La typologie des systèmes de propriété de C. R. Noyes

Un outil d'évaluation contextualisée des régimes de propriété privée, publique et commune*

Matthieu Galey

Abstract

One of the major achievements of law and economics in the field of environmental studies is to have recast the economic analysis of problems of pollution and depletion of scarce natural resources in an institutional perspective. It is now widely known that many, if not all, environmental problems stem from deficiencies in the way property rights over those resources are defined, distributed and enforced (Coase 1960). Nevertheless, the microeconomic theory of property rights suffers from many methodological and theoretical shortcomings. We can mention its reductive anthropological assumptions, its lack of a sound conceptual basis regarding ownership, as well as its inability to trace and explain the origin of structural insufficiencies in positive municipal systems of property. Free-market environmentalism relies, for example, on a confusion between regimes of common property and regimes of open access (Bromley 1991). The methodological question of a case by case assessment of the environmental efficiency of diverse regimes of property according to their cost in specific institutional, economic, technological and cultural contexts is very complex and, in the end, remains open (Cole 2002).

In this regard, the typology of systems of property defined in 1936 by the institutional economist Charles Reinold Noyes appears to be of prime utility. This typology would seem to act as a cognitive adaptor that helps to build a bridge not only between the legal cultures of civil law and common law pertaining to land law, but also between legal formalism and the instrumentalist approach and assumptions of microeconomics. Indeed, according to Noyes, systems of property stem from the interplay of two fundamental dimensions: the institutional substance, that is, the type of legal relations that are effectively practised in economic life, and the legal form in which this moving institutional substance is crystallised and through which it is refracted. Noyes then goes on to distinguish between systems of property inherited from the Romanist tradition, which are direct and collateral, and systems of property rooted in the feudal background of common law, which are derivative and lineal.

This typology helps to account for many conceptual differences, or even misunderstandings, between civil and common lawyers, as well as between civil lawyers and legal economists, when one is speaking of landownership and property rights. It also helps to understand why some property regimes, whether public, private or common, prove to be more efficient in one legal system than in another. Exclusion and coordination costs, linked to the introduction or modification of a property regime, are indeed not the same, according to the kind of systems of property in which one is working and according to the way this system of property is legally formalised. This typology thus helps us to further our understanding of transaction costs arising from institutional changes that are introduced in the matter of property regimes in order to improve the allocation of scarce natural resources. Legal form and legal formalism are not neutral. They are to be taken seriously by the economist.

* C. R . Noyes' Typology of Property Systems. A Tool for the Contextualized Evaluation of Private, Public and Common Property Regimes.