



Institutionalization of common land property in Portugal: Tragic trends between “Commons” and “Anticommons”



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ABSTRACT

The use and exploitation of natural resources is generally structured by institutions, especially by property institutions. The main objective of this paper is to present a diachronic analysis of the institutionalization of common land property in Portugal. The several types of ownership may be largely explained by common land history. We intend to draw an outline of the emergence, evolution and transition of common land from the late nineteenth century to the present day, using the matrix proposed by Heller. The economic problem of the optimal level of appropriation is recurrent in studies that analyze the economic implications of property rights. Thus, it is imperative to analyze whether or not the dimension of common land ownership is relevant to its efficient exploitation.

In essence, we infer that common land ownership in the 1st period (1850–1926) may be classified as limited-access commons (limited access to commoners) with a relatively small average size of 50 ha. This common land was primarily used for grazing, firewood collecting and shrub extraction. In the second period (1926–1974), the State dictatorship invoked the public interest (forest easements) and took possession of more than 80% of common land, promoting the transition from limited-access commons to state ownership. The units of commons were aggregated in forest perimeters for Silviculture activity, the average size being greater than 3400 ha. Finally, we analyzed the institutionalization of common land ownership in the period after the democratic revolution on April 25th 1974. We concluded that the incipient legal and institutional frameworks revealed an inability to integrate an effective title to these territories to give way to a better classification of limited-exclusion anticommons. The Heller matrix approach revealed to be a useful tool, however insufficient to study holistically Portuguese common land institutionalization. In our preliminary conclusions the Heller matrix appears to be an ill-posed problem (no *continuum*). It allows for the reversibility between different property regimes that involve great simplifications in the epistemology of property rights.

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Introduction

At the beginning of our civilization, all resources were freely accessible to everyone. That is, commons in the broad sense. However, even before the creation of the modern Nation-State, social

rules were developed to maintain an implicit order associated with the consumption of these resources in environments with multiple users. With the institutionalization of the modern Nation-State this organization was clear; there was a transition from free access to legal systems based on property rights. The classic law and economic specialists suggest that the emergence of property rights is a story of evolutionary success (Coase, 1960; Demsetz, 1967). Agreement with this idea implies that the emergence of property rights has been a process toward efficiency, leading to more complex property regimes, and experimenting tragic trends along the whole process.

The concept of property rights is not easy to define. The key to understand this concept involves the notion of exclusivity. In order to claim the right of property, one or more individuals must first possess the ability to exclude all other potential users. With

Abbreviations: AFN, Autoridade Florestal Nacional – National Forest Authority; CAP, Common Agricultural Policy; DGRF, Direcção Geral dos Recursos Florestais – Government Department of Forest Resources; EU, European Union; JCI, Junta de Colonização Interna – Board of Internal Colonization; Natura 2000, – EU – wide network of nature protection areas; PNVTC, Programa Nacional para a Valorização dos Territórios Comunitários – National Program for the Upgrading of Common Land; SAC, Special Areas of Conservation; SPAs, Special Protection Areas.

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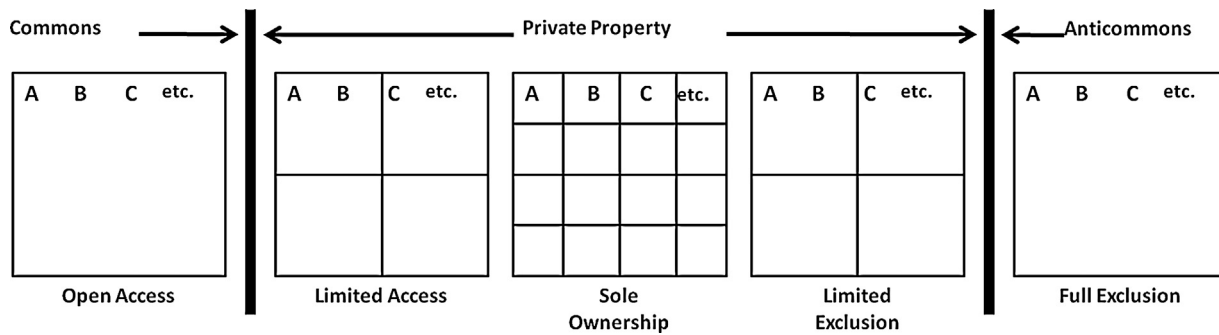


Fig. 1. Boundaries of private property, matrix analytical study on the transition of ownership of common land (source: Heller, 1999).

the competition excluded, the individual can then decide how to use the ownership and how to allocate the income from that property. Of lesser importance, but generally included in the concept of property rights, is the notion of transferability. This means that the owner of the exclusive rights can transfer them to another person in exchange for exclusive rights to other assets. When the transaction costs are low, the initial allocation of property rights is not important (Coase, 1960), because the rights can be freely adjusted and changed to promote increased production. However, when the transaction costs are high (which often occurs), the allocation of property rights is more critical, since the transfers are less fluid. Accordingly, the pre-existence of property rights has profound and lasting effects on the production and distribution of goods with a high transaction cost, such as land.

According to Demsetz (1967), the classic formula which states that increasing the values of resources leads to the creation of private property, implies that private property is established only when the benefits of this type of ownership outweigh the costs of institutionalization. Thus, the primary function of the emergence of collecting property rights is that of guiding incentives to achieve greater internalization of externalities. All costs and benefits associated with social interdependencies are potential externalities. This formula has been modified and improved over time, particularly in relation to common property regimes; proponents continue to apply a basic cost-benefit analysis to predict the evolution of ownership systems for efficiency and for the establishment of networks and social welfare. Accordingly, property is simply another legal institution that evolves to efficiency under the influence of certain competitive conditions (Fitzpatrick, 2006). At most, if property rights are fully defined and entirely implemented so that the network of private and social net benefits is equalized, there will be no externalities (Libecap, 1986).

Fundamentally, tragic trends emerge from commons due to lack of the fragmentation of entitlements. The users of scarce resources, apparently having full powers and prerogatives inherent to unrestricted ownership, can eventually cause the overuse and depletion of this resource, mainly due to overlapping and uncoordinated use. The negative effects of commons exploitation, in the presence of multiple beneficiaries (e.g., overuse, congestion, pollution, destruction, etc.), were associated with the users' non-cooperative behavior and their choice of acting, based on individual rationality rather than on group rationality. This resulted in the "tragedy of the commons" (Gordon, 1954; Hardin, 1968). Economic analyses of common property typically proceed under the hypothesis that extractors make independent choices with a view to maximizing their material well-being. Since each individual neglects the implications of their decisions on the payoffs of other extractors, this results in suboptimal extraction levels from the perspective of the group as a whole (Sethi and Somanathan, 2004).

Although Meade (1952) was the first author to introduce the concept of anticommons in the sense of being a positive externality,

the first successful example which illustrated this inefficiency was proposed by Heller (1998), who analyzed the transition from a Marxist economy to a predominantly market economy. This author pointed out that in the early 1990s many shops in Moscow remained empty, while small improvised street kiosks were full and performed numerous transactions. The problem was the fact that the many and various regulators (privatization agencies, local and federal government) had the right to exclude: no one could open a business without getting all the licenses from each of these regulators. Thus, legal and institutional frameworks revealed incipient failure to integrate efficient ownership. The tragic potential of anticommons arises from effective decomposition of entitlements on resources. Similarly in the commons the overlapping and uncoordination between these entitlements can lead to the same consequences. To this regard, Heller (1999) introduced the concept of "boundary principle". This concept refers to the legal doctrines that separate these property categories from one another and also help keep resources well-scaled for productive use, so this principle limits the right to subdivide private property into wasteful fragments. The boundaries between different forms of ownership can be easily understood using Fig. 1. The thick vertical lines in this figure represent the possible boundaries of private property in a developed and always functional society. Please note that commons, private property and anticommons are not contiguous realities (Heller, 1999). Among these categories there are intermediate situations of limited access commons and limited exclusion anticommons (Fig. 1).

The layout proposed by Heller (1999) is extremely simple and intuitive, corresponding to a proper analytical and prototype skeleton for extreme situations. We proposed to test this grip/disagreement in the real-world situation of the institutionalization of common land property in Portugal. These 3 regimes are ideal, analytical types. In practice, resources are usually held in a mixed combination of property rights regimes. As such, this paper attempts to outline the emergence, evolution and transition of the institutionalization of common land ownership in Portugal, from the mid-nineteenth century to the present time. It is a study of common land memories together with an interactive analysis of social and natural data, thus contributing to the rational and holistic understanding of common land ownership in Portugal. In this paper we focus on the economies of scale issues and on the optimization of land use of Portuguese common land. The economic problem of the optimal level of appropriation is recurrent in studies that analyze the economic implications of property rights (Araújo, 2008). Thus, it becomes imperative to analyze if common land ownership has the adequate dimension for efficient exploitation. In this dimension, the positive interdependence of individual members (commoners) along with the social interest of holders and non-holders should be guaranteed (Heller, 1998). Private property is often thought as a physical entity that can be physically divided. According to this view, we can fragment land successively. However, at some point

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