


Commons in Transition

COMMON PROPERTY AS A TOOL FOR LONG TERM CONSERVATION: THE CASE OF A FAMILY ESTATE IN PROVENCE (FRANCE)

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Common Property as a Tool for Long Term Conservation:

The case of a Family Estate in Provence (France)[1]

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"Thus, where many individuals will work, live and play in, the next century will be governed and managed by mixed systems of communal and individual property rights."

(E. Ostrom, 1999)

1 Introduction

In France the literature of common pool resources is very limited and so is the participation to the IASCP activities[3]. There are some good reasons for that. As a matter of fact, the French Revolution declared private property as of paramount importance in opposition with the Ancient Regime custom where layers of different rights were distributed among different persons and institutions perpetuating the feudal system of leasehold between landlords and peasants. The absolute concept of property was stressed at the turn of the 19th century in two major sentences.

"La propriété étant un droit inviolable et sacré, nul peut en être privé si ce n'est lorsque la nécessité publique, légalement constatée l'exige évidemment et sous la condition d'une juste et préalable indemnité."[4] (Article 17 de la Déclaration des Droits de l'Homme et du Citoyen de 1789)

And a few years later, the Code Civil (1804) states: *"La propriété est le droit de jouir et de disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois et les règlements."*[5] (Art. 544)

The idea was to prevent any claim of title on the land by the nobility and insure economic growth by mobility of land and chattels. So property belongs to a private entity or to the state.

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[3] The closest concept is "Gestion patrimoniale" developed by some mavericks loosely linked with the Ministry of Agriculture, such as Institut National Agronomique de Paris and Centre de Coopération Internationale en Recherche Agronomique pour le Developpement (CIRAD).

[4] "The property being a full proof and a crown right , no one can be deprived from it except when public need, legally noted, requires it obviously and under the condition of a just and previous allowance."

The sole reference to common property is art. 744 of Code Civil*:"Il est des choses qui n'appartiennent à personnes et dont l'usage est commun à tous. Des lois de police règlent la manière d'en jouir."*[6]. This deals with both res nullius and res communis.

The passion for absolute property is stressed by the legal instability of "indivision"; i.e. jointly held property. *"Nul ne peut être contraint de rester dans l'indivision."*[7] (Art. 815 of the Code Civil)

Moreover, mortmain[8] was prohibited for economic, social and of course tax reasons and remaining village commons and large estates belonging to the church and the nobility was sold as "biens nationaux".

This early 19th century legal doctrine was to evolve and new tools emerged, such as co-propriété (condominium housing), co operatives, associations, foundations,[9] …But on the whole, common property (res communis) is considered as to be avoided in favour of public or private property.

During the 20th century , private property itself was progressively deprived of a growing number of its attributes. The "artichoke syndrome" i.e. taking out the substance, became obvious through town and country planning and environmental regulations The strict no compensation principle for public regulations was introduced by the Vichy regime in 1943 and reverently reasserted in all successive town and country planning acts. The discussion on "taking" was a kind of taboo which just begins to be unveiled especially through the recent constitutional check at both the French level (Conseil Constitutionel) and the European level (European Court of Human Right).

Presently, though some 85 % of the French territory formally belongs to millions of private owners (a tentative figure is 4 millions) land is submitted to dozens of regulations which strictly control actual uses and in certain cases the remaining right of the formal owner is to pay land taxes …the ultimate stage of the property rights entropy!

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[5] "Property is the right to enjoy and possess things in the most absolute manner, provided man does not make use against laws and regulations."
[6] "Some goods belong to nobody and are used by all. Laws and regulations state how to use them."
[7] "Nobody can be compelled to stay in joint ownership."
[8] "A transfer of land or houses to a corporate body as such as a school or a church for perpetual ownership." (Webster)
[9] A bill aiming at the creation of "fiducie" comparable to "trust" was discussed in 1992 but was not adopted. "The French legal system does not distinguish between legal ownership and benficial ownership, nor does have two separate bodies of law, as it is the case in legal system based on English law that distinguish common law and equity" (F. Barrière, Trust Law Symposium, 2000).

To a certain extent one can say that if the Revolution freed the land from feudal right, we are now in the situation of quasi regulatory nationalisation. This means that the situation could be compared with the one existing in ex communist countries, a mixed regime of de facto public property with a de jure private property regime.

How can common property survive in such a setting? My point is that it appears as a natural necessity and the case study support this evidence.

2 Facts

The estate belongs to the family since the late 16th century and was passed from generation to generation by primogeniture. In spite of the Revolution introducing equal sharing for each child, a kind of quasi primogeniture right allowed the most interested or able child to stay on the estate with some compensations to his brothers and sisters (sometime a rich marriage helped !) By the late sixties, it appeared that the amenity value of the property (for residence and recreation) equalled or superseded the agricultural value.

In 1973 in a registered deed sharing the property to the 4 legitimate heirs, it was decided:

- to prevent development around the beautiful traditional building[10],
- to submit all properties to pre-emptive rights between the owners,
- not to appropriate some key resources, such as lake, tennis, springs, roads and a limited amount of adjacent land (landscape land, parking space, …)
- to limit potential development by a minimum 7000 m2 lot.

[10] By conservation easement on adjacent land in favour of the the buildings. Easement goes with the land and accordingly is perpetual otherwise mentioned.

1610

Family estate of some 100 ha 50 % agricultural land, 50 % woods owned by one person.

1973

Passed by primogeniture ,
the by quasi primogeniture strategy
with moderate compensation.

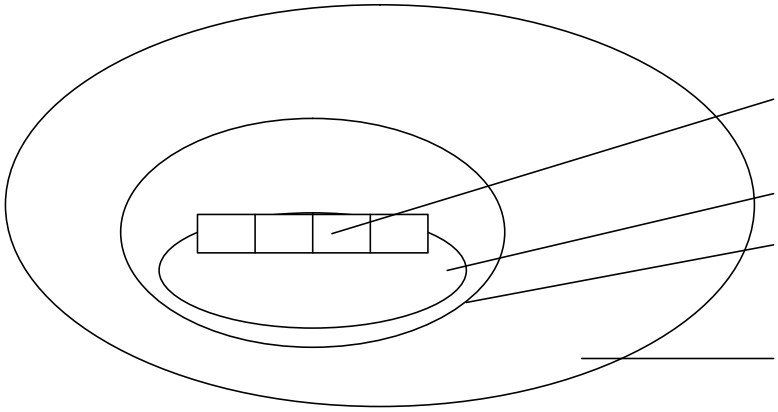
1973

Child 1	Child 2
Child 3	Child 4

1999

Sharing of the land and the buildings with conservation easements and pre-emptive .rights and some jointly held land.

Most of the agricultural land attributed full fee to the eldest son for farming.



1999 Setting up of "Association Familiale de la Tuilière" to cope with the management of the jointly held property and neighbourhood practices.

2002 New pre-emptive right registered deed and reassessment of conservation easements.

2003 Setting of "Association Syndicale Libre", a kind of trust for the jointly held property to become formal common property for all stakeholders (some 16 persons).

3 Institutional Setting

So we can consider that two sets of common property emerged:

- land under easement,
- jointly held property.

Land under easement, whether farmed or not, did not raise specific problems: it prevented the building of separate houses and limited the price of the farm land and associated taxes (especially inheritance taxes).

But jointly held property, though limited in superficies (some 4 ha), needed careful management and conflicts over its use aroused, especially for competing use of water between agriculture and recreation.

In 1999, to cope with the potential or actual conflicts, an association was registered to manage the de facto commons. This association happened to be very lively since the coming generation (some 45 offspring!), contrary to expectations, appeared to be most interested in the family history and land. As a matter of fact they had spent from their infancy part of the summer vacation on the estate participating to family events (annual tennis tournament, marriages, and even a family festival,…).

However the association cannot deal with the land itself. So the key issue is how to manage the de facto commons. Making a decision is submitted to the unanimous agreement of each of the formal co-owner and of course one can imagine that a single person could prevent action[11]. So the idea is to move from the de facto common property regime to a de jure one by transferring jointly held land and possibly easement to a special legal body called "Association Syndicale Libre", a kind of trust, where the chairman board will be able to make decisions based on the majority rule for common pool resources. This "sustainable" management of the commons needs not only strong quasi tribal feeling and link with the land of the family group but also leadership and formal institutions allowing effective management.

Now, if the stakeholders control more or less the future of their property, the role of the local government is not clear since it zoned the whole area as "natural area" where development is strictly limited to agricultural buildings. But precisely the idea is that zoning being very flexible and whimsical (politically or otherwise) only private agreements could succeed in protecting the landscape.

If zoning regulation is relaxed in the future, of course development is possible on the land not submitted to conservation easement but the main features and amenities of the estate will not be destroyed, thanks to the CPR trust.

[11] Decision on the modification of the land or the buildings is vested in the formal owners who are now the 14 children, the parents retaining the usufruct.

Now one must consider that no legal setting cannot really master the future. The 1973 agreement (easements and pre-emptive rights) were efficient for thirty years and the new institutions are devised for the next thirty years[12].

On the whole, the estate integrity and spirit has been secured for an additional sixty years to the family saga. This is not a small accomplishment compared with most public planning. What will happen from 2030 on is an other story that will be written by the grand-children!

4 From practice to theory

Of course the outcome of this case study is not the by-product of a theory but the result of an informal bottom up process. However it is most interesting to check to what extent it supports the common property principles. E. Ostrom set up a list of six factors which allow common property regimes to emerge and survive. Let's check each of them:

a) *"Boundaries must be clearly defined so that individuals within a group know which resources they can use and how and so that individuals outside the group know when they are trespassing."*. This is obvious for all the family members. For outsiders a negotiation with the local government allowed a right-of-way for a hiking trial making clear that open access is limited.

b) *"Group decisions require rules that determine how the group parcels out the value of the resources."* The association board meets four times a year to devise common rules and a formal general meeting with some forty participants (including children over eight) is held each summer.

c) *"Customary rules must be linked to the time and place specific resource constraints so that resulting rules are efficient, or there will be pressure to change them."* This is true since a minute survey of each parcel of land has been done for legal status and changing management agreement.

d) *"There must be effective monitoring of rules and rewards for individuals who abide by rules or sanction those who violate them"* Monitoring is very strict especially for water withdrawal for agriculture. The fact that some deeds are registered insure stability and ultimately sanctions.

[12] Pre-emptive right, according to French law, cannot last more than thirty years and easement should be limited in time to cope with the new economic and social conditions.

e) *"Where conflicting demands are likely to arise between group members, dispute resolution mechanisms such as local arenas for bargaining are necessary."* The association has been set up as a bargaining institution and succeeded to settle inevitable family disputes.

f) *"The rules must not be subject to change by higher levels of government."* Since management agreements are devised to protect the environment and that the local government is engaged in a kind of "snob zoning" there is no contradiction. Even if development is allowed on the estate not submitted to easement, there is a special agreement on large lots compatible with landscape protection.

In addition with this factors, the key condition is *"group identity and homogeneity"*. This is obviously the case since a traditional family behaviour is to a certain extent akin to a tribal one. So the case study fits perfectly the CPR model.

Now we can also test the design feature of both the resources and the appropriators "conducive to an increased likely hood that self governing associations will form" (Ostrom, 1997).

- Attribute of the Resource
  - *Feasible improvement*: the estate is in very good condition and even under improvement through less polluting agriculture and check on water use for agriculture.
  - *Indicators*: perfect knowledge of the resources.
  - *Predictability*: no major issue.
  - *Spatial extent*: CPR proper is very limited.
- Attribute of the Appropriators
  - *Salience*: obvious and strong feelings about the private and common property rights.
  - *Common understanding*: most if not all the members of the family share common values.
  - *Discount rate*: very low, since the aim is to keep the land out of land speculation.
  - *Distribution of interest*: better off members as well of less are equally interested in management co-ordination.

- *Trust*: the strong and ancient family links insure a rather good mutual trust but registered pre-emptive rights and conservation easements make provision for a relaxing of the trust with the passing of time.
- *Autonomy:* in spite of the growing number of planning and environmental regulations managing the resources is still possible. But development is nearly impossible by local land use plans.
- *Prior organisational experience*: during the last thirty years a kind of internal management co-ordination has been experienced which has been formalised by the creation of Association Familiale de la Tuilière in 1999 and the coming CPR Trust (Association Syndicale Libre) in 2004.

5 Common Property in Perspective

De facto common property situations are in fact very frequent and especially in the field of family estates. However, all institutions in the field of property law, environmental regulation, inheritance taxes, zoning and planing regulation, … do not consider it. Accordingly, absent of active will and legal arrangement, existing and informal, CPR are jeopardised in favour of private and/or state property.

De jure CPR, even when they meet the Ostrom's conditions and features must be embedded in registered contracts or agreed upon conventions.

- CPR does not replace private property but is able to inpart to it some additional value especially for conservation.
- CPR can be limited to a small amount of the resources provided they are of paramount importance to the whole property.
- CPR implies collective action which is always more difficult and time consuming than individual decisions.
- CPR management reinforces the social link within the community involved. This is true for a family through the passing of the generation but certainly for other type of communities.

What could be the role of common property as a half way between public and private property?

- Limited regulation

  Regulation should avoid to transfer the right of use to the sole government but give priority to communal institutions, i.e. such as co-operatives, associations, land trusts, communities, …The government role should be limited to enforce these common property rights and be responsible only if subsidiarity appears impossible (i.e. res nullius)

  In the privatisation process, when not completed, the land should be given back with environmental easement attached. Easement is much more stable than regulation since it is a registered contract going with the land and not subject to the whim of changing politicians and bureaucrats.

- Land trusting

  The question is whether land trusts are akin to common property. We refer to some 1500 US land trusts under the umbrella of the Land Trust Alliance or to the UK National Trust.

  These institutions buy land full fee or less than fee (easement or covenant) but actually this land is a de facto CPR held in trust by a small group with a strong identity devising specific management rules for a well defined territory. On the contrary, the French "Conservatoire du Littoral" is a national state organisation, managed by civil servants, using public money to buy private land by eminent domain. The land acquired becomes public. Again the common property solution was discarded in favour of public ownership.

6 Concluding remarks

If private property is the most effective mean for economic land management (farming, forestry, …) the conservation of environmental amenities need some CPR. The CPR are to be understood not only as material resources (land, water…) but also institutional such as easements or land trusting arrangements. But such institutions work under the proviso of a strong group and social cohesion.

Privatisation of public land could gain efficiency if it makes room for CPR institutions which will co-operate with environmental regulations. To the extent that environmental regulations are necessary the question is whether to give authority to the government or to smaller communities. For the time being it seems that common pool resources institutions are not really considered as an option, though human history demonstrates the contrary.

If zoning regulation is a very ancient tool at the basis of urban development of such different cities as ancient Rome and New York, its extension to environmental issues raises major problems colliding with property rights.

If formal private land becomes de facto public land we are heading back to the communist land pattern. So ironically as former communist countries privatise land, western countries nationalise the use of land.

The problem is that to a certain extend former communist countries are also confronted with the wise use of land for environmental reasons and balance privatisation with regulation. Environmental regulations are to be devised not as a re-nationalisation of land but as a legitimate and wise use of police power.

This Family CPR case study is of course very limited but could be extended to many land owners trying to implement sustainable development in favour of their offspring. But beyond families number of human groups are willing to manage their resources: associations, unions, co-operative churches, conservation groups, land trusts,[13] …

Experience of communist as well as western countries ascertains that governments are seldom good stewards of the environment when they go beyond devising a set of institutions giving room to a whole flexible gamut of property right regimes.

As Gordon Tullock has remarked, *"government is nothing more than a prosaic instrument designed to co-ordinate human behaviour through potential resort to coercion when the costs associated with reliance upon voluntary agreement are considered to be excessively high by a group of people possessing sufficient power to set and enforce the rules under which rules are made". (quoted by J. Baden, 1998)*

Common property regimes should be considered as a workable alternative to public and private property. There is a major misunderstanding about the meaning of "The tragedy of the commons" as Garrett Hardin acknowledged:

[13] Some kind of common property arrangment is widely used for new housing development in order to enhance the environment and real estate prices. However it is much easier to set up rules before the sale of the property .

"It is now clear to me that the title of my original contribution should have been "The Tragedy of the Unmanaged Commons". I can understand how I might have misled others." (Personal communication of G. Hardin to J. Baden, 1994.)

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