The ELO recognises the latent conflict between protecting resources and using them. It also underlines the fact that this should not lead to adopting disproportionate regulatory constraints. Restrictive standards are only acceptable if they are scientifically justified, comprehensible, easily applicable in the field and sustainable in terms of human, technical and financial resources.

The stakes are high and deserve special attention, particularly as a similar thematic strategy, even broader than this one, has just been launched by DG Environment on the sustainable use of natural resources. Its objective is to analyse all natural resources, to study the life cycle of the products and sever the link between the use of the resource and the ensuing negative impact on it. This is a good example of the Commission's favourite 'decoupling' principle. These two strategies and the different environmental directives will be coordinated.

The ELO has a simple message - European society needs to sustainably manage its natural environment in a way only soil professionals know how. Without economic continuity there is no environmental continuity.

■ Marie-Alice BUDNIOK
ELO legal advisor

1 The Strategy is established for about 25 years and will lead to Communications and Directives.
2 Consultation Forum: steering committee, group of working party chairmen, five working parties (erosion, organic matter, pollution, research and monitoring) and about twenty sub-groups.
3 Less than one year of work will allow the Commission to draw up and submit the first Communication on methods to assess the major risks incurred by soil in Europe: erosion, organic matter, pollution, compacting, salinisation, flooding and land slides.

Common Property as a Tool for Long Term Conservation [1]

Max FALQUE [2] and Mireille FALQUE [3]

"Many of the places where 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)

In France, research and literature on property and joint management of resources is not very wide-spread, and the same can be said of participation in the activities of the International Association for the Study of Common Property (IACSP). History can provide some explanation for this. The French Revolution (1789) declared private property of paramount importance. This was in opposition to the Ancient Regime with its different layers of rights to property and use thereof, distributed among different persons and institutions, which perpetuated the feudal system of leasehold between landlords and peasants. Article 17 of the 1789 Declaration of Human Rights and of the Citizen states that "property is an inviolable and sacred right and no one may be deprived of his property unless it is a matter of legally established public necessity, subject to fair compensation in advance".

A few years later, the Napoleonic Code (1804) stated, "Property is the right to enjoy and use things in the absolute sense of the term, on condition that the use made thereof is not contrary to the law. " (Art.544).

The idea was to prevent any claim of title to the land by the nobility and ensure economic growth by mobility of land and chattels. So now property belonged either to a private entity or to the state. The sole reference to common property is art. 744 of the Civil Code: "Certain items belong to no one and are available for use by all. Police regulations shall govern the means of their use." This deals with both res nullius and res communis.

The enthusiasm for absolute ownership is reflected in the legal instability of "indivision", i.e. jointly held property. "Nul ne peut être contraint de rester dans l'indivision." [4] (Art. 815 of the Civil Code). Moreover, mortmain [5] was prohibited for economic, social and of course tax reasons and any remaining village common land and large estates belonging to the church and the nobility were sold as "biens nationaux" during the Revolution (1790-1793). By the same token "servitudes" (covenants) were strictly limited to negative obligations in order to avoid the revival of feudal institutions.

This early 19th century legal doctrine was to evolve and new tools emerged, such as co-propriété (condominium housing),

co-operatives, associations, foundations etc. But on the whole, common property (res communis) is not recognised as such and the concept of public or private property has prevailed.

During the 20th century, private property itself was progressively deprived of a growing number of its attributes. The "artichoke syndrome" i.e. peeling away progressive layers, is clearly the result of the multiplication of dubious 'entitlements' and also of the constraints of town planning and environmental regulations. The strict 'no compensation' principle for public covenants was introduced by the Vichy regime in 1943 and faithfully repeated in all successive town and country planning acts. Moreover the emergence of environmental preoccupations led to the dwindling of the usus, abusus et fructus rule conferred by the Revolution on its citizens. Discussions on the legitimacy of expropriation were taboo, and this was only reversed by the case law of the Conseil d'Etat in France and by the European Court of Human Rights.

Although some 85% of French territory formally belongs to millions of private owners (a tentative figure is 4 million), land is subject to dozens of regulations which strictly control its actual use. Sometimes the sole remaining right of the owner is to pay land and capital taxes - the ultimate distortion of property rights!

Although the 1789 Revolution freed the land from the feudal system, it could be said that we are now creeping towards "environmental feudalism" (Yandle 1992). The current situation could be compared with that in the former 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 is a natural necessity and the following case study supports this evidence.

Facts

The study concerns an estate which has belonged to a family since the late 16th century and was passed from generation to generation through the eldest child. In spite of the Revolution introducing the principle of an equal share for each child, an informal system of preferential allocation allowed the most interested or able child to stay on the estate subject to compensation given to any brothers and sisters (sometimes a financially advantageous marriage helped !) By the late 1960s, it appeared that the amenity value of this property (primary or secondary residence) equalled or exceeded the agricultural value.

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

- to prevent development around the attractive traditional building, [6]
- to establish pre-emptive rights for the owners for the entire property,
- to share certain key resources, such as the lake, tennis court, springs, pathways and a limited amount of adjacent land (landscaped areas, parking area etc)
- to limit further development to a minimum of 7000 m≈ (2 acres) lot.

1999 Setting up of "Association Familiale de la Tuilière" to cope with the management of the jointly held property and to promote good neighbourliness with measures such as noise limitation, use of water, parking facilities etc.

2002 Official renewal and adaptation of the 'preferential pact' which will eventually expire (30 years max).

2003 Renegotiation of the 'easements' for environmental protection purposes, in order adjust them to the new conditions and to establish a "landscape charter" to expire after approximately thirty years.

2002 Creation of "Association Syndicale Libre", a kind of trust allowing the jointly held property to become formal common property for all stakeholders (some 16 persons including the children of original four).

Institutional Setting

So two sets of common property emerged:

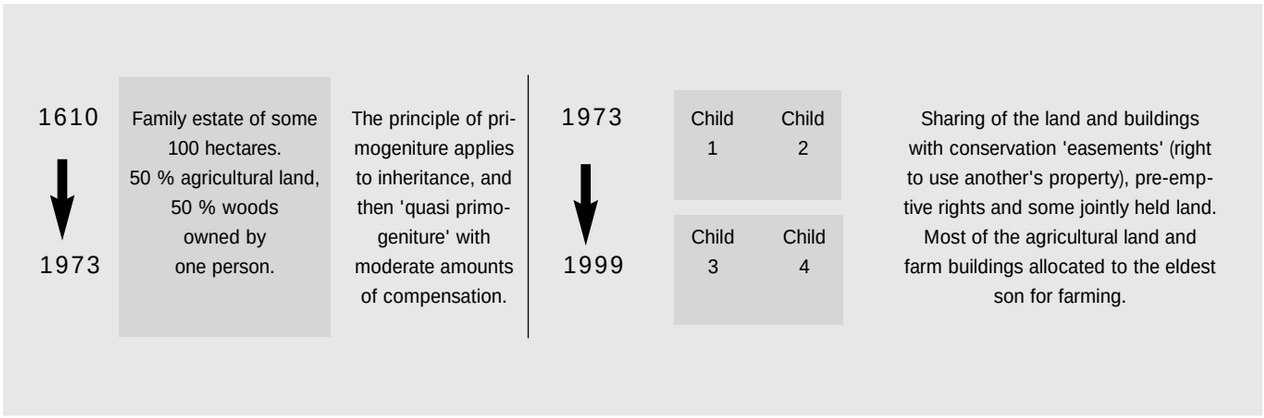
- covenanted land ('under easement'),
- jointly held property.

Land under easement, whether farmed or not, did not raise specific problems; it banned the building of individual houses and limited the price of the farmland and associated taxes (especially inheritance taxes).

But jointly held property, though limited in surface area (some 4 hectares or 10 acres), needed careful management and conflicts over its use arose, especially the water resources for agriculture and/or recreation and more generally on whether intensive farming and a residential function were compatible.

In 1999, to cope with potential or actual conflicts, an association was set up bringing the two generations together - some 45 offspring! Contrary to expectations the younger elements were those most interested in the family history and land. They had spent part of their summer holidays on the estate since infancy, as well as attending family gatherings (annual tennis tournament, marriages etc).

However an association cannot deal with the land itself. The key issue is how to manage the joint property. Decisions require unani-



mity among the co-owners, so a single individual can block an initiative [7]. The idea is therefore to move from a de facto common property regime to a de jure one, by transferring jointly held land and possibly the easement to a special legal body called the "Association Syndicale Libre", a kind of trust, where the managing agent can take decisions based on a simple majority. This "sustainable" management of jointly held property does not merely require a community spirit and a sense of a bond with the family land, but it also requires leadership and the creation of formal bodies to promote effective management.

However although the stakeholders more or less control the future of their property, the role of the local government is not clear. The whole area has been classified a "natural area" where development is strictly limited to agricultural buildings, but this is no guarantee of protection, because it depends so much on the political whims of the people in power, market pressures and fashion. If zoning regulations are relaxed in the future development will be possible on land free from conservation convenants, but at the same time the main features and amenities of the estate will remain intact due to the intervention of the trust.

What happens when 'zoning' policies are forced through with scant consideration for the issues at stake? This was discussed by R. H. Nelson (1999) who writes, "While municipal zoning and neighbourhood association control over neighbourhood environmental quality do overlap in a number of key respects, the private neighbourhood has several major advantages. For example, except where an historic or special district can be justified, zoning does not cover the fine details of neighbourhood architecture, trees and shrubbery, yard maintenance and other aesthetic matters that may have a major impact on the character of the neighbourhood. Thus, neighbourhood associations have a considerably greater authority over actions potentially influencing the character of the neighbourhood than zoning typically affords"

No law holds total sway over the future. The 1973 agreements (easements and pre-emptive rights) were designed for a period of thirty years. Now new institutions will manage the next thirty years [8].

On the whole, the estate's integrity and the family values which underpin it have been secured for an additional sixty years. This is no mean accomplishment compared with most public planning. What will happen from 2030 on is another story that will be written by the grand-children!

To be continued…

■ M. & M. FALQUE

1 An extended version of this article was published in "Etudes Foncières".

2 Consultant in environmental policy.

3 Landscape architect (MLA Newcastle University) Cabinet Adonis, Paris

4 "Nobody can be compelled to stay in joint ownership."

5 "A transfer of land or houses to a corporate body such as a school or a church for perpetual ownership." (Webster)

6 By conservation covenant on adjacent land to protect the buildings. The covenant goes with the land and accordingly is perpetual unless otherwise stated.

7 Decisions on the modification of the land or the buildings are taken by the formal owners who are now the 14 children, the parents retaining the usufruct.

8 Pre-emptive rights, according to French law, cannot last more than thirty years and an easement should be limited in time to allow it to adjust to new economic and social conditions.

Common Property as a Tool for Long Term Conservation (follow-up)

Common Property in Perspective : de facto common property situations are frequent, especially for family estates. However the institutions dealing with property law, environmental regulations, inheritance taxes, zoning and planning regulations ignore it altogether. In the absence of any legal framework common resources (CR) are at a disadvantage compared to private and/or state property.

De jure CR, even when they meet Ostrom's conditions and features, must be covered by registered contracts or agreements.

- CR do not replace private property but are able to impart additional value to it, especially as regards conservation.
- CR can be limited to a small proportion of the resources, provided they are of paramount importance to the whole property.
- CR require collective action, which is always more difficult and time- consuming than individual decisions.
- CR management reinforces social bonds within the relevant community. This is true for families as one generation succeeds another, and even more so for other types of communities.

What contribution could common property make as a half way house between public and private property?

It would restrict red tape

Regulations should avoid transferring exclusive usage rights to the government and instead give priority to communal institutions, i.e. co-operatives, associations, land trusts and communities. The government's role should be limited to enforcement of these common property rights. They should only step in if subsidiarity appears impossible (i.e. res nullius and exclusively public property).

If the privatisation process remains incomplete, the land should be returned with its environmental 'easement' attached. Easements are much more stable than regulations, since they are registered contracts directly connected to the land, not subject to the whims of politicians and bureaucrats who are here today and gone tomorrow.

Land trusts

Are land trusts akin to common property? There are some 1500 trusts under the umbrella of the US Land Trust Alliance and the UK National Trust.

These institutions buy land either at full price or at a discount (easement or covenant). The land is actually a de facto common property held in trust by a small group with a strong identity, who then devise specific management rules for a well defined territory. The French "Conservatoire du Littoral" on the other hand is a state organisation managed by civil servants, using public money to buy private land. The land acquired becomes public. This is another example of how the common property solution has been discarded in favour of public ownership.

(To be continued…)

■ Max FALQUE & Mireille FALQUE

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Common Property as a Tool for Long Term Conservation: The case of a Family Estate in Provence - France (concluding remarks)

Although private property is the most effective means of economic land management (farming, forestry etc), the conservation of environmental amenities requires the existence of some CR. They must be understood not only as material resources (land, water etc) but also as institutions subject to 'easements' or land trust arrangements with a strong group identity and social cohesion.

Privatisation of public land could become more efficient if it made room for CR institutions which comply with environmental regulations. Where 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 resource institutions are not really considered an option, though human history demonstrates the contrary has been the case.

Zoning is a very ancient tool used in the urban development of cities as different as ancient Rome and modern New York, but its extension to environmental issues raises major problems colliding with property rights.

If formally private land becomes de facto public land we are heading back to the communist land pattern. Ironically as former communist countries privatise land, western countries are nationalising its use.

To a certain extent former communist countries are also confronted with the issue of how to wisely use land while making room for the environment, and how to balance privatisation with regulation. Environmental regulations need to be devised not as a re-nationalisation of land but as a legitimate and wise use of police power.

This family CR case study is of course very limited but could be extended to many landowners trying to implement sustainable development in favour of their offspring. Not only families but other groups too are willing to manage their resources this way in the form of associations, unions, co-operative churches, conservation groups and land trusts etc.

The experiences of communist as well as western countries suggest governments are seldom good stewards of the environment when they go beyond devising a panoply of institutions governing a range of property 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. The "Tragedy of the Commons", as Garrett HARDIN acknowledged, is easily misunderstood:

"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.)

■ Max FALQUE & Mireille FALQUE

Diary dates 2004

22 March, Brussels
Award of the 2003 Anders Wall prize by the Anders Wall foundation, the European Commission (DG Environment) and Friends of the Countryside.

23 March, Brussels
Presentation of Carlos Otero and Tony Bailey's book: "Europe's Natural and Cultural Heritage - the European Estate," by Friends of the Countryside. The presentation will be made to the partners of the European Landowners' Organisation and the press.

21, 22 and 23 April, Mimizan, France
FOREXPO: European Forests and Forestry Fair www.forexpo.fr

14-15 April, Maastricht
Seminar - European Public Administration Institute: "Financial Management of the European Union's Structural Funds" (www.eipa.nl)

27 April - 1 May, Bucharest
51st General Assembly of the International Hunting Council with a symposium on 'Farmland as a Habitat' (www.cic-wildlife.org).

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Fête de la nature et Championnat de trompe de chasse du Benelux 15 mai 2004

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