

BOOK REVIEW – JULY 2009

**A Review of "PROPERTY RIGHTS AND NATURAL RESOURCES" by Richard Barnes,
Hart Publishing, Oxford, UK, 2009 ISBN 978-1-84113-589-2 pp 436**

The maxim "you cannot judge a book by its cover" applies to this work by Richard Barnes, a senior lecturer in law at the University of Hull, UK.

Attracted to the title as a longstanding practitioner in natural resources law, I was interested in refreshing myself since attending a seminar in London on "The Legal Character of Petroleum Licences" as long ago as 1981.

Perhaps a more appropriate title for this work would have been "Property Rights and Marine Natural Resources" because the existing title does not convey its focus – it is a historical and analytical study of how the 'common pool resources' of the oceans have been inadequately regulated and an outline of possible measures to reverse the over-exploitation of fish stocks. The author examines open-access regimes and compares and contrasts how notions of common, collective and private property all have a role in better regulation.

This is a very worthwhile work – it is authoritative, comprehensive, well-structured and eminently readable.

Recalling the economist Garrett Hardin's phrase 'tragedy of the commons' in 1968, the author identifies three root causes of degradation of the commons through over-use (which are replicated in any resource system, be it common land, forestry or fisheries). These root causes are, first, allowing fishermen to catch as much as possible and to fish beyond sustainable levels (echoes of climate change here); second, high transaction and enforcement costs; and, third, low productivity.

The author explains the reasons for this regulatory failure, starting with the lack of data (or simple ignorance of the problem) and the authority of States to regulate marine resources. States generally only had authority to regulate activities within their territorial sovereignty until the UN Convention on the

Law of the Sea in 1982. However, the period since its adoption has been marked by the failure of coastal States to effectively regulate fishing activities within their domestic jurisdictions and by the inability of States to agree on effective controls over the residual high seas. As well, there have been the complications that arise in relation to the Exclusive Economic Zone regime.

The author elaborates on the trend towards market-based regulatory systems and towards the use of property rights and market-based mechanisms to regulate fisheries in Australia, Canada, Iceland, New Zealand, Norway and the USA. The basic policy has been to limit entry to fisheries via creation of property rights in the form of fishing licences and this policy has been to a degree successful.

The author considers it can be misleading to characterise fishing licenses as private property because, although they have some of its attributes, they are fundamentally linked to public interests such as ecological sustainability.

In chapter 4, the author reviews the private and public functions of property in considerable detail, explaining that, despite property's characteristic association with private interests and the notion of exclusivity, it cannot be understood apart from its public function. He cautions against too narrow a view of property merely as the right to exclude and suggests it is more accurate to talk about 'property holdings' rather than 'property rights'. He reminds us that property rights exist not for their own sake but because they facilitate certain State's affairs and he emphasises that perceptions of property are socially constructed and susceptible to change.

At the core of the author's approach is his explanation:

"Property rights are rights in rem, rights which are good against the entire world and not just against specific persons. An important aspect of this is the need for the State to act as the guarantor of title. Put another way, property rights (at least in positive law) cannot exist without a supporting legal system. Typically this is domestic law, although in exceptional cases international law may serve this function. More specifically, property rules are dependent on the notion of territorial sovereignty. This is evident in the lex situs rule, which provides that property relationships are determined by the law of the place where the property is located. One consequence of this has been a reluctance to accept the existence of private property rights arising beyond the territorial authority of States."

Whilst, under the common law, fish in their natural habitat belong to no-one, fishing licences are in most jurisdictions treated as proprietary in nature, consistent with the characteristic that licences are usually transferable, subject of course to any qualifications or conditions in the legislation or instrument by which they are created. The author explains that public property is structured in much the same way as private property, the main difference being that title to public property is vested in an agency acting in the public interest.

The author is an advocate for another form of fishery holding with a strong public duty function, namely stewardship, a notion which entails responsibility to the environment and a focus on sustainability. Many jurists and legal scholars argue that stewardship is inconsistent with the notion of private ownership but the author points to the potency of stewardship in the context of natural resource regimes, not discounting the difficulty of calibrating the typical incidents of private ownership and the public interest.

In all this, the author does not overlook the significance of traditional rights or what he describes as 'the public right to fish'. In his concluding chapter, the author suggests that the growing body of environmental rules under international law is transcending the interests of individual States. The development of rules on the protection of biodiversity and of ecosystems shows how traditional rules of property are ill-suited to regulating complex ecological conditions and servicing diffuse private and public interests. In the context of marine natural resources, the author propounds that stewardship provides a more suitable vehicle for facilitating all these ends.

Although the author gives credit to property rights as effective in reducing over-fishing, he reminds us of four additional considerations: first, it is not only private property rights that are capable of preventing the tragedy of the commons (notions of common property and collective property are also relevant); secondly, property rights are vulnerable to legal challenge; thirdly, fishing rights will always be subject to limits (to ensure resource sustainability); and, finally, fishing rights must necessarily be limited by environmental rules.

This is an excellent work of study and reference for both law students and legal practitioners. It is enlightening and enjoyable to read.

As for petroleum licences, they share something in common with fishing licences: a form of State-guaranteed title is vital so that the exploiter has a legal right that is marketable to the world and capable of being financed. The author deals briefly with petroleum and mineral resources in chapter 7. The author acknowledges the difficulty of reconciling any obligation of adjoining States to cooperate in joint development with the long-established principle of permanent sovereignty over natural resources. The latter continues to win hands down

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