies the reasons for keeping some resource as commons are numerous:

- If there is enough for all with access to the resource there is no reason to incur the costs of enforcing property rights.

¹ As far as I can understand English language does not have a good word to distinguish between these two classes of land. In Scandinavian languages words similar to the Norwegian "innmark" (arable and meadow lands held in severalty) and "utmark" (wastes, woods and pastures held partly in severalty and partly in common or jointly) captures the distinction in usage and includes the connotation of differences in property rights. We shall here use arable to mean all land that currently is cultivated, fallow or allocated for future cultivation, and non-arable to denote the rest including pastures, forests, mountains, rivers, and small water bodies.

- If access to a resource is essential for the survival of a family it would be seen as unjust to deny anyone access to a minimum level of the resources.
- If traditional societies see that there is safety in numbers, maximising the number of people imply resource access for every member of the community.
- If there are technical difficulties of excluding particular persons from access to a resource, keeping it in common may be the only feasible way of managing it.

Thus, commons abound both in European history and in contemporary, so-called ‘traditional societies’.

Today one can say that the commons in European history was a method of reconciling a **multiplicity of partly interdependent users and interests focusing on an area containing a multiplicity of partly interdependent resources**. As a method of resolving conflicts about access and distribution in a situation of multiple interdependent users and resources the commons has worked extraordinarily well. Not because the commons is a natural phenomenon, but because people applied their ingenuity and capacity to finding ways to make it work. The commons is today best seen as a method for solving problems among land users rather than a solution in itself.

The removal of the commons, their enclosure, was on the political agenda in England from 1236 until 1876, and their demise and disappearance has been a common enough assumption all throughout the twentieth century. But 1876 also marks a turning point. The change of name on the Inclosure Act to the Commons Act in 1876 marks this turning point. By the time of the Commons Act 1876, the force of the enclosure drive was spent. New concerns, found in the urban populations, were on the rise and had by now become prominent. In the Inclosure Act 1845 the urban concerns with access for the public to common lands appear for the first time as a minor interest. In 1866 the first Metropolitan Commons Act was passed. In 1863 we get a “Town Gardens Protection Act”, in 1872 a “Parks Regulation Act”, in 1906 and Act on Open Spaces, in 1938 an Act on the “Green Belt” of London, and in 1949 the Act on “National Parks and Access to the Countryside”. The interests of the urban populations had between 1845 and 1849 grown to be a major concern. Regulations to promote the preservation and management of the remaining commons in the 1876 Act were just a minor part of this.

The reduction of, or disappearance of, the medieval commons should not be lamented per se. What I think is less fortunate is that by forgetting about the old commons we forgot about the reasons for developing this amazing legal technology in the first place. The many enclosures may have simplified the landscape and disentangled the interdependence of interests and resources. But the simple landscape of dominium plenum did not last. Even before the turning point around 1850 large groups of people with stakes in the landscape appeared on the political scene and demanded their share of the goods. The enclosures had not managed to disentangle forever the multiplicity of partly interdependent users and partly interdependent resources. By the 1920s a new course in land use regulations pointed to the contemporary system of tenure.

Since the 1920s the drivers of change have been the advent of new concerns rooted in the interests of urban populations for access to nature and the protection of biodiversity, and the public health concerns about pollution and environmental degradation.

The societal dynamic threatening the environmental qualities are often associated with the powers inherent in the dominium plenum property regime that grew out of the customary law regime and the enclosure movement. As urban society has matured and learned more about the

goods and services provided by natural ecosystems in their various stages, a new concern about their management has emerged. .

This interdependence of traditional resources (such as water, forest) and the ecosystem services (such as biodiversity, prevention of erosion) is of general interest. Recreation and biodiversity will for example depend heavily on how traditional resources are utilized. The interdependence of many of the goods and services of different types is in one sense obvious. But it is seldom, if ever, seen in the design of regulation regimes.

For environmental goods and services the efforts or expenditures required to maintain the level of service will in most cases appear as incomes foregone by not exploiting goods like forest or water. These costs are not evenly distributed. Depending on the distribution of property rights to the traditional resources, the level of conflict around the institution of new public regulations will vary. For example, in a private recreation area the organisation must either include landowners and other stakeholders or in other ways accommodate their interests to align incentives for maintenance and enjoyment. The resort owner alone will seldom be sufficient.

A modern society requires that there are ways of specifying resources and dividing rights among several and different owner interests. There also has to be ways of sharing and co-managing resources and benefits within groups of differing sizes and interests.

The simple conclusion about the future of common property must be that there always will be one form or another of common property. But as cultural values and ways of thinking evolve, so the property rights system will evolve. To recognize the commons of the future we need to understand their foundation in general problems of collective action and ideas about equity.

On that basis I say that the commons have reappeared, but with new names. Today they are the lands of the National Trust, and the National Parks. They are seen in the parks in the cities and the green belts around them. They are found to be world heritage sites.