

When the law is silent, trespassers w...: law and power in implied property rights

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Presentation Notes:

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When it comes to property, the law does not always rule.

We looked at prices emerging from on-going and hotly contested bilateral exchange of property interests in land in NZ high country of the south island.

Does relative value of property rights exchanged drive prices? In other words, does an economic interpretation of the law drive prices?

This question has 2 components: who owns what rights? What is the value of those rights?

Used empirical economics research to impute the value of the property rights, and tested 4 competing interpretations of the law concerning ownership of property rights in this exchange.

Found that none of the stated arguments about who holds which rights (and how much they're worth) explains the observed pattern of prices.

So we turned to dynamics of the negotiation, and other ideas of political economy to offer explanations of the prices.

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Harshly desolate and spectacularly empty

Specifically, we started to ask if runholders hold exclusive possession rights in the high country.

Though custom clearly says yes, they do have exclusive possession, the law is far less clear

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2.4 million ha, about the size of Israel, just smaller than Belgium

Eastern slope of southern alps, backbone of South Island

(green and yellow land on west coast is park and conservation land)

Textual clue = exclusive pasturage

Policy setting = why question arose

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Let's start by looking at the nature of a lease.

There are two types of lease – common law lease and statutory. A common law lease grants the tenant exclusive possession, quiet enjoyment, and a guarantee that the landlord will not breach the terms of the lease before the end of the lease term. These rights come from legal precedent dating as far back as the Magna Carta. A tenant in a flat has a common law lease under which she may refuse entry to all would-be visitors, even the landlord. The landlord must give formal notice well before entering the flat. As such, exclusive possession is automatically included in a common law lease. Exclusive possession is sometimes called exclusive occupation and, more commonly, trespass rights. But as I'll cover in a moment, the term trespass rights is incorrect.

The second type of lease is a statutory, not from common law. In a statutory lease no rights are automatically included. A statutory lease grants only those rights explicitly written in the statute governing the lease – in this case the Land Act and the CPLA. If the original statute does not explicitly confer exclusive possession, then it does not exist. Even the lease agreement cannot grant more rights than those granted by the original act. Only the statute can create a right in a statutory lease.

Not surprisingly, long battles have been waged about the distinction between statutory and common law leases. The question of statutory vs common law lease arose in Australia in the 1990s in a case of Aboriginal vs. pastoral claims in land. Pastoral leases in Australia are almost identical to New Zealand's in form, function, and history. The two nations' leases evolved from the same origin. The common origin and Australasian legal structure suggests that Australian precedent should be persuasive in New Zealand. As long as there is no clear New Zealand case law to the contrary.

The question of whether pastoral leases are statutory or common law leases went to the Australian High Court. The OZ high court concluded:

It is clear that pastoral leases are not creations of the common law...That they are now and have for very many years been anchored in statute law appears from the cases which have considered the legal character of holdings under legislation of the Australian states.

The Court further decided that, as creatures of a statute which never mentioned exclusive possession, pastoral leases do not interfere with native title and do not confer the right to exclude others. As such Aborigines were deemed welcome to hunt on pastoral lease land.

OK, so far we've established that pastoral leases are statutory, not common law, leases. If the statute explicitly mentions exclusive possession, then the runholders have it. If it doesn't, then they don't. so the obvious question is, where do the statutes mention exclusive possession?

As it turns out, they don't.

Though phrases describing exclusive possession, such as 'exclusive occupation' and 'quiet enjoyment' are mentioned in policy documents describing the high country, the words 'exclusive possession' are nowhere in the Land Act.

Thus as a matter of basic legal principle, pastoral leases do not confer exclusive possession.

Hang on, hang on, hang on, you might be thinking now of the Trespass Act 1980 or the Property Law Act 2007. surely these are NZ statutes which explicitly grant exclusive possession.

It might seem intuitive that a law making trespass a criminal offence would give the runholders the power to exclude all trespassers. As a matter of legal principle, however, the Trespass Act does no such thing. The phrase 'trespass rights' is incorrect. Trespass is a remedy, not a right in itself. It gives the right-holder the power to enforce his or her underlying right of exclusive possession by means of the remedy of criminal trespass.

If the underlying right of exclusive possession has no legal foundation, then the remedy of trespass is meaningless. That the Trespass Act tried to give this authority further supports the thesis that pastoral rights are statutory in nature. In the case of the high country, statute and case law clearly suggest that pastoral leases fail to confer exclusive possession. As such, the Trespass Act establishes the power to enforce a non-existent right. This is akin to authorising police to write speeding tickets in a zone with no speed limit.

Though it might seem that the Trespass Act should grant runholders as occupiers the right to exclude trampers, deer-stalkers, and mountain bikers, nothing in the Trespass Act changes the core issue that the runholder's exclusive possession depends entirely on those words' existence in the Land Act or CPLA. When such issues have been tested in court, laws such as the Trespass and Property Law Acts were not deemed relevant. In other words, neither the Trespass Act nor the Property Law Act helps the runholders' case here.

So far we've got: it's a statutory lease. Exclusive possession is not in the statute, and the Trespass Act doesn't establish exclusive possession. So far the evidence is not looking good for exclusive possession in the high country.

However, there are a few more things to consider before definitively concluding that exclusive possession in the high country is but a myth. Let's go back to the lease in a flat, where the landlord must give notice before entering the flat. In the high country, the landlord does NOT need to give notice to a runholder before entering the run. In s. 26 of the Land Act 1948, the Crown reserves 'free rights of ingress, egress, and regress at all reasonable times.'

One might be tempted to infer that everyone BUT the Crown must give written or oral notice before entering. In other words, one might try to use s. 26 of the Land Act to imply that runholders do have exclusive possession, and that statute affirms this.

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Case law suggests that this inference would be incorrect. The Queensland Land Act has a section similar to s. 26, which implies much more strongly that Queensland pastoral runholders might have exclusive possession. Section 400 of the Queensland Land Act (1994) requires the government to obtain the runholder's consent to enter the land, or failing that, give 14 days' prior notice. But even this much stronger provision does not confer exclusive possession, as the High Court found that Queensland runholders do not have exclusive possession.

One final way to settle legal questions such as whether or not pastoral runholders may restrict public access is to look at the legislative intent at their inception. For this, let's look first to the pastoral lease description by their originator Henry George Grey, who was the third Earl Grey and the head of the Colonial Office in Britain from 1846 to 1852.

In establishing the pastoral lease system in Australia and laying the groundwork for New Zealand's leases, Grey granted the pastoralists the exclusive rights to pasturage; but Grey explicitly stated that those pastoral rights in no way interfere with others' rights to hunt on the pastoral estate. In a dispatch to then Governor FitzRoy, Grey described the pastoral lease as follows:

'giv[ing] only the exclusive right of pasturage in the runs, not the exclusive occup[a]tion of the Land. ... Nor was it meant that the Public should be prevented from the exercise ... of such rights as it is important for the general welfare to preserve, and which can be exercised without interference with the substantial enjoyment by the lessee of that which his lease was really intended to convey.'

This suggests that a runholder may exclude all individuals who wish to use the forage to the detriment of the runholder's sheep. This is the right of exclusive pasturage, conveyed by section 4 CPLA 1998. It in no way suggests that the runholder may exclude a trampler who does not seek to kill sheep, eat grass, or intentionally disturb the soil.

Given the limited nature of a runholder's rights, to call a runholder a 'lessee' is actually almost as incorrect as the term trespass rights. Technically runholders are 'holders of a quasi-usufruct of statutory origin.' Try to say that 10 times in a row. What it means is that the Crown's granting of a grazing use right, no matter how exclusive and how perpetually renewable, does not now, and will never in any way diminish the residual land ownership by the Crown as landlord. Suffice it to say, statutory pastoral usufruct rights '[fall] far short of full ownership of land.'

This stands in stark contrast to much of the rhetoric surrounding property rights in the high country. Runholders and their advocates often claim a pastoral lease confers exclusive possession. Many have also conflated quiet enjoyment and exclusive possession so much so as one might conclude they are one and the same. However frequently they are touted in newspapers and policy documents, these

phrases are never followed by a footnote listing the statute, section, and sub-section from which these rights arise. If there's one thing I learned in graduate school, it's to never trust anything without a footnote.

Just to review what we've covered about access in the high country, I'll sum it up in 6 points which flow in order:

1. Pastoral leases are statutory leases, not common law leases.
2. As such, the only property rights conferred to the runholder are those explicitly written in the statutes governing the lease arrangement (Land Act 1948, and Crown Pastoral Land Act 1998).
3. Neither statute confers a right of exclusive possession.
4. Hence the tradition of exclusive possession in pastoral runs, and the accompanying 'trespass rights', has no foundation in statute or common law.
5. Though it may appear that the Trespass Act 1980 authorises the runholder to exclude people from his or her run, the Trespass Act should not apply. Trespass is not a right, but a remedy. It is the power to enforce one's right of exclusive possession. A runholder cannot enforce a non-existent right of exclusive possession. Applying the Trespass Act to Crown pastoral leases is akin to giving German police the authority to issue speeding tickets on the Autobahn where there is no speed limit.
6. As a matter of legal principle, recreational access to Crown pastoral lands need not interfere with the existing property right of exclusive pasturage. There is no legal reason that recreationists should be excluded from Crown pastoral lands as long as recreationists respect gates and stock, do not disturb the soil, and do not eat or cut the grass.

By themselves, there is nothing new or inventive in these 6 points. In Law School, it's Property 101. That a pastoral lease is a creature of statute, and thus conveys no right of exclusive possession or trespass has received judicial support at the highest levels in the Commonwealth. This means the right of exclusive possession in a pastoral lease is but a myth, albeit long-standing and well-ensconced.

It also means that a primary goal of tenure review – to provide recreation access to the high country – is superfluous. In other words, the Crown has just spent 16 years, and \$27M buying back something that it already owned. The Crown didn't need to privatise 300,000 ha of high country land, 9 km of Tekapo shoreline, and Perkins Bay to gain legally secure public access to the high country. As a matter of legal principle, the Crown had never given it away in the first place. It thus follows, then, that the Crown has held public access rights all along.

Back to Professor Sax again, the only surprising thing about our 6 point argument is that it directly contradicts high country custom. So you see that Professor Sax was right when he said "[the] most striking incongruity between law and custom is how often custom wins."

ibid

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Indeed access and explicit property do not always coincide. One can hold a right to benefit from a resource, but lack the ability to do so. Though commonly documented as a right-holder who lacks the requisite labor to capture a resource's benefits, it could also refer to anglers whose walking access to publicly owned waters is blocked or impeded by surrounding private land posted with No Trespassing signs.

In contrast to explicit property rights, access rights by custom and convention do not rely on formal enforcement by the state, and there are many forms of coercion entirely outside the law. To Ribot and Peluso, the power of access takes two forms: 1) the capacity of A to affect the behavior and ideas of B; or 2) the capacity of disciplinary practices to induce behavior without coercion. Implied property or access rights, by definition, cannot rely on formal enforcement because such an attempt would be a Schrodinger's cat moment at which an implied right either gets formalized or dissolves.

a community's developed expectations can be as significant as formalities such as title ownership in resolving "claims of custom versus title."

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power, narratives, assertion, strategy, and property itself work together to allow implied property to prevail over explicit law, and private desires over public interests. The story of access to the South Island high country also illustrates a broader pattern in implied property - that an assertion of exclusion establishes power that often becomes a private right recognized at law.

In sum what conclusions can be drawn about implied property? Implied private property is especially powerful for smaller groups with homogenous or similar interests, *the few*. It is resilient; its advocates are able to continue to yell loudly despite statutory or judicial pronouncements to the contrary. It is capable of influencing outcomes successfully in the contest of custom versus the law when it articulates a community's expectations. Because it is outside the rules of statute and common law, the self-adjusting balance of crystals and mud, it has the propensity to make up its own *ad hoc* rules without check. This tendency presents especial dangers to lawmakers, who must guard against elevating unworthy claim into property right, especially where property norms tend to obscure rather than reveal the effect of externalities. And the lawmaker's adherence to settled principle should not be obfuscated by implied property's apparent façade of "propertiness."

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This is but one example of our proposition – that power, narratives, assertion, strategy, and property itself work together to allow implied to prevail over explicit, and private over public. The story of access to the South Island high country also illustrates a broader pattern in implied property, that an assertion of exclusion establishes power that often becomes a private right recognized at law. In the *Fish and Game* decision, the judgment relied first on the assertion and expectation of exclusivity instead of the statute. This was the Shroedinger's cat moment where the judgment makes implied law explicit. While we like to think of explicit law as prescient, when explicit grows out of implied law it cannot avoid being both *post hoc* and *ad hoc*.