

CHANGING NAME-TAGS

A LEGAL ANTHROPOLOGICAL APPROACH TO COMMUNAL LANDS IN PORTUGAL¹

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Introduction

The issue of common property regimes inspires a worldwide debate on property and natural resource management. Most contributions to this debate address directly or indirectly Hardin's (1968) challenging article on the "tragedy of the commons". Three major lines can be discerned. One consists of attempts to prove that Hardin's concepts and models are flawed. Berkes *et al.* (1989) and Feeny *et al.* (1990) for example, stress that Hardin confuses common property with open access situations. F. von Benda-Beckmann (1995) points to the lack of congruence in Hardin's analogy between overpopulation, related to the private rights to sexual intercourse and procreation, and communal grazings. The second line of criticism consists of case material on 'comedies of the commons': reports of successful (meaning sustainable) resource management by and on behalf of communities (e.g., Cox 1985; Acheson 1988; various contributions to McCay and Acheson 1987). The third line is composed of articles that expose defects of alternative property regimes. Fife (1977) demonstrates that it may be economically perfectly rational for a private owner to prefer extermination of a natural resource to conservation, on the basis of maximizing profit. Hardin (1979) himself shows that planting slow-growing tree species like the californian redwoods is an uneconomic use of land for private investors.

By definition, property should be a central concept of any debate on common property-rights regimes. Strangely enough, most contributions to that debate lack a systematic

¹ The research for this paper was financed by a grant from the Dutch Organisation for Scientific Research (NWO). I wish to thank Franz von Benda-Beckmann for his useful comments on earlier versions of this text.

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and thorough analysis of this concept. They remain confined to a highly schematic division of property-rights regimes into four mutually exclusive categories: open access, state, communal and private property (e.g., Ostrom 1990; Bromley 1992; Acheson 1994; Hanna, Folke and Mäler 1996). This simplified or 'thin' categorisation having been made, property is taken for granted and seen as self-evident. However, certain case studies indicate that the lines that divide these categories are less clear than the model suggests. Property-rights regimes may take new forms according to economic, demographic or political conditions. The Tigray described by Bauer (1987) change their tenure system from an inclusive communal into an exclusive private-hereditary model and vice versa according to economic conditions and demographic pressure. In response to governmental disempowering policies, villagers in Portugal and Spain formally divided their commons into private plots while maintaining in practice the communal use form the government policies sought to abolish (Rodrigues 1987; Brouwer 1995b: 149-150; Galilea 1998). These examples indicate that the property form can be flexible in response to internal dynamics or external impositions. They also indicate that the outside property form may not correspond to social relations and forms of resource use underneath. Apparently, the property categories that dominate in common property discourse are not as clear-cut and mutually exclusive as they appear at first sight (Berkes 1996; McCay 1996).

Property is a concept that covers a wide variety of social relations. The 'thin' approach currently dominating the debate impedes a correct understanding of the ways in which people are part of property relations. As a result of the superficial treatment of property, the debate on common property issues remains shallow. It produces overarching models that are 'suspended' from social reality and pay insufficient attention to cultural and historical specificity. To overcome this limitation, McCay (1996) and McCay and Jentoft (1998) call for 'thick' descriptions of specific property relations. Thick descriptions produce "a stratified hierarchy of meaningful structures" in terms of which concrete actions "are produced, perceived and interpreted" (Geertz 1973). They consist of a "careful specification of property rights and systems of resource use and their embeddedness within discrete and changing historical moments" (McCay and Jentoft 1998).

The superficial treatment of property renders the common property regime debate shallow. A similar conclusion can be drawn with regard to the debate's second central concept: community. Community is a problematic notion in itself. It is difficult to delineate a community. Is a family household a community? And what about a corporation, or the totality of the citizens of a certain state? In this paper I shall not attempt to answer these difficult questions, but to address another related issue. As Li

(1996) argues on the basis of the Philippine common property debate, in the common literature communities seem to be equated to a certain ideal-typical village. Inequalities within commoners' communities remain unattended to (e.g., Cox 1985; Acharya 1989; for a critique, see Brouwer 1995a). This approach reflects the fact that most of the literature on common property arrangements confines itself to the two-dimensional space defined by the pairs community-state and community-market. The common property resource debate is largely caged in a nostalgic discourse revolving around the desire to retain the remnants of the organic social relations of the (ideal-type) *Gemeinschaft* in a contractually organised (ideal-type) *Gesellschaft* characterized by commodification, abstraction and alienation (e.g., Dias 1983, 1984; Cox 1985; Ribeiro 1991; Jodha 1996; Ostrom and Schlager 1996). It stands in the powerful tradition within post-enlightenment thinking that counterposes a harmonious community to cruel capitalism (Li 1996).

The idealization of commons-managing communities is partly the result of the policy agenda of many of the debate's participants. Images of successful resource-managing communities are used to advocate a shift of resource control away from the State and private capital to the rural people whose livelihoods depend most directly upon those resources (Li 1996: 504). Within political struggles, as elsewhere, for example within the framework of judicial trials or court cases, an idealized image is considered a more effective weapon than a detailed account that may include aspects that run counter to the case one wants to defend.

It may be justifiable from a political advocacy perspective to present simplified images of social life and discard its complexities, although, in my opinion, ultimately social movements are better off with a solid analysis than with an image that only provides a partial understanding of the reality they act in and want to change. From an academic point of view, no justification exists for this type of simplification. The models developed within academia should not be 'suspended' from but 'grounded' in reality through an intimate link to the collected data (Glaser and Strauss 1967). They should elucidate the complex social interactions they are supposed to represent and make visible the structures that underlie these social practices.

The subject matter of this paper is the communal land issue in Portugal. However, I have no intention of advocating common property arrangements *per Se*. Instead, I want to contribute to the 'thick' mode of analysis called for by McCay and Jentoft (1998) through a thorough analysis of property, its forms as specified by the adjectives public, common, private, etc., the contextual and historical dimension of its contents, and the relevance of property labels for social struggles. For this aim the paper relies on a

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legal anthropological approach that combines a juridical view on property with an ethnographic study of the processes of rule and norm production, reproduction and enforcement concerning property at different levels within societies.

The paper starts with a short discussion of the basic concepts and approach. Then it continues with an elaboration of the legal aspects of the commons in Portugal. It shows that there is a difference between popular and legal speech over the commons, and that within the legal sphere different names and understandings as to concrete sets of property rights evolved. The notions mentioned in these sections come alive in the third part, which describes and analyzes a conflict between two communities over certain tracts of land. One Community claims land as its commons, whereas another maintains that it is its parish land. In the last section the paper returns to its starting point by contrasting a 'thin' with a 'thick' analysis of the case.

Law as a Social Phenomenon

Property is a legal concept, with a long history within different legal traditions, which as far as relevant to this paper will be discussed later. Yet the property concept cannot be understood if one limits oneself to a law-centred approach. For property is also a social phenomenon, consisting of the relations among people over resources. The powers of a proprietor over his property are always dependent on wider social relationships. These powers exist only if they are socially accepted, and recognized and defended by the society of which the proprietor is part. On the other hand, society always puts certain constraints on rights of user, so that property is never absolute or complete. Any form of property (state, common, private) has a societal or communal dimension to it, which enables and protects the proprietor and constrains him.

The study of law as a social phenomenon has developed within the field of legal anthropology. Roughly speaking, one may say that within legal anthropology two different currents exist. The first is the older and perhaps in terms of volume produced the most important. This current consists of authors such as Bohannan (1967), Pospisil (1967, 1971), Redfield (1967), and Gluckman (1969), who try to distil law from primitive societies. Through the identification of abstract norms or through case studies of conflicts, they attempt to determine whether within a certain society law exists and, if it does, what it can be considered to consist of. My paper should be located in the second approach within legal anthropology. This is less interested in tracing or constructing 'native' law than in understanding how nonnative frameworks, i.e. law, are part of social life. The subject-matter of this type of study is rule making, bending and eluding in the interaction between different social agents. Examples are Moore

(1973, 1978), K. von Benda-Beckmann (1981), and F. von Benda-Beckmann and Van der Velde (1992).

An important consequence of acknowledging that law is a social phenomenon is the notion that law is part of social struggles. Laws are not produced in a social vacuum. They are political statements, shaped by the aspirations and normative conceptions of those who have been able to influence their formulation. Chanock (1982) provides a colourful image of the way in which male aspirations for power over women in combination with a Victorian conception of gender relations conducted to a so-called 'traditional' legal system favouring male over female interests in marital disputes. His article shows that the production of rules (laws) is never innocent. A similar conclusion can be drawn from the way in which in Portugal laws have treated the concept of common property (Brouwer 1995b; see also below).

In principle it would be possible to study the common property concept exclusively as a legal phenomenon. Such a law-centred approach would recognize insufficiently the social nature of law. In a law-centred approach, law appears as a self-consistent body of rules, which are produced by the State and are, to an extent that depends on the nature of the political regime, an expression of a *volonté general* or general will (Spiertz and Wiber 1996). The recognition that law is intimately connected to the State's real and claimed powers, however, requires that one analyzes the State and the political field. The State, which itself is divided, is both the arena and the stake in social struggles for political power, dominance, and the realisation of particular interests (Jessop 1983). These multiple ambitions, interests and struggles produce inconsistent and diverse texts with multiple interpretations. Moreover, even within clearly defined polities such as the European states, the State is not the sole source of rules. There is 'legal pluralism' even here. Local bodies, communities, guilds, the Church, different societal fields (so-called 'semi-autonomous fields') all produce rules with a strong normative power over those for whom they are designed, and these are sometimes backed up by the central State's juridical apparatus. Consequently, law is rarely coherent and mostly inconsistent (see: Bohannan 1967; Pospisil 1971; Moore 1978, Galanter 1981; Merry 1988; Griffiths 1986, 1991; F. von Benda-Beckmann 1991; Brouwer 1992; Spiertz 1992; Li 1996; Spiertz and Wiber 1996).

The acknowledgement of legal pluralism has helped the understanding of several aspects of law and power: the 'gap' problem (Nelken 1981); 'legal cannibalism' (Spiertz 1992) exemplified by municipal laws that predate the State and are absorbed by the State or *inediatisiert* (Van den Bergh 1996); the autonomy of society vis-à-vis the State; and the existence of room for manoeuvre within the normative field for social movements that seek to contest state power and legitimacy (Brouwer 1995b).

In his critique of legal pluralism, Tamanaha (1993) argues that its proponents overstretch the term law. He contends that that concept should remain reserved for State-produced norms of conduct. I agree that over-stretching concepts only blurs our perception of reality. However, Tamanaha's criticism does not deny the main point entailed in the concept of legal pluralism: the production of politically significant rules and rule enforcement outside the State apparatus. This will be illustrated by the case-study of the collapse of communal land use arrangements in Northern Portugal that forms the core of this article.

The Property Concept

The above discussion has profound consequences for an understanding of the concept of property. Viewing law as malleable, inconsistent and the outcome of, and object at stake in ongoing struggles within society (F. von Benda-Beckmann 1992, 1995; Spiertz and Wiber 1996), and more particularly within the political field (Brouwer 1995b), automatically leads to an approach in which property is no longer an overarching and self-evident notion. Instead, it emerges as a container that constantly receives new contents and new labels from different actors who, in the course of the various social struggles in which they are involved, refer to different normative frameworks before different fora, in different 'rooms', and within different sections of society (F. von Benda-Beckmann 1995). Actors 'shop' for forum and idiom. Within their culturally, socially, economically and politically limited fields of choice, they select an idiom and a room to obtain the most favourable outcome (K. von Benda-Beckmann 1981; Spiertz 1991).

The contents of the property container are often summarized by the phrase 'bundle of rights' (e.g., Hanna, Folke and Maler 1996; Ostrom and Schiager 1996). The idea of a bundle of rights is borrowed from the Common Law system (Maine 1883 quoted by K. von Benda-Beckmann 1995; Stein and Shand 1974 quoted by Van den Bergh 1988: 80-81; Van den Bergh 1996). It expresses an understanding of property as a combination of different capacities (strands) of an individual or a group of individuals to exploit a resource, to regulate access and use by exclusion, admission and direction of other users, and to derive rents from his own use or from by use by others. (Ostrom and Schlager [1996: 1331 provide a schematic overview of different bundles of rights.) Each strand refers to a single right over a single resource, so that the reach of an actual property right depends on the combination of strands contained in the bundle. Because property is a social phenomenon, this is historically determined. Thus the bundle's composition is malleable.

In addition to a content, the bundle has a label or name tag. This label may be summarized by the words state, common, private, or others. It is important that these name-tags, although contingent on the content, may or may not cover the content. Moreover, the content itself is both resource and stake in social struggle. Under certain conditions, it may be useful to present a certain combination of entitlements as 'private' (e.g., the Portuguese and Spanish villagers mentioned above). In other cases, such as the one described in the rest of this paper, 'public' or 'common' may be more appropriate.

A 'thick' analysis requires the reading of a series of events (in the words of Geertz 1973, a 'discourse' or 'dialogue')² in such a manner that the underlying stratified hierarchy of meaningful structures becomes visible and transparent. This paper attempts to provide such a 'thick' analysis of a 'discourse' or 'dialogue' between inhabitants of a rural area in the north of Portugal. It describes the evolution of the complex combination of entitlements held over time by the different stakeholders involved. It shows that the labels that were strategically tagged to these entitlements were highly relevant to the outcome of the ensuing struggle. At a certain moment, common land is labelled waste land. As a result, it becomes subject to a reclamation policy that entails the liquidation of common property arrangements and the transfer of land to the private or the public domain. In the specific case, local people succeed in tagging another label to the land, that of public (parish) property. Under this label it no longer fits into the category destined for reclamation, and so escapes government interference. This new tag leads to problems between the parish, that now uses it to claim the land as its property, and a part of the commoners, who feel that their rights are being infringed.

The strategic value of these tags is partly shaped by the rights they refer to. Tags and contents are not identical, but they are also not totally independent. Tags referring to specific feudal elements of property lose their legal value when it becomes clear that these elements have been formally abolished, but may retain social influence. An interesting feature of the case described in this paper is that phantoms of old, long abolished rights continue to play an important role in present social practices and legal discourse.

² For Geertz, discourse includes language as well as non-language practices; it is "conducted in multiple tongues and as much in action as in words" (Geertz 1973). Words and idioms of which they are part (including the legal idioms) thus are on equal footing with social actions.

One Common, Two Discourses

Communal grazing areas existed all over Europe. In most countries they disappeared during the profound political and economic changes of the nineteenth century. In Portugal, these commons remained at least partly intact. Here, about 507,000 ha are communal lands. Most can be found in northern districts such as Vila Real (Devy-Vareta 1993: 161).

In popular speech the rural population of Vila Real will refer to commons as *montes do povo*. A literal translation of this term would be ‘the people’s hills’. Indeed, in most cases these commons are situated on highlands. However, in this phrase the word *monte* does not have the ordinary significance of ‘hill’. Instead, it is etymologically connected to the word *montado*, which refers to forest pastures and which is still used for the stands of cork and stone oaks in the south of Portugal. The expression *monte blanco* meant a communal thicket (Neves 1964). In the past, the term *montado* was also applied to the commons in the north of the country. In the 1515 charter of the municipality of Vila Real, the phrase *montado de gado de ora* (livestock *montado*) was used to denote the communal grazing grounds in the area (Arquivo Nacional Torre de Tombo, Casa do Infantado, Livro 215). In 1886, the parish council of Torgueda in the same municipality used *monte* and *inontado* as synonyms in its by-laws. Apparently, the popular term does not connect the commons to waste highlands, but to open forest areas.

Whereas in popular language the word *monte* prevails, in legal and administrative discourses people use the term *baldio* (plural *baldios*). This term was first applied as a general denominator for communal land during the eighteenth century. The concept of communal ownership of land, however, is much older. It can be traced back to the period immediately following the conquest of the Iberian peninsula from the Moors, the so-called *reconquista*, and the foundation of the Portuguese kingdom in the twelfth century. The Crown claimed the *dominium directum* or *dominium eminens* over all land in the realm and handed out certain grants to nobles, to the Church and religious orders, and to peasant communities. These grants resulted either in the private appropriation of that land or in its subjection to certain forms of communal exploitation, such as grazing, the collection of brush for fertilizer, and the gathering of wood for construction and fuel. As a result, a situation emerged in which collective rights were exercised on three types of land: land owned by the Crown, land held by nobles or corporations, and land owned by communities (Gralheiro 1990: 24). Hespanha (1980: 219-224) calls this feudal conception of law ‘realist’: it presupposes a general order in which things and men are integrated. The relations between men and things are derived from the functions that these things have or can have in that order

(*ex parte rei*). Each of the alteriative uses corresponded to a type of appropriation or *dominium*.

In the eighteenth century the lawyer Tomaz Vila Nova de Portugal reinterpreted earlier royal ordinances. Within the general category of waste lands or *baldios*, he distinguished *maninhos* (private land under communal exploitation), *bens do concelho* (land owned by the municipality), and the *logradouros comuns* or the 'true' *baldios*, which belonged to the *povos* (village communities). According to the legal system of these days, *povos* were communities with a special legal status and autonomy within the municipality. In 1772, a new law explicitly separated these 'true' *baldios* from municipal property (JCI 1939: 1; Velozo 1953: 23-25; Rodrigues 1987: 19-20; Graiheiro 1990: 24-27).

Commons in Portuguese Civil Law

In the nineteenth century legal theorists formulated a new approach to the concept of property. They distinguished between four categories. The first category, *res communes*, consisted of objects that concerned humanity in general, like the air or the sea. The second, *res publicae*, was composed of things that pertained to the nation, such as rivers and harbours. The third category, *res universitatis*, were things that involved only a part of the nation (a community or municipality). For example, theatres, stadiums, and the *baldios* belonged to this category. The last category, *res singulorum*, were things that pertained to private individuals. This was identical to private property (Velozo 1953: 26; Soares 1968: 27-31).

This approach had a strong influence on the Civil Code that was enacted in 1867 and maintained for almost a century, until 1966. In articles 379, 380, 381, and 382 a distinction was made between public things, communal things, and private things (*coisas ptiblicas*, *coisas comuns*, and *coisas particulares*). The first and third categories referred to public and private property (*res publicae* and *res singulorum*) respectively, whereas the second category referred to communal property, the *res universitatis* (as something different from shared property or corporate property). Communal property was defined in article 381 as follows:

Communal are natural or artificial things which are not individually appropriated, and of which only the individuals living within a certain administrative circumscription or forming part of a certain public corporation are allowed to take profit within the confines of administrative regulations. (Quoted in Velozo 1953: 28; my translation).

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These 'communal things' expressly included the *baldios*. Article 473 equated them to 'any municipal or parochial land' and incorporated them in the property of municipalities or parishes (Soares 1968: 51). Thus the Civil Code placed the commons within the category of *res universitatis* and firmly consigned them to the State and its institutions.

However, one should take into account that the establishment of such a legal framework did not automatically imply that the State really controlled the destiny of these commons. The autonomy at a local level of the municipalities, which were older than the state itself, was still large, and in many respects they defended local interests against the central government instead of limiting themselves to the implementation of policy guidelines coming from above. The position of parishes within the state apparatus is even more ambivalent. Parishes were originally ecclesiastical units wherein the Church exercised certain functions that later came to be seen as typically pertaining to public administration (e.g., keeping birth, death and marriage registers). It was not until the administrative code of 1878 that parishes were turned into the lowest level of state administration (Caetano 1991: 352-254; Gralheiro 1990: 32-35). However, like the municipalities, they were not automatically turned by this development into obedient servants. Again, **within** the parishes central guidelines and local interests could clash, creating a gap between what the central government wanted to happen and what really happened at a local level.

The formal consignment of the commons to the State entailed by the legal theory embodied in the 1867 Civil Code may not have meant that the State acquired full control over the commons, but it accorded with the State's overall aspirations with regard to the commons. From the end of the eighteenth through the nineteenth and twentieth centuries, the Portuguese governments took various measures to abolish the commons. Reviews by the JCI (1939: 1-12), Rodrigues (1987: 32-48), Gralheiro (1990: 32-36), and Nunes and Feijó (1990: 65-74) demonstrate that there has been a constant tendency in legislation to legitimize or stimulate the privatization of the commons or to promote their transfer to the State. After the downfall of the monarchy in 1910 the new republican regime continued in the same vein. However, it was only after the military coup of 1926 that the State acquired enough power to impose its policy by force. Several measures were taken to promote division, settlement, and afforestation of the commons. In 1966 this policy culminated in the exclusion of the concept of communal property from the new Civil Code. As a result, the *baldios* were included in the private property of the administrative bodies, municipalities, and parishes, although they could still be subjected to certain collective usufructuary rights. As long as these rights were exercised, the law placed certain limits upon the local authorities' liberty to alienate the land or to allocate it to other uses. But, as the

(administrative) law also contained stipulations that enabled the lifting of these collective rights, it was clearly geared to the disappearance of the commons.³

The authoritarian regime which reformulated the Civil Code in 1966 was brought down in 1974 by a military take-over. One of the coup's effects was the restoration of the commons. Although the concept of common property did not return to the Civil Code, it was implicitly re-created by certain articles in the new constitution which defined the types of property legally existing in the country, and by a special decree, *Decreto-Lei* 39/76. This 'law of the *baldios*' reinstated community control over the commons. As most of the commons had been afforested by the State during the previous period, it also formulated guidelines for the new relation between the commoners and the State Forestry Service.

Decree 39/76 prescribed how villages should organize themselves to regain control over their communal Land and the revenues from the forests on them. Among other things, the law required an inventory to be made of entitlements and of entitled individuals. The latter were thought to be the 'members' of the community owning the *baldio*. The administration of the commons was attributed to a body elected by the members' general assembly, the *conselho directivo*, or management committee. Recognition of the management committee by the State Forestry Service was a precondition for the initiation of the process of transfer of the land by the Service to the community. Thus the factual establishment of a common was made dependent on State approval. Consequently such establishment could become the outcome of a complicated interplay between the Forestry Service and different sections within a village community. (For a further description of some cases, see Brouwer 1995b: 213-222, 245-251. The law was revised in 1993.)

What's in a Name? The Significance of a Signifier

The legal term for communal land differs from the term used by the general population. Whereas the population speaks of *monte*, lawyers and administrators use the word *baldio*. In Portuguese the word *baldio* literally means 'naked' or 'uncultivated' and is etymologically akin to the Arabic word *baladi* or to be bald (JCI

³ Article 390 of the Administrative Code distinguished between dispensable and indispensable areas, and areas available and/or suitable for forestry. The first category had to be divided among the commoners (art. 397), whereas the latter had to be afforested (art. 401, 402 and 403) (Paixão *et al.* 1983; Caetano 1991: 947-948).

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1939: 1; Velozo 1953: 23; Castro 1971; Soares 1968; Rodrigues 1987: 18; Gralheiro 1990: 20; see also Vassberg 1975: 631-632, for the use of the word *baidlo* in Spain). The use of a word meaning 'uncultivated' for common property is connected to a confusion of the use of a certain area and its property status. Communal land is equated with waste land. This conflation of communal and waste land is misleading. Historical evidence indicates that the qualification of the commons as waste land, suggesting that the land was unused and, hence, available for other forms of exploitation and for other users, was incorrect. The commons served as pastures and were also used as outfields from which farmers collected the brush they used to fertilize their cultivated infields (Taborda 1932: 99, 111; Nunes and Feijó 1990). According to 1985 statistics, 70% of all uncultivated grounds (approximately one million ha) are privately owned; whereas, as a result of State afforestation efforts, 75% of the *haldios* (circa 380,000 ha) are actually covered by forests! Apparently, the legal status of land cannot be deduced from ecology and vegetation.

The use of the term *baidlo* in law has a specific significance. It expresses the legislators' or the State's perspective on these areas: they were waste lands, without any use or utility, and hence available for reclamation. Thus the use of this concept coincided with the State's ambition to develop these lands through reclamation for agriculture or for forestry.

The redefinition of the commons in terms of *res universitatis* has a similar background. The way in which the concept of the commons was translated into a legal text has a specific relevance which can be grasped by perceiving law as a way of portraying or mapping normative structures. Like geographic maps, laws can be drawn in different ways, according to different methods of projections, on different scales, and with different symbols (Santos 1987). The projection method applied in the distinction between *res communes*, *res publicae*, *res universitatis* and *res particulares* is the hierarchy in the State. These categories refer to different, ranked social aggregates on different 'scales' that correspond to levels within the state apparatus. Individuals are not aggregated in families, village communities, or professional categories, but rather in the administrative units of the parish, the municipality (*res u.niversitatis*), or the State itself (*res publicae*). The inevitable consequence of this type of projection is the concealment of certain features of social reality outside the State's administrative order which might also be important for the mapping of the normative structures that govern the use of land. In a manner similar to that of ordinary Mercator maps, where Africa appears deformed and smaller in relation to Europe than it is in reality, the method of projection chosen in the 1867 Civil Code disfigured or obscured forms of social organization that diverged from the hierarchy of levels in the State. Such deformations are not accidental. The general use of the Mercator projection is certainly the result of

the metropolitan view of the world expressed in it (Woods 1993: 57-61).⁴ Similarly, the distortions and incongruities in legal maps are related to certain societal conditions, like the power of the State. The confusion in the 1867 Civil Code of community property with municipal or parish property facilitated the dissolution of community control over the *baldios*, and in doing so reflected the attempts to impose State control on the community and dissolve or take away the commons.

The *baldio* forms an example of the importance of names (labels) in legal discourse: commons are renamed waste lands so as to pennit the implementation of a centrally designed development policy. Renaming thus also is an act of appropriation: even without directly changing formal property rights, the new label prepares terrain for what is going to follow, namely, the dissolution of communal property rights. Finally, the case confirms a point made iii the introduction: property and its categories are not self-evident, but emerge in a strategic way. Beneath the simple notion of 'common' is hidden an amalgam of different arrangements of tenure and use.

The use of *baldio* as a term for communal land has a specific political meaning. A similar point can be made about the use of the word commons. The emphasis on the role of community control and the neglect of individual claims or rights from larger entities such as the State reflects the attempt to present common property regimes as a socially and ecologically desirable alternative to private and state property in resources.

The *baldio* case is not unique. It represents an example of a more widespread phenomenon of central governments trying to wrest control over resources from subject communities. On many occasions and in many places, States consume in an act of legal cannibalism nonnative frameworks formulated within subjugated entities which existed before the state. So did for example the colonial powers in their overseas domiions in Africa and Asia (Migot-Adholla and Bruce 1994; Mamdani 1995; Li 1996: 516; Juma and Ojwang 1996; Simbolon 1998). In Mozambique, for instance, the 1944 land law declared all land to be the property of the State and available for reclamation (Mozambique 1944). In Indonesia, all land which has no individual title falls within the definition of state land; the 1967 Forestry Law considers all people living in state forests without individual titles to be squatters (Li 1996: 516).

⁴ For this reason, NGOs like the World Council of Churches, Oxfam, and NOVIB (in the Netherlands) have promoted the equal area Peters projection which depicts the continents according to their relative geo-areas (Woods 1993: 57-61).

One issue raised in the introduction regarding the concept of property remained largely outside the discussion: that is, the function of law and its different idioms as a language in social interaction. The next case study of a conflict between two communities over a piece of land will elucidate this aspect of law.

Vila Verde Versus Parada de Pinhão

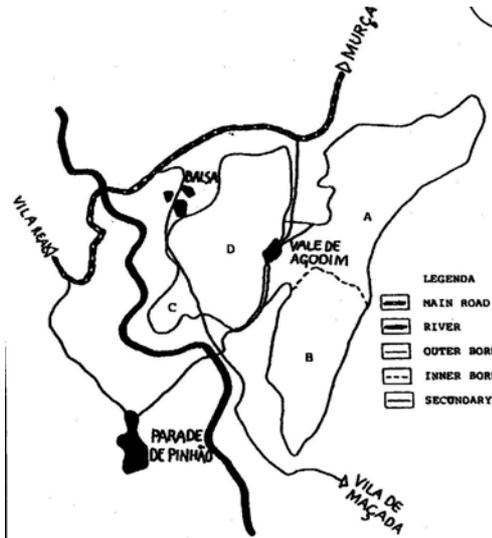
Some twenty kilometres from Vila Real on the road to the east lie Balsa and Vale de Agodim, two hamlets in the parish of Vila Verde in the municipality of Alijó. In 1989, the village populations of these hamlets created a joint management committee for their commons according to the rules defined by the 1976 decree on the *baldios*. The initiative received broad support. The constituent assembly was attended by 86 of the 102 commoners. The committee was immediately recognized by the local forestry administrator.

The objective of management committees is normally to manage the village commons and its revenues. However, in this particular case its prime objective was to win a court case against the parish council of neighbouring Parada de Pinhão, in the municipality of Sabrosa. When the case was won, the committee would immediately be dissolved and the commons handed over to the parish. The case was brought to court in Alijó in late 1989 or early 1990. According to the villagers, that parish had illegally claimed 338 ha of '*baldia* land' and its revenues (for the situation of the villages and the disputed tracts, see the map, Figure 1). As one can read in the trial record, they demanded

that the defendant be condemned to recognize that the disputed lands are commons of the villages of Balsa and Vale de Agodim, of the parish of Vila Verde, and that these consequently belong to and are owned and used, and the usufructuary rights in them exercised by the plaintiff, the commoners' assembly, to whom they were restored in terms of art° 30 of law 39/76 of the 19th of January (Alijó Court n.d; my translation).

The court case was the last battle in a protracted war that had been triggered by two incidents. The first occurred some time in the late 1970s and can be seen as one of the many unintended consequences of the 1974 revolution. That revolution led towards the restitution of the commons. It also profoundly changed the country's internal political structure and its relationship with the outside world. It brought parliamentary democracy, opened the doors to EEC membership, and triggered a rapid decolonization of Portugal's African provinces, Cape Verde, Guinea Bissau, Angola,

and Mozambique. During the 1950s and 1960s the Portuguese government had actively promoted migration to these territories. When in 1975-1976 the colonies gained independence, about 400,000 to 800,000 colonists returned to the motherland (Serrao 1985: 1001).



One of these returning colonists was Mr Salgueiro from Balsa.⁵ Like many of his fellows he had to build a new home. For the construction of the roof he needed timber. As there were pines growing on the village commons, he thought it would be unnecessary to purchase timber and asked his fellow-villagers what he had to do to obtain it. They told him that he should ask permission from the Parish Council of

⁵ The names of persons are pseudonyms.

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Parada de Pinhão, across the Pinhão River. Normally permission would be granted without any difficulty. They also told him that of course nobody would make a great fuss if he were to take the pines without authorization. Why bother to ask if it would be granted anyway? Salgueiro, however, decided that it was more appropriate to ask the council president for permission. If it was true that he would receive the pines, why should he not respect law and authority and ask for them as procedure demanded? Just as he expected, the president told him that it would be all right. He only asked Salgueiro to wait until the trees had been resinated. It would be a waste to cut a tree without taking its resin first. Salgueiro agreed and waited.

In the mean time two things happened. First, the parish priest of Parada de Pinhão, worried about the dilapidated condition of the chapel and its precinct which were the destinations of an annual pilgrimage, decided to raise funds for the sanctuary's improvement. The parish council sympathized with the idea and agreed to sell some of its timber. Trees were cut in several areas, not only within the parish of Parada de Pinhão itself, but also in some of the stretches east of the river, in Vila Verde. The people of Balsa and Vale de Agodirn did not object to these fellings because the revenues were to be spent on the church. Second, after elections in Parada de Pinhão, a new parish council took office. When Salgueiro went to see the new president, the latter bluntly refused permission saying that he would never again give any pine to anyone. Salgueiro was enraged, especially since that parish council had just cleared several high quality tree stands and made a substantial amount of money from the timber growing on the land belonging to *his* hamlet. Without the pines he had no choice but to alter the plan for his house and make a concrete roof. But from then on, relations between Salgueiro and the parish council of Parada de Pinhão were deeply disturbed. He started to ask himself how it was possible that outsiders from Parada de Pinhão could freely dispose of the pines growing in the parish of Vila Verde, whereas he, an inhabitant of the parish, did not get what he was entitled to. Salgueiro resolved to investigate the background of this strange situation and to disclose his results to officials. He even wrote to the prime minister (interview 21 October 1990).⁶

⁶ People from Parada de Pinhão presented a slightly different image. According to them, the outgoing president had warned Salgueiro that the parish council was going to change and that his successor was less likely to give him the pines. Nevertheless, Salgueiro waited, "because he wanted to fell the trees when the moon was right". People believe that trees felled at full moon in August or during the waning moon in February provide better timber. Salgueiro let the time pass and as predicted he did not get his trees. He then went to see the former president and asked him to mediate. The

The second incident dates from 1984. On 27 February of that year the Parish Council of Parada de Pinhão announced the public sale of some of its trees in a local newspaper, *A Vóz de Trás-os-Montes*. Although the advertisement did not refer to any trees standing on territory outside the parish, it soon appeared that some of the areas near Balsa and Vale de Agodim, east of the river, were included as well. As the trees were to be resinated before felling, a man came to the area in order to prepare resin collection and people soon became aware of what was happening. They contacted the Parish Council of Vila Verde, because they thought that it would be the right institution to defend the land against further intrusions. The Parish Council had the duty of representing the people of Vila Verde. Moreover, being the owner of the disputed areas and forests to defend the land and the trees on it was in its own interests. Pressured by the population, the Parish Council brought the case to court and sued its homologue of Parada de Pinhão in March 1985, claiming that the disputed land belonged to the property of the civil parish of Vila Verde.

But apparently the Vila Verde Parish Council was not very eager to pursue the action. It needed to present the names and signatures of individuals who would testify that the grounds truly belonged to Balsa and Vale de Agodim before a certain date. About twenty people from these hamlets offered to give evidence and defend their case. Salgueiro and another man, Morgado, who had also become engaged in the conflict, gathered the signatures and photocopies of the identity cards that the court required and handed these to Lopes, the president of the Parish Council, who promised to deliver them to the court house in Alijó. Some time later during a visit to Alijó, Salgueiro and Morgado ran into a court clerk who asked them whether they had abandoned their claim. He told them that the judges had not yet received the names and signatures of the witnesses and therefore intended to drop the case. The men were surprised and hurried to the town hall to ask the president of the municipality what was going on. There, they were soothed and told that everything would be all right (interview 21 October 1990). However, in January 1989, the people of the hamlets were surprised by the news that the parties had arrived at a compromise agreement and that the case had been dismissed. Vila Verde agreed to accept the property rights of Parada de Pinhão over the *baldios* of Lameirões, Luvetia, and Esteval (338 ha; A, B and C in figure 1),

latter agreed and convinced his successor to hand over the trees. However, after their talk, Salgueiro claimed that he would have got them anyway as he possessed a document that proved that the villagers from Balsa and Vale de Agodim were fully entitled to the fruits of the *baldios*. The agreement was then cancelled again and the conflict initiated (interview 21 October 1994).

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whereas Parada de Pinhão acknowledged the rights of Vila Verde over the areas of Ervedeira and Castelhana (141 ha; D in figure 1) (Alijó Court n.d).

The inhabitants of Balsa and Vale de Agodim were astounded by the compromise and felt betrayed by their own representatives, who had handed over most of the contested area to the enemy without even consulting them. The people's leaders, Morgado and Salgueiro, met and decided to continue the war in order to recover the land surrendered by Parish Council of Vila Verde by using a new weapon. They went to the Communist Party for advice, 'because the communists know how to act in this kind of affairs.' The Communist Party brought them into contact with another organization, the secretariat of the commons' management committees in Vila Real.⁷ The man in charge of this body told them that if they really wanted to claim the commons of their villages, they should create a management committee. That committee would be able to claim ownership of the commons in terms of the 1976 bill against both the Parish Councils of Vila Verde and Parada de Pinhão. Furthermore, he introduced them to Jaime Gralheiro, a lawyer who was a specialist in common property matters and an author of an extensive commentary on the *baldios* laws (Gralheiro 1990). The lawyer agreed to take up the affair and presented it again in court in Alijó.

According to the villagers, the Parish Council of Parada de Pinhão has again since then tried to rob them of their property. In January 1990, a lumberjack appeared who had bought trees in the Balsa/Vale de Agodim area from the Parish Council of Parada de Pinhão. The population was furious and blocked the road. They stopped the police, who had been sent by the authorities to protect him, elsewhere. Salgueiro went to talk to the lumberjack and explained to him that the Parish Council of Parada de Pinhão had sold him something which it did not own, and the best thing he could do was to return to Parada de Pinhão and ask for his money back. A forest guard who arrived at the scene also intervened. The Parish Council did not have permission to fell the trees and, as they were not yet fully grown, the guard refused to issue a licence (interview 21 October 1990).

The case of Balsa and Vale de Agodim remained pending in court until October 1993, when, for the time being at least, the conflict was settled by mutual agreement between the parties. Parada de Pinhão recognized the claims of Balsa and Vale de Agodim to most of the *baldios*. The people from the hamlets acknowledged that the commons

⁷ The secretariat is a non-governmental organization that tries to unite all communal land management committees in order to defend their common interest. The organization is managed by a secretary, who is paid by one of the two fanners' syndicates, the Confederação Nacional de Agricultura.

lying between the Pinhão River and the road connecting Balsa to Vilar de Macada belonged to the population of Parada de Pinhão. Finally, it was agreed that the Serra das Lameiras *baldios* would be split and the border would be marked by a firebreak (Alijó Court n.d).

The Commons as Private Property

The conflict between the parish council of Parada de Pinhao and the people of Balsa and Vale de Agodim can be read as an exchange of fire in a war, or, in a less colourful way, as an exchange of phrases in different languages and idioms, a discourse (Geertz 1973). The event in itself may interest the reader as a picturesque story of a rural conflict. From a sociological perspective, however, it is merely a starting point for analysis. Questions arise about motives and the forms of legitimation invoked by the different parties and about the way in which they used different means (concrete actions, legal idioms) in their efforts to achieve their aims.

The first step on the road to a more complete understanding of the case is to recognise that underneath the bare question of ownership presented to court - who was the rightful master of the disputed pieces of land - lay another issue. That was the existence of different descriptions of the legal status of the land, of different labels and contents of the word property. The Parada de Pinhão parish council argued that the land was its private property (*dominium plenum*). It produced a document of 1892 which listed the disputed areas among a series of properties which had been acquired by Joaquim Pedro Miller from the Count of Sampaio and had been sold by his daughter Guilhermina Magalhães Miller and his other heirs to the parish council of Parada de Pinhão. In the 1930s the central State land reclamation and forestry agencies had accepted this document as proof that the grounds were not *baldios*, i.e. waste lands, but part of the property of the parish council. For that reason, they had refrained from dividing and afforesting the land (JCI 1939: 304-305).

Initially the inhabitants of Balsa and Vale de Agodim were inclined to accept this argument. However, they argued that, if the Sampaio/Miller estate had become the property of the parish, the parts of that estate lying east of the river were the property of the Vila Verde parish. In the past, the hamlets and the surrounding land east of the Pinhão River had been part of Parada de Pinhão. Later, the territory had been detached and transferred to Vila Verde. As a natural consequence of this administrative division, the estates of the parish council also had to be partitioned. In such cases, the partition is made on the basis of the new geographical division. Thus, together with the villages the parish properties lying to the east of the river were legally transferred to the parish council of Vila Verde.

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The idea that the land belonged to the parish council of Vila Verde emerged during and as a result of the conflict. Until then the villagers had accepted that the Parada de Pinhão parish council exercised some control over these tracts. They had accepted this because the new administrative division had no influence on the villagers' daily life. The inhabitants of Balsa and Vale de Agodim hardly noticed any difference. Ecclesiastically, the separation was never implemented: the inhabitants of Balsa and Vale de Agodim continued to go to mass in Parada de Pinhão, to pay their *côngrua* (an annual ecclesiastical tax) to the priest there, and, when they died, to be buried in the graveyard of that parish (Alijó Court n.d). The parish council of Vila Verde hardly ever interfered in the hamlets' internal affairs. Thus, the inhabitants hardly noticed and rapidly came to ignore the new administrative order. People living in Balsa and Vale de Agodim used their commons as they had always done. Because in the past the Parada de Pinhão parish council had had a say in management of the commons, the people of Balsa and Vale de Agodim continued to ask permission to engage in particular forms of exploitation, especially the cutting of wood. The 'normality' of this regulation was challenged only when the population thought that the council was abusing its privilege (interview 21 October 1990). That challenge even then did not at first relate to the property status of the land: the villagers continued to see it as parish property.

In the light of the description of the land as private parish property it was natural that the villagers turned to their parish council in Vila Verde. However, as the Vila Verde Parish Council betrayed their interests, they decided to change the argument and look for another juridical description. This they found in the 1976 law on the commons. By creating a commoners' assembly and electing a management committee, they established grounds to describe the disputed areas as common property. Of course this description was not entirely imaginary; it was based on the exploitation of the land as a common pool resource for brush, the! wood and pasture. According to the villagers there had been several herds, seven in Balsa and five in Vale de Agodim. As a result of general social and economic development, pasturage had declined. The number of animal heads decreased sharply because of the mass migration of young and able men to North-Western Europe, Brazil, and the African territories. As a result, since the sixties the land had been covered spontaneously by a pine forest (Alijó Court n.d). In Balsa, today nobody has cattle which they can take to graze on the commons, but in Vale de Agodim some have. There, people still have some 70 to 80 sheep and goats, and many more cows (interview 21 October 1990).

The villagers also acknowledged that inhabitants from across the river exercised certain rights on the disputed lands. However, they denied that these rights were part of a 'bundle' of rights held by the Parada de Pinhão parish council over these areas.

Instead, they argued that these rights had a different origin. In part they were the individual rights of certain inhabitants of Parada de Pinhão. People from Parada de Pinhão owning land on the east bank of the river were entitled to collect brush on the commons on that side to fertilize those fields as a kind of extension of their private property rights. They however did not hold grazing rights. In addition, the inhabitants of Balsa and Vale de Agodim collectively paid the Parada de Pinhão parish priest their annual religious fees or *cóngruas* by selling each three or four years some strips of brush of the common called Esteval. But this money was given to the Church, and not to the Parish Council, and hence did not reflect or confirm any property rights of that body. This tradition explains also why in 1980 or 1981 the inhabitants of Balsa and Vale de Agodini had accepted the sale and cutting of pines by the parish council of Parada de Pinhão: they had been told that the money was to be used to repair the sanctuary (Alijó Court n.d).

The question about the property status of the disputed tracts underlay the court case. Different assertions about that Status were made during the process. However, it was only one of the issues brought up by the parties. Both lawyers did their utmost to put forward nice legal arguments. The defendant's lawyer suggested for instance that the management committee had no capacity to sue, on the ground that it was a mere aggregate of people administering a common land but not an incorporated legal person. He claimed also that the litigation was a *res judicata* and should be dismissed on the ground that the Parish Council of Vila Verde had litigated over the same claim in 1985, and the settlement then agreed to by both parties had been confirmed by the court. When in October 1990 both objections were rejected, Parada de Pinhão appealed to the Court of Appeal in Porto, but without success.

The plaintiff's lawyer went so far as to contest the very existence of the Count of Sampaio and Guilemina Magelhães Miller. He also disputed the property claim by Parada de Pinhão on the basis of the contract of sale of 1892. That contract referred to the sale not of property but of the *dominium directum*, the paramount ownership of a lord, as distinguished from that of his vassal holding the *dominium util*. These paramount ownership rights were extremely limited as they concerned only the payment of rents by the user, who was completely free to use the land as he wanted or to alienate it (Van den Bergh 1988). During the nineteenth and early twentieth centuries these rights which stemmed from the feudal legal system were abolished. Therefore, the plaintiff argued, today the contract put forward by Parada de Pinhão to sustain its ownership rights was completely worthless.

Both parties also made opposing claims about the factual exploitation of forest in the disputed areas. Parada de Pinhão asserted that it had exploited the areas for over 50 years by the collection resin and the felling of trees. The villagers affirmed that the actual forest was the result of spontaneous regeneration and not of human interference, and that it had not been used on a regular basis. Totally at a loss, the court sought an appraisal by experts. They concluded that two areas of the forest must have had a spontaneous origin, probably following on a decline in grazing. In other parts they found signs of exploitation dating from the period between 1960 and 1972, sustaining the allegations made by Parada de Piithão.

Historical Roots: Phantoms from the Past

The administrative reforms of the nineteenth century, mentioned above, in which the hamlets of Balsa and Vale de Agodim were detached from Parada de Pinhão and transferred to Vila Verde, would perhaps not have caused so many problems had they been carried out in a straightforward manner. But for almost fifty years the hamlets were in a vague position. In 1855 they were administratively separated from Parada de Pinhão, that was part of the municipality of Sabrosa. However, for religious affairs, the inhabitants remained dependent on that parish. Only civil affairs had to be dealt with in Vila Verde. This situation was particularly confusing as at that time State and Church had not been separated and the Church exercised certain civil functions such as the registration of births, marriages and deaths. A reform of 1878 did not fully solve the problem: the hamlets of Balsa and Vale de Agodim were returned to the parish of Parada de Pinhão for both their religious and their administrative affairs, but they remained in the municipality of Alijó. Only in 1913 was the natural effect of the 1855 division finally consummated: the hamlets were separated from their parish on the west side of the Pinhão River and included in Vila Verde on the east (*Diário do Governo*, 7 August 1913). In religion the villagers remained dependent upon the parish west of the river, but since Church and State had finally been separated in 1911, this had no civil effect.

In addition to this intricate process of administrative division and the incomplete separation of Church and State, the case has another historical root. In the past the hamlets of Balsa and Vale de Agodim had been single farms. They had never been recognized as independent village communities or *povos*. Under the legal system that preceded the 1867 Civil Code, *povos* had a specific status. Although dependent upon the municipal courts and administration, they were authorised to deal with minor offences, and also maintained a certain administrative autonomy. To become a *povo*, a village had to consist of at least twenty households and be situated over ten to twelve

kilometres from a town with a court house *Ordenações Filipinas* I, Título IX, nº 73). Parada de Pinhão had been an independent fief (*honra*) of the Counts of Sampaio and the major town in the area. Balsa and Vale de Agodim were too small and too close to Parada de Pinhão to be made *povos* and their inhabitants had been fully dependent on the juridical and administrative systems of that town. This past still influences today's attitudes. The inhabitants of Parada de Pinhão see the people from Balsa and Vale de Agodim as 'uncivilized boors' and treat them as such. As the villagers put it: "In the eyes of the people from Parada de Pinhão, we are even less than the dogs that they keep to guard their farms" (interview 21 October 1990). The present conflict was a kind of revenge or, as the son of the Parada de Pinhão parish president put it to the dismay of his father, "an attempt by both hamlets to emancipate themselves and become independent" (interview 21 October 1994).

Medieval rules about the political status of communities, a nineteenth century administrative division, and the relatively late secularization of the Portuguese states explain the emergence of this conflict. But they are not the only phantoms of the past that disturb today's peace. The peoples of Vila Verde and Parada de Pinhão are also haunted by ancient concepts of property that, although officially dead and buried, continue to exercise power today. On the basis of a contract of sale of 1892 the parish council of Parada de Pinhão argued that the land was the private property of the parish. It also acknowledged that it had been exploited communally by the parishioners, and so, in eighteenth century terms, described the land as a *maninho*. The villagers agreed that the land probably had not been a 'true' *baldio* as defined by Tomaz Vila Nova de Portugal, but they claimed that that description was valid today. They argued that, because of the abolition of feudal rights, the land had become *baldio*, a 'real' common.

Conclusion

The question raised at the beginning of this paper concerned the way in which property is dealt with in the common property-rights debate. It was argued that in most of the literature property is treated superficially. The historical contingency of different resource-use rights is hardly acknowledged. Instead, the discussion limits itself to a simple categorization of property regimes along the lines open access, state, common and private• property. It is proposed that a more complete understanding of common property arrangements requires a more detailed or 'thick' analysis of concrete common property-like situations, which will expose the different underlying structures of production, perception and interpretation of social action.

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This paper shows that such a ‘thick’ analysis of a concrete case does indeed lead towards new understandings. A ‘thin’ reading of the case between the two groups, the villagers of Balsa and Vale de Agodim in the parish of Vila Verde, and the Parish Council of Parada de Pinhão, would probably have resulted in a simplified image of the situation. It would have appeared that the village communities were fighting for the restitution of what had been unlawfully seized from them by the local State, which merely wanted to make easy profits by selling the timber and resin. My reading of the events leads to a very different conclusion. According to this, *baldio* appears as one of the labels that can possibly be tagged to the disputed areas. That, for the time being, and for most of the area, it is the ‘winning’ label, is a result of the different factors that structure the ‘dialogue’ between the parties.

As the analysis of the events has shown, the application of the *baldio* label is contingent on many factors. The first is the collapse of existing use regulations in the semi-autonomous field consisting of the main proponents of the conflict, the parish councils of Parada de Pinhão and Vila Verde, and the inhabitants of Balsa and Vale de Agodim. This collapse was brought about by the fact that one of the field’s members, a relative outsider, who was dissatisfied with the functioning of the field, started to question the legitimacy of the arrangements. It resulted in the recognition that the land had a legal status and that this status might be disputed. The historically changing legal framework, from which different descriptions and idioms could be taken, strategic alliances in and outside the legal field, and, last but not least, a deeply-rooted complex of inferiority among the inhabitants of Balsa and Vale de Agodim in their relation with Parada de Pinhão structure the evolution of the conflict and its outcome, the creation and official acknowledgement of a common covering a large part of the disputed areas.

Finally, the *baldio* label itself can be questioned. It appears that it has a twin brother, *monte*. *Monte* is the word used by the population to refer to communally used open woody vegetation, whereas *baldio* stems from the State’s legal and administrative idiom and expresses the State’s desire to appropriate and reclaim these lands.

The various labels for the commons in Portugal refer to different idioms, different political ambitions and different relations between private and communal use entitlements. The use of these labels is politically meaningful as it is part of the ‘dialogue’ between the different stakeholders in the commons. The implication is clear. ‘Commons’ cannot be taken for granted even if they have an official legal basis. If indeed many contributions to the debate on common property-rights regimes are ‘thin’ and based on ‘overarching’ models of property, it is urgently necessary to revise much of the debate which has taken place so far, in order to establish what the ‘commons’

referred to really are. It is obvious that a thorough analysis of the legal basis of these commons and the way in which this basis is developed within social struggles will constitute an important contribution to such a reappraisal.

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